



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE MISCELLANEOUS NO 134 OF 2014

IN THE MATTER OF THE ESTATE OF NYANGAGA OKUNGU – DECEASED

AND

BETWEEN

BENSON OLUOCH OTIENO...PETITIONER/RESPONDENT

VERSUS

SAMWEL OKOTH MAYOGA.....OBJECTOR/APPLICANT

RULING

OBJECTOR/APPLICANT'S CASE

1. This ruling determines the summons for revocation of grant dated 23rd June 2014 by **JOASH MAYOGA NYANGAGA** ('*Joash*'). Before the matter was set down for hearing the said applicant Joash, died and Samwel Okoth Mayoga successfully obtained an order of the substitution of his father. The application dated 23rd June 2014 seeks the following reliefs:

1. THAT the grant of letters of administration intestate issued herein to the Petitioner/Respondent for the administrator of the estate of the deceased herein on the 2.1.2001 and confirmed on 24.6.2002 be revoked and/ annulled.

2. THAT all dealings and/or transactions entered into by the said Petitioner/Respondent pursuant to, as a result of and/or consequent to the said grant particularly as concerns land parcel No Kamagambo/Kabuoro/256 including the sub-division and disposal of any portion thereof be nullified.

3. THAT this court be pleased to grant such orders as may be in furtherance of the foregoing.

2. The application was supported by the affidavit sworn by Joash averring that Benson Oluoch Otieno ('*Oluoch*') petitioned the court in **Kisii High Court Succession Cause No 201 of 2001** and obtain grant of letters of administration intestate for the estate of the deceased on 2nd November 2001. He subsequently applied to have the grant confirmed and the said grant was confirmed on 24th June 2002. The confirmed grant was made in favour of Oluoch, Henry Okach Osongo and Stephen Muya Okungu. The applicant advanced that other than Oluoch the other two persons appearing on the confirmed grant were strangers to the deceased's estate. According to the applicant Oluoch intended to disinherit the true dependents of the deceased. It was the applicant's case that the deceased died intestate and was survived by Joash, Krestina Okech Nyangaga, Persila Adoyo Nyangaga, Serfina Oyugi Nyangaga and Leah Achieng Mayoga. It was advanced that the petitioner misled the court to believe that he was the deceased's son. Upon the issuance of the certificate of confirmation of grant the petitioner had the land registered in his name as the sole proprietor of parcel 256 and without the consent of other dependents and proceeded to subdivide land parcel No. KAMAGAMBO/KABUORO/256 ('parcel 256') into KAMAGAMBO/KABUORO/5441 and 5442. Oluoch has disposed portions of the deceased's land to James Waore Muya and other third parties.

3. At the hearing of the objection Samuel Okoth Mayonga (Pw1) testified that the deceased had two wives Rosebella Ogolla who was the mother to Joash and the second wife Pascalliah Amollo had one son Joseph Otieno. He testified that he is the son of Joash while Oluoch and Dominic Wendo Otieno are sons of Joseph Otieno. He testified that Oluoch subdivided the land without informing them and transferred part of it to James Waore Muya who is not the deceased's beneficiary. On cross examination he testified that Joash never sold part of the deceased estate. He also testified that the deceased had not divided the land between his two wives but showed each wife where to put up their homes.

4. Shem Otieno Omingo (Pw2) testified that the deceased had two wives and that Oluoch is his grandson. He also testified that Joash had sold land to Joseph Akombo in the 1980's.

APPLICANT'S SUBMISSION

5. It was submitted that at the time Oluoch filed the petition the deceased sons and daughters were alive and this by virtue of him being a grandson he was not seized of the requisite capacity to apply for grant of letters of administration over the deceased estate. The case of **Ernest Moturi Ogora & Another v Christopher Obwagi & 2 Others (2016) eKLR** in support of the applicant's case. It was also advanced that it was incumbent upon the Petitioner to take out a citation against the persons ranking in priority to either take out or renounce the taking out of grant of letters of administration. They relied on the case of **Re Estate of Kageto Gitome (Deceased) 2018 eKLR** and **Re Estate of Gamaliel Otieno Onyengo (Deceased) 2018 eKLR**. It was submitted that the petitioner failed to disclose and/or otherwise withheld material, essential and paramount information from the court and consequently the grant of letters of administration to the petitioner was procured on the basis of false information. They relied on the case of **In the Matter of the estate of LAK – (Deceased) [2014] eKLR**. The applicant submitted that the court should revoke the grant issued to Oluoch and further revoke the subdivisions affecting the estate of the deceased and restore the original parcel land namely, LR NO. KAMAGANBO/KABUORO/256 in the name of the deceased.

RESPONDENT/PETITIONER'S CASE

6. Oluoch filed a replying affidavit dated 15th August 2016 in response to the objection. He averred that he is the son of Joseph Otieno (also deceased) who passed away in 1993. Joseph Otieno was the deceased's son. He deposed that the deceased had divided parcel 256 into two equal portions which were occupied by his father and Joash. Joash then secretly obtained a grant pertaining to the deceased property vide **Kisii High Court Succession Cause No 65 of 1997** leaving out Joseph Otieno's sons – Oluoch and Dominic Wendo Otieno. It was averred that on application for revocation of grant, the court revoked the said grant on grounds that the grant had been fraudulently obtained.

7. Oluoch proceeded to petition for grant in **Kisii High Court Succession Cause No 201 of 2001** and included both Dominic Wendo Otieno and Joash as beneficiaries of the deceased. Upon confirmation of the said grant Oluoch subdivided parcel 256 into LR NO KAMAGAMBO/KABUORO/7643, 7644 and 7645. He advanced that KAMAGAMBO/KABUORO/7643 and 7644 belong to him and his brother Dominic Wendo Otieno while KAMAGAMBO/KABUORO/7645 was reserved for Joash. He explained that although the three parcels were in his name he lays no claim to KAMAGAMBO/KABUORO/7645. According to Oluoch, Henry Okech Osongo and Stephen Muya Okungu have purchaser's interest on the portion of his land forming part of the deceased's estate. He alleged that Joash had illegally sold a portion of his land to Dismas Zero Kwaya and he reported the issue to the area Assistant Chief. He contends that the application herein will delay the distribution of the deceased's estate.

8. The petitioner in support of its case relied on the evidence of George Obiya Owuor (Dw1) and Oluoch (Dw2).

9. Dw1 testified that the deceased had 2 wives and that although he could not tell whether the land was divided equally between his wives the land had been divided between the two wives and there was a boundary separating the two portions. He testified that Joash sold portions of his (Joash's) land as well as a portion belonging to Oluoch.

10. Dw2 testified that the deceased was his grandfather and that he had divided his land between his two wives. He testified that Joash sold a portion of the land to Joseph Akungu and 'Daktari' while another portion belonging to his mother was sold to Dismus Zero Kwaya. On cross examination he testified that he left out some of the deceased's daughter's for reason that they were married and have their respective homesteads.

11. It was submitted that the applicant's submission relate to **Kisii High Court Succession Cause No. 134 of 2014** and not the current file before the court which is **Kisii High Court Miscellaneous Civil Application No. 134 of 2014**. It was further submitted that the court should therefore disregard their submissions. It was the petitioner's case that the applicant had failed to prove their case on a balance of probabilities.

DETERMINATION

12. I have considered the application and the response thereto, the evidence and the parties submissions. The only issue raised by the application is whether or not the grant issued to Oluoch should be revoked. Therefore, in determining whether or not to revoke the said grant this court is guided by the provisions of **section 76 of the Law of Succession Act** which provides as follows;

76. Revocation or annulment of grant

“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 has ordered or allowed; 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.”

13. After considering the evidence presented by both parties, I find that the following facts are not in dispute:

1. The deceased had two wives. Joash and Joseph Otieno are the deceased's sons. The deceased was also by his daughters.
2. Both Samwel Okoth Mayoga and Oluoch are the deceased's grandchildren.
3. Oluoch misled the court in **Kisii High Court Succession Cause No 201 of 2001** to believe that he was the deceased's son and Joash a brother to the deceased.
4. That the confirmed grant did not include the deceased's true beneficiaries

14. The grant obtained by Oluoch in **Kisii High Court Succession Cause No 201 of 2001** was thus obtained through the making of false statement and concealment of material facts as Oluoch failed to disclose the real and true beneficiaries of the deceased.

15. I have also noted that the parties herein have filed **Kisii High Court Succession Cause No 65 of 1997** and **Kisii High Court Succession Cause No 201 of 2001** leaving this court no choice but to first consolidate all other proceedings into one file. That file shall be **Kisii High Court Succession Cause No 201 of 2001**.

16. Having so found that there was material non-disclosure and having consolidated all the causes relating to the deceased estate, I hereby revoke grant issued to Oluoch and also give all the beneficiaries an opportunity to agree on distribution of the deceased's estate. I therefore make the following orders;

- a. The grant issued to BENSON OLUOCH OTIENO in **Kisii High Court Succession Cause No 201 of 2001** on 2nd November 2001 and confirmed on 24th June 2002 is hereby revoked;
- b. The Kisii County Land Registrar is directed to cancel the registration of the title for LR NO KAMAGAMBO/KABUORO/7643, 7644 in the name of BENSON OLUOCH OTIENO and shall revert it to the original title being land parcel LR. NO KAMAGAMBO/KABUORO/256 in name of the deceased, NYANGANGA OKUNGU;
- c. A fresh grant of letters of administration intestate for the deceased's estate shall issue forthwith to SAMWEL OKOTH MAYOGA and BENSON OLUOCH OTIENO;
- d. The administrators or any of them shall thereafter present an application for confirmation of grant within 60 days from the date hereof;
- e. There shall be no order as to costs.

Dated, Signed and Delivered at KISII this 17th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Mr. Mulisa For the Objector

Petitioner Present

Ms. Rael Court Assistant