



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 209 OF 2000

IN THE MATTER OF THE ESTATE OF WILLIAM AKUMA (DECEASED)

PASKARIA MOIGE ONTITA.....PETITIONER /APPLICANT

AND

JOSEPH MOSE AKUMA.....OBEJCTOR/ RESPONDENT

RULING

1. Paskaria Moige Ontita (the applicant) through a Summons dated the 19th February 2020 brought under sections 47 and 76 of the Law of Succession Act (the Act) and Rule 49 of the Probate and Administration seeks the following orders;

- a. Spent
- b. That this Court be pleased to consolidate this cause with succession cause no. 227 of 2000
- c. That this Court after granting prayer (b) be pleased to revoke the grant issued to Joseph Mose Akuma on 2/5/20001 in Succession cause No. 227 of 2000.
- d. That this Court be pleased to direct the Kisii County Land Registrar to cancel entry No. 5 in the register of Land parcel title No. Central Kitutu/Mwamanwa/34 and reinstate the name of the late William Akuma
- e. That this Court be pleased to appoint Paskaria Moige Ontita and Joseph Mose Akuma as Co- administrators of the estate of the late William Akuma and issue a fresh grant of letter of administration
- f. The cost of the application be provided for.

The application is supported by the affidavit of Paskaria Moige Ontita dated the 19th February 2020 and the grounds stated on the face of the application. The application was opposed by Joseph Mose Akuma (the respondent).

2. The applicant depones as follows in her affidavit; she is aware that on the 5/2/2001 three files namely succession cause nos. **107/1999, 209/ 2000** and **227/ 2000** were consolidated. On the 1st October 2001 they agreed that the dispute in court then should be referred to the D.O. Mosoch Division for arbitration. The D.O arbitrated over the matter and the award was filed in court and read to them on the 14/5/2002. The respondent's application to challenge the decision was dismissed and the award was confirmed and adopted as a judgment of the Court. The respondent appealed against the judgement and the Court of Appeal dismissed the appeal on the 29th July 2011. She is aware that in 1994 her late mother Maria Kemunto placed a restriction on the suit land which was erroneously removed on the 12/6/2001 by the Land Registrar. She applied and obtained a probaton order from this court over the said parcel of land.

3. She depones further that she has been informed by her lawyers that the respondent using the grant issued in succession cause no. 227 of 2000 wrongly and unlawfully caused his name to be registered as the owner of L. R. No. 334 on 12/6/2001 even after the 3 files were consolidated on the 5/2/2001. That on the 15.2.2018 the respondent fraudulently, wrongfully and unlawfully applied to subdivide the suit land even when he knew that she was entitled to half the share. That on the 9.2.2018 the Kisii County Land Registrar cancelled the illegal sub divisions and therefore the resultant numbers L.R. Nos. Central Kitutu/Mwamanwa/2718, 2719 and 2720 are none existent. That the grant issued to the respondent in succession cause no. 227 of 2000 after the 3 files were consolidate was not only irregular but illegal and wrongful and fraudulent and that her application should be granted.

4. As earlier stated the application was opposed. The respondent filed a replying affidavit dated the 11th March 2020. He depones as follows; that land parcel number Central Kitutu/Mwamanwa/ 34 was registered in his names by way of transmission in the year 2001 and the same

was sub divided into 4 fours and given parcels no 2718, 2719, 2720 and 2712. That the Land Registrar has no power to cancel and annual the same. That the cancellation is the subjection of a court case in Petition No. 5 of 2019 in the Environment and Land Court Kisii. That it is only fair that the status quo be maintained until the petition is heard and determined.

5. The application was canvassed by way of oral evidence. Mr Momanyi relied on the applicant's affidavit adding that this Court and the Court of Appeal held that the applicant should get half the suit land and that for purposes of administering the estate the grant should be cancelled and a fresh grant issued. That it was unlawful for the respondent to use the grant issued to register the land in his name. That the grant has to be confirmed first before registration as provided by section 55 of the Act. That since this Court is the one that deals with succession matters it should ensure that the estate is administered as per the law. Reference was made to section 26 of the Land Registration Act 2018 to support that argument that the transmission of the suit land to the respondent can be challenged as the registration was unlawful and irregular. Mr Masese for the respondent relied on the respondent's affidavit and argued further that this application should have been filed in succession cause no. 227 of 2000 and not 209 of 2000 if the applicant wants the position to revert back to the way it was in 2001. That the application is in the wrong succession cause as the suit land has been dealt with and sub division has occurred. That for the court to order that the position reverts back to what it was in 2001 it would be trampling on the people's rights who have not been heard. If the consolidation order is made then the aggrieved parties can apply. Mr Momanyi in reply submitted that under section 47 of the Act this court has a wide discretion to determine any dispute before it without looking at the technicality before it. That the court ordered that the 3 files be put together and they have been together. That there was no confirmed grant to transmit the property. That the sub divisions were cancelled and the respondent remains as the owner of the land.

ANALYSIS AND DETERMINATION

6. I have considered the affidavits oral submissions and the law as per the Act. The petitions in Succession cause no. 209 of 2000 and Succession cause no. 227 of 2000 are for the estate of William Akuma Ombongi the deceased. William Akuma died on the 16th October 1995. Succession cause 209 of 2000 was filed by the applicant. The D.O's award was adopted as a judgment in cause 209 of 2000 on the 18th July 2003. The award was that the late Maria Kemunto the applicant's mother lived on part of land parcel no. CK/Mwamanwa/34. Paskaria as the only surviving child has a right to claim inherit her mother's share from that land. She should get half of the land parcel number Central Kitutu/Mwamanwa/34. The Court of Appeal dismissed the respondent's appeal against the D.O's award. With the dismissal of the appeal the judgment of the High Court which adopted the award therefore still stands. I have carefully perused succession cause no. 209 of 2000 and note that the grant issued to the respondent on the 2nd May 2001 was not confirmed.

7. The respondent filed another petition for letters of administration intestate for the deceased's estates on the 13th September 2000 in succession cause no. 227 of 2001. This was after succession cause no. 209 of 2000 was filed. A grant of letter of administration intestate was issued on the 2nd of May 2001. This grant too was not confirmed.

8. The first issue for determination is whether the succession cause no. 209 of 2000 and succession cause no. 227 of 2000 should be consolidated. It has been argued that the 2 cases cannot be consolidated because the land parcel has been sub divided into other parcels of land and other persons have a right to the land will not be heard. These other persons have not been disclosed by the respondent. The principles for consolidation of suits were set out in the case of *Nyati Security Guards & Services Ltd V Municipal Council of Mombasa (2000) eKLR* where the court held as follows:

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:

a) Some common question of law or fact arises in both or all of them;

b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;

c) For some other reason, it is desirable to make an order for consolidating them;

Succession cause nos. 209 and 227 of 2000 relate to the estate of the deceased known as William Akuma who died on the 16th October 1995. The asset in both causes is Land Parcel No. Central Kitutu/ Mwamanwa/43. The parties involved in both causes are the applicant and the respondent. The common question of law to be determined in both causes is who shall inherit or is entitled to inherit the land parcel, the rights and reliefs claimed relate to the land parcel the subject of both causes. It is only in order that the two cases be consolidated. It was improper and an abuse of the court process for the respondent to file succession cause no. 227 of 2000 knowing very well that succession cause no. 209 of 2000 was pending with a grant to be confirmed based on the award of D.O adopted as a judgment. The main purpose of consolidation is to save costs, time and effort. I find that the request to consolidate the 2 causes numbers 209 of 2000 and 227 of 2000 is in order in my view none of the parties will be prejudiced. I therefore consolidate succession cause no.209 of 2000 and succession cause no 227 of 2000. The proceedings shall continue in succession cause no. 209 of 2000. With that I can move to the next issue.

9. The next issue for determination is whether the grant in succession cause no. 227 of 2000 should be revoked. The applicant argues that it was obtained fraudulently and therefore it should be revoked. The respondent on the other hand argues that revoking the grant will affect the rights of other parties who have acquired parcels sub divided from parcel number 34. The respondent admits that the Land Registrar cancelled the said titles and that the action taken by the Land Registrar is the subject of a petition before the ELC Court. Section 76 (b) of the Act provides as follows;

Section 76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of

something material to the case;

When the respondent filed succession cause no. 227 of 2000 he knew that succession cause no. 209 of 2000 was pending confirmation of the grant. By filing another succession cause the respondent concealed from the court something material and obtained the grant in cause no 227 of 2000 fraudulently. It's only in order that this court revokes the grant issued in succession cause 227 of 2000 which was filed after succession cause no. 209 of 2000. The grant issued in succession cause no. 227 of 2000 dated the 2nd May 2001 is hereby revoked. Bearing in mind the that the court of appeal upheld the D.O's decision that the applicant is entitled to half of land parcel no. 34, I appoint Paskaria Moige Ontita and Joseph Mose Akuma as co-administrators of the estate of the late William Akuma. I fresh grant of letters of administration intestate shall issue in the names of Paskaria Moige Ontita and Joseph Mose Akuma. Any of them is at liberty to apply for a confirmation of the grant within 60 days.

10. The 3rd and last issue is whether this court should direct the Kisii County Land Registrar to cancel entry No. 5 in the register of Land parcel title No. Central Kitutu/ Mwamanwa and reinstate in the register the name of the late William Akuma. The grant that caused the said transmission of the title in the name of the respondent has been revoked. What follows is that the title should revert back to the name of the deceased. This court therefore directs the Kisii County Land Registrar to cancel entry No. 5 dated 12.6.2001 in the register of Land parcel title no. Central Kitutu/Mwamanwa/34 and reinstate in the register the name of the late William Akuma

11. FINAL ORDERS;

- i. Succession cause no. 209 of 2000 and Succession cause no. 227 of 2000 are consolidated. The proceedings shall continue in succession cause no. 209 of 2000.
- ii. The grant issued to Joseph Mose Akuma on the 2nd May 2001 in Succession cause no. 227 of 2000 is hereby revoked.
- iii. **Paskaria Moige Ontita** and **Joseph Mose Akuma** are appointed as administrators of the estate of the late William Akuma. A fresh grant to issue. Any of the administrators is at liberty to apply for confirmation of the grant within 60 days.
- iv. Kisii County Land Registrar shall cancel entry No.5 in the register of Land parcel title No. Central Kitutu/Mwamanwa/34 and reinstate the name of the late William Akuma into the register.
- v. Each party shall bear its own costs.

Dated, signed and delivered via Email (in line with the Practice Directions dated the 17th April 2020) this 23rd day of April 2020

R.E.OUGO

JUDGE

Applicant Absent

Respondent Absent

Mr. Mose

ICT Officer