



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 360 OF 1998**

**IN THE MATTER OF THE ESTATE OF MICHAEL MAKOKHA (DECEASED)**

**RULING**

1. The application for determination is dated 18<sup>th</sup> April 2019. It is brought at the instance of Petronilla Nashiba Makokha, I shall refer to her hereafter as the applicant, in respect of the application dated 18<sup>th</sup> April 2019. She has named Florence Nehanda Omocho and Festus Olang Chuma, as respondents, and I shall refer to the two as the 1<sup>st</sup> and 2<sup>nd</sup> respondents, respectively, to the said application. The applicant would like registration of Bunyala/Budonga/176 in the name of the 2<sup>nd</sup> respondent to be cancelled, and the property restored to the name of the deceased so as to facilitate transmission of the said property as per the certificate of confirmation of grant issued on 31<sup>st</sup> March 2014. It also seeks joinder and injunctions. The applicant accuses the 1<sup>st</sup> respondent of causing the said estate asset to be transferred to the 2<sup>nd</sup> respondent who was not one of the heirs. She expresses frustration that the administratrices were having a challenge in having transmission done in accord with the certificate of confirmation of grant dated 31<sup>st</sup> March 2014.

2. The 2<sup>nd</sup> respondent has filed a reply to that application through an affidavit that she swore on 17<sup>th</sup> March 2020. She explains that she was the one who had initiated the cause in court, and obtained representation, as sole heir and beneficiary. The property was devolved to her exclusively. She then sold it to the 2<sup>nd</sup> respondent. She dismisses the applicant as neither an nor dependant of the deceased, asserting that the applicant and her sisters were not entitled to equal share of the property in question. She states that she was not aware that the grant was later amended. She says she was registered owner of the property through transmission, having been registered in 1999. She denied selling the land to a Zablon S. Wawire, saying that the latter became registered proprietor through fraud, but the 2<sup>nd</sup> respondent was a *bona fide* purchaser of the said property from her. She states that as at the date the sale was conducted due diligence was done, and there was no other interest over the land. She asserts that there would be no justification for the court to cancel the registration.

3. The 2<sup>nd</sup> respondent has also filed his own response, through an affidavit that he swore on 17<sup>th</sup> March 2020. He asserts that he is the registered proprietor of Bunyala/Budonga/176, having bought the same from the 1<sup>st</sup> respondent. He states that at the time he did the purchase he had done due diligence and did not find any other interest. He says that he sees no basis for the court to cancel his registration.

4. In addition to the responses, the respondents also filed a notice of preliminary objection, dated 17<sup>th</sup> March 2020. They state that the court lacks jurisdiction, and the application dated, 18<sup>th</sup> April 2019 was null and void.

5. Directions were given on 7<sup>th</sup> July 2020, for disposal of both the application and the preliminary objection by way of written submissions. Both sides have complied, by filing written submissions, complete with authorities to support their respective positions. I have read through them and noted the arguments made therein.

6. Before I consider the application and the preliminary objection on their merits, I feel constrained to look at the entire background. The cause herein relates to the estate of Michael Makokha, deceased. The date of his death, if at all he died, is unknown, for the cause herein was initiated on the basis of a presumption of death. He was said to have had disappeared in 1968, and his whereabouts were still unknown as 16<sup>th</sup> June 1998, when Tanui J. presumed him dead.

7. Representation to his intestate estate was sought by the 1<sup>st</sup> respondent, in her capacity as his only child, and a grant was made and issued to her on 30<sup>th</sup> September 1998. She had expressed the deceased to have had died possessed of an asset described as Bunyala/Budonga/176. She had the grant confirmed on 23<sup>rd</sup> October 1998, devolving the entire estate to her. A certificate of confirmation of grant in those terms issued on even date.

8. On 23<sup>rd</sup> March 2010, a summons for revocation of the grant of 30<sup>th</sup> September 1998 was filed, dated 19<sup>th</sup> February 2010. The applicant to that revocation application was the applicant to the instant application dated 18<sup>th</sup> April 2019. Her case was that representation was obtained by the 1<sup>st</sup> respondent fraudulently, since she was not the sole survivor of the deceased, for the deceased had other daughters, being the applicant, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa. The applicant said that she and her sisters had not been involved in the process. The 1<sup>st</sup> respondent responded to that application, through an affidavit that she swore on 7<sup>th</sup> September 2010. She denied that the applicant and Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa were her sisters, asserting that the three never occupied Bunyala/Budonga/176. She asserted that she had no knowledge that the deceased had other children. The revocation application was heard and disposed of orally by Chitembwe J, where the applicant, the 1<sup>st</sup> respondent, and Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa testified. The court eventually concluded, in a judgment that was delivered on 20<sup>th</sup> February 2014, that the applicant, the 1<sup>st</sup> respondent, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa were all daughters of the deceased by the same mother. The grant made to the 1<sup>st</sup> respondent on 30<sup>th</sup> September 1998 was revoked, and it was ordered that a fresh grant issues to the applicant, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa, thereby excluding the 1<sup>st</sup> respondent from administration. It was further directed that Bunyala/Budonga/176 be shared equally between the applicant, the 1<sup>st</sup> respondent, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa. Thereafter a fresh grant

issued in the names of the applicant, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa, dated 31<sup>st</sup> March 2014, and a certificate of confirmation of grant, distributing Bunyala/Budonga/176, equally between the applicant, the 1<sup>st</sup> respondent, Nastacia Makokha Imbosa and Sislilia Shiakaba Barasa, issued, dated 31<sup>st</sup> March 2014.

9. The applicant thereafter filed a Motion, undated, on 25<sup>th</sup> September 2014, seeking to have the 1<sup>st</sup> respondent compelled to surrender the original title deed for Bunyala/Budonga/176 to the applicant herein, and for the Deputy Registrar of the court to be empowered to sign all the relevant documents to facilitate transfer and registration of Bunyala/Budonga/176. It was averred that the 1<sup>st</sup> respondent had failed to cooperate. The said application was argued on 22<sup>nd</sup> July 2015, and orders were accordingly given, ordering the 1<sup>st</sup> respondent to surrender the original title deed to the applicant herein, and for the Deputy Registrar to sign the relevant documents.

10. What emerges from the filings with respect to the Motion, dated 18<sup>th</sup> April 2019, which mirrors another Motion, dated 21<sup>st</sup> September 2015, which was subsequently withdrawn, on 12<sup>th</sup> November 2019, is that after the judgment of 20<sup>th</sup> February 2014 revoked her grant and issued a fresh one to the applicant and the other daughters of the deceased, and redistributed the estate equally amongst the four daughters of the deceased, the 1<sup>st</sup> respondent went ahead, despite that judgment, and purported to sell Bunyala/Budonga/176, which was to be shared equally amongst the four daughters, to the 2<sup>nd</sup> respondent. The judgment was delivered on 20<sup>th</sup> February 2014, the new grant and certificate of confirmation of grant were issued on 31<sup>st</sup> March 2014, the sale transaction purportedly happened on 1<sup>st</sup> April 2015. The 1<sup>st</sup> respondent was aware of the revocation application, and gave evidence at the hearing of that application. It cannot be said she was unaware of what was happening. What she did was to steal a march over her sisters. That is obviously the case when one considers her averments in her affidavit of 17<sup>th</sup> March 2020, that her sisters were not heirs, yet the court had already declared them to be so. She, no doubt, sold the property so as to defeat the judgment of 20<sup>th</sup> February 2014 and the orders made post that judgment, for her to surrender the original title deed. Her acts were of a person who was hell-bent on disregarding and defeating court orders and court processes. This is the colour of impunity and disrespect for the rule of law. It is something that a court of law ought not countenance. Clearly, the 1<sup>st</sup> respondent was not happy with the outcome of the revocation proceedings. However, instead of appealing against the judgment, she went about trying to defeat it, by purporting to sell the property, the subject of the judgment, so as to make it unavailable to her sisters.

11. I am not persuaded that I do not have jurisdiction to determine the matter. The 1<sup>st</sup> respondent purported to sell the property when there was still active litigation before this court over the same, with respect to its distribution. The court was seized of the matter then, and the acts of the 1<sup>st</sup> respondent were meant to defeat what the court was doing. I do find merit in the application dated 18<sup>th</sup> April 2019, and I do hereby allow the same in terms of prayers (i) and (ii), thereof. Costs shall be in the cause. Any party aggrieved has the liberty to challenge these orders at the Court of Appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 16<sup>th</sup> DAY OF October. 2020**

**W. MUSYOKA**

**JUDGE**