



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

SUCCESSION CAUSE NO. 168 OF 2013

EMMANUEL LEKEKENY KAYO.....PETITIONER/RESPONDENT

VERSUS

NENKOKO NONKIPA KETERE.....APPLICANT

RULING

1. Emmanuel Lekakeny Kayo the petitioner/ respondent ('the petitioner') petitioned for letters of administration intestate on the 29th April 2013 for the estate of **Olekayeu Kiramba Chesirikan** who died on the 2.2.1980. The petitioner indicated that he is the only surviving son of the deceased and that the deceased had 4 adult married daughters namely **Naogepa Kimai, Nanyu Kipintoi, Ndikany Tirman** and **Koto Lekiyok Mantu**. The only assets indicated are 60 acres 'land in Olomismis Group Ranch and 1 Town Plot at Kilgoris.

2. A grant of letters of administration was issued to the petitioner on the 15th June 2016. This grant was confirmed on the 21st September 2017 the 2 assets indicated in the confirmed grant were the 60 acres in Olomismis Group Ranch and the Town Plot in Kilgoris Town. The petitioner was the sole beneficiary of the 2 assets.

3. On the 10th January 2019 the petitioner filed an application seeking a review of the orders issued on the 21.9.2017; he also sought to have Land Reference No. Transmara/ Olomismis /758 and 769 inserted in the description of the property in the petitioner's name as a sole proprietor. He also sought that town plot No. Transmara/Olomismis/423 be inserted in the description property in the proprietor's name. This application was granted and an amended certificate of confirmation of grant was issued on the 10th April 2019. The sole beneficiary of the said 5 parcels of land is the petitioner.

4. On the 30th May 2019 the objector filed summons for revocation under sections 3, 71 & 76 of the Law of Succession Act Cap 160 and Rules 44, 49, 59, 63 & 73 of the Probate and Administration Rules. The objector seeks the follows orders;

i. Spent

ii. Pending the Hearing and determination of the Summons herein, the Honourable Court be pleased to stay the Implementation and/or enforcement of the Amended Certificate of Confirmation of Grant issued on the 10th April 2019 in favour of the Petitioner/Respondent and particularly, the limb thereof touching on LR. NO's TRANS-MARA/OLOMISMIS/423 & 769, respectively.

iii. Pending the Hearing and determination of the Summons herein, the Honourable Court be pleased to suspend the Implementation of the Decision by the land Registrar, Trans-Mara East/West Sub-Counties in terms of the letter dated 17th May 2019, recalling and threatening to rescind the Applicant's Titles in respect of LR. NO's TRANS-MARA/OLOMISMIS/423 & 769, respectively.

iv. The Grant of Letters of Administration and the Amended Certificate of Confirmation of Grant granted to the Petitioner/Respondent on the 10th day of April 2019, be revoked and/or annulled, to the extent that same concerned the properties, that is LR. NO's. TRANS-MARA/OLOMISMIS/423 & 769, of a living person, namely, the Applicant.

v. In the alternative and without prejudice to prayer (4) hereof, the details of LR. No's TRANS-MARA/OLOMISMIS/423 & 769, respectively, belonging to and registered in the name of the Applicant be deleted and/or removed from the schedule at the foot of the Amended Certificate of Confirmation of Grant issued on the 10th day of April 2019.

vi. The Honourable Court be pleased to grant an Order barring/prohibiting the Petitioner/Respondent from (sic) carrying out and/or undertaking Succession in respect of LR. NO's TRANS-MARA/OLOMISMIS/423 & 769, respectively.

vii. *The Honourable Court be pleased to strike out the Notice of Motion Application dated 10th January 2019 and the attendant Documents, on account of being filed by an unqualified and unauthorized person, contrary to and in violation of the provisions of the Advocates Act, chapter 16, Laws of Kenya.*

viii. *Costs of the Application be borne by the Petitioner/Respondent.*

5. By a consent dated the 16/12/2019 parties agreed that the summons dated the 29/5/2019 be canvassed by affidavit evidence and the respective statements filed by the objector/ applicant and petitioner/ respondent.

6. The applicant filed an affidavit dated the 29th May 2019 in support of the Summons and a statement dated the 25th September 2019. The Respondent filed a replying affidavit dated the 18th June 2019 and a statement dated the 25th October 2019.

OBJECTOR'S CASE

7. According to the objector **L.R No. Transmara /Olomismis/423 & 769** do not belong to and have never been registered in the name of the deceased. That the 2 parcels of land do nor comprise nor form part of the estate of the deceased. That the inclusion of the 2 parcels of land is fraudulent and is intended to defraud the applicant. That they belong to a living person and that the succession cause herein was carried out and or undertaken without full and frank disclosures. According to the objector the 2 parcels of land were allocated to her during the subdivision and alienation of what was Olomismis Group Ranch Land and that the same was transferred to and registered in the names of the members of the Group Ranch. That following the completion of the sub- division some disgruntled members filed civil suit **KISII ELC Case No 249 of 2013** seeking to invalidate the sub-division, transfer and registration of the various parcels of land to the members including the suit properties. That the said suit was heard and was dismissed. That she has been lawfully issued with the title in respect of the suit properties and at no time were the 2 parcels of land registered in the name of the deceased (see 'NNK 4 (a) & (b)') that since the 2 parcels of land belong to her they cannot be the subject of the succession cause as she is still alive.

8. The objector further contends that the proceedings herein and the documents attendant thereto have been filed and / or lodged by an unqualified person and that the Notice of Motion application dated the 10th January 2019 is a nullity. That she has credibly been informed that the Advocates on record who crafted and drew the pleadings including the Notice of Motion dated the 10th January 2019 was struck out from the Roll of Advocates and thus the same is unqualified. That since the petitioner's lawyer was not licensed to practise then the entire documents and/or pleadings filed are invalid, null and void. That owing to the foregoing, the Proceedings culminating into the issuance of the Grant of Letters of Administration and the attendant Certificate of Confirmation of grant issued on the 9th day of April 2019, were substantially Defective, unlawful, illegal and otherwise *void ab initio*. That in view of the foregoing, the Grant of Letters of Administration herein and the amended Certificate of Confirmation of Grant, ought to be revoked as concern the suit properties.

Petitioner/Respondent's Case

9. The respondent in his affidavit and statement avers as follows; the deceased was a member of Olomismis Group Ranch which was dissolved in or about June 2009. His father the deceased was entitled to 60 acres' agriculture land. Payments were made by his mother and father for the said land. That the Objector who is his sister never made any payment as she was married and her husband Daniel Chenonge Ole Ketere made payment on 31.3.2009 for her parcel of land no. 591 where she resides up to now. Her sons Wilson Kikamai Kamai and Joab Memusi Kamai also made payments for their allocated parcels nos. 590 and 592 respectively. That the objector is being propelled by her sons and Bernard Ketere to snatch his father's parcel of land. That the objector was never a member of the Olomismis Group Ranch to entitle her to L.R. Transmara/Olomismis/423 & 769. That the deceased was the owner of the said 2 parcels of land (see ELK3) and that upon his death his name was crossed out and replaced with that of his widow Nawuoshi Ene Kayeu. That none of his siblings is challenging his inheritance nor have they laid any claim to their father's land as they all benefitted from their husbands' allotments in the Ranch. That the objector has no basis in law as she is well catered for in her marriage. That he has been in occupation of L.R. Transmara/Olomismis/769 at all material times including demarcation. That all his siblings including the objector consented to him petitioning for the grant. He sought to have the Summons dismissed.

ANALYSIS AND DETERMINATION

10. Parties filed written submissions. The objector filed her submissions on the 16th January 2020 and the Respondent on the 7th February 2020. I have considered the affidavits the submissions and the law. The issues that are for determination in this matter are;

i. Whether the grant should be revoked on the basis of concealment/ non-disclosure of material facts

ii. Whether the assets listed in the certificate for Confirmation of Grant issued on the 10th April 2019 belonged to the deceased?

11. I have carefully perused the court file. The respondent filed his petition on the 29th April 2013 as the only surviving son of the deceased. In his affidavit in support of the petition for letters of administration intestate he listed his siblings 4 sisters as follows; **Nadgepa Kimai, Nanyu Kipintoi, Ndikany Tirman and Koto Lekiyok Mantu ('beneficiaries')**. The name of the objector is not amongst the 4 names. The beneficiaries signed a consent dated the 12th October 2015 indicating that they were in agreement to the petitioner applying for the letters of administration intestate, each one placed a thumb print against their names and ID card number. The respondent filed an application to confirm the grant on the 28th March 2017, the beneficiaries filed a consent to the said application on the 10th July 2017 and thereafter after the application was granted a certificate of grant was issued on the 21st September 2017. The objector was not part of this process. She was not named as a beneficiary of the estate of the deceased.

12. In a statement filed in court on the 25th October 2019, the respondent deposes that the deceased's children both surviving the deceased

were the following;

- i. *Nenkoko Nookipa Ketere-married with children*
- ii. *Tirere Limpaso Kayo- Deceased-No children*
- iii. *Mercy Tayo- married with children*
- iv. *Naimutie Mrampi – married with children*
- v. *Kosenja Kayo-Deceased- No children*
- vi. *Karie Kayo- Married with children*
- vii. *Nkaulo Kayo- Deceased-Married with children*
- viii. *Naanyu Kipintoi- Married with children*
- ix. *Emmanuel Kayo- Married with children.*

13. The objector's name appears in this statement and not the petition. Rule 26 of the Probate and Administration provides as follows;

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”

In the matter of the *Estate of Muriranjia Mboro Njiri Nairobi HC Succession Cause Number 890 of 2003 Kamau AgJ* had this to say with regard to defective and irregular proceedings leading up to the issuance of a grant:

“Under Rule 26 of the Probate and Administration Rules, consent of heir in equal degree is mandatory. The consent was never obtained from Milka. Citations were never obtained and Milka never signed any of the application forms although her name was disclosed... in the circumstances mentioned above and upon its own motion, this court hereby revokes the grant issued under the Nakuru High Court Succession Cause Number 108 of 2001 to Mary Nyambura Muriranjia and Milka Njeri Muriranjia on the grounds that the proceedings to obtain the grant were defective in substance.”

It is evident that the petitioner did not comply with the provisions of Rule 26. He admits that the objector is his sister, she is an heir in equal degree as the petitioner. The objector has indicated that she became aware of the succession case when she was asked to surrender the titles in respect of land parcels 423 & 769 on the 17th May 2019. The petitioner has not demonstrated that he cited the objector as provided under Rule 22 of the Probate and Administration Rules. The objector's consent was not obtained when the petition was filed. I find that the petitioner failed to disclose to the court that he had another sibling who was also a beneficiary to the estate of the deceased nor did he obtain her consent to file the petition. The proceedings were defective plus there was non-disclosure of a material fact.

Section 76 of the Law of Succession Act provides for instances when a grant can be revoked. Section 76 (a) and (b) provides that 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 that that the (a) ***proceedings to obtain the grant were defective in substance and*** (b) ***the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material***. Under section 76 the court has the discretion to revoke the grant. Revocation of a grant will depend on the circumstances of each case.

14. The properties the objector claims to be hers are parcels no. **423 & 769** which were the subject of the Notice of Motion dated the 10th January 2019 which was filed by the firm of Kasamani & Co. Advocates. It has been submitted that the petitioner did not present any evidence of ownership of the 2 parcels of land at the time he filed the application dated 10th January 2019. The petitioner's supporting affidavit dated the 28th January 2019 did not attach the titles of the said 2 parcels of land. In his further affidavit dated 6th March 2019 he states at a paragraph 4 ,5 & 6 as follows;

‘4.That the Title Deed to Land Reference Transmara/Olomismis/769 was issued to one NENKOKO NONKIPA KETERE in error and the Land Registrar addressed her to return the title vide letter dated 1.11.2017 (Annexure ELK3)

5. That Land Reference Transmara/Olomismis/423 also remains in the names of the Group Ranch while it was allocated to my deceased father. And I had registered a caution thereon (Annexure ELK 4 (a) (b).

6. That I now attach herein a copy of Adjudication Register showing that the 3 Parcels of Land were all in my father's name. (Annexure ELK 5 (a) (b) (c))’.

He deposes that he lodged a caution. It is evident that there was no title issued in the name of the deceased for parcels no. 423 and 769. The objector has annexed a Title Deed for Transmara /Olomismis/769 dated 21st May 2013 plus a certificate of search dated the 29th April 2014 that shows that the title deed was issued on the 21.5.2013 and that she is the proprietor of the said parcel of land.

It is further evident that at the time the petitioner filed the application dated the 10th January 2019, the 2 parcels of land were not in the deceased's name. There is a dispute on the ownership of parcel no. 769. The objector has filed copies of ELC Case No. 174 of 2014. In the said case the petitioner has filed suit against her, the Land Registrar – Transmara and The Chairman Olomismis Group Ranch seeking an order of prohibition to against the defendants from further dealing with parcel no. 769. He claims that Chairman of Olomismis group ranch and one Nenkoko Nonkipa Ketere fraudulently caused the said parcel of land to be registered in the objector's name. The objector contends that parcel no 769 belongs to her she is still alive and that it cannot be listed as part of the deceased's estate. As correctly submitted this issue pertaining to fraud and/or fraudulent acquisition of an interest in land is a mandate that exclusively belongs to the Environment and Land Court. Until the issue of ownership is resolved it is my view and holding that parcels nos. 423 and 769 cannot be said to part of the estate of the deceased. Once it is established that the 2 parcels of land belonged to the deceased, then the parties can apply to have them included as part of the deceased subject for distribution as provided in the Law of Succession Act Cap 160.

15. What orders is the objector entitled to? The application that brought in the 2 parcels in dispute is the application dated the 10th January 2019. This lead to the amendment of the certification of confirmation of the grant. The objector has satisfied this court that an order to revoke the grant is in order, however since what was challenged mainly are the orders that resulted from the application dated the 10th January 2019 it is my view that the details of Land **Registration Numbers Transmara/Olomismis/423 & 769** shall be deleted from the schedule in the amended certificate of confirmation of grant issued on the 10th April 2019. I will not revoke the grant.

16. Final orders;

- i. The details of Land **Registration Numbers Transmara/Olomismis/423 & 769** shall be deleted from the schedule in the amended certificate of confirmation of grant issued on the 10th April 2019.
- ii. An amended certificate of confirmation of the grant shall issue without the 2 parcels of land namely parcels number 423 and 769.
- iii. Parties shall pursue the issue of ownership of the parcels of land nos. 423 and 769 before the ELC Court.
- iv. Since this is family matter each party to bear its own costs. It is so ordered.

Dated, signed and delivered at KISII this 25th day June 2020

R. OUGO

JUDGE

In the presence of:

M/s Ochwal For the Objector/Applicant

Mr. Mukoya For the Petitioner/Respondent

Ms. Rael Court Assistant