



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION NO. 261 'B' OF 2004.

IN THE MATTER OF THE ESTATE OF OCHOKI MOMANYI (DECEASED)

AND

ROBERT MOGENI OCHOKI.....PETITIONER

VERSUS

RICHARD NYAMACHE ORUTA.....OBJECTOR

AND

JEFFERSON MONGARE MWABORA.....INTERESTED PARTY

RULING

1. The objector herein filed Summons for Revocation of Grant dated 6th May 2013 under section 76 of the Law of Succession Act and rules 44,49,59,63 &73 of the Probate and Administration Rules for orders that: -

1. Spent

2. Spent

3. Spent

4. The grant of letters of administration issued to the petitioner on 9th day of March 2012 be revoked.

5. Costs of the application be borne by the petitioner/respondent.

2. The application was supported by the affidavit of the Objector in which he avers that on the 2nd January 2011, he bought a parcel of land measuring 0.036 Ha from some of the beneficiaries to the deceased estate. He attached a copy of the sale agreement marked as "RNO2". He states that on learning that a succession cause had been filed in respect to the estate of the deceased, he came to court and perused the court file only to realize that himself and his co-objector had been excluded from the list of the beneficiaries of the estate of the deceased as purchasers while other purchasers had been included as beneficiaries in the said estate. He further states that the Petitioner failed to disclose to the court the fact that he was a purchaser of land belonging to the deceased and hence sought the revocation of the grant issued to the petitioner while arguing that the estate of the deceased was likely to be wasted, alienated and disposed of to their detriment.

3. The application was opposed by the Petitioner vide a replying affidavit dated 12th June 2014. In the said replying affidavit the Petitioner confirmed that on the 9th day of March 2012, this court issued to him a certificate of confirmation of grant of letters of administration and pursuant to the said confirmation issued, Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 was subdivided and registered in the names of the beneficiaries. He termed the grant of letters of administration obtained herein as lawful, procedural and with due notice to all beneficiaries and interested parties.

4. He contended that the agreement annexed to the 1st Objectors supporting affidavit as annexure RNO-1 did not establish the objectors interest over the estate of the deceased comprised in Land Parcel Nyaribari Chache/B/B/Boburia/1440 as Kerubo Ochoki and Priscah Mokeira Auma were not the Petitioner's herein and hence did not have any powers to sell any portion of the deceased's land. He further contended that the sale agreement entered into between the objectors and the alleged sellers did not have the authority or consent of the deceased or himself as Petitioner. He further contended that the objectors did not demonstrate that any fraud preceded the issuance of the grant of letters of administration.

5. The petitioner's case was that the grant of letters of administration was confirmed to all the beneficiaries who were all present in court during the confirmation and therefore, it could not be said that the objectors had no information regarding the proceedings before the court. He thus termed the present application as an afterthought and one defeated by delay.

6. The interested party similarly opposed the summons for revocation of grant through a replying affidavit dated 20th August 2015 wherein he contended that before starting the succession process, Charles Auma Ochoki sold to him an additional land measuring approximately 11ft by 100ft. He added that he has been in occupation of the said piece of land since 2007, has fenced it and started development thereon. He further stated that the objector only built the houses in 2011 & 2013, long after he had purchased the land, without consulting the administrator of the estate. He further contended that the area chief had arbitrated over the issue and confirmed that he is the rightful owner of the piece of land which is in contention. He attached a copy of land title deed for Land Parcel /B/B/Boburia /10121 measuring 0.036 Ha obtained in the year 2013 as J.M.M 001 a & b and a copy of the said agreement marked 'J.M.M002.

THE EVIDENCE

7. PW1, Richard Nyamache Oruta the objector herein testified that he was approached by Gaterina Kerubo Ochoki and Prisca Kerubo Arima to construct for them 3 semi-permanent houses and in exchange for a plot measuring 25 ft by 100ft. He added that the said agreement was reduced documented and signed by all the parties. He produced a copy of the said agreement dated 26/1/2011 as Pexh.1. He also produced the photographs of the three semi-permanent houses as P exhibit 2. He further told the court that he spent kshs. 600,000 to Kshs. 700,000 to construct the houses and yet he had not been given title to the land. He stated that after the completion of the houses, he went to the Land Registrar to conduct a search only to realize that the interested party had been given the piece of land after which, he was advised by the land registrar to come to court. He claimed that he came to court with the Petitioner where they recorded a consent dated 27th June 2013 stating that he should get a piece of land measuring 25ft by 100ft carved out of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440. He produced the said consent as Exhibit 3 and added that, the said consent was adopted by the court as an order of the court on 12th July 2013.

8. He further testified that the interested party refused to sign documents relinquishing the said piece of land to him. He referred to the consent dated 8th February 2012 as the genuine consent emanating from the petitioner's family granting him a piece of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440. He produced the same as P Exhibit 5. He accused the interested party of serving him with a completely different consent which was undated and not filed in court and hence, it was his case that that even though it was not a genuine consent, it was still used in the confirmation of grant dated 9th March 2012. He produced the said consent which was marked as MFI P 6.

9. He also stated that after the confirmation of grant, the portion he was to get was given number 10121 and registered in the name of the interested party. He contended that the Petitioner wrote and signed a statement wherein he stated that the interested party obtained the piece of land through fraud and that he should get the land he bought. He produced the said statement as P exhibit 8.

10. He sought this court's orders to enable him acquire the transfer documents of a portion of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 measuring 25ft by 100ft.

11. On cross examination he confirmed that confirmation of grant was done on 9th March 2012 and the agreement executed on 26th January 2011, at least one year before the confirmation of grant but that the application for confirmation of grant was filed on 18th August 2010 before the agreement was executed. He also confirmed that the size of the land he bought was not shown in the agreement, and that neither was the position of the land shown and that the interested party was also a purchaser but for a different portion of the suit land which has now been subdivided to 10121. He claimed that the interested parties parcel includes his portion which should be carved out and given to him since the interested party has encroached into and taken over his portion. He also confirmed that they entered into a consent dated 26th June 2013 in respect to LR. No. 10121 which was a subdivision of the suit land.

12. On further cross examination by Mr. Anyona advocate for the petitioner, he confirmed that the administrator of the deceased estate (Petitioner) was not a party to the agreement he entered into with Priscah and Kerubo.

13. PW2 Gatarina Kerubo Ochoki confirmed that she sold land to the objector in exchange for houses which and that in exchange for the land, the objector constructed for her. She alleged that the interested party was interfering with PW1 on his land measuring 25ft by 100 ft. On cross examination, the court noted that the witness was unable to answer any of the questions due to her advanced age.

14. PW3 Priscah Kerubo Auma testified that she was married to one Charles Auma, now deceased, and that PW2 is her mother-in-law. She confirmed that she sold land to the objector measuring 25ft x 100ft to the objector in exchange for 3 semi-permanent houses that the objector built for her. She added that also gave the interested party a piece of land so that he could build a house for her but that the house he built collapsed. She stated that after confirmation of grant, she was given a parcel of land but she did not know the title number of the said land.

15. On cross examination she confirmed that she sold land to PW1 which was separate from the one sold to the interested party.

16. PW4 was Priscah Moraa Nyangau the daughter of PW2 and a step sister to the Petitioner. She corroborated the testimony of PW2 and PW3's that the objector bought a piece of land from them measuring 25 by 100ft in exchange for three semi-permanent houses that he built for them. She added that the interested party also bought the upper part of the land and a dispute arose when the interested party took the whole land including the objector's share instead of 25 X100 ft that he bought. She confirmed that on the land, PW3 has a share of land where she farms. She contended that on the ground, the interested party had taken up PW2's share. She further stated that if the interested party only took up his 25 by 100ft share, they would have no problem. She urged the court to order that PW1 and get their shares of land.

This marked the close of the objector's case.

17. DW1, the petitioner herein, testified that Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 belonged to the deceased. He stated that

his family members consented to him taking up succession proceedings in this case and that the interested party was included in the succession cause. He further stated that the objector did not consult him as the administrator when he allegedly purchased the land and that the interested party approached him on the land he had bought during the currency of the succession cause. He further stated that the objector had no right to seek for revocation of grant as the person who sold him the land was still alive.

18. On cross examination, he confirmed that indeed the objector constructed three semi- permanent houses for PW2 according to their agreement. He also confirmed that he saw the agreement wherein the interested party purchased land measuring 25ft X 100ft and that he was part of the said agreement as a witness.

19. On re-examination, he clarified that PW3 sold Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 sold land to objector in 2011.

20. DW2 was Jefferson Mongere Mwabora the interested party in this case. He confirmed that he bought the land in 2007 from Charles Auma Ochoki i.e. PW3's husband. He confirmed that he was included in the confirmation of grant as indicated in the certificate of confirmation of grant. He further stated that he did not have any relationship with the objector did not know if he was also a purchaser of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440.

21. On cross examination, he confirmed that he entered into a land sale agreement with Charles Auma Ochoki on 11th December 2007 and that the purchase price was Kshs. 100,000 which he paid in two instalments of Kshs. 60,000 and then Kshs. 40,000. This marked the close of the petitioner and the interested party's case.

DETERMINATION

22. Parties then agreed to file their written submissions which I have perused and considered. After considering the application for summons for revocation of grant, the petitioner's and the interested parties opposing replying affidavits, their evidence in court and their submissions, I note the issues that present themselves for determination are: -

1.) Whether the objector has set out and established the grounds for revoking a grant.

2.) Whether this court has jurisdiction to grant the objector title to land parcel no Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 measuring 25ft by 100ft.

23. With regard to the first issue of determination, section 76 of the Succession Act provides: -

“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 just the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

24. The objector's case was that the petitioner, when applying for the grant, failed to disclose to the court that PW2 and PW3 had sold to him land parcel no. Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 measuring 25ft by 100ft. From the evidence presented before this court, I note the objector was neither a beneficiary to the deceased estate in terms of section 66 of the Law of Succession Act nor was he a dependant in terms of section 26 of the said Act. I note that Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 belonged to the deceased and that the objector did not enter into any sale agreement with the deceased (while he was still alive) as the agreement was made with the deceased's widows PW2 and PW3 who are still alive. Under the above circumstances, my humble view is that this court was not the right forum for the objector to seek remedy because the Law of Succession Act concerns itself with property of a deceased person and how the said property devolves amongst his beneficiaries /dependants and not how the deceased beneficiaries/dependants choose to use their share of deceased property.

25. With regard to the second issue of determination, it is undisputed that the objector built three semi-permanent houses for PW2 and PW3 in exchange for a portion of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 measuring 25ft by 100ft. It is the objector's evidence that even after building the said houses at a cost of roughly Kshs. 600,000 to Kshs. 700,000 sometime in 2011, he has not been given vacant possession or title to the said land. I find that the objector's case relates to title (ownership) and occupation of Land Parcel No. Nyaribari Chache /B/B/Boburia /1440 measuring 25ft by 100ft and I further find the same falls under the jurisdiction of the Environment and Land Court or the Magistrates Court which now has jurisdiction to deal with land matters. My take is that the objector herein should pursue his claim to the land against PW2 and PW3 before the land court that is vested with the requisite jurisdiction.

26. In the end I find that the summons for revocation of grant dated 6th May 2013 does not meet the criteria or conditions set under section 76 of the Law of Succession Act and I dismiss it with further order that each party shall bear his/her own costs of the application.

Dated, signed and delivered in open court this 21st day of March, 2018

HON. W. A OKWANY

JUDGE

In the presence of:

- N/A Anyona for the Petitioner
- Mr. Sagwe for the Objector
- Omwoyo: Court Clerk