



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO 478 OF 2011

IN THE MATTER OF THE ESTATE OF MORAA MOMANYI (DECEASED)

JOSEPH CHERUIYOT CHEBIRIR.....PETITIONER/RESPONDENT

VERSUS

BARNABAS NYANTIKA ONUKO.....OBJECTOR/APPLICANT

RULING

1. This matter relates to the estate of **Moraa Momanyi** (“the deceased”) who died on 15th October 1990 and whose only asset was a piece of land; **LR. No. North Mugirango/Magwagwa 1/890** (“Parcel 890”). Gekara Ogeto sought grant of letters of administration before the Senior Principal’s Magistrates Court at Nyamira vide Succession Cause No. 1 of 2011 and on 18th April 2011 the letters of administration was granted to **Gekara Ogeto**. In due course **Joseph Cheruiyot Chebirir** (“**Chebirir**”) filed summons for revocation of grant and a consent order was issued revoking the grant of letters of administration issued to Gekara Ogeto and a fresh grant was issued to Joseph Cheruiyot Chebirir.

2. Vide chamber summons dated 3rd December 2013 **Charles Mose Sitima** (“Sitima”) made an application under Section 76 (b) of the Law of Succession Act for revocation of grant issued to Gekara Ogeto. The application was based on the ground that the grant was obtained fraudulently by making of a false statement and or by concealment to the court that Sitima was a beneficiary to the estate. He contends that Gekara Ogeto is a complete stranger to the estate. In his affidavit Sitima confirmed that he is a defendant in Suit **No. Kisii HCCC No. 86 of 2012** where the plaintiff claims to the administrator of the estate of the deceased. He claimed that Gekara Ogeto was not related to the deceased and caused **Parcel 890** to be registered in his name. He deposed that the grant had already been issued to Chebirir who is a Kalenjin by tribe and a stranger to the beneficiaries.

3. In due course **Barnaba Nyantika Onuko** (“Onuko”) filed summons dated the 26th April 2017 seeking for cancellation of title and rectification of the register seeking the following orders;

2. THAT this court be pleased to issue an order of injunction restraining the Petitioner/Respondent by his agents, servants or any other person from evicting the objector, trespassing, selling, alienating or dealing with LR. No. North Mugirango/Magwagwa1/890 in any manner pending the determination of the application.

3. THAT this court be pleased to issue an order of inhibition inhibiting the respondents by his agents, servants or any other person from transferring, alienating, charging or disposing off LR. No. North Mugirango/Magwagwa1/890 pending the determining of this application.

4. THAT this court be pleased to make a declaration that the transfer and registration of LR. No. North Mugirango/Magwagwa1/890 into the names of Joseph Cheruiyot Chebirir without confirmation of grant of letters of administration from the names of the late MORAA MOMANYI is null and void.

5. THAT this honorable court be pleased to rescind, recall, vary and/ or null, the transfer, registration of LR. No. North Mugirango/Magwagwa1/890 in the names of JOSEPH CHERUIYOT CHEBIRIR in lieu and/or in place of the deceased.

6. THAT this Honorable Court be pleased to grant an order directing cancellation of title and Rectification of the Register in respect of LR. No. North Mugirango/Magwagwa1/890 by deleting the name of JOSEPH CHERUIYOT CHEBIRIR and restoring the names of the deceased herein, as the legally registered owner, in respect of the subject land pending the confirmation of the grant for equal distribution of the estate.

4. Chebirir filed his reply to Onuko’s application on 21st June 2018. He deposed that the deceased had a co-wife and Onuko Momanyi was his step brother and the father to Onuko. Onuko Momanyi was charged with the responsibility of taking care of parcel 890. That the younger

wife of Onuko Momanyi vacated the land when she was requested to do so. That the objector filed an objection which he withdrew with costs.

5. The matter was set down for hearing and **Barnaba Nyatika Onuko** testified as PW1 while **Joseph Cheruiyot Chebirir** as DW1.

6. Onuko testified as follows that; the deceased was his grandmother and his father Joseph Onuko Momanyi is deceased. He never saw his grandmother but he knows she was the registered proprietor of parcel 890. He only knew of Chebirir in court. He has been in use of the land therefore he is entitled to inherit the land as his father is deceased. He knows Kerubo but he did not know that the deceased and Kerubo were co-wives. The deceased only had one child and he is the deceased's grandchild. The deceased lived on the land. He stays on the land and is not aware of any eviction order. It was against the law for Chebirir to change the land to his name.

7. Chebirir testified as follows that; the deceased was his mother and died in 1990. Onuko's father was Joseph Onuko Momanyi Onuko who was his step brother whose mother was Kerubo Momanyi Kemunto. The deceased gave Joseph Onuko Momanyi the land to cultivate for food. The deceased only had one son, and three children who have since died and therefore moved from parcel 890. Joseph Onuko Momanyi cultivated the shamba alone and Onuko sold it to Mose Stima.

8. The parties filed their respective submissions. The objector submitted that as per **section 82 (b) (ii)** of the **Law of Succession Act** no immovable property should be sold before confirmation of grant. He noted that the transfer and registration of parcel 890 was before the confirmation of grant which offends both **section 45** and **82 (b) (ii)** of the **Law of Succession Act**. He contends that he is entitled to the estate by virtue of **section 29** of the **Law of Succession Act**. They advanced that **section 80** of the **Law of Succession Act** allows the court discretion to order for a cancellation of title and revert it to the original owner where title was obtained by fraud.

9. The petition filed its submissions of 24th April 2019 contending that parcel 890 was transferred in the name of Chebirir and he holds it in trust for other legitimate beneficiaries. They advanced that the application was misplaced in view of the table of consanguinity given pursuant to **Rule 7 (i) (e) (iii)** of the **Probate and Administration Rules**. They explained that the applicant had not met the threshold set out in **section 76** of the **Law of Succession Act**.

DETERMINATION

10. The main issue before this court is a determination of the beneficiaries of the deceased estate. It is not in dispute that a suit was instituted in the Environment and Lands Court, **Joseph Cheruiyot Chebirir vs Charles Mose Sitima & Another ELC No. 86 of 2012** pertaining to parcel 890. The court observed as follows;

"12. The 3rd defendant testified that the suit property belongs to his grandmother, Niora Momanyi who he stated he did not know where she disappeared to. He said that he had never seen his said grandmother. He affirmed that it was his father who was using the suit land and thereafter he and his wife continued using it. The witness stated that Niora Momanyi was his father's step mother..."

21. ...I have held that Mora Momanyi (deceased) was at any rate the registered proprietor of the property in 2010 when the 2nd defendant purported to purchase a portion of the same from Dw3. The plaintiff in his evidence stated that his late mother allowed Dw3's father who was her brother to use her land after she moved with her son, the Plaintiff herein to Loreti, Kericho. This evidence by the plaintiff is uncontroverted. It is instructive that the plaintiff's mother's step brother, the said Onuko Momanyi never constructed a house on the suit property. The 2nd defendant's father equally never constructed a house in the suit property. This in my view is consistent with the family of Onuko Momanyi only been allowed use of the land and not to build thereon.

22. DW3 stated in evidence that after his father died he continued using the land and did not know that the land was registered in the name of Mora Momanyi (Niora Momanyi). Although he claimed the land was left to him by his father, DW3 at the time he allegedly sold the portion of the land to the 2nd defendant did not know who the registered owner was..."

11. To put the findings of the Environment and Land Court in context, the 3rd defendant in **Joseph Cheruiyot Chebirir vs Charles Mose Sitima & another ELC No. 86 of 2012** is Onuko who is the objector herein. Chebirir testified that Onuko is the child of his step brother. Is Onuko a dependent within the meaning of the Law of succession Act? **Section 29** of the **Law of succession Act** provides as follows;

"29. Meaning of dependant

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

12. From the above definition, children of the step-children i.e. step grandchildren are not considered as dependents. Though the children of the deceased and grandchildren are included, the step grandchild has been conspicuously left out from the list of dependents. I therefore find that Onuko is not a beneficiary of the estate and neither is he a dependent of the estate. I note that the procedure in which Chebirir transferred

parcel 890 was not in accordance with the laws of succession though he is the only beneficiary to the estate. The transfer ought to have been done after the grant was confirmed pursuant to **section 82 (b) (ii)** of the **Law of Succession Act**.

13. The orders sought by Barnaba in his application are orders he should have pursued in the Environment and Land Court (ELC), to come to this court to pursue orders the said orders in light of the ELC court decision dated the 24th February 2017 is an abuse of the court process. The application dated 26th April 2017 is hereby dismissed as the objector is not a beneficiary of the estate and not a dependent in accordance to **section 29** of the **Law of Succession Act**.

Dated, signed and delivered at Kisii this 7th day of August, 2019.

R. E. OUGO

JUDGE

In the presence of:

Mr. Sagwe h/b Mr. Gichana for the Petitioner

Miss Kebungo h/b Mr. Nyambati for the Objector

Rael Court clerk