



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO.183 OF 2009

IN THE MATTER OF THE ESTATE OF:

GABRIEL MABACHI OKELLO.....DECEASED

BETWEEN

LUCAS OUMA MABACHI.....PETITIONER/ RESPONDENT

AND

BENJAMIN OKELLO SEMBEOBJECTOR/APPLICANT

RULING

1. The applicant herein moved the court by way of chamber summons dated 21st January 2019 under sections 47,58, 76 & 82 of the Law of Succession Act and Rules 44,49,59 63 & 73 Probate and Succession Rules as well as Articles 48 and 159 of the Constitution of Kenya. He is seeking the following orders:

- a) That this honourable court revokes the certificate of confirmation of the grant herein.
- b) That this court issue letters of administration to the objector/applicant.

2. That costs of application be borne by the respondent.

3. The application is premised on the following grounds:

- a) That the deceased herein during his lifetime had transferred land parcel number **SAMIA/LUCHULULO/BUKHULUNGU/225** on 12th June 1982.
- b) That during the lifetime of the deceased after the transfer to the objector, there was no dispute involving the said parcel of land.
- c) That the said parcel of land ought not to have been included in the estate of the deceased herein.
- d) That the grant was obtained by fraudulently and by misrepresentation of facts.

4. On the 12th June 2019, the parties sought to have the application disposed of by way of written submissions. Both parties filed and exchanged the submissions.

5. Upon my perusal of the supporting and replying affidavits, the submissions of the parties as well as the record, the following facts emerge:

That in the Busia **ELC28/2015** a ruling that was delivered by Kaniaru J. on 26th July 2018, the judge observed as follows at paragraph 13:

In this particular case the applicant's title is under challenge. Yet this is the very title he brandishes as instrument of conclusive ownership. In Munyu Maina vs. Hiram Gathima [2013] eKLR the Court of appeal held inter alia:

That where a registered proprietor's title is under challenge, it is not enough to dangle the instrument as proof of

ownership. The proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances.

In the instant case itself, the crux of the matter revolves around the acquisition of the title by the applicant. It is therefore fallacious for the applicant to assume that possession of the title perse carries with it overriding merits entitling him the remedy of injunction.

6. The application was dismissed. Before filing the present application, the applicant ought to have moved to the court to resolve the issue of his acquisition of title. Unless and until the issue of title has been addressed by a competent tribunal, the applicant cannot base any claim on the said title.

7. The applicant has in his own words said he was a nephew of the deceased. The deceased left behind a widow and children. The applicant can only be enjoined as an heir by demonstrating that the deceased had in his lifetime taken him in as one of his children. This onus is on him to do so. He cannot assume that he entitled to inherit the deceased by virtue of being a nephew. He has not discharged this obligation.

8. From the foregoing analysis of the evidence on record, I find that the application for revocation must fail with costs.

DELIVERED and SIGNED at BUSIA this 18th day of December, 2019

KIARIE WAWERU KIARIE

JUDGE