



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 596 OF 2012

IN THE MATTER OF THE ESTATE OF ANDARANIKO BIGOGO BIKERI (DECEASED)

JAMES BIKERI BIGOGO.....PETITIONER

VERSUS

RONALD ONDABU BIGOGO

BETTY KERUBO MOGIRE

ELIZABETH GESARE MACHOKA

KENNEDY KENYANZA BIGOGO.....OBJECTORS

AND

JOYCE KWAMBOKA NYARANGO.....APPLICANT/INTERESTED PARTY

RULING

1. The deceased Andaraniko Bigogo died on the 6.9.2008. On the 27.9.2012 James Bikeri Bigogo son of the deceased petitioned for a letters of administration intestate. In the petition he states that the deceased died intestate and left the following survivors; James Bikeri Bigogo (son), Ronald Ondabu Bigogo (son), Elizabeth Gesare Machogu (daughter in law), Betty Kerubo Mogire (daughter in law), Kennedy Kemanso Bigogo (son) and Joyce Kwamboka Nyarang'o (Buyer). The only asset left by the deceased as per the petition was West/ Kitutu/ Bogusero/589.

2. By consent of all parties, the following consent was recorded and adopted as a Court order on the 17th of October 2014;

i. The subdivision of original parcel of land title **No.West Kitutu/Bogusero/589** into new parcels of land title Numbers West Kitutu/Bogusero/7100, **West Kitutu/Bogusero/7102**, West Kitutu/Bogusero/7103, **West Kitutu/Bogusero/7104** and **West Kitutu/Bogusero/7105** is hereby cancelled.

ii.The title Deeds issued in respect of the new parcels of land namely Title Numbers **West Kitutu/Bogusero/7100**, **West Kitutu/Bogusero/7102**, **West Kitutu/Bogusero/7103**, **West Kitutu/Bogusero/7104** and **West Kitutu/Bogusero/7105** are hereby nullified.

iii. That the Land Registrar Kisii County is hereby ordered to rectify the Land Register to restore the original parcel of Land **Title No.West Kitutu/Bogusero/589** in the land register in the deceased's name **"BIGOGO BIKERI"**.

iv.That the following assets are hereby included in the list of the assets of the deceased's estate (i) **LR. NO.Nyaribari Chache/Keumbu/231**, **LR No.Nyaribari Masaba Bokimotwe 1/268**, LR No. West Kitutu/Bogusero/706, Plot No.14A/Keroka, Plot No.13A/Keroka and Plot No.77B/Keroka Town.

v. That a grant of Letters of Administration Intestate of the deceased's estate is hereby granted to Ronald Ondabu Bigogo, Hudson Mose Bigogo and Sebastian Onderi Bigogo to jointly administer the deceased's estate.

vi. That all parties and beneficiaries herein do agree on the mode of sharing and distribution of the estate and file a written consent in respect thereof within a period of 30 days from the date hereof or within such other period as court and the parties may find convenient.

vii. Costs of this cause be paid out of the proceeds of the estate.

3. Thereafter a grant of letters of administration intestate was issued to Ronald Ondabu Bigogo, Hudson Mose Bigogo and Sebastian Onderi Bigogo on the 23rd of October 2014.

4. On the 18th February 2016 the grant was confirmed and a certificate of confirmation of the grant was issued distributing the deceased's properties namely; West Kitutu/ Bugusero/589, Nyaribari Chache/ Keumbu/231, West Kitutu/ Bugusero/706. Plot No.14A/Keroka. Plot No. 77B/Keroka and Plot No.14A/Keroka. The said properties were distributed to the beneficiaries of the estate as per the certificate of confirmation dated the 18th February 2016.

5. On the 17th January 2018 the interested party/ applicant filed an application for revocation of the grant and or rectification of the grant under Section 74, 76 and 93 of the Law of Succession Act Cap. 160 (the Act), Rules 43, 44,49,59,63 and 73 of the Probate and Administration Rules(the Rules). The applicant seeks the following orders;

i. That pending the hearing and determination of the summons the Court be pleased to issue a prohibitory order of injunction restraining the petitioners/respondents from disposing off, selling, alienating and /or appropriating the Assets of Andariniko Bigogo Onderi the deceased herein more particular L.R. No. West Kitutu/ Bugusero/ 9699,9700,9701,9702 and 9703 respectively same being resultant parcels emanating from the original L.R. No. West/Kitutu/Bugusero/589 in any manner whatsoever and/or howsoever.

ii. That pending the hearing and determination of the summons herein the Court be pleased to grant an order of inhibition, inhibiting any transaction, sale, charge and/or any other dealing with L.R.No. West Kitutu/Bugusero/9699, 9700,9701,9702,9703 in a manner whatsoever and/or howsoever.

iii. That the confirmed grant of letters of administration granted to the petitioners/respondents on the 18th February 2016 be revoked.

iv. In the alternative, the confirmed grant dated 18th February 2016 be rectified/alterd pursuant to Section 74 and Rule 43 of Cap 160 to reflect the name of the purchaser Joyce Kwamboka Nyarango (purchaser) in place of James Bikeri Bigogo (Beneficiary) who had sold all his portion measuring 0.62Ha.

v. That the register in respect of L.R. West/ Kitutu/ Bugusero /589 be rectified and the titles in respect of the resultant parcels namely L.R. West Kitutu/Bugusero/ 9699,9700,9701,9702 & 9703 respectively in names of petitioner/ respondent be corrected as to the share of James Kwamboka inserted be deleted and in its place to reflect the name of Joyce Kwamboka Nyarango (purchaser) who had already transferred to third parties respectively.

vi. Costs of the application be borne by the petitioners/ respondent.

6. The application was opposed by the petitioners vide an affidavit sworn by Ronald Ondabu Bigogo.

7. In her supporting affidavit dated the 17th January 2018 she avers that; James Bikeri sold his portion of land measuring 0.62Ha to her, the sale agreement was done before Momanyi Aunga & Co. Advocates. That at the time of confirming the grant of letters of administration the petitioners/ respondents did not disclose to the court the true identities and respective shares of the beneficiaries of the estate of the deceased at the time of distribution. That the petitioners/ respondents alienated the entire estate to themselves without taking regard to Section 93 of the Act which requires "that all transfers of any interest in immovable or moveable property made to a purchaser either before or after the commencement of the act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of the act". That upon confirmation of the grant of letters of administration the petitioners/ respondents proceeded to sub divide the original suitland into 5 portions namely West/Kitutu/Bugusero/9699,9700,9701,9702 & 9703 and further confirmed a portion of land to James Bikeri Bigogo in place of Joyce Kwamboka Nyarango and later sold to Clement Nyariaro Marita and Concepta Ombachi. That the petitioners/ respondents are aware that the purchaser has constructed a house on the land purchased and by becoming the sole heirs of the estate she has been disinherited as well as other purchasers who are beneficiaries of the deceased's estate. That the grant and issuance of the letters of administration together with the confirmation was wrought with illegalities and was defective and that the same should be revoked or rectified.

8. Ronald Ondabu Bigogo in his affidavit dated the 23rd July 2018 responds as follows; that the applicant is not a beneficiary to the estate of the deceased. The estate has been fully administered and shared amongst all the beneficiaries as per the certificate of confirmation of grant and the beneficiaries have been issued with respective titles. That the beneficiaries namely Ronald Bigogo, Betty Kerubo Mogire, Elizabeth Gesare Machoka and Kennedy Bigogo are not privy to nor interested in any alleged transaction between the applicant and James Bikeri Bigogí concerning the latter's share of the estate. That the documents presented by the applicant are forged as the signatures on them are forged. That the court vide its order of 25th October 2017 did intervene and thwarted the applicant's corrupt practices.

9. At the hearing the applicant testified that she bought a shamba from James Bigogo, they signed an agreement. She paid him 1,150,000/- for a 200 feet by 300 feet. He gave her title number No. 7100. She fenced and gave it to her children. Her son Duke sold it to Clement Marita who has built a home in the said shamba. She was not invited to come to court to give her consent.

10. On cross-examination she stated that she did a search at the time she bought the land and found that the title was in the deceased's name. That James did the succession himself and gave her a title. She did not know that he had no authority to sell the land. She was not aware that the court told them that what they did was wrong. She did not place a caution. She is not a relative of the deceased. James has not refunded him the money.

11. Ronald Bigogo reiterated what was deponed in his replying affidavit. Adding that parcel no. 589 was for the 2nd house. They are 5 boys from the said house, James Bigogo, Ronald, 3rd son who is deceased is represented by Elizabeth, the 4th son too is deceased and is represented by his wife Betty and Kennedy Bigogo. That they divided the shamba and each person got his title deed. That their last born who is disabled told him that someone built in his shamba.
12. On cross-examination he stated that James Bigogo was not given any grant. That they did not write to Joyce when they made their consent. That he does not know when James sold the shamba. They got equal shares.
13. James Bigogo testified that the L.R. Kitutu/Bugusero/589 was divided amongst the 5 brothers as was ordered by the Court. That he did not sell the shamba to Joyce Kwamboka nor did he take her to a lawyer to sign an agreement. That the Court ruled that the shamba be reverted back and subdivided.
14. On cross-examination he stated that he never went to the office of Momanyi Amuga on the 31/10/11 to sign an agreement nor was he paid Kshs.1,150,000/-. That he does not know Francis Onchari Nyaringo.
15. Parties filed written submissions. The applicant interested party reiterated her evidence and relied on the provisions of Section 93(1) of the Act. She relied on the following cases; in the matter of Mwaura Mutungi alias Mwaura Mburu Civil Appeal No.935 of 2003; in the matter of the estate of Yusuf Mohammed P & A No. 434 of 1995 and In the matter of the estate of Eunice Wanjiene Kibia Succession cause No. 926 of 1997 submitting that in all 3 cases it was held that property which had been sold and transferred to lawful purchasers could not revert back to the estate of the deceased. It was submitted that the court had the discretionary power to make orders as it deem fit given the circumstances of the case and in particular the portion of land measuring 0.62HA given to James Bikeri Bigogo.
16. The petitioners/respondents submitted that the applicant is not claiming an interest on the property parcel no. 589 on the basis of an alleged sale of a portion of land by a beneficiary James Bikeri. That she has not disclosed any valid ground to justify a revocation of the grant and has failed to satisfy the requirements of Section 76 of the Act. That any transaction or agreement of sae entered between the applicant and any beneficiary of the estate before the grant and confirmation of the letters of administration is invalid. Reliance was made on the following cases; **Re Estate of John Gakunga Njoroge (deceased) [2015]**, **Re Estate of Jaswant Singh Boor Singh Dhanjal (deceased) 2016**. On prayers 2.3.5 & 6 it was submitted that the court had no jurisdiction to grant the said orders. That they concern a claim of land by the applicant against one of the beneficiaries of the estate based on an alleged sale of agreement. That the claim falls within the jurisdiction of the Environment and Land Court-(see Succession **Cause No. 127 of 2011 High Court of Kenya at Kisii**).
17. I have considered the affidavits filed by the parties, oral evidence, the submissions and the law. The issues for determination are;
- Whether the applicant has demonstrated that there is a ground or grounds to revoke the grant
 - Whether this court can issue the injunctive orders sought.
18. The applicant is not a beneficiary of the deceased's estate. Her claim is for the portion she claims was sold to her by one beneficiary James Bikeri Bigogo. It is apparent that at the time James Bikeri petitioned for a grant he indicated that the Applicant was a Buyer. By then James Bikeri had not obtained a grant to administer the deceased's estate. He had no authority to dispose off any portion of the deceased's estate. The applicant admits that at the title of the parcel of land she bought was still in the name of the deceased. The provisions of Section 82 (b) Proviso (ii) of the Act provides that, **"no immovable property shall be sold before confirmation of grant"**. The applicant seeks to rely on the provisions of section 93 of the Act, which provides;
- (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*
- (2) A transfer of immovable property by a personal representative to an purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.*
19. With the knowledge that the land was not in the name of James Bikeri the Applicant cannot rely on the provisions of Section 93 of the Act. Her only recourse is to sue James Bikeri. The applicant in my view has failed to demonstrate that there was fraud, concealment of facts at the time of confirmation of the grant. I find that her plead to revoke the grant cannot stand.
20. On whether the court should grant the injunctive orders sought. From the consent order dated 17th October 2014 the Land Registrar was to restore the Original parcel of Land Title No. west Kitutu/ Bugusero/ 589 in the land register in the deceased's name Bigogo Bikeri. The sub divisions from the said parcel of land were also cancelled. This consent has not been set aside. The injunctive order sought cannot be granted as the consent order is still in existence. All in all I find that the only way out for the applicant is to sue the beneficiary who sold land to her. I find no merit in her application and it is dismissed. Each party to bear its own costs.

Dated signed and delivered at Kisii on this 26th day of April 2019.

R.E.OUGO

JUDGE

In the presence

Mr. Sagwe For the Applicant

Mr. Nyatiki For the Respondent

Rael Court clerk