



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**SUCCESSION CAUSE NO.13 OF 2018**

**IN THE MATTER OF THE ESTATE OF:**

**PATRICK S.M. OJENGE.....DECEASED**

**AND**

**SAMSON MUGA ..... 1<sup>ST</sup> PETITIONER**

**SHEM MUGA .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**DORIS AKOTH SAOKE ..... OBJECTOR**

**RULING**

1. The record reveals that on the 3<sup>rd</sup> October 1993, a sale agreement was entered between the late **Patrick S.M. Oj'eng'e** (herein, the deceased) and the late **Joseph Muga Saoke**, for the sale of four (4) acres of a parcel of land belonging to the deceased described as Land Parcel No.South Kabuoch/Koguta/595.

The agreement was confirmed and affirmed by an affidavit deponed by both vendor (deceased) and purchaser (late Joseph Muga Saoke) in 1995.

After the death of the deceased in or about the year 2012, the two petitioners/respondents, **Samson O. Muga** and **Shem O. Muga**, in their capacity as the administrators of the estate of the late Joseph Muga Saoke, filed a citation directed at the widow of the deceased, **Doris Akoth Saoke**, to accept or refuse grant of letters of administration intestate respecting the estate of her late husband, Patrick S.M. Ojenge (deceased).

2. The court considered the citation and in a ruling made on 7<sup>th</sup> November 2014, it was noted that the family of the deceased had not taken out letters of administration despite several requests to do so. The court then directed the said family to take out such letters of administration within forty five (45) days from the date of the order and in default, the respondents herein were to accordingly petition for the grant.

The ruling was to be served upon the said widow of the deceased as well as one **Samuel Owino Saoke** and **John Solomon Saoke**.

However, none of them moved the court to grant of the letters of administration.

Instead, the necessary petition was made to the court by the respondents and on the 18<sup>th</sup> August 2016, the grant of letters of administration intestate was granted to them and formally issued on 19<sup>th</sup> August 2016. It was confirmed on 7<sup>th</sup> March 2017 and the necessary certificate of confirmation of grant was issued on 8<sup>th</sup> March 2017, indicating that the estate property being land parcel No. Kabuoch/Koguta/595 was to be shared between the estates of the deceased Patrick S.M. Ojenge and the late Joseph Muga Saoke with the estate of the deceased getting **1.362 Acres** and that if the late Joseph Muga Saoke, getting **4 acres**.

3. It is this grant and by extension the certificate of confirmation of grant that the applicant/objector, Doris Akoth Saoke, now seeks orders for their revocation vide the summons for revocation of grant dated 25<sup>th</sup> July 2018, based on the main grounds that the grant was obtained by fraud and concealment of material facts with regard to the actual and rightful beneficiaries of the estate of the deceased.

The application is further supported by the applicant's averments contained in her supporting affidavit dated 25<sup>th</sup> July 2018.

The respondents opposed the application vide the grounds contained in their replying affidavit dated 8<sup>th</sup> August 2018. "**Viva-Voce**" evidence in support of and in opposition to the application was led by the applicant (**PW1**) and the first respondent (**DW1**). None of them called any witness.

4. Both parties filed written submissions. Those of the applicant were undated but filed on 23<sup>rd</sup> July 2019, while those of the respondent were dated 22<sup>nd</sup> July 2019, but filed on 23<sup>rd</sup> July 2019, by **M/s Nyauke & Co. Advocates**.

This court, having given due consideration to the application in the light of the rival submissions holds the view that the basic issue arising for determination is whether the impugned grant and indeed the certificate of confirmation of grant were obtained fraudulently by the making of a false statement or by concealment of material facts.

**Section 76 (b)** of the **Law of Succession Act** provides for revocation of a grant if it was obtained by the making of false statements or by concealment from the court of something material to the case.

5. From the evidence, there is no dispute that the respondents obtained the grant after successful citation proceedings against the family members of the deceased including the applicant, who being the widow of the deceased was most entitled to share in the estate of the deceased.

Apparently, the respondents' move against the applicant and others was essentially to safeguard their late father's alleged beneficial interest in the estate property on account of a sale agreement entered between him and the deceased late husband of the applicant.

Their "**locus stand**" in the citation proceedings and these proceedings germinated from the alleged sale agreement and indeed the grant of letters of administration intestate issued to them respecting the estate of their late father. This grant is exhibited in the record and was issued by the High Court in Kisumu on the 24<sup>th</sup> October 2001.

6. The sale agreement was herein disputed by the applicant and so was the fact that she was served with the notice of citation and the citation order made by the court on 7<sup>th</sup> November 2014, directing her to obtain the grant of letters of administration respecting her late husband's estate within forty five (45) days from that date, failure to which the respondents would be at liberty to petition for it.

These issues ought to have been raised in the citation proceedings but the applicant and others as citees were not present in court to raise them. This did not however, prevent her from raising the issues in this application as a grant of representation, whether or not confirmed may at any time be revoked or annulled if the proceedings leading to the obtaining of the grant were defective in substance as provided for under **Section 76 (a)** of the **Law of Succession Act**.

7. With regard to the validity of the sale agreement allegedly made between the deceased and the late father of the respondents, the applicant contended without dispute from the respondents that both the vendor (applicant's late husband) and purchaser (respondents' late father) were brothers. The applicant however, contended further that the alleged sale agreement was not existent or was a false document. She thus implied that the sale agreement could not be relied upon to create a beneficial interest in favour of the respondents and their late father before them in the estate of the applicant's late husband.

Although the alleged nonexistence of the agreement and the alleged falsity of the sale agreement are factors which were not sufficiently proved by the applicant, the unreliability of the agreement was proved or strongly implied on a balance of probability for reasons that it does not show that the late father of the respondent took immediate possession of part of the property sold to him or did in fact take possession at a later stage. The affidavit in support of the agreement came two (2) years (i.e. 1995) after the alleged agreement without any explanation being preferred by any of the parties. It indicated that the transfer of the purchased portion would occur at a later stage but it does not also show that the late father of the respondent took actual possession of part of the estate.

8. If indeed the late father of the respondents took possession immediately after the sale agreement or at a later stage, the remedy available to the respondents was by way of a land suit based on the doctrine of adverse possession or by way of damages based on a breach of contract. The citation and indeed a succession suit such as the present suit was not the right forum as the respondents cannot claim beneficial interest in part of the property which lawfully belonged to the deceased husband of the applicant prior to his death on the basis of a legally unreliable sale agreement.

It would follow that inasmuch as the citation proceedings by the respondents were anchored on the sale agreement, they were defective in substance and therefore null and void ab-in-tio. It did not therefore matter that the applicant was or was not served with the notice of the citation and/or the court order of the 7<sup>th</sup> November 2014.

9. Therefore, the grant of letters of administration issued to the respondent respecting the estate of the deceased Patrick S.M. Ojenge and the accompanying certificate of confirmation of grant are amenable to revocation in terms of **Section 76 (a)** of the **Law of Succession Act** rather than **Section 76 (b)** of the **Act**.

In the exercise of this court's inherent power under **Rule 73** of the

**Probate and Administration Rules**, it is hereby ordered that the impugned grant and the accompanying certificate of confirmation of grant be revoked forthwith and a fresh grant **be** issued forthwith to the applicant, **Doris Akoth Saoke** together with her adult children, **Samuel Owino Saoke** and **John Solomon Saoke**.

The fresh grant may be confirmed after expiry of six months from this date hereof or any shorter period as may be deemed necessary.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**24.10.2019**

[Dated and delivered this **24<sup>th</sup>** day of **October, 2019**]