



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO. 215 OF 2008

IN THE MATTER OF THE ESTATE OF PHILIP MOKAYA GESANDADECEASED

BETWEEN

STEVEN MANGI MOKAYA.....APPLICANT

VERSUS

ESTHER MONGINA NYAKEGO.....OBECTOR

JUDGEMENT

1. PHILIP MOKAYA GESANDA (hereinafter “the deceased”) died intestate on 29th April, 2007. Grant of letters of administration intestate in respect to his estate was issued to the Petitioner herein STEVEN MANGI MOKAYA which grant was confirmed on 13th December, 2016. The applicant/objector herein, ESTHER MONGINA NYAKEGO, however filed the instant summons for revocation of grant dated 20th April, 2017 in which she sought the annulment of the said grant issued to the petitioner on the grounds that:-

i. The proceedings to obtain the grant were defective in substance.

ii. The Grant was obtained fraudulently and by concealment from the Court of something material to the case since the Petitioner herein did not inform nor seek the consent of the Objector to file the application for grant of letters of administration.

iii. The Grant was further obtained fraudulently and by concealment of some fact material to the case as the petitioner concealed to list the Objector as a liability having purchased parcel of land from the deceased.

2. The application was supported by the objector’s affidavit sworn on 20th April 2017 wherein she repeats the grounds listed in the application and reiterates that the petitioner fraudulently concealed the fact that she was a purchaser of a portion of LR NO. EKERUBO SETTLEMENT SCHEME/14 (hereinafter “the suit land”) belonging to the deceased. She attached a copy of the sale agreement to her affidavit marked “CNI”.

3. The court record does not show if a replying affidavit or grounds of opposition was filed by the petitioner in response to the instant application and when it came up for hearing on 11th October 2017, Mr. Motanya advocate for the objector and Mr. Ochwangi advocate who appeared on behalf of Mr. Anyona for the petitioner agreed to canvass it by way of written submission which I have carefully perused.

4. Having regard to the fact that the petitioner did not file any response to the application, it follows that averments made by the objector in respect to the claim that she purchased the suit land have not been controverted. In his submissions filed in court on 1st November, 2017 the petitioner made attempts at denying the claim that the objector purchased the suit land from the deceased. I however find that written submission is not the correct/proper forum for presenting such a denial in view of the fact that written submissions, as opposed to by a replying affidavit, is not evidence which the court can rely upon in determining a matter. On the contrary, written submissions are merely the views, opinions or arguments of an advocate intended to persuade the court to make a decision in his client's favour. In the case of **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi and another [204] KLR** the Court of Appeal held that:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

5. Section 3 of the Evidence Act Cap 80 Laws of Kenya defines evidence as:

“ Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity.”

6. Taking a cue from the above cited case, I find that the objector's claim that she purchased the suit land from the deceased has not been denied by the petitioner. The question which then arises is whether failure to include the objector's interest in the Succession case as a *bona fide* purchaser of the deceased's property entitles the objector to seek the revocation of the grant issued to the petitioner.

7. **Section 76 of the Law of Succession Act** stipulates as follows on the circumstances under which a grant may be revoked and/or annulled.

“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.”

8. I find that the applicant had a duty to prove that the grounds set out in Section 76 of the Laws of Succession Act before the grant issued is revoked. The applicant was under a duty to prove that the grounds set out in **Section 76** of the **Law of Succession Act** were applicable in this case before the grant issued is revoked. The gravamen of the applicant's case is that the grant was fraudulently obtained because his consent was not obtained before the filing of the petition and further that the grant was obtained fraudulently by failing to disclose his interest in the deceased's estate as a purchaser. By stating that the petitioner concealed the fact that she had purchased the suit land from the deceased, the applicant pre-supposes that the petitioner was aware of the said purchase, but chose to hide it from the court. The issue of the petitioner's knowledge of the sale agreement was not pleaded or proved. Assuming, for argument's sake, that the petitioner was aware of the purchase of suit land, would that be a valid ground for revocation of the grant issued herein? I have perused the petition (Form P & A 80) and the affidavit in support (Form P & A 5). I note that the names of all the beneficiaries of the estate of the deceased are listed in the said forms. My finding is that the applicant, as a purchaser, is not a person entitled to a grant of letters of administration under **Section 66** of the **Law of Succession Act**. I would further add that the applicant was neither a dependant nor beneficiary of the deceased and he cannot therefore apply for revocation of a validly issued grant. In **Ileri Nyaga v Karani Ngari & Another Embu HC Succ. No. 68 of 2007 [2010] eKLR** it was held:-

“... a buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate.”

9. In the instant case, I similarly find that if indeed the applicant bought part of the suit land from the deceased, then the recourse available to him is to sue the administrator of the estate for specific performance of the land purchase agreement that he had with the deceased. I further find that a valid grant cannot be vitiated merely because a purchaser was not recognized or involved in the succession proceedings.

10. The upshot of it all is that the summons for revocation grant is hereby dismissed with no order as to costs.

Dated, signed and delivered in open court this 28th day of February, 2018

HON. W. A OKWANY

JUDGE

In the presence of:

Miss Momanyi for the Petitioner

N/A for the Objector

Omwoyo: Court Clerk