



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

P & A. CAUSE NO. 157 OF 2007.

IN THE MATTER OF THE ESTATE OF ALFRAYO ASIRIGWA MUG'ENDI.....(DECEASED)

ESINASI ASIRI MUNG'EDI.....PETITIONER/RESPONDENT

VERSUS.

PRIDGEON BARASA MASAKE.....APPLICANT

JUDGMENT.

ALFRAYO ASIRIGWA MUNG'EDI - Deceased died on 10.10.1996 at the age of 76 years. He left a widow ESINASI ASIRI MUNG'EDI the Petitioner and 6 Children - (1) son and (5) daughters and a grandson Natalie Shiverenge. Esinasi Asiri Mung'edi the widow filed this Succession Cause in August 2007 - 11 years after the death of the deceased. In form P & A 5 the Petitioner stated that the deceased died intestate and left the following surviving him.

- (a) ESINASI ASIRI MUNG'EDI (WIDOW)**
- (b) JANE MUNG'EDI - DAUGHTER - MARRIED**
- (c) SOPHIA KHAVERE MUNG'EDI - DAUGHTER - NOT MARRIED**
- (d) ROSELYNE RAVONGA MUNG'EDI - DAUGHTER - MARRIED**
- (e) LINET KWANZIMA ASIRIGWA - DAUGHTER - MARRIED**
- (f) LILIAN MUSIMBI ASIRIGWA - DAUGHTER**
- (g) STEPHEN SIMANI ASIRIGWA - SON**
- (h) NATALIE SHIVERENGE - GRANDSON**

He had the following assets;

LAND PARCEL NUMBER

- (a) E. BUKUSU/N. SANG'ALO/155**
- (b) E. BUKUSU/N. SANG'ALO.2783**
- (c) E. BUKUSU/N.SANG'ALO/2782**

His liabilities were in respect to;

- (a) PHARES WEKESA MASIBO**
- (b) RUTH ASEKA**
- (c) CHARLES MBACHI**

(d) PIUS MAKANDA

(e) ALWODI DALIZU

Upon application, a grant of letters of Administration Intestate was issued to the Petitioner Esinasi Asiri Mung'edi, on the 24th July 2008 signed by Mboghohi Msagha - J. On 7.8.2008, the Petitioner filed Summons for confirmation of grant and annexed affidavit in support indicating the shares to each beneficiary. On 15.10.2009, the Certificate of Confirmation of grant was issued by Muchemi - J distributing the property as follows;

Name: Description of property Share of Heir

- (1) ESINASI ASIRI MUNG'EDI E. BUKUSU/N.SANG'ALO/2785 0.025Ha
- (2) ESINASI ASIRI MUNG'EDI E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (3) JANE MUNG'EDI E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (4) SOPHIA KHAVERE MUNG'EDI E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (5) ROSELYNE RARORA MUNG'EDI E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (6) LINET KWANZIMA ASIRI E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (7) LILIAN MUSIMBI ASIRIGWA E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (8) STEPHEN SIMANI ASIRIGWA E. BUKUSU/N. SANG'ALO/2783 0.05Ha
- (9) NATALIE SHIVERENJE E. BUKUSU/N. SANG'ALO/155 1.4 Acres
- (10) PHARIS WEKESA MASIBO E. BUKUSU/N. SANG'ALO/2782 50 x 150ft
- (11) RUTH ABITIKA ASEKA E. BUKUSU/N. SANG'ALO/2782 50 x 150ft
- (12) CHARLES MBACHI E. BUKUSU/N. SANG'ALO/2782 50 x 150ft
- (13) ALWODI DALIZU E. BUKUSU/N. SANG'ALO/2782 50 x 150ft
- (14) PIUS MAKANDA E. BUKUSU/N. SANG'ALO/2782 25 x 100ft
- (15) ESINASI ASIRI MUNG'EDI E. BUKUSU/N. SANG'ALO/2782 Balance

The applicant Pridgeon Barasa then filed this Application for revocation or annulment of grant dated 24.5.2015, seeking;

i) That the grant of Letters of Administration issued to Esinasi Asiri Mung'edi on 24th July, 2008 and confirmed on 15th October 2009 in respect of the Estate of Alfayo Asirigwa Mung'edi be revoked.

ii) That the proceeding to obtain the grant were defective in substance.

iii) That the grant and confirmation of grant was obtained fraudulently by making false statement or by concealment from court of material facts to the case.

iv) That the petitioner failed to produce in court within prescribed time an inventory of the assets and liabilities of estate of the deceased.

By order of the Court, the application for revocation was canvassed by viva voce evidence. Pw1 Esinasi Asiri Mung'edi the Petitioner and Administrator of the Estate's evidence was taken de beneese by Mabeya - J to preserve it due to her advanced age and frail health on 25.7.2014. She testified that she knew her husband sold land to the applicant and transferred the land to him, when the deceased was alive. He is in possession of the same. Applicant again bought another parcel of land which he latter merged with the original one. Pw2 Sofia Khavere Asirigwa the daughter of the deceased and the Petitioner adopted her witness statement filed in court on 28.1.2015. She stated that the deceased's father sold a parcel of land measuring 50 x 100ft to the father of the applicant who passed on before the land was transferred to him. She then stated in her statement.

Our father then moved on to transfer the interest in the Applicant's name which was now E. Bukusu/N. Sang'alo/2784. The other remaining plot was named as E. Bukusu/N. Sang'alo/2785 and the rest as 2782. Our father's health then changed drastically thereafter he passed on.

Our mother the Respondent herein, took the initiative to petition this Honourable Court for letters of administration which she was successful. She proceeded to share the estate to the beneficiaries thereon. To her shock, the Applicant purports to have proprietary interest on our fathers estate. In a nut shell, this was our fathers property and it's we the children to share it out as beneficiaries. He could not have done such, as at the time of his death, he was in bad shape with the applicant to have negotiated any further land transactions following the applicant's construction on our land. Our mother still owns the original land title deed to the same.

On being Cross-Examined by Counsel for the Objectors/applicant this witness confirmed that there are buildings on the land which have been there for 10 years. She also confirmed that Stephen Asirigwa is the brother and had been jailed for transfer of title of deceased against the law. Upon further cross-examination by Bw'Onchiri for 4 objectors she said;

I know 4th Respondent. I am child of deceased. Stephen was charged in Court with 4 others. The 4 others Pridgeon. He interfered with all 3 titles. He is not charged with only 1/55. Pridgeon has title East Bukusu 2784. Shown a copy of title No. East Bukusu/North Sang'alo/2784 (Marked as PMF 1). In 1983 my dad was alive. My father sold Plot 50 x 100 being 2884. My father did not add 50 x 100ft. At the point I was home. In 1985 my father was alive. My father took her to the D.O. My father died in 1996 October. In January 1996 he was sick in Hospital. I deny that my father did not give a title. I knew Pridgeon got a title for 2784. I object to 2785. I object because I have a letter.

Pridgeon Masake Barasa the applicant adopted his statement dated 12.11.2014 as evidence in chief. He stated that in 1983 he purchased a plot measuring 50ft by 100ft from the land parcel No. East Bukusu/West Sang'alo/153 at Kshs.5000/= from the deceased. Thereafter the deceased added him another 50ft by 100ft at price of Kshs.1,200/= which was paid to him. He then put up shops on the two parcels of Land. In 1995 the deceased took him to the D.O. for consent and on 3.1.1996 he was issued with 2 title deeds East Bukusu/North Sang'alo/2784 and East Bukuru/North Sang'alo/2785. He therefore stated that East Bukusu/East Sang'alo/2785 does not belong to the estate as the same had been transferred to his name by the deceased. He produced the Sale Agreement dated 22.5.83 and another dated 6.1.1985 and title deed E. Bukusu/North Sang'alo/2785 in his name as Exhibit. He took possession and has done development on it.

By Consent Counsel for both parties filed written Submissions. Mr. Bw'Onchiri for the applicant Pridgeon Barasa and 4th Respondent submitted that the Summons for revocation are premised on four grounds. Firstly the proceedings to obtain the grant were defective, confirmation of grant was obtained fraudulently and that the Inventory of assets and liability was false in material Particulars. He submitted that from the evidence of the witnesses the applicant/4th Respondent had established that the parcel of land East Bukusu/North Sang'alo/2785 is registered in his name and did not form part of the Estate of the deceased available for distribution and ought to be excluded from the list of assets for distribution. He referred this court to the decision in Machakos Succession Cause No. 112/2014 in the matter of the Estate of Job Ndunda Muthika (Deceased) 2018 eKLR to fortify his submissions.

Mr. Khakula for the Petitioner submits that from the pleadings and evidence, the sub-issue raised is whether R. Bukusu/N. Sang'alo/2785 was transferred to Pridgeon Barasa Masake by the deceased. He submitted that it is unlikely. He submitted;

Was title No. E. Bukusu/N. Sang'alo/2785 actually transferrd to Pridgeon Barasa Masake by the deceased?

It was not. The Land Registrar had issued a title deed to the deceased on 31.10.1995. He would not have allowed a transfer without recalling that first title deed. To issue another title deed to Pridgeon Masake on 3.1.1996 he is obligated by law to recall and destroy the earlier title deed or declare it lost and publish such notice as he may think fit. Sections 32(1) (i), 3391 & (2) and 35(1), 92 & (3) of the Registered Land Act, Cap 300 then in force are couched in Mandatory terms.

It was incumbent upon Pridgeon when he testified, to satisfy the court that these provisions of the law had been followed. It was also incumbent upon him to show that the transfer was over board. He should have produced copy of a signed transfer by the deceased, a copy of minutes of the Land Control Board consenting to the transfer and a copy of a consent letter by that Board. The rule of evidence is that he who alleges a fact must prove it (Section 107(1) of the Evidence Act Cap 80). The objector has not done so. His objection must fail.

From the evidence and submission the main issue in this application for revocation or annulment is (a) is title E. Bukusu/N. Sang'alo/2785 part of the free estate of the deceased available for distribution? Section 3 of the Law of Succession Act;

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

In the confirmed grant (supra) the Parcel of Land E. Bukusu/N. Sang'alo/2785 has been allocated to Esinasi Asiri Mung'edi measuring 0.025Ha. This is the Parcel of Land the applicant contends belongs to him having bought from the deceased who he avers transferred the same to him before he died. Pw1 Esinasi Asiri Mung'edi the wife of the deceased and administrator of the estate confirmed in her evidence which she gave on 25.7.2014 that indeed the applicant had bought a parcel of land from her husband, and had transferred the land to him when deceased was alive; and took possession of it. He again bought another Parcel from deceased which he later merged with the original one. This is also the evidence of Sofia Khavere Asirigwa the daughter of the deceased. As this is their evidence it follows that the Parcel of Land E. Bukusu/N. Sang'alo/2785 belongs to the applicant Pridgeon Barasa Masake and was therefore not part of the estate of distribution. Its inclusion in the confirmed grant and distribution was irregular as it was not part of the estate.

I therefore order that the grant issued on 24.7.2008 and certificate of confirmation issued on 15.10.2009 be amended to remove Parcel No. E. Bukusu/North Sang'alo/2785 from the properties available for distribution.

Each party to bear his own costs.

Dated at Bungoma this 30th day of October, 2020.

S.N. RIECHI

JUDGE