



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION NO. 77 OF 2015

IN THE MATTER OF THE ESTATE OF: ODAKA ADIYE ABWOCHA ALIAS MESHACK ODAKA ADIYE.....DECEASED

BETWEEN

ARMSTRONG FREDDIE KASUKU.....APPLICANT

AND

JOSEPH BARASA ODAKA.....RESPONDENT

ATHNAS B. WANYAMA.....INTERESTED PARTY

RULING

1. Armstrong Freddie Kasuku the applicant herein moved the court by way of summons for revocation of grant under sections 76 (b) of the Law of Succession Act and Rule 44 of Probate and Administration Rules. The application is premised on ground that the grant was obtained fraudulently by concealment from court material facts that land parcel number Bukhayo/Matayos/293 did not belong to the deceased.

2. The applicant contended that:

- a. He had purchased the said land parcel number Bukhayo/Matayos/293 at a public auction and that at the time the deceased died, the land had ceased being his.
- b. That the petitioner was aware of this fact and concealed the same from the court.

3. Joseph Barasa Odaka, the petitioner herein, opposed the application on grounds that:

- a. That the application is misconceived and lacks merit.
- b. That the application is belated and an afterthought.
- c.. That the application has no good grounds.

4. Athnas B. Wanyama, the interested party herein, also opposed the application contending that the applicant is not a member of the family of the late Odaka, the deceased herein.

5. One of the contention in this matter is that the application is belated and an afterthought. The Law of Succession Act does not give a time from within which an application for revocation may be filed. Section 76 of the Act provides:

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— [Emphasis added]

This means that the application cannot be decided on this ground.

6. If a party can persuade the court that he is an interested party, then under the same section 76 of the Act then such a party has *locus standi* to move the court in the manner the applicant herein has done. One does not have to be a blood relative to have some interest in a deceased's

estate. Such a party's interest must be legally recognized. In this case, I will address this issue while analysing the other issues raised by the parties.

7. Odaka Adiyee Abwocha alias Meshack Odaka Adiyee died on 5th March 2010.

8. In a letter dated 6th March 2003, Joseph Odaka wrote to the bank concerning land parcel number Bukhayo/Matayos/293. His letter was to the effect that he had mortgaged the said parcel of land for a loan of Kshs.30, 000/=. When he was unable to service the loan, the bank sold the land in April 1995 for Kshs. 2,600,000/= and he was therefore claiming the difference.

9. The National Bank of Kenya through the company secretary wrote a letter dated 17th March 2016 addressed to the Land Registrar, Busia. The gist of the letter was to confirm the status of land parcel number Bukhayo/Matayos/293 previously charged to the bank. He confirmed that the land was sold in a public auction to Armstrong Kasuku, Apollo Ndongi and Athanas Wanyama. A copy of title deed issued on 5th June 1996 confirmed what the letter from the bank stated.

10. Three important facts emerge from these facts:

A. That at the time of the death of Odaka Adiyee Abwocha alias Meshack Odaka Adiyee in 2010, land parcel number Bukhayo/Matayos/293 was no longer registered in his name.

B. At the time of filing the present succession cause, Joseph Barasa Odaka was aware that of this fact but proceeded as if this was not the case.

C. The applicant in spite of the fact that he was not related to the deceased herein is an interested party and has the requisite *locus standi*.

11. I therefore make a finding that the petitioner/respondent obtained the confirmation of grant by fraudulent means and by concealment of material facts. Section 76 of the Law of Succession Act provides:

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—

(a) that the proceedings to obtain the grant were defective in substance;

(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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

12. The grant is hereby revoked and annulled. Since there was no other property listed in the estate of the deceased, I will not make any further orders except that the application is allowed with costs to the applicant.

DELIVERED and SIGNED at BUSIA this 30th day of September, 2020

KIARIE WAWERU KIARIE

JUDGE