



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 454 OF 2014

IN THE MATTER OF THE ESTATE OF RICHARD DAVID OKELO (DECEASED)

RICHARD DAVID OKELLO

HOSBON L. OCHIENG

BRIAN OTIENO.....APPLICANTS

VERSUS

SELINE AKINYI OKUMU

SABRI AKBAL MOHAMED.....RESPONDENTS

RULING

1. Richard David Okelo, the deceased herein (the Deceased) died on 3.11.88. A grant of letters of administration in respect of the estate of the Deceased (the Grant) was on 28.5.12 issued to Seline Akinyi Okumu, (the 1st Respondent), a daughter of the Deceased. The 1st Respondent stated in her application for the Grant that she was the only person who survived the Deceased. The Grant was confirmed on 19.6.13 and a certificate of confirmation of grant issued on 4.7.13. The estate comprising Plot No. MN/II/1070 (the Property) was distributed to the 1st Respondent as the sole beneficiary. The record shows that the 1st Respondent sold the Property to Sabri Akbal Mohamed (the 2nd Respondent) for Kshs. 3,700,000/= and the Transfer dated 15.10.14 was registered on 12.11.14.

2. The foregoing are the circumstances that provoked Richard David Okello, Hosbon L. Ochieng and Brian Otieno, (the Applicants) to file the Summons dated 19.1.15 (the Application) seeking revocation of the Grant. The Applicants also seek cancellation of any alterations under entry numbers 5, 6 and 7 in Title No. CR 16729 in respect of the property. The Applicants also seek an order that the District Investigations Officer Kisauni investigates the illegal and fraudulent issuance of the Grant and consequent transfer of the Property.

3. The Applicants claim that they are the sons of the Deceased who died while they were still minors. They are the only survivors in the family of the Deceased. Their mother Millicent R Okello, step mother Alice R. Okelo, brother George Odede and sister Milka Odhiambo all died due to illness. They further claim that the 1st Respondent is a stranger to them. According to the Applicants, the transfer of the Property to the 2nd Respondent was done in secrecy and the Respondents seek to evict them therefrom yet they have nowhere else to call home. On 5.1.15, strangers went to the Property and asked the Applicants to move out as the same had been purchased and was to be demolished to pave way for a storied construction. This led the 1st Applicant to check for the original title in the Property only to find it missing. He then reported the loss at Kiambeni Police Station. A search of the title at the Lands Office revealed that the Property had been transferred to the 2nd Respondent by the 1st Respondent both strangers. The Applicants were not involved in the process of obtaining the Grant and the same ought to be revoked. Their efforts to reach out to the Respondents to amicably resolve this matter have failed. They prayed that the Grant be revoked.

4. In her Replying Affidavit sworn on 17.7.17, the 1st Respondent averred that she is a daughter of the Deceased. The Applicants are imposters and therefore not beneficiaries of the estate of the Deceased. The administration herein has been determined and the estate distributed and the Property sold to a third party. She denies the allegations of fraud. It is not true that the original title to the Property was lost as she has had the same all along having collected the same from the bank. She prayed that the Application be dismissed.

5. The 2nd Respondent in his Replying Affidavit sworn on 10.11.17 confirmed that he purchased the property from the 1st Respondent for Kshs. 3,700,000/=. Upon executing the agreement dated 30.7.14, he paid a deposit of Kshs. 1,850,000/= to C. K. Areba acting for both parties. The Advocates had conducted a search which confirmed that the Property belonged to the 1st Respondent. Subsequently the transfer was duly registered and title issued to him. He stated that he is a bona fide purchaser for value without notice of any irregularities to the title. He only became aware of the dispute after purchasing the property and demanded a refund of the deposit and costs. He thereafter filed Chief Magistrates Civil Case No. 256 of 2015 which is still pending. According to him, he acquired good title and he urged the Court to dismiss the

Application.

6. At the hearing, the 1st Applicant reiterated the averments in his affidavit in support of the Application. He however stated that the 1st Respondent is his step-sister. According to him, the Deceased had 3 wives. Their mother was the 3rd wife while the 1st Respondent's mother was the 1st wife. The Applicants lived on the Property with their mother from birth until 1999 when they moved upcountry to enable George Odede the 1st Respondent's brother rent the same to support himself. In 2002, the 2nd Applicant returned to Mombasa and stayed with George until his demise in 2006. The 2nd Applicant continued to collect rent until 2011 when the 1st Respondent came into the picture and they all shared the rent. They came to learn in 2014 that the 1st Respondent had sold the property when their tenant was evicted. The 2nd Respondent came to learn that the Applicants were beneficiaries of the estate at this time. The 1st Applicant confirms that the 2nd Respondent was not aware of the irregularities with the title and he is ready to settle the matter.

7. The 1st Applicant further stated that the 1st Respondent rebuffed efforts to reach a settlement forcing the Applicants to move to Court. The Applicants were not involved in the process to obtain the Grant. The letter from the chief claiming that the 1st Respondent was the only survivor of the Deceased was not true. The Applicants have a letter from the District Officer of Rarieda Division. He stated that they found this letter in the archives of the Deceased amongst other documents. The Applicants are agreeable to settle the matter as long they all get an equal share of the proceeds of sale.

8. The 2nd Applicant reiterated the testimony of the 1st Applicant. He and his mother and siblings stayed in the Property till 2001. When their mother died they moved to Siaya and left the 1st Respondent's brother. When he returned to Mombasa he found the 1st Respondent's brother had rented the out the Property. He began to manage the Property in 2008 and also got tenants for the same. Prior to that the 1st Respondent's brother used to collect rent until his demise. They were not informed when the Grant was obtained and the Property was sold without their involvement. He too is willing to have the matter settled by sharing proceeds of sale with the 1st Respondent who is their half-sister.

9. For her part, the 1st Respondent stated that the Deceased had 2 wives. Her mother had 4 children 3 of whom are deceased. Her stepmother had no children of her own. Upon the demise of the Deceased, her brother Odede lived on the property until he died. She then came to Mombasa to look after the Property as the tenant was being disturbed by the Applicants who claimed to be sons of the Deceased. She filed these proceedings. She got letter from chief of Uyoma who knew the Deceased very well. The Deceased was buried in Uyoma. The Property was charged and she procured the discharge of the same. She then sold the Property to the 2nd Respondent and was paid Kshs. 1,850,000/= being 50% of the purchase price. The balance is yet to be paid. She denies that the Applicants are children of the Deceased. The birth certificate produced by the 1st Applicant indicates that he was born in 1991 yet the Deceased died in 1988. He cannot therefore be son of the Deceased. The 1st Respondent said she cannot share property with the Applicants as they are not children of the Deceased. She doubted the authenticity of the chief's letter exhibited by the Applicants as it refers to Succession Cause No. 1 of 1984 yet the Deceased died in 1988. The letter is also unsigned.

10. Nasra Mohamed Ali the mother of the 2nd Respondent stated that he was in Australia. She signed the Agreement to purchase the Property on behalf of the 2nd Respondent and paid Kshs. 1,850,000/= as 50% of the purchase price together with Kshs. 140,000/= to C. K Areba, advocate. Title was issued in the name of the 2nd Respondent. The balance was to be paid upon handing over vacant possession of the property. Nasra, the 1st Respondent and someone from the advocate's office went to the Property. They found the 1st Applicant and 2 other young men and a fracas arose and they were denied entry into the Property. The 1st Applicant told her the house did not belong to the 1st Respondent. Nasra thereafter filed CMCC No. 256 of 2015 which is still pending before Court. She stated that they bought the Property in good faith and they only knew the 1st Respondent. She got to know about the dispute later.

11. Parties filed written submissions which I have considered together with the authorities cited. The issue that this Court must determine is whether the statutory grounds for revocation of the Grant have been established by the Applicants. The Applicants' claim is that the 1st Respondent obtained the Grant fraudulently by failing to involve them as sons of the Deceased. The Law of Succession Act (the Act) provides that a grant obtained fraudulently is liable for revocation. Section 76 of the Act provides:

“ 76 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)...

12. The foregoing provision of the Act provides that an application for revocation of grant may be made by “any interested party”. An applicant who seeks the revocation of a grant of representation must therefore demonstrate to the Court that he has sufficient interest to challenge the grant. In the instant case the Applicants claim that they are sons of the Deceased while the 1st Respondent is adamant that they are not. Black's Law Dictionary Tenth Edition defines “interested party as:

A party who has a recognizable stake (and therefore standing) in a matter.

13. Do the Applicants have a recognisable stake in the matter herein that entitles them to impugn the Grant that was obtained without their involvement? The 1st Applicant produced his birth certificate as proof that he is the son of the Deceased. He averred in paragraph 8 of his affidavit in support of the Application:

That at the time of my fathers (sic) death – RICHARD DAVID OKELO [DECEASED] I was only a year old as can be attested by the birth Certificate and I have since then moved to another home as at the time I required a sponsor to fund my education. (annexed herewith and marked RDO 4 is a copy of my Birth Certificate.)

14. A look at the exhibited birth certificate however indicates that the 1st Applicant was born on 3.6.91 yet the Deceased died on 3.11.88. In his testimony, the 1st Applicant had stated that he could explain the discrepancy. Unfortunately he offered no explanation as to why his birth certificate showed he was born 3 years after the demise of the Deceased. It is the practice of this Court to ask for the national identity card of each witness who takes the stand and to record the number and year of birth indicated therein. For the 1st Applicant, the Court did record his ID number 27745023 and his date of birth being 1990. Again this shows that he was born 2 years after the demise of the Deceased. No other documentary or other evidence was tendered to support his claim. The Court further notes that no material was availed by way of documentary or other evidence regarding the relationship between the 2nd and 3rd Applicants and the Deceased.

15. The Applicants relied on a letter from the District Officer Rarieda Division dated 6.2.90 addressed to the District Commissioner, Siaya. This letter indicates the cause number as MSA Cause No. 1 of 1984. The Deceased died in 1988, 4 years after the alleged cause. Notably also the letter is not signed. Further, in his testimony, the 1st Applicant stated that this letter was found in the archives of the Deceased amongst other documents. Really? How would a letter written 2 years after the demise of the Deceased be found in his own archives? To my mind, the authenticity of the letter is doubtful.

16. The Applicants stated in their supporting affidavit that the 1st Respondent is a stranger unknown to the family of the Deceased. The supporting affidavit also contains an averment that the Applicants through their lawyer invited the Respondents to amicably settle the matter. It strikes me as strange that the Applicants would be willing to settle the matter with a party they claim is a stranger whose actions were criminal. The Court notes that the 1st and 2nd Applicants did in their testimony make an about-turn from their averments on oath and recognised the 1st Respondent as the daughter of the Deceased. The 1st Applicant stated “Seline Akinyi is my step sister” while the 2nd Applicant stated “Seline is our half-sister”. In their testimony the Applicants repeatedly expressed their willingness to settle the matter with the Respondents as long as everyone got an equal share.

17. It is trite law that he who alleges must prove. This principle is firmly embedded in the Evidence Act. Section 107 stipulates:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

18. Given the foregoing discrepancies and in light of the fact that the 1st Respondent has dismissed the Applicants as imposters, one would have expected the Applicants to go to great lengths to lay before the Court sufficient material that would convince the Court that they are indeed the sons of the Deceased. They Applicants would have for instance called an independent witness such as a relative to testify on their behalf. Unfortunately, no effort appears to have been expended in this regard. In the circumstances I am not satisfied that there is anything on record to bring me to the conclusion that the Applicants are children of the Deceased. The burden of proof clearly lay on the Applicants but they have failed to discharge the same. As such the Applicants have no recognisable stake in the estate of the Deceased and therefore no standing in the matter herein. It follows therefore that the Applicants have no legal basis to challenge the manner in which the 1st Respondent obtained the Grant and they are not entitled to apply for its revocation.

19. The Applicants relied on the case of In re Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR to buttress their case. This authority however, is not relevant as the applicants therein are widow and daughter in law of the deceased therein and therefore interested parties within the meaning of Section 76 of the Law of Succession Act.

20. Having found that the Applicants have no *locus standi* to bring this Application, the conclusion of this Court is that the 1st Respondent obtained the Grant legally. She thereafter transferred the Property to herself. The 2nd Respondent after conducting a due diligence exercise found that the property is in the name of the 1st Respondent and proceeded with the purchase. I find no reason to interfere with an otherwise lawful transaction between the Respondents.

21. In the result, this Court finds that the Applicants have not demonstrated that there exists any of the statutory conditions set out in Section 76 of the Act to warrant the revocation of the Grant. The Application dated 19.1.15 therefore lacks merit and the same is dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MOMBASA this 25th day of January 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**