



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

SUCCESSION CAUSE NO. 48 OF 2017

IN THE MATTER OF THE ESTATE OF CHELOTI KISAKA

IN THE MATTER OF SUMMONS FOR REVOCATION OF THE GRANT

BETWEEN

RUTH KWACHIMOI CHELOTI.....1ST APPLICANT

PATRICK MANDU CHELOTI.....2ND APPLICANT

VERSUS

CHARLES NALIKA CHELOTI.....PETITIONER/RESPONDENT

RULING

The deceased Cheloti Kisaka Son of Nalika died on 14.4.1981. He had 2 wives and several children. Upon his death the Respondent/Petitioner Charles Nalika Cheloti his eldest son filed Succession Cause No. 23/1995 at Webuye Resident Magistrates Court. He obtained grant which was confirmed on 19.4.1996 and a Certificate of Confirmation issued. In the confirmed grant, the grant shows;

SCHEDULE:

Name: Description of Property: Share of Heirs:

1. CHARLES NALIKA NDIVISI/MUCHI/1443

KISAKA 1251, 1781 and Webuye

Municipal Shop L R31:

On 6.10.2017 the Applicants filed this Summons for revocation/annulment of the grant seeking;

(a) That this application be certified urgent and service be dispensed with in the first instance.

(b) That a prohibitory order be made restraining and or prohibiting any dealing with land parcel namely NDIVISI/MUCHI/1413, 1251, 1718 and Town Plot No. 31 and 7996/61A Webuye Municipality pending hearing interpartes of this application.

(c) That a preservatory Order be issued in respect of the entire estate of the late CHELOTI KISAKA pending hearing and determination of the summons herein.

(d) The Respondents specially the Petitioner be restrained from disposing, transferring, demarcating or in any way intermeddling with the Estate of the deceased CHELOTI KISAKA in cahoots with the interested party.

(e) That the grant issued to the Petitioner in Webuye SPM Cause No. 23 of 1995 and confirmed on 19th April 1996 be revoked and or annulled.

The application is premised on the grounds that the Respondent has used the grant to disinherit the real heirs to the estate; the grant was obtained by fraud and without consent of all family members, that he has sold property of the estate and that the applicants are on the verge of being evicted. The application is supported by the affidavit of Ruth Kwachimoi Cheloti the 1st applicant and widow of the deceased.

By Consent this application was to be canvassed by viva voce evidence. Both parties filed written witness statement and gave evidence. The applicant Ruth Kwachimoi Cheloti testified that the deceased Cheloti Kisaka had 2 wives. Maria Nambuba (1st wife) and Ruth Cheloti (2nd wife). Maria had 10 children – (4) Sons and (5) daughters and the sons are;

1. Charles Cheloti (Respondent)

2. John Makokha

3. Samwel Wanjala

4. Charles Kisaka

Then Ruth the applicant has 3 surviving children;

1. Patrick Cheloti

2. Rose Cheloti

3. Njawa Cheloti

The deceased had several property which were identified and distributed among the beneficiaries by the clan. In particular she was given Plot No. 61A Webuye Town which had permanent shops. This the applicant contents was given to her but the Respondent has decided to sell the same at Kshs.1.5million and given her only Kshs.400,000/=. She has also an issue with plot No.1251 measuring 15 acres where her son has only been given 1 acre. She testified that 12 acres other property was transferred to her and she has sold part of it to other people. Upon cross examination by Mr. Ocharo for the Respondents the applicant she confirmed she only had issues on the 2 plots and in particular was aggrieved by the sale of Plot No. 61A Webuye.

The Petitioner/Respondent filed his witness Statement and gave evidence. He testified that upon the death of his father the deceased, he filed for Succession in Webuye and was granted Confirmation of grant. He distributed the property to the dependants. Including the applicant and title was issued to each of the beneficiaries in this statement and evidence he has explained how he distributed the estate.

The Petitioner explained the distribution of property as follows;

1. Ndivisi/Muchi/1443;

(a) The deceased himself for the house of the 1st Applicant

(b) Charles Kisaka

(c) Samuel Wanjala Cheloti

2. Ndivisi/ Muchi/1251 which was amalgated with another be bought from one Zebi Zakari and later subdivision to Ndivisi/Muchi/15362 5372 which he registered in his name and 5362 changed to 1834 – 6841 which he allocated to;

(a) Samuel Wanjala Cheloti - Ndivisi/Muchi/6834

(b) Charles Nalika Cheloti – Ndivisi/ Muchi/6835

In trust of Agnes Nanjeko

(c) Patrick Manda - Ndivisi/Muchi/ 6838

(d) John Makokha - Ndivisi/Muchi/6836

(e) Charles Naliaka Cheloti - Muchi/6841 & 6842

3. Ndivisi/ Muchi/1718 was registered in his name and name of one Ramji Karsan Visharam a buyer.

4. Plot No. 61A Webuye town was sold to the Interested Party Alexander Muchai for Kshs.1,500,000/= Funds used to pay rates debts and the balance to be divided equally among the family members. The appellants were allocated Kshs.400,000/= which they have refused to pick.

After the Hearing, Counsel for both parties filed respective written submissions. Mr. Sichangi for the applicant submitted that the Petitioner/Respondent did not follow correct procedure in distributing the estate among the identified beneficiaries in particular he submits that Plot No. 61A was sold to by the Respondent for Kshs.1,500,000/= and offered only Kshs.500,000/= to the applicants in respect of Ndivisi/Muchi/1251 only one acre was given to Patrick Cheloti the 2nd Applicant and the rest was registered in the Respondents name. He urged the court to revoke the grant to pave way for proper accountable and equitable distribution of the estate; to the beneficiaries.

Mr. Ocharo for the Petitioner responded submitted that Sec. 76 of the Law of Succession Act states the grounds upon which a grant can be revoked. He submitted that the Petitioner/Respondent has in his evidence has shown how he has distributed the estate of the deceased to the beneficiaries including the applicant. He submits that the only reason the applicant seeks revocation is because she got less than she expects.

From the evidence and submissions, it is common ground that after the deceased died, the petitioner filed Webuye Succession Cause No. 23/1995 and was issued with Confirmation of Grant on 19.4.1996 in which all the property of the deceased were vested in Petitioner as administration with no mode of distribution or shares indicated. The petitioner has in his evidence stated how distribution was done to beneficiaries and titles issued including to the applicant which fact she admits. She was issued in 2000. The applicant on being Cross examined stated why she filed this application she stated.

“I do not complain until they sold the Shop recently. If the shop was not sold I would have come court”

From the evidence therefore the applicant is only unhappy about the sale of shop and Plot No. 61A and plot No. 1251 where Patrick her son was given 1 Acre. She has no issues with the rest of the distribution. The applicant contends that Plot No. 61A was assigned to her. The Petitioner in his statement and evidence has explained that the same was identified as a property to the whole family. As there were tenants, who paid rent for educating the children including the applicants children. The property attracted rates arrears and it was decided by majority of dependants to sell it; pay rates to County Council; pay debts owed by estate and the balance be divided equally among the dependants. It was sold for Kshs.1.5million, payment made for rate arrears and balance distributed. The applicants were given Kshs.400,000/= which they have refused to accept.

The applicant in the application dated 6.10.2017 seeks for this court to revoke the grant issued on 19.4.1996. The grounds upon which a court can revoke or annul a grant is provided by Section 76 of the Law of Succession Act which provides;

“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;

(b) 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 order or allow; 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.

The applicant has not in this application demonstrated any of the above grounds for revocation. Her only issue is on Plot No. 61A which has been sold at Kshs.1.5million and divided among the dependants. Where she submits that it was supposed to be exclusively hers, this court finds it was part of the estate. The sale of the property to pay outstanding rate, debts of the estate and divide the balance to beneficiaries by the petitioner was a prudent and diligent way of administration of the estate. I therefore find no merit in this application, I direct that the sum due to the applicant of Kshs.400,000/= be deposited in court within 21 days for her collection upon such deposit the Respondent do transfer the Plot No. 61A to the Interested Party if same has not been done.

Dated and Delivered at Bungoma this 23rd day of July, 2019.

S.N. RIECHI

JUDGE