



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 503 OF 2000**

**IN THE MATTER OF THE ESTATE OF JOHN OMULWANI AMUNABI DECEASED**

**BETWEEN**

**MIKAL AFWANDE MANYASA.....1<sup>ST</sup> APPLICANT**

**FESUTS AMBUKA ALALA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CONSOLATA NYAPELA AMUNABI....ADMINISTRATRIX/RESPONDENT**

**R U L I N G**

1. Mikal Afwande Manyasa (herein referred to as the 1<sup>st</sup> applicant) has filed an application dated 24<sup>th</sup> November, 2016 seeking for orders :-
  - 1) That the honourable court be pleased to reopen this cause by setting aside its judgment of 11/2/2016
  - 2) That the grant of letters of administration and a certificate of confirmation of grant issued on 26/04/2012 be revoked and or annulled.
  - 3) That a prohibitory order do issue restricting any dealings in respect of land parcel Bustotso/shibeye/1462, Bustotso/Shibeye/1647 and Bustotso/Shibeye/1695 pending hearing and determination of these objection proceedings.
  - 4) That pending the hearing and determination of this application this honourable court be pleased to issue an order restraining the administrator herein from interfering with parcel of land Nos. Bustotso/shibeye/1462, Bustotso/Shibeye/1647 and Bustotso/Shibeye/1695 as to their occupation and use or in any other manner whatsoever interfering with the users of the said parcels of land as they form part of the estate of the deceased.
  - 5) That Mikal Afwande Manyasa be made a party to this cause as an objector.
  - 6) That the costs of this application be in the cause.
2. Festus Ambuka Olala (herein referred to as the 2<sup>nd</sup> applicant) has also filed a similar amended application dated 18<sup>th</sup> April, 2016 seeking for orders that:-
  - 1) That this honourable court be pleased to have this case re-opened by setting aside its judgment dated 11/10/2016.
  - 2) That the grant of letters of administration intestate made herein to Consolata Nyapela Amunabi and confirmed on 11/10/2016 be revoked and/or annulled.
  - 3) That the applicant herein Festus Ambuka Olala (suing as a legal representative of the estate of TRYAS OLALA RASTO be made party to this succession cause by putting his name as a liability to the deceased's estate herein.
  - 4) That a prohibitory order do issue restraining any dealings in respect of L.R No. Bustotso/shibeye/1462, Bustotso/Shibeye/1647 and Bustotso/Shibeye/1695 pending the hearing and determination of the objection proceedings herein.
  - 5) That a prohibitory order do issue restraining any dealings in respect of LR No. Bustotso/Shibeye/5719 and L.R. No.

Butsotso/Shibeye/5718 which were created as a result of sub-division of LR NO. Butsotso/Shibeye/1695 which formed part of the deceased's estate.

6) That pending the hearing and final determination of this application, the honourable court be pleased to issue an order restraining the administratrix herein from interfering with LR. Nos. **Butsotso/shibeye/1462, Butsotso/Shibeye/1647 and Butsotso/Shibeye/1695** as to their occupation, use or in any other manner whatsoever interfering with the users of the said parcels of land which form part of the deceased's estate.

7) That pending the hearing and final determination of this application, the honourable court be pleased to issue an order restraining the administratrix herein from interfering with LR. No. Butsotso/Shibeye/5719 and LR No. Butsotso/Shibeye/5718 which were created as a result of sub-division of LR No. Butsotso/Shibeye/1695 as their occupation use or in any other manner whatsoever interfering with the users of the said parcels of land which form part of the deceased's estate.

8) That costs to be provided for.

3. The first applicant, Mikal contends that the grant issued to the respondent on the 26<sup>th</sup> April, 2012 was obtained fraudulently by concealment of material facts as a result of which she and some other beneficiaries to the estate of the deceased herein have been disinherited. The 2nd applicant Festus, on the other hand says that his later father, **Tyras Olala Rasto** had bought two portions of land from the deceased herein but that during distribution of the estate herein the respondent did not disclose that fact and as a result disinherited the estate of his father.

4. Mikal Afwande Manyasa was represented by **Mr. Khayumbi Advocate** while **Mr. Ombaye** appeared for Festus Amboka Olala. **Mr. Nyikuli** appeared for the respondent.

5. The background to the applications is that on the 26<sup>th</sup> April, 2012, this court presided over by Chitembwe J annulled a grant of letters of administration earlier issued to one one Joyce Maloba Amunabi (herein referred to as the former petitioner) and issued the same to Consolata Nyapela Amunabi the administratrix/respondent. The respondent subsequently filed summons for confirmation of grant dated 7<sup>th</sup> September, 2015 that were confirmed by the court presided over by Mwitwa J vide a judgment delivered on 11<sup>th</sup> October, 2016. The learned Judge ordered the estate of the deceased to be distributed as follows:

(a) Parcel Number Butsotso/Shibeye/1462 be shared equally among the following beneficiaries-

1. David Munabi
2. Margaret Andeso
3. Mical Afande
4. Pamela Siringi
5. Melisa Etna
6. Jennifer Kadogo
7. Aggrey Sitaka Asala
8. Rose Ebicheti Abiero
9. Joyce Maloba Amunabi

(b) Parcel Number Butsotso/Shibeye/1647 be shared equally among the following beneficiaries.

1. David Munabi
2. Margaret Andeso
3. Mical Afande
4. Pamela Siringi
5. Melisa Etna
6. Jennifer Kadogo
7. Aggrey Sitaka Asala

(c) Parcel Number Butsotso/Shibeye/1695 to go to Consolata Nyapela Amunabi wholly

6. It is the orders of the learned judge in that judgment that prompted the instant applications.

**Case for Mikal Afande- 1<sup>st</sup> applicant**

7. The 1<sup>st</sup> applicant supported her application dated 24<sup>th</sup> November, 2016 by her affidavit sworn on the even date. The gist of her application is that the land parcel given to the administratrix during the confirmation No. Butsotso/Shibeye/1695 is a commercial plot with shops therein from which the family has been getting rent. That it was unfair to allot the whole portion to the respondent.

8. The 1<sup>st</sup> applicant further contends that her father had disposed of part of the estate to some purchasers as follows:-

- Sale to Jacton Nyikuli measuring 0.02 Ha from land parcel Butsotso/Shibeye/1695.
- Sale of this plots to Trayas Olala Rasto measuring 0.05Ha and 0.07Ha.
- Sale of portion of Butsotso/Shibeye/1647 to one Nicholas Andika Matsia measuring 0.61Ha.

9. The applicant further states that there are other occupants on the estate of the deceased who have settled and who have obtained title deeds as follows:

- Alfred Mateya occupying Land Registration No. Butsotso/Shibeye/2789
- Simeon Omuyomain Occupation of Land registration No. Butsotso/Shibeye/2786
- Violet Nyakoa in occupation of land registration No. Butsotso/Shibeye/2790
- Harison Omukhulu Okot Occupaying Butsotso/Shibeye/2963

10. The applicant contends that the above information was not given to the court before it confirmed the grant to the respondent. That she was not informed of the proceedings so that she could put in her view. Therefore that the grant issued to the respondent should be revoked to pave way for proper distribution of the estate to the beneficiaries.

**Case for Festus Ambuka-2<sup>nd</sup> applicant**

11. The 2<sup>nd</sup> applicant supported his application dated 18<sup>th</sup> April, 2018 vide his affidavit sworn on the same date. He says in the affidavit that his late father Tryas Olala Rasto had bought two portions of land from the deceased herein from land parcel Butsotso/Shibeye/1695 measuring 0.07Ha and 0.05Ha. That the petitioner herein did not include his father as a liability to the estate of the deceased herein but that the petitioner went ahead to distribute and to sub-divide the estate into two portions 5718 and 5719 in her name without considering his late father's interests. That he, the applicant, has been occupying part of the land his father bought from the deceased. That the respondent has written him a letter dated 19/12/2016 demanding that he vacates the land.

12. The 2<sup>nd</sup> applicant annexed to his application agreements of sale of land by the deceased to his late father, Marked "KS02". He also annexed certificate of official search of the new land parcels after the sub-division of land parcel Butsotso/Shibeye/1695, marked "KSO 4(a) (b) and (c). He annexed a demand letter from the respondent marked "KSO 5"

**Response**

13. The respondent responded to the applications by Mikal dated 24<sup>th</sup> November, 2016 vide her replying affidavit sworn on 2<sup>nd</sup> March, 2017 in which she states that the applicant therein is her step-sister being the daughter of the second wife of the deceased while she was daughter to the 3<sup>rd</sup> wife of the deceased. That after the grant was made to the former petitioner and the grant confirmed, the former petitioner subdivided land parcels 1462 and 1647 and sold 2 large parcels to buyers. That the former petitioner and the mother to the applicant were the beneficiaries of the said sale. Further that the confirmation contained in the judgment of Mwita J dated 11<sup>th</sup> October, 2016 was made following full disclosure. That the 1<sup>st</sup> applicant is the person referred to in the judgment as Mical Afande who was awarded equal share in both parcels Butsotso/Shibeye/1462 and 1647. That she, the respondent, settled for the smallest part of the estate so as to avoid settling the other houses' arrangements with their purchasers.

14. The respondent says that the affidavit by Mikal Afwande does not make any specific claim of her own other than fronting for others. That her application does not disclose any ground for revocation. That the orders sought of injunction are not issuable in succession matters. That the orders of prohibition being sought are not merited.

15. In response to the application by Festus Ambuka Olala, the respondent stated in a replying affidavit sworn on 13<sup>th</sup> July 2018 that the applicant's father did not buy any land from the deceased but was sold a portion of land parcel No. Butsotso/Shibeye/1695 by the former petitioner which was nullified by the court.

16. That the purported agreements annexed by the applicant as annexure "KS02 are all fabricated. That the said annexures refer to land titles Butsotso/Shibeye/1745 and 1746 which do not form part of the estate of the deceased. That in any case, any such sale would have been deemed null and void for all purposes by dint of the requirements of land control Act Cap 302 as they purport to have been made during the life time of the deceased but without any evidence that the necessary consent was sought or obtained within the time provided.

17. That the application does not disclose any ground for revocation. That the 2<sup>nd</sup> applicant's claim is of land which he should pursue in the land court.

18. In response to the averments by the respondent, Festus stated in a supplementary affidavit sworn on 25<sup>th</sup> October, 2015 that the sale agreements are genuine as they are signed by both his father and the deceased in the presence of witnesses. That his father took possession of his portions of land parcel 1695 with the consent of the deceased. That the agreements are not void and the deceased passed away before obtaining the necessary consent of Land Control Board.

### **Analysis and Determination**

19. There are two applications, one by Mikal Afwande Manyasa and the other by Festus Ambuka. The respondent in both applications is Consolata Nyapela Amunabi who is the current administratrix of the deceased's estate herein. It is prudent to consider the two applications separately.

#### **Application by Mikal Afwande Manyasa**

20. The application by the 1<sup>st</sup> applicant is based on the grounds that she and some other beneficiaries of the estate of the deceased were left out of the succession proceedings and that their consent was not sought during confirmation. That the grant and the certificate of confirmation were obtained fraudulently by concealment of material facts. Further that she and some other beneficiaries have been disinherited of their shares.

21. It is clear from the judgment of Mwitia J that the applicant was one of the beneficiaries of land parcel Butsotso/Shibeye/1462 and 1647 which she is required to share equally with other beneficiaries. She has not shown how she was disinherited in respect to those two parcels of land.

22. The applicant says that her father sold a portion of land parcel 1647 to the one **Nicholas Andika Matsia**. Though she said that a copy of the sale agreement was annexed to her application, there was none annexed. In any case the said person did not come forward to lodge his claim during the succession proceedings.

23. The 1<sup>st</sup> applicant has named people contained in paragraph 7 above who are purported to have settled on the deceased's estate after buying their parcels of land. However, the people named therein did not buy land from the deceased. They did so from the prospective beneficiaries of the estate. There is no evidence that a grant had been confirmed when they bought their parcels of land. They are just intermeddlers to the estate having bought the land from people who had no grant of letters of administration contrary to section 45 of the Laws of Succession Act. They are therefore not protected creditors of the deceased's estate. They can make their claim from the people they bought their parcels of land from after the estate is distributed among the beneficiaries.

24. In respect to land parcel No. Butsotso/Shibeye/1695 the 1<sup>st</sup> applicant says that the plot contains family shops. That it was unfair to allocate the entire plot to the respondent without her input. However apart from stating that the allotment of the plot to the respondent was unfair the applicant has not stated her preferred mode of distribution of the said plot. She has not attached any documents e.g the valuation of the plot to show that the allotment to the respondent was unfair in compassion to what the other beneficiaries got.

25. It was disclosed during the hearing before Mwitia J that some people had bought parcels of land from the estate. The learned judge considered the issue and dismissed the matter. There is therefore no evidence that the grant was obtained fraudulently without disclosure of material facts. It was disclosed that the 1<sup>st</sup> applicant was one of the beneficiaries of the estate. There is no reason to revoke the grant as sought by the 1<sup>st</sup> applicant.

#### **Application by Festus Amboka Olala-2<sup>nd</sup> applicant**

26. The 2<sup>nd</sup> applicant says that his deceased father bought two portions of land from the deceased herein in land parcel **Butsotso/Shibeye/1695**. The applicant says that he is in occupation of part of the land. The two sale agreements produced by the applicant dated 20/6/1999 and 10/4/2000 indicate that the parcels of land sold to the applicant's father by the deceased were on plot number 1745 and 1746. If that is the case the applicant has not explained why he is in occupation of a portion in plot No. 1695 when his father bought land on portions 1745 and 1746. The dispute then is where the land bought by the applicant's father is situate. That kind of disputes does not lie within the jurisdiction of a succession court. The applicant should sue the respondent in a civil suit for it to be determined where the land bought is situate.

27. Going by the documents produced herein there is no evidence that respondent concealed any material facts that the 2<sup>nd</sup> applicant's father had bought land from the deceased in respect to land parcel **Butsotso/Shibeye/1695**. The 2<sup>nd</sup> applicant has not shown sufficient reason for the court to revoke or annul the grant issued to the respondent.

28. The upshot is that there is no merit in the applications dated 24<sup>th</sup> November, 2016 and 18<sup>th</sup> April, 2018. Both applications are accordingly dismissed with costs to the administratrix/respondent.

**Delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of December, 2019.**

**J. N NJAGI**

**JUDGE**

In the presence of:

.....N/A.....for Mikal Afwande/1<sup>st</sup> Applicant

.....Mr. Ombaye.....for Festus Amboka Olala/2<sup>nd</sup> Applicant

...Mr. Nyikuli... for Consolata Nyapela Amunabi/Administratix/Respondent

Consolata Amunabi.....present.....

Mikal Afwande.....present.....

Festus present.....

Court Assistant.....polycap.....

30 days right of appeal.