



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 5 OF 2009**

**IN THE MATTER OF THE ESTATE OF ANDREA OOKO TIANGA (DECEASED)**

**AND**

**ESTHER BARASA..... PETITIONER**

**VERSUS**

**HASSAN AMIANI ONGACHI ..... 1<sup>ST</sup> OBJECTOR/APPLICANT**

**ATHUMAN SWALEH AKHONYA ..... 2<sup>ND</sup> OBJECTOR/APPLICANT**

**R U L I N G**

1. The succession cause herein is in respect to the estate of the late Andrea Ooko Tinga, herein referred to as the deceased. The petitioner is a sister-in-law to the deceased. The deceased left behind land parcel Butso/Esusemyia/46. The two objectors allege to have bought parcels of land from the deceased before the deceased passed away. The petitioner filed this succession cause and was issued with a confirmed grant of representation. The objectors filed an application for revocation of the said grant. However the petitioner went ahead and sub-divided the estate of the deceased – land parcel LR. Butso/Esusemyia/46 and sold it to other people. She did not recognize the liability of the objectors.

2. The objectors have now filed an application dated 27<sup>th</sup> September, 2018 seeking for orders that:-

1. The court nullifies the sub-division of LR. Butso/Esusemyia/46 and order its reinstatement under the ownership of Andrea Ooko Tianga.

2. That the petitioner herein Esther Barasa be ordered to file Summons for confirmation of grant within 60 days failure to which the objectors be granted leave to file the same.

3. The application is supported by the grounds on the face of the application and the joint affidavit of the applicants. The applicants depone in their affidavits that the petitioner sub-divided the subject land into Butso/Esusemyia/2659 and 2660. That subsequently land parcel Butso/Esusemyia/2659 was further sub-divided to create LR. Butso/Esusemyia/4705 and 4706. She sold the new parcels of land to third parties. The applicants contend that the transfer and subdivision was done fraudulently as this court has never made an order distributing the estate of the deceased herein but that the petitioner used a fraudulent order to distribute the estate. The applicants state that they are in occupation of the suit land.

4. The applicants have filed copies of title deeds that show that land parcel No. Butso/Esusemyia/2660 was sold to one Grace Oudo Omwalo while land parcels Butso/Esusemyia/4705 and 4706 have been sold to one David Moi Henry Muchelule. The applicants have also filed an order from the Chief Magistrate's Court Kakamega ELC No. 573 of 2018 that indicates that the said David Moi Henry Muchelule has sued the applicants over land parcel Butso/Esusemyia/4705.

5. Mrs. Muleshe, counsel for the petitioner raised a preliminary point of law on the jurisdiction of this court to hear the matter. She submitted that this court has no jurisdiction to issue the orders sought. That a grant of representation was issued to the petitioner. That titles have been issued. That this court has no powers to cancel the said titles. That it is only the Environment and Land Court that can grant the orders sought. She asked this court to transfer the matter to the court that is seized of the matter – the Environment and Land Court.

6. The court record indicates that the petitioner was issued with a grant of letters of administration on 19<sup>th</sup> November, 2009 which grant was confirmed on the 13th April, 2011. The applicants then filed an application dated 29<sup>th</sup> December, 2011 seeking to have the grant revoked.

Before then they had placed caution on land parcel Butso/Esameiya/46 on the 25<sup>th</sup> January, 2010. The petitioner filed an application dated 25<sup>th</sup> January, 2010 seeking to have the said caution removed. There is no record in the court file of the said application having been heard. However, the petitioner went ahead to sub-divide and sell the land before the objection proceedings were heard.

7. Though the applicants allege that this court never made an order for distribution of the estate this is not the case as there is a confirmed grant dated 13<sup>th</sup> April, 2011.

8. The documents filed by the applicants indicate that the father to the 1<sup>st</sup> applicant and 2<sup>nd</sup> applicant had a case at Lurambi Divison Land Disputes Tribunal Case No. 46 with the deceased herein where the tribunal awarded the 1<sup>st</sup> applicant's father 3 acres and the 2<sup>nd</sup> applicant 12 acres of the disputed land – Butso/Esameiya/46. The award was adopted in Kakamega Chief Magistrate's Court Misc. Application No. 7 of 1997. A decree was drawn by the court to that effect. The decree has to date not been executed. In her affidavit in reply to the application for revocation of grant the petitioner denied that the deceased had sold land to the father to the 1<sup>st</sup> applicant and to the 2<sup>nd</sup> applicant. However in her affidavit in support of the petition for letters of administration intestate form P&A 5, the petitioner did recognize Swaleh Akhonya and Ramadhan Angachi as liabilities to the estate of the deceased herein.

### **Analysis and Determination**

9. The jurisdiction of the High Court in succession matters is provided in Section 47 of the Law of Succession Act that provides that:-

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”**

10. Article 5 of the Constitution of Kenya, 2010 however provides that the High Court shall not have jurisdiction in respect of matters –

(a) .....

**(b) falling within the jurisdiction of the courts contemplated by Article 162 (2), which courts include the Environment and Land Court.**

11. The jurisdiction of the Environment and Land Court under Article 162 (2) (b) of the Constitution is limited to hearing and determining disputes relating to-

**the environment and the use and occupation of, and title to, land.**

12. The jurisdiction of the High Court in succession matters is limited to disputes between the personal representative of the deceased and the deceased's survivors, beneficiaries, dependants and creditors. Where other parties such as purchasers are involved then the matter falls out of the realm of the succession court and should be heard before the Environment and Land Court. It has been recognized that both the High Court and ELC have concurrent jurisdiction in matters concerning land. In **Munyasya Mulili & 3 Others –Vs- Sammy Muteti Mulili (2017) eKLR** Nyamweya J. cited the case of **Salome Wambui Njau (suing as the administratrix of the Estate of Peter Kiguru Njuguna (Deceased) –Vs- Caroline Wangui Kiguru, ELC (2013) eKLR**, where it was held that:-

**“In matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.”**

The court then concluded that:-

**“It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the law of succession .....**

**On the second issue as regards this court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules ...”**

13. In the **Estate of Alice Mumbua Mutua (Deceased) (2017) eKLR** Musyoka J. held that:-

**“..... what I can gauge from the papers placed before me is that it relates to a dispute between a buyer and a seller of land. It hinges on whether the buyer should have possession or occupation thereof. It is about title, for the buyer is no doubt asserting entitlement to the property having exchanged money with the sellers over the same. That would squarely place the matter within Article 162 (2) of the Constitution. In those circumstances, it would mean then that the High Court has no jurisdiction over the matter by virtue of Article 165 (5) of the Constitution.**

It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon.

The position is not as simple. The Law of succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules.

Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41 (3), which provides as follows –

**‘where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ....’**

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distribution the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by the court are limited to what I have stated above.”

14. The parties in this succession cause and their predecessors have had a long standing dispute over land parcel Butso/Esmeiya/46 running way back from 1994. An order was made by a Magistrate’s Court for the deceased herein to transfer parcels of land to the 1<sup>st</sup> applicant’s father and the 2<sup>nd</sup> applicant but the order has so far not been implemented. Matters have now been complicated by the fact that the petitioner has sub-divided the land and sold it to third parties. The applicants have a pending case at Chief Magistrate’s Court Kakamega ELC. 573 of 2018 with David Moi Henry Muchelule, one of the purchasers of land parcel No. Butso/Esmeiya/4705 that was as a result of sub-division of land parcel Butso/Esmeiya/2659.

15. A creditor to an estate of a deceased person is recognized as one of the persons who can be granted letters of administration over the estate of a deceased person as provided by Section 66 of the Law of Succession Act. This is a recognition that creditors are beneficiaries of the estate when the estate is being distributed.

16. The applicants herein have a decree from the predecessor of the Environment and Land Court, the Land Disputes Tribunal, in respect to the estate of the deceased. What is pending now is execution of the decree of the Chief Magistrate’s court which adopted the ruling of the Land Disputes Tribunal. It is pointless to send the applicants back to the Environment and Land court when they have a decree from that court for implementation by this court. Any dispute between the petitioner and the applicants over the suit land before the Environment and Land court would be *re judicata*. It is therefore my considered view that it is this court that is better placed to hear and determine the matter and not the Environment and Land court. The objection by Miss Muleshe is thereby dismissed.

17. There is a pending application before this court by the applicants for revocation of the grant that was issued to the petitioner. The petitioner sub-divided and sold the suit land well knowing that there was an application pending before the court. This was an abuse of the process of the court. When she filed the petition she had recognized the applicants as creditors to the estate. Her act of selling the land to third parties was no doubt meant to defeat the applicants’ claim over the estate of the deceased.

18. This court has inherent powers under Section 47 of the Law of Succession Act and under Rule 73 of the Probate and Administration Rules to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. These powers include cancelling title to land issued in contravention of the procedure set out in the Law of Succession Act.

19. The applicants have challenged the grant issued to the petitioner. The petitioner has disposed of the estate to a third party well knowing that there is a pending matter over the estate. The matter cannot proceed because there are other titles that have been issued over the suit land.

20. Section 76 of the Law of Succession Act 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—**

**a. ....**

b. ....

c. ....

d. (i) .....

**(ii) to proceed diligently with the administration of the Estate.”**

21. When the petitioner filed the petition she recognized the 1<sup>st</sup> applicant’s father and the 2<sup>nd</sup> applicant as creditors to the estate. She has now disposed of the estate without giving the applicants their entitlement. The petitioner has thereby failed to diligently administer the estate by not giving the applicants their entitlement. This is sufficient reason to strip her of the powers of the administrator of the estate. I am of the considered view that the grant issued to her and the subsequent titles issued pursuant to sub-division of land parcel Butso/Esimeya/46 should be cancelled so as to enable this succession cause to proceed to its logical conclusion.

22. The court therefore on its own motion and in the interest of justice makes the following orders:-

(1) The grant of letters of administration issued by this court to the petitioner on 19<sup>th</sup> November, 2009 together with the certificate of confirmation of grant issued on 13<sup>th</sup> April, 2011 are hereby annulled and revoked.

(2) That title numbers Butso/Esimeya/2659, 2660, 4705 and 4706 or any other title issued pursuant to sub-division of land parcel Butso/Esimeya/46 are hereby cancelled and revoked.

(3) The suit land herein to revert to Butso/Sumeyia/46 in the name of the deceased, Andrea Ooko Tianga.

(4) A fresh grant of letters of administration to issue to the applicants, Hassan Amiani Ongachi and Athuman Swaleh Akhonya.

(5) The applicants to file summons for confirmation of grant within 45 days from the date hereof.

**Delivered, dated and signed in open court at Kakamega this 30<sup>th</sup> day of May, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

No appearance for Petitioner/Respondent

Parties:

Petitioner/Respondent - absent

Objectors/Applicants - present

Court Assistant - George