



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 326 OF 1994

IN THE MATTER OF THE ESTATE OF REUBEN SAYO (DECEASED)

ISAAK ALIAZA.....OBJECTOR/APPLICANT

VERSUS

SAMUEL KISIAVUKI.....PETITIONER/RESPONDENT

RULING

1. The Objector/Applicant has filed an application dated 27th June, 2017 seeking for orders that:-

- (a) Spent.
- (b) Spent.
- (c) The Grant of Letters of Administration issued to the Petitioners/Respondents herein and confirmed be revoked and/or annulled.
- (d) Costs be provided for.

2. The dispute herein relates to land parcels Nos. Tiriki/Gisambai/1852 and 1853 which were a result of sub-division of land parcel No. Tiriki/Gisambai/1108 that belonged to the late Reuben Sayo,(herein referred to as the deceased). The deceased was a grandfather to both the petitioner and the objector.

3. The facts not in dispute are that the deceased had bequeathed his said land to both the petitioner and the objector before he died on the 19/5/1981. After he died, the petitioner came before this court and filed this succession cause. He was issued with a grant of letters of administration. Land parcel Tiriki/Gisambai/1108 was confirmed in his name. He sub-divided the land into two equal portions and obtained title deeds to them in his name being land parcels No. Tiriki/Gisambai/1852 and 1853. He sold land parcel 1853 to one Douglas Imbaiza. He retained land parcel 1852 in his name.

4. The Objector contends that the petitioner did not inform him when he filed the succession cause. That he came to learn of it in 2012. That their deceased grandfather had bequeathed the land to them on condition that it would not be sold to an outsider. That the objector had agreed to sell his portion to him for a sum of Ksh. 300,000/=. He gave the petitioner a cow valued at 20,000/=. He thereafter found that the petitioner had sub-divided the land into two portions and sold land parcel 1853 to Douglas Imbaiza. That he lives on land parcel 1853 that was sold to Douglas. That he went to the Land Control Board. He was told to pay Ksh. 300,000/= to be refunded to the buyer. The buyer refused to take the money. He then filed this application to revoke the grant on the grounds that the petitioner secretly conducted the succession cause without his knowledge and without disclosing that the objector was a beneficiary to the estate of the deceased. He sought that the grant be revoked so as for the land parcel to revert to the original number to enable him get his rightful share of the estate.

5. The petitioner says that the Objector lives on land parcel No. 1852. That he has reserved the said land parcel for the Objector. However that he has not transferred the land to him as he has refused to pay money to the land Surveyor and that he has not been co-operative. That he is willing to transfer the said parcel of land to him. That the land measures 0.5 Ha which is equivalent to what went to him in land parcel 1853.

6. The petitioner further stated that the objector had given him a cow worth Ksh. 20,000/= in appreciation for him conducting the succession cause over the land. He at the same time said that the cow was given as a guarantee that the objector would pay him a balance of Ksh. 300,000/=.

7. The objector insisted that he lives on land parcel 1853. That the petitioner had agreed to sell his portion to him for Ksh. 300,000/=. That in the year 2014 he gave him a cow in appreciation for conducting the succession cause. That he is currently in use of both parcels of land though he lives on 1853.

8. The petitioner denied that the objector is in occupation of both portions of land. He said that the objector lives on land parcel 1852. That there is a boundary between the two parcels of land but that the objector has uprooted the fence.

9. A perusal of the court file indicates that the petitioner did not include the objector as a beneficiary to the estate of the deceased when he filed the succession cause. He instead indicated that he was the sole beneficiary to the estate. It is admitted that both the petitioner and the deceased were beneficiaries to the estate of the deceased. In the premises the grant issued to the petitioner was obtained without disclosure of a material fact that the Objector was a beneficiary to the estate.

10. The documents placed before the court indicate that the objector had filed a caution over the land before the Registrar of Lands. Both parties appeared before the Registrar on 5/8/2016 for proceedings for removal of the caution. The petitioner produced a copy of the proceedings as exhibits, D.Ex 2. In the said proceedings, the objector stated that he had come into an agreement with the petitioner for the petitioner to sell him his portion for Ksh. 320,000/=. That in pursuance of the agreement he gave the petitioner a cow worth Ksh. 20,000/=. He remained with a balance of Ksh. 300,000/=. That the petitioner then sold the land to someone else.

11. In his evidence before the Land Registrar the petitioner admitted that he wanted Ksh. 320,000/= for him to sell the land to the objector. That the petitioner gave him a cow worth kshs. 20,000/-. The balance was to be paid immediately but was not paid. He then sold the land to Douglas Senachi. He stated during the proceedings that he wanted to transfer land parcel 1852 to the objector.

12. It is clear from the above that the cow was paid in furtherance of an agreement to sell the petitioner's portion of the land to the objector. The deal did not go through and the petitioner sold the land to someone else.

13. The objector told this court that the deceased had given instructions that the land should not be sold outside the family. However, there was nothing produced to prove that. Even if this were the case it was not binding to any of the parties. The petitioner was thereby free to sell his portion of the land to whoever he wanted. The objector cannot force the petitioner to sell his portion of the land to him.

14. There was a disagreement as to whether the objector lives on land parcel 1852 or 1853. The petitioner was represented by the firm of **Nyanga & Co. Advocates** while the firm of **P. D. Onyango & Co. Advocates** appeared for the objector. In their submissions the firm of P. D. Onyango & Co. Advocates stated that the objector currently occupies land parcel Tiriki/Gisambai/1852 and that the petitioner transferred land parcel 1853 to Douglas Imbaiza. It would appear that the objector lives on land parcel 1852.

15. The objector seeks to have the grant issued herein revoked so that he can get his share of the deceased's estate. The petitioner has done a succession cause over the deceased's estate. He is willing to transfer land portion No. 1852 to the objector. The objector on the other hand wants the petitioner to sell his parcel of land to him.

16. The cause of the dispute between the parties appears to be that the objector is not happy that the petitioner sold the land to someone else. The application for revocation seems to be geared towards pressuring the petitioner to sell his portion of land to the objector. On the other hand the petitioner has refused to transfer the land to the objector over a claim of costs incurred in conducting the succession cause and sub-dividing the land. He has however not filed any claim against the objector to recover any such costs. He is at liberty to do so. This however cannot be a bar to the petitioner giving the objector his share of the estate.

17. In the foregoing I do not see any reason for revoking the grant issued to the petitioner since the objector's parcel of land is available for transfer to him. The application for revocation of grant dated 27/6/2017 is thereby declined.

18. Rule 73 of the Probate & Administration Rules grants this court inherent powers to make such orders as may be necessary for the ends of justice. The ends of justice will be served if the objector's entitlement is transferred to him. I therefore make the following order:-

The petitioner Samuel Alekwa Kisiavuki is hereby ordered to transfer land parcel No. Tiriki/Gisambai/1852 to the objector, Isaak Clement Aliaza within 3 months of the delivery of this ruling failure to which the Kakamega Land Registrar is hereby ordered to cancel the current title deed to the said parcel of land and issue a fresh one in the name of Isaak Clement Alianza with this Court's Deputy Registrar signing all the necessary documents for the purpose of effecting the transfer.

Orders accordingly. Each party to bear its costs.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Objector/Applicant

No appearance for the Petitioner/Respondent

Objector/Applicant - absent

Petitioner/Respondent - absent

Court Assistant – Polycap

30 days right of appeal.