



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 31 OF 2006**

**IN THE MATTER OF THE ESTATE OF YUSUF KIPKORIR CHEPKEITANY (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT**

**BETWEEN**

**DAVID MUTURI MIGWI.....OBJECTOR/APPLICANT**

**AND**

**SALLY JEMELI KORIR.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**EDWIN KIPROP KORIR.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**RULING**

[1] The application that is the subject of this ruling is the one dated **18 June 2018**. It was filed herein on **22 June 2018** by the Objector, **David Muturi Migwi**, pursuant to the provisions of **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya, Rules 44** and **73** of the **Probate and Administration Rules**. The application is also expressed to have been brought under **Section 128** of the **Registered Land Act, Chapter 300** of the **Laws of Kenya**; and was filed through the law firm of **Raydon Mwangi & Associates**. It was premised on the grounds that:

[a] The Grant was obtained fraudulently by making a false statement and by concealment from the Court of facts material to the cause.

[b] That the Grant was obtained by means of an untrue allegation of facts;

[c] That the Applicant has legal interest in the estate of the late **Yusuf Kipkorir Chepkeitany** on ground that he bought 4 acres from the deceased in land parcel known as UASIN GISHU/ILLULA SETTLEMENT SCHEME/567/90 but the Respondents failed to disclose to Court about this fact;

[d] That the Applicant has been in actual possession of the said portion of land as he awaited transfer of title prior to the demise of the deceased;

[e] That despite the Grant being given to the Respondents herein, the above parcel of land is intact; and

[f] That the Respondents have totally failed to transfer the portion of aforesaid parcel to him.

[2] The application was supported by the Respondent's/Applicant's Supporting Affidavit, sworn on **18 June 2018**, wherein he averred that the deceased was known to him by virtue of being the owner and/or allottee of ten acres of land at Illula Settlement Scheme known as **Parcel No. 567/90**; and that on the **2 October 1986**, he entered into a Sale Agreement with the deceased for the purchase of a portion of that land, measuring 4 acres; which was to be excised therefrom. He further averred that he paid the full purchase price to the deceased and was immediately given possession of the subject portion which he fenced off. He accordingly proceeded to cultivate, develop and reside on the portion pending issuance of title.

[3] The Applicant further deposed that he enjoyed peaceful occupation of his portion of the land until the demise of the deceased in the month of March 2005. Thereafter the Respondents commenced encroachments onto his portion and even threatened him with eviction; and that when he got to learn that the Respondents had petitioned the Court for Grant of Letters of Administration without disclosing his interest in four acres of the land, he filed this Objection application. He annexed a copy of the Sale Agreement dated **2 October 1986** between him and the deceased, **Yusuf Korir Chepkeitany** to his Supporting Affidavit to buttress his position.

[4] The Petitioners/Respondents opposed the application. They relied on the Replying Affidavit sworn by the 1<sup>st</sup> Respondent on **26 September 2018** and confirmed that they were issued with Grant of Letters of Administration to the estate of the deceased herein on **13 May 2009**; and that thereafter, the Applicant filed a suit by way of Originating Summons before the Environment and Land Court at Eldoret No. **ELD ELC No. 232 of 2012** laying claim to four acres of the land. She further averred that that suit was fully heard and determined in their favour; and that an appeal therefrom was likewise dismissed with costs. It was thus the contention of the two Respondents that the instant application has been brought in bad faith to embarrass them and further delay the finalization of this matter. They denied any fraud and asserted that they made full and frank disclosure to the Court in their Petition for Grant and pointed out that, the Applicant, not being a dependant of the deceased, has no capacity to bring the instant application or lay claim to a portion of the deceased's estate.

[5] The application was canvassed by way of written submissions, which I have given due consideration in the light of the applicable provisions of the law. In particular, **Section 76 of the Law of Succession Act, Chapter 160 of the Laws of Kenya**, 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) 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;**

**(c) 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.**

[6] It is manifest therefore that the Respondents' argument that an application for revocation can only be brought by a dependant of the deceased is unfounded. Indeed, it is now settled that the above provision is wide enough to include a purchaser. Thus, in **Musa Nyaribari Gekone & 2 others v Peter Miyienda & another [2015] eKLR** for instance, the Court of Appeal sitting in Kisumu held that:

**"The expression *'any interested party'* as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the Law of Succession Act when he held that the 1<sup>st</sup> respondent has the *locus standi* to present the application for revocation of the grant. We agree with the learned Judge that the 1<sup>st</sup> respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant."**

[7] What the foregoing means is that the Applicant is entitled to a merit hearing on the basis of his evidence and to a determination whether or not his application is well founded from the standpoint of **Section 76 of the Law of Succession Act**. However, I note that the Respondents also took the view that the doctrine of *res judicata* is applicable to the facts hereof; in that the question as to whether or not the Applicant's claim to 4 acres of the Suit Property, namely Parcel No. **Uasin Gishu/Illula/567/90** has been heard and determined not only by the Environment and Land Court, but also by the Court of Appeal in **Eldoret Civil Appeal No. 47 of 2015: David Muturi Migwi vs. Sally Jemeli Korir & Another**.

[8] Indeed, the documents annexed to the 1<sup>st</sup> Respondent's Replying Affidavit sworn on **17 December 2009** in respect of an earlier

application are copies of the pleadings initially filed in **Eldoret High Court Case No. 14 of 2006 (OS)**, showing that the Applicant had moved the Court seeking, inter alia a declaration that he was entitled to the suit land by adverse possession. Then in the 1<sup>st</sup> Respondents Replying Affidavit to the instant application filed on **2 October 2018**, she annexed a copy of the Judgment of the Court of Appeal in **Eldoret Civil Appeal No. 47 of 2015**; a clear indication that the Applicant's claim to ownership of the Suit Property by way of adverse possession was considered and dismissed by both the lower court and the Court of Appeal.

[9] The Court of Appeal was however explicit that the decisions turned on technical issues as opposed to the merit of the Applicant's case. At paragraph 6 and 13 of the Judgment of the Court of Appeal dated **17 May 2018**, it was observed that:

**“The learned judge dismissed the claim on two grounds namely, firstly, that the originating summons was not supported by an affidavit and secondly, that an extract of the title of the land claimed by the appellant was not annexed...We would agree with the appellant's submission that failure to annex a certified extract of title to the affidavit is a procedural irregularity which could be cured by providing the extract of title at any stage of the proceedings. We also agree that in the circumstances of this case, failure to file a comprehensive affidavit to support the claim to land by adverse possession was not fatal to the claim since oral evidence was tendered at the trial to support the claim. However, this is not a case where the appellant merely failed to produce a certified abstract of title. Rather, this is a case where the deceased did not have a registered title to the land and none existed at the time of trial. By Section 41 of the Act, Government land cannot be acquired by adverse possession.”**

[10] The Court of Appeal accordingly came to the conclusion, at paragraphs 14 and 15 of the said Judgment, that:

**“...since the deceased did not have title to the land and the land was vested in SFT, a Government body, at the time the originating summons was lodged, the contingent interest in land by the deceased could not have been extinguished by operation of law and the claim to land by adverse possession was not maintainable in law. The rest of the grounds of appeal relate to the merits of the claim for adverse possession. The court did not determine the merits of the claim...we do not find it necessary to delve into the merits of the claim...”**

[11] In the premises, it cannot be said that the Applicant's application dated **18 June 2018** is *res judicata* for purposes of **Section 7** of the **Civil Procedure Act** as read with **Section 47** of the **Law of Succession Act**. I would accordingly agree with the position taken by **Hon. Kuloba, J.** in **HCCC No. 2340 of 1991: Mwangi Njangu vs. Meshack Mbogo Wambugu & Another** that:

**“Res judicata applies where there is an existing final judgment rendered upon the merits without fraud and collusion...”**

[12] Accordingly, I take the view that the Applicant is entitled to ventilate his grievance herein as an interested party within the ambit of **Section 76** of the **Law of Succession Act**; and in particular Sub-sections (b) and (c) thereof, granted the grounds relied on in the Summons dated **18 June 2018**. Those two provisions recognize that a grant may be revoked or annulled if an applicant demonstrates 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; or 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.

[13] Needless to say that the burden of proof was on the Applicant to show that there was fraud or false statement, or that there was concealment of facts from the court. A careful perusal of the Applicant's affidavit shows that what stands out is the allegation of concealment of his Land Sale Agreement with the deceased. There is nothing to show that there was fraud of any kind or that the Respondents made a false statement to the Court. The fact of the matter is that the 10 acres of land that is known as **Uasin Gishu/Illula/567/90** was at all times registered in the name of the deceased and that the vendor would take the necessary steps to ensure the 4 acre portion was transferred to the Applicant. Unfortunately, this did not happen in the lifetime of the vendor. Accordingly, the only way the transfer could be effected after the death of the deceased was through transmission by the administrators of the estate of the deceased.

[14] If, as appears to be the case herein, the Respondents for some reason did not acknowledge or recognize the alleged agreement between the deceased and the Applicant, then that is a question that would then go to the Environment and Land Court for ventilation in the normal manner. As matters stand, I am not satisfied that the Applicant has proved fraud or material non-disclosure for purposes of **Section 74** of the **Law of Succession Act**. Likewise, there is no demonstration that the grant was obtained by means of an untrue allegation of a fact essential in point of law.

[15] The foregoing being my view of the matter, I would dismiss the application dated **18 June 2018**, which I hereby do with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**OLGA SEWE**

**JUDGE**