



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: D.S. MAJANJA J.)

SUCCESSION CAUSE NO. 418 OF 2015

IN THE MATTER OF THE ESTATE OF

WILLIAM AKEYA SAMBO (DECEASED)

BETWEEN

JOHN NYABUTO.....APPLICANT

AND

JOHN MOYA NYAGWARA.....PETITIONER/RESPONDENT

RULING

1. This matter concerns the estate of William Akeya Sambo (“the deceased”) who died intestate on 1st January 2006. The deceased did not have a wife or children. His nephew, John Moya Nyagwara (“Nyagwara”) applied for and was granted letters of administration intestate on 8th March 2016. Following confirmation of the grant on 17th November 2016, Nyagwara became the owner of the deceased’s only property, BASSI/MASIGE/2248 (“Plot 2248”).

2. On 20th November 2017, John Nyabuto (“Nyabuto”), filed a summons for revocation and annulment of the grant on the basis that the petitioner failed to disclose material facts and in particular the fact that Plot 2248 was non-existent as the deceased had sold a portion of it being BASSI/MASIGE 3019 (“Plot 3019”) to Stephen Ndege Kegera (“Kegera”) before he died. Nyabuto alleged that he was the registered proprietor of Plot 3019 which he had purchased from Kegera.

3. In his deposition sworn on 2nd March 2018 in response to the summons, Nyagwara deponed that Plot 3019 had never been legally registered and that the Lands Registry did not have a record of that title. He pointed out that Nyabuto did not provide the sale agreement and transfer forms for the purchase from Kegera as evidence of the purchase by Kegera from the deceased. He admitted that Plot 2248 had been subdivided into Plots 3018 and 3019 and that Plot 3019 had been registered in Kegera’s name but that the Land Registrar cancelled that registration and reinstated the original title on 10th April 2014.

4. Nyagwara complained about the titles to Plots 2248 and 3019 before the District Criminal Investigation Officer (“DCIO”) Nyamache, who commenced investigations. Thereafter, Nyabuto was arraigned before Ogembo Law Courts in ***Criminal Case Numbers 923 of 2017 and 1064 of 2017*** and charged with the offence of forcible detainer contrary to **section 91** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. Nyagwara contended that he had no obligation to inform Nyabuto about the proceedings as he had no interest in the land.

5. As the case involved the title to Plot 2248, I summoned the Kisii County Land Registrar, Tom Mokaya, to give the history of the subdivision of Plot 2248. He testified that Plot 2248 was first registered on 22nd August 1974 in the name of Akeya Sambo. On 24th November 1997 a change of name was recorded from Akeya Sambo to William Akeya Sambo. On 8th September 1998, the parcel was closed and new numbers for Plots 3018 and 3019 opened. Following a letter from the CID office Gucha, the two numbers were cancelled and the property reverted back to William Akeya Sambo on 10th April 2014. A restriction was recorded on 26th June 2015 barring any dealings on the land until succession proceedings were finalized. Following the presentation of a certificate of the grant dated 17th November 2016, a certificate of title for Plot 2248 was issued to Nyagwara on 30th November 2016. A new title was re-issued on 24th January 2018 as the proprietor’s name was wrongly spelled.

6. In cross examination, the Land Registrar confirmed that according to a certificate of search dated 19th February 2013, Plots 3018 and 3019 were registered in the name of the deceased and Kegera respectively although he stated it was not clear from the register in whose names Plots 3018 and 3019 had been registered as the entries must have been expunged from the record. When shown a copy of a letter of consent

from the Land Control Board dated 29th March 2015 in respect of Plot 3019, he observed that the Deputy County Commissioner, Kisii Central could not consent to transfer outside his jurisdiction as the land is situated in Nyamache Sub-County. He could not ascertain the authenticity of documents relating to the transaction and stated that the Land Control Board did not sit on Sundays.

7. Nyabuto reiterated that he had purchased the land from Kegera, who had capacity to sell, it to him. Kegera told the court that he had bought the land from the deceased in 1996 and was issued with a title deed dated 16th October 1996 when the deceased was still alive. He stated that he went to Nyamache Land Control Board meeting with the deceased. He refuted the claim that he had forged the deceased's signature on the mutation form and application to the Land Control Board.

8. Nyagwara testified that the deceased was his father's elder brother and that he died without a wife or children. He stated that the dispute with Kegera began in 1998 when Kegera invaded Plot 2248. Nyagwara recalled that he had inquired from the deceased about the land but the deceased denied having sold the land. He told the court that he knew that Plot 2248 had been subdivided into Plots 3018 and 3019 registered in the names of the deceased and Kegera respectively but the Land Registrar cancelled the sub-division following a letter from the DCIO.

9. The summons for consideration is grounded on **section 76 (b)** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* which provides that 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 on the ground that, "(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."

10. Nyabuto's case is that Nyagwara made an untrue allegation of a fact essential in law to justify nullification of the grant issued to him. From the facts I have outlined, he contends that Nyagwara did not reveal to the court that Plot 2248 was no longer available for distribution as it was non-existent, a portion of it having been sold by the deceased to Kegera who in turn sold it to him. Thus the main issue arising for consideration is whether Plot 2248 formed part of the deceased's estate and whether it was available for distribution.

11. The impugned grant was issued in respect of Plot 2248. According to the Land Registrar, the deceased was the registered proprietor at the time Nyagwara applied for the grant of representation. While Nyabuto purchased Plot 3019 from Kegera, its registration was cancelled by the order of the Land Registrar on 10th April 2014. The result of the cancellation is that there is no nexus between Nyabuto and the deceased. Nyabuto was neither a creditor, beneficiary or survivor of the deceased. He bought the land from Kegera who claims that the deceased sold him the land and it is to Kegera that Nyabuto must now seek relief. My conclusion on this matter is fortified by the decision of W. Karanja J., in *Ireru Nyaga v Karani Ngari & Another Embu HC Succ. Cause No. 68 of 2007 [2010]eKLR* where she held that:

[A] buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate. [Emphasis added]

12. The same principle was echoed by Makau J., in *Muriuki Hassan v Rose Kanyua & 4 Others MRU HC Succ. Cause No. 62 of 2012 [2014] eKLR* where he considered the position of an interested party who was for all intents and purposes in a better position than Nyabuto as he was, unlike Nyabuto, a purchaser from a direct beneficiary. The learned judge observed as follows:

The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties' interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan.

13. In light of the conclusion I have reached, I have exercised great circumspection on commenting on the nature of the contract documents, the validity of the Land Control Board consent and whether in fact, the Land Registrar could set aside a registration on account of a letter written by the DCIO. All these matters are better resolved in another forum.

14. Finally let me deal with an issue raised by the applicant regarding the status of the deceased. The deceased did not have a spouse or children. Being the only surviving relatives of the deceased, the petitioner, his mother and five sisters were entitled to apply for grant and share the deceased property in equal shares in accordance with **section 39 (1)** of the **Act**. The deceased's relatives have not complained about the administration of the estate and as a matter of fact, Nyabuto is not related to the deceased. Additionally, and as I have found, he has no registered interest in Plot 2248 hence I find and hold that he has not established any basis for me to revoke or annul the grant on the basis of non-disclosure of material facts.

15. For the reasons set out above, I dismiss the summons of revocation dated 20th November 2017. I make no order as to costs.

DATED and DELIVERED at KISII this 20th day of FEBRUARY 2019.

D.S. MAJANJA

JUDGE

Mr. John Moya Nyagwara acting in person

Mr. Ochoki instructed by Ochoki and Company Advocates for the objector