



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO.387 OF 2015

FORMERLY NDHIWA SUCC. CAUSE NO.59 OF 2013

IN THE MATTER OF THE ESTATE OF:

AUDI ONGWENA.....DECEASED

AND

GEORGE OKOTH AKOKO.....PETITIONER/RESPONDENT

VERSUS

CONSOLATA OLOO OMBOSI.....1ST OBJECTOR/APPLICANT

PILISTA AUMA OMBOSI.....2ND OBJECTOR/APPLICANT

RULING

[1] The deceased, **Audi Ongwena**, as per the death certificate exhibited herein died on the 5th August 1975 at the age of seventy nine (79) years.

The application or petition for grant of letters of administration intestate respecting his estate comprised of a parcel of land described as **No. Gem/Koyolo/46**, was made by **George Okoth Akoko** (petitioner/respondent) in the month of August 2013, approximately thirty eight (38) years after the demise of the deceased. He did so in his capacity as the grandson of the deceased who was also survived by other grandsons and a grand-daughter including Michael Oswago Ombosi, Joseph Muga Ombosi, Kennedy Ochieng Ombosi and Emily Achieng Omondi.

Two buyers, Joseph Kwama Agutu and Simion Omenya were also listed as beneficiaries of the estate.

[2] After the necessary prerequisites, the grant was eventually issued at the Ndhiwa magistrate's court, on **12th March 2014**, such that the objection to the making of the grant dated 29th July 2015, and filed by **Consolata Oloo Omwai** and **Pilista Auma Ombosi** (applicants/Objectors) was of no effect as it had already been overtaken by events.

Nonetheless, the present application for revocation of grant was filed herein on 13th December 2018, vide the summons for revocation of grant dated 10th December 2018.

The grounds on which the application is based are set out in the summons and buttressed by the applicants' supporting affidavit dated 10th December 2018.

It is thus the applicants' contention that the respondent/petitioner obtained the impugned grant by fraud and concealment of material facts.

[3] Indeed, under **Section 76 (b)** of the **Law of Succession Act**, a grant obtained fraudulently by the making of a false statement or by concealment of material facts may be revoked by the court at any time.

The respondent opposed the application on the basis of the grounds set out in his replying affidavit dated 25th February 2019, incorrectly labelled as an affidavit of protest to the grant being revoked.

In the response, it is evident that the respondent concedes that he was not the only beneficiary of the estate. His objection is largely grounded

on ownership of the estate property which according to him was the property of the deceased who was his grandfather and had three sons and two daughters. That the sons included his (respondent's) father called Akoko and Dalmas Ombosi Audi. That, his father erected his homestead on the estate property but Dalmas settled on a separate parcel of land which was registered in his name. That, his father remained in the estate property which was registered in the name of the deceased and continued to do so even after the death of the deceased in 1975.

[4] The respondent stated that his father died on the 2nd July 2006, before he could file a succession cause and have the estate property registered in his name. He implied that he filed the present succession cause after his cousins displayed hostility towards him over his occupation of the estate property and after learning that part thereof had been sold by his cousin, Michael Oswago Ombosi, the eldest son of Dalmas who had fraudulently obtained money from one Herbert Nyamurongi by falsely stating that he was the **"biological son"** of the deceased and in the process, intermeddled with the estate.

However, in their response to the foregoing, the applicants in a further affidavit dated 24th June 2019, accused the respondent of not stating actual facts with regard to the estate property which had actually been sold to several people by his father Akoko Audi, who had his separate piece of land which he sold and moved into and occupied part of the estate property.

The applicants contend that the respondent intermeddled with the estate property by selling part thereof to one Joseph Kwama Agutu and that it is not true as alleged by the respondent that Michael Oswago Ombosi sold part of the property to the said Herbert Nyamurongi.

[5] Both the applicants' and the respondent's written submissions filed herein by **Ochoki & Co. Advocates**, on behalf of the applicants and **G.S. Okoth & Co. Advocates**, on behalf of the respondent are essentially a reiteration of the applicants' supporting affidavits and the respondent's replying affidavit.

From all the affidavits and the submissions it is apparent that the allegations of fraud and concealment of material facts made by the applicants against the respondent were not substantially or at all proved.

In the petition for the grant, the respondent did include, as beneficiaries all those who were deserving to be included as such. These included the respondent, his cousins, Michael Oswago, Joseph Muga, Kennedy Ochieng and Emily Achieng. All of them were grandchildren of the deceased as their fathers were the sons of the deceased.

The applicants are said to be daughters-in-law of the deceased as they were wives of the late Dalmas Ombosi, son of the deceased.

The inclusion of their son Michael Oswago as a beneficiary served their interest in the estate property and hence the interest of their late husband.

[6] The only property available for distribution was the estate property No. Gem/Koyolo/46. This ought to have been shared among all the listed beneficiaries who included those who purchased part thereof from the deceased prior to his death. However, inasmuch as the certificate of confirmation of grant dated 12th March 2014 indicated that the property was to be transmitted wholly to the respondent, it was issued erroneously and apparently without the approval of other beneficiaries.

It was also issued irregularly on the same date that the grant was issued instead of after the expiry of six (6) months.

Suffice to say that the certificate of confirmation of grant is amenable to revocation on the basis of the reasons aforesaid.

[7] Consequently, the application insofar as it relates to the revocation of the grant is devoid of merit but is merited in relation to revocation of the certificate of confirmation of grant.

Accordingly, the certificate of confirmation of grant issued to the respondent and dated 12th March 2014, is hereby **revocated** with directions that the listed beneficiaries do agree on the mode of distribution of the estate after which the respondent or any other beneficiary may take out necessary summons for confirmation of grant.

Otherwise, the grant issued to the respondent/petitioner on 12th March 2014 remains intact. However, any transaction undertaken by the respondent or any other beneficiaries on the strength of the revoked certificate of confirmation of grant becomes null and void **"ab-initio"**.

Ordered accordingly.

J.R. KARANJAH

JUDGE

24.10.2019

[Dated and delivered this 24th day of October, 2019]