



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

(REVOCATION OF GRANT)

CIVIL APPEAL NO. 5 OF 2018

(CORAM: R.E. ABURILI J.)

JORAM OTOYO OJWANG'APPELLANT

VERSUS

JOSEPH OYUCHO OWITI.....RESPONDENT

(Being an appeal against the Ruling dated 11.1.2018 in Succession Cause Case No. 328 of 2016 in Siaya Principal Magistrate's Court before Hon. E.N. Wasike – S.R.M.)

JUDGMENT

1. This appeal arises from the ruling of Hon. E.N. Wasike – SRM at Bondo dated 1st March 2018, in Bondo Succession Cause No.328 of 2016, Joseph Oyucho Owiti – Objector Vs Jaram Otoy Ojwang – Petitioner. The Petitioner in the said cause, Joram Otoy Ojwang had on 25.4.2017 been issued with a grant of Letters of Administration in respect of the estate of the late Ogola Otoy (Deceased).
2. On 11.7.2017, vide a summons for revocation of grant dated 10th July, 2017, the Respondent herein Joseph Oyucho sought to have the grant issued on 25.4.2017 in favour of the Petitioner in succession cause No. 328 of 2016 annulled.
3. The grounds upon which the summons for revocation of grant were premised are:
 - a) *That the deceased's property listed to be succeeded by the administration had been confirmed and a certificate issued to Martha Atieno Otoy who is the mother of the deceased Ogola Otoy by the same Court vide Succession cause No.130 of 2016.*
 - b) *That the certificate of confirmation of grant in respect of the deceased's estate had been issued to Martha Atieno Otoy on 17.2.2017.*
 - c) *That the Petitioner misled the Assistant Chief to believe that the Petitioner was the brother of the deceased yet he was a distant relative to the deceased person's family.*
4. In the affidavit in support of the Summons for revocation of grant sworn on 10.7.2017 by Joseph Oyucho Owiti, it was deposed that vide Bondo P.M. Succession cause No. 130/2016, one March Atieno Otoy had filed for letters of Administration intestate to administer the estate of the late Ogola Otoy in her capacity as the biological mother of the said deceased Ogola Otoy.
5. That vide gazette Notice issued on 24.6.2016, a grant of letters of administration intestate was issued to her on 2.8.2016 and which grant was later confirmed on 17.2.2017 pursuant to the provision of **Section 71 (1) and (3) of the Law of Succession Act**. The said grant and certificate of confirmation were annexed to the affidavit.
6. That the Objector/Deponent purchased property **Siaya/Mahaya/911** from Martha Atieno Otoy as per the annexed copy of Sale of Land agreement. It is also deposed that the said Martha Atieno Otoy is since deceased.
7. That upon purchase of the said land from Martha Atieno Otoy, the said Martha Atieno Otoy transferred the said parcel of land Siaya/Mahaya/ 911 in favour of the Objector as shown by annexed application for consent to transfer, consent to transfer and transfer respectively and eventually the Objector was issued with a title deed which copy he annexed. It was issued on 1.3.2017.
8. The Petitioner, through the Law firm of Ayoo-See & Associates Advocates filed grounds of opposition dated 21.8.2017 and a replying

affidavit sworn by the Petitioner Joram Otoy Ogwang on 21.8.2017 contending and deposing that the Objector has no *locus standi* to object to the grant, that the Objector cannot purport to speak and seek revocation of grant herein on behalf of Martha Atieno Otoy now deceased before succeeding the deceased's estate, and that the summons for revocation/annulment of grant filed by the Objector herein lacks merit, Mischievous and ought to be dismissed with costs to the Respondent Petitioner.

9. In the Replying affidavit, the Petitioner deposes in addition to grounds of Objection that the Gazette Notice annexed was in respect of Bondo PMCC No. 129/2016 was misleading as the same and not confirm to the parties in the Court register because the deceased in succession cause No.129/2016 is a citation to accept or refuse letters of administration hence the Objector was misleading.

10. That Bondo PMCC Succession cause No. 130/2016 did not have a date when the same was registered in Court, which is mandatory and that he would summon the Executive Officer to produce in Court at the hearing a Succession Register to prove the same.

11. That the Objector took advantage of the old age of Martha Atieno Otoy to file Succession on her behalf and that the said Martha Atieno Otoy did not participate in the said Succession proceedings.

12. That as there was no gazettelement of Bondo PMCC Succession Cause No. 130/2016 and that as gazettelement is Mandatory, the said Succession process is a sham and so the said grant must be revoked.

13. He urged the Court to dismiss the summons for revocation of grant with costs for want of probability. The Petitioner also annexed the citation in Bondo P.M. Succession cause No. 129 of 2016 which has no relation with the late Ogolla Otoy and Martha Atieno Otoy.

14. The Parties made oral arguments to canvass the Summons for revocation of the grant. They reiterated what was contained in their pleadings, affidavit and or grounds of objection as reproduced herein above.

15. In his Ruling made on 1.3.2018 the Learned Magistrate Hon. E.N. Wasike considered all the arguments by both Parties and found that the Objector had an interest in the proceedings hence he had *locus standi* to object.

16. Secondly, that the Objector had demonstrated that he had legally acquired the suit property which the Petitioner had sought to succeed.

17. On the question of different numbers of the Succession causes, it was held that, that was a mere technicality.

18. On whether parcel No. Siaya/Mahaya/ 911 belongs to Joseph Oyuch Owiti it was held that there was land sale agreement between the deceased Martha Atieno Otoy and the Objector over the land parcel No. Siaya/Maya/911 and a transfer effected and title issued in favour of the Objectors, following the right procedures hence it was erroneous for the Petitioner to have enlisted the subject property for succession purposes.

19. The trial Court also found it strange that a child aged 11 years. Ogola Otoy was said to be the registered owner of the subject parcel of land as per the Chief's Letter dated 28.9.2016.

20. Further, he found that the certificate of Official Search dated 12.8.2016 has different descriptions of the subject parcel Siaya/Mahaya/911 on the front part but at the back page it gives the description as Asembo/Mahaya/911, an indication that either of the listed parcel was grafted over another to conceal some material facts and which he found suspicious and of no probative value.

21. He found the application by the Objector meritorious and allowed it, revoking the grant issued on 25.4.2017 and awarded the Objector costs of summons for revocation of the grant.

22. It is the above ruling that provoked this appeal filed on 28.3.2018 by the Petitioner.

23. In the Memorandum of Appeal dated 23rd March 2018. The Appellant Joram Otoy Ojwang appeals against the ruling made on 1.3.2018 by Hon. E.N. Wasike on the following 6 grounds.

- 1. The Learned Magistrate erred in Law in ruling against the Appellant without following the laid down legal procedure.**
- 2. The Learned Magistrate erred in finding that the deceased herein Ogola Otoy could not have been the registered owner of land in question at 11 years old yet the official search filed in court confirmed the same.**
- 3. The Learned Magistrate erred in finding that the Petitioner concealed some material facts yet the official search filed therein on 12/8/2016 clearly indicated the names of the deceased and not the Objector herein and the letter of the Area Assistant Chief dated 28/9/2016 explained the relationship between the Petitioner and the deceased.**
- 4. The Learned Magistrate failed to appreciate the Bondo Succession No. 130/2016 was not gazetted as required by Section 67 of the Succession Act (sic) whose annexure also speak differently but went ahead to justify the same procedural errors and instead nullify Succession Cause No. 328/2016 whose process was legal.**
- 5. The Learned Magistrate erred in finding that the Petitioner included the property which was the Objector's property yet the official search filed with the Petition dated 12/3/2016 shows clearly that the deceased was the registered owner.**

6. The Ruling dated 1/3/2016 is unlawful and contrary to law as the Learned Magistrate upheld/ and or justified errors in succession cause no. 130/2016.

24. The Appellant prayed that the appeal be allowed; the ruling of the lower court dated 1/3/2018 be set aside and that the objector's application dated 10/7/2017 be dismissed with costs to the appellant.
25. The parties filed written submission which they also highlighted on 17/9/2018 on which latter date, the Court reserved this matter for judgment.
26. In the written submissions as submitted orally on 17/9/2018, the appellant's counsel Mr. Oduor holding brief for Mr. Ayoo-See Advocate argued grounds 1 & 4 together, grounds 2&3 together and ground 5 separately. No mention was made on ground 6.
27. According to Mr. Oduor, the Appellant resides on the suit land and that when the Respondent purchased it, he knew that the appellant was and still resides on it, but never approached the appellant.
28. That the Respondent having transferred the land into his name, there was no reason why he objected to the grant. It was submitted that the appellant has no other land apart from the suit land hence the grant should be reinstated to enable him pursue his right before the Environment and Land Court.
29. In the written submissions, it was submitted that **Section 67 of the Succession Act** was flouted in that the Bondo Succession No. 130/2016 was never gazetted. That the Objector was not a party to Bondo Succession No. 129/2016, hence the trial magistrate erred in revoking the grant on grounds 2 and 3. It was submitted that no law in Kenya prohibits a child from being registered as the owner of the land, so long as the legal procedure is followed and more so, as there was no contrary evidence as to who owned the land in question other than Ogola Otoyoyo who was known by the Area local administration as per the Chief's letter dated 29/9/2016.
30. On ground 5, it was submitted that there was no concealment of material facts as the facts allegedly concealed were never disclosed by the trial court.
31. Further, that the Objector meddled with the deceased's estate as he bought it long before succession was filed hence the sale was not proper.
32. That the Petitioner was born in 1953 and he grew up in the said land and lived on it with his step mother Martha Atieno Otoyoyo who is deceased (died aged 90 years) hence the Objector took advantage of her age to get the title to the land while leaving out the Petitioner / Appellant who was in occupation of the said land.
33. That the Objector is the one who filed succession cause no. 129/2016 or 130/2016 not Martha Atieno Otoyoyo and that those proceedings were conducted secretly.
34. Further that the Objector filed a replying affidavit to this appeal introducing new evidence.
35. That the Petitioner intends to file a suit against the Objector for fraudulently acquiring land before the Environment and Land Court hence the revoked grant should be reinstated. Reliance was placed on **KSM HCC Succession No. 1136/2013 Estate of Nahashon Sewe Olweny and KSM HCC 61/2014 – Estate of Wilcah Odera Atoka** (without setting out the relevance of the two decisions to this case). He urged the court to allow the appeal as prayed.
36. In response, the Respondent relied on his replying affidavit filed on 28/5/2018 and his written submissions filed on 19/9/2018. He added that the Appellant was aware that the Petitioner had purchased the suit land but that he walked away.
37. That he only bought a portion of the main land not the homestead, where the appellant resides.
38. The Respondent denied ever intending to evict the Appellant from his land and submitted that there are 3 other people living on the suit land and who cooperated on the subdivision of the land but that the Appellant was troublesome.
39. That he had adduced no new evidence and that there were fabrications on the file; as the Chief's letter and Green card are contradictory.
40. It was submitted that the Death Certificate used to file for succession was forged. That the last born son of Martha was born in 1967 and died in 1982 and not in 1992.
41. That the Respondent paid money for the purchased land to assist Martha succeed her son's property not to meddle in the estate.
42. Mr. Oduor advocate for the Appellant in a brief rejoinder maintained his earlier submissions that the Respondent was adducing evidence which should have been adduced at the trial stage and that there was no corroboration of evidence of fraud on the death certificate.

Analysis and Determination

43. I have carefully considered this appeal in accordance with Section 78 of the Civil Procedure Act, this being first appeal, by re-evaluating and analyzing the lower court record and evidence.

44. I have also considered the written and oral submission made by both parties and the statutory and case law relied on by the parties especially the Appellant.

45. The main issue for determination in this matter emanate from the grounds of appeal as submitted on and which are derived from the ruling of 1/3/2018 made by Hon. E.N. Wasike, SRM, Bondo, PM's court, revoking a grant issued to the Appellant in Bondo PM Succession Cause No. 323 of 2016. However, before I delve into those issues, I must make some factual observations.

46. On 29/11/2016, the Appellant herein filed a Petition No. 323/2016 seeking to administer the estate of Ogola Otoyoy who died on 6/4/1982. Form P&A 80 however, as witnessed by Joseph Otiende and Eunice Achieng Ojwang which bears the name of Ogola Otoyoy as deceased in handwritten form has a different name of the deceased person in typed form who is Philip Otieno Ogutu. The latter name was deleted by pen but retained at a place where he is said to have died on 6/4/1982. The deceased and Petitioner/Appellant are said to be brothers. Form P&A 80 is the Petition for Letters of Administration intestate and therefore, where it is apparent that the names of the deceased on the Petition vary from the death certificate and affidavits in support, in the absence of any correction of the error, any grant issued on the basis of an erroneous deceased person as per the petition is void and amenable for revocation.

47. The assets which were subject of the petition are listed as Land Parcel No. Siaya/Mahaga/911 valued at Kshs. 400,000/= with no liabilities whereas the person surviving the deceased Ogola Otoyoy as per P&A 5 are the Appellant herein Joram Otoyoy Ojwang as brothers and Martha Atieno Otoyoy, Mother – Adult.

48. The Certificate of official search No. 12/2016 on Siaya/Mahaya/911 in the front and Asembo/Mahaya/911 at the back shows that the property was registered on 8.6.1992 being Ogola Otoyoy and on 13/5/2016 a restriction was said to be pending.

49. The death certificate annexed to the Petition is No. 0443581 dated 7/11/2016 for Ogola Otoyoy who died on 6/4/1982 at Mahaya Sub-location aged 11 years.

The question that I must pose here is, how could a person who died on 6/4/1982 have been registered as owner of the parcel of land on 8/6/1992 posthumously?

50. Whereas there is no bar to a minor being registered as owner of land, the big question is whether a person could become registered owner of land ten years after their death.

The other question becomes whether the estate which is subject of this appeal and dispute between the Appellant and the Respondent belongs to one and the same person Ogola Otoyoy the minor who died aged 11 years on 6/4/1982 and later became registered owner of the land Siaya/Mahaya/911 or another Ogola Otoyoy?

51. None of the parties to this appeal have address this mystery. None less, on 22/11/2016, *Form 38* is said to have been thump printed by Marita Atieno Otoyoy, consenting to the Appellant herein Joram Otoyoy Ojwang to obtain letter of administration of the Estate of Ogola Otoyoy who died on 6/4/1982.

52. The Succession Cause was gazetted on 17/3/2017 vide gazette notice No. 2636 and a grant was issued on 25/4/2017.

53. When the Respondent/Objector filed summons for revocation of grant as reproduced in this case, he annexed gazette notice for Cause No. 129/2016 but in his pleadings he stated that the Cause was Bondo PM Succession Cause No. 130/2016. The said cause concerned the Petitioner being Martha Atieno Otoyoy, being the mother to the deceased Ogola Otoyoy who died intestate on 20th November, 1979.

54. All other documents in support of the summons are court documents including *Grant (P&A 41)* dated 2/8/2016 issued to Martha Atieno Otoyoy in respect of the estate of Ogola Otoyoy who died on 20/11/1979 domiciled at Mahaya.

55. A certificate of confirmation was issued on 17/2/2017 to her and the schedule of property in the estate to be administered is Siaya/Mahaya/911 measuring 1.8ha. She was to get the whole share of the estate.

56. It is the same piece of land which is subject of agreement for sale and eventual transfer between Martha Atieno Otoyoy and the Objector/Respondent Joseph Oyuchyo Owiti, dated 22/6/2016 witnessed by the Chief of Asembo Location among other people.

57. On page 1 of the said Sale Agreement, it is indicated that the purchase price was Sh. 245,000/= payment made was Sh. 195,000/= balance of Kshs. 80,000/= was to meet the succession and all necessary process, completion date was to be after completion of necessary documents and process.

58. There is then application for consent to transfer dated 9/3/2017 which was after the certificate of confirmation of grant dated 17/2/2017. Consent was granted on 9/3/2017 and Transfer of Land made on 31/3/2017 as shown by the annexed Transfer of Land form bearing the photograph of the Seller/Transferor and Buyer/Transferee.

59. On 31/3/2017, the Respondent Joseph Oyuchyo Owiti became the registered proprietor of the parcel Siaya/Mahaya/911 measuring 1.8ha whose register was opened on 8.6.1992.

60. Both parties have raised pertinent issues. However, it is not within the province of this court to determine ownership of the land in question. The court will only determine the issues that arise from the trial record as per the grounds of appeal and as argued together.

61. Therefore, on ***Whether the Respondent had locus standi to challenge the grant of letters of administration intestate granted to the appellant***, the Learned Magistrate was of the view that the Respondent/Objector has ***locus standi*** because he had an interest in the parcel of land which was listed as part of the estate of the deceased yet the said parcel of land was transferred and registered in the name of the Objector who bought it from Martha Atieno Otoyoy.

62. The Appellant on the other hand, claims that the Objector was a meddler of the deceased's parcel of land/estate as he took advantage of the age of Martha Atieno Otoyoy aged over 90 years to carry out succession and get title to the land. That he bought the land before succession was carried out.

63. The Respondent contends that he bought the land and paid consideration, part of which was to be utilized to carry out succession of the land.

64. As earlier posed, having established that the succession done by Martha Atieno Otoyoy was in respect of Ogola Otoyoy who died on 20th November, 1971 and not Ogola Otoyoy who died on 6/4/1982, the Trial Magistrate should first have resolved this mystery before delving into issues of ***locus standi***.

65. In addition, the land in question is the same namely: Siaya/Mahaya/911 measuring 1.8 ha. However, going by the dates when the register was first opened on 8.6.1992, it is not possible that Ogola Otoyoy who died on 6/4/1982 could have been alive on 8/6/1992 to be registered owner of the said parcel of land subject of this dispute.

66. The other question is whether the error in the gazette of a wrong succession cause number was fatal to the Respondent's case. Albeit, there is the question of Gazette Notice no. 2404 of 24/6/2016 in respect of Cause No. 129/2016 for Ogola Otoyoy who died on 20/11/1979 and not Cause No. 130/2016, I find that the misdescription of the Cause No. with correct particulars of the Petitioner, estate and date of death is not fatal and therefore a grant would not be void on that ground alone.

67. The Appellant in my view did not demonstrate what prejudice he had suffered by the wrong numbering of the cause as all the other documents refer to Cause No. 130/2016 and as the Objector was not responsible for the wrong numbering, as he was never a party to the cause, I find that the misdescription is a mere procedural error which does not go to the root of the substance of the cause hence it was curable by application of **Article 159 of the Constitution**.

"159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that:-

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

68. In **Nicholas Kipto Arap Korir Salat v IEBC & 6 Others [2013]eKLR**, the Court of Appeal, Ouko J A and Mohammed J A made it clear that default in compliance with rules of procedure may be excused in the interest of justice in accordance with **Article 159 of the Constitution**. The majority judges stated:

"Deviations from and lapses in form and procedures which do not go to the root of the dispute or which do not at all occasions prejudice or miscarriage of justice to the opposite party ought not to be evaluated to the level of criminal offence attracting such punishment of the offending party, who may in many cases be innocent since the rule of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect.

Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

69. In this case, albeit the Appellant claims that the trial magistrate erred in holding that the error in the Gazette Notice was a procedural technicality, my humble view is that it is a mere want of form where the gazette notice cited a wrong cause number but the parties and subject matter were correct. The appellant has not demonstrated that there was no nexus between the Petitioner and deceased in cause No. 130/2016 which was cited by the Objector but which was gazetted as Cause No. 129/2016. It is not shown that the Objector was responsible for the wrong numbering of the cause as he was not a party to the succession cause and even if he was, he was not the Petitioner.

70. Accordingly, I am persuaded that the trial court made no error in holding that the error in the gazette notice was a mere technicality, as the Appellant was in no way prejudiced by the error. It was rather an issue of form than of substance since anybody searching the court register for the succession cause No. 129/2016 would find that the parties are totally different from Cause No. 130/2016 which latter was the right parties. In his replying affidavit the appellant had dared to have the Executive Officer of the Court produce the Court Register to demonstrate that his fears were real but he did not which leaves this court with no option but to conclude that the correction Succession Cause was 130/2016 but the Court presented for gazette notice a wrong cause number. Nonetheless, the grant and certificate of confirmation of grant are in respect of Cause No. 130/2016.

71. In this case, what was critical for the Objector, having regard to the circumstances of the case, was the right to the protection of title to the property which the Petitioner was subjecting to succession proceedings. He was also entitled to the right to a fair hearing for adjudication of disputes which are substantive rights enshrined and guaranteed by the Bill of Rights.

72. Therefore, in my view, allegations of *locus standi* and or wrong cause number being gazetted are procedural technicalities which are abhorred by **Article 159(2)(d) of the Constitution** that justice shall be administered without undue regard to procedural technicalities. Accordingly, ground nos 1, 4 and 6 of the Memorandum of Appeal fail. The same are dismissed.

73. Further, I am of view that any person having an identifiable interest can object to succession proceedings and seek to be heard. The Respondent had demonstrated on a balance of probability that he had sufficient interest in the cause and that an adverse order had been issued affecting the title to land that he had acquired. Whether that acquisition was procedurally done or not is for the court – Environment and Land Court or Subordinate court vested with jurisdiction to hear and make a determination.

74. In succession proceedings, a person who can show that *prima facie*, he has title to the land in question in my view, has sufficient interest to intervene in the proceedings to challenge the grant and seek to be heard on the same because the grant issued after he had acquired title to the land is adverse to his interests. Such person is an independent person who, in my view, should have been joined to the succession proceedings in Cause No. 328/2016. This is so because as at 31/7/2017 the Respondent had title to the disputed land.

75. This then brings me to determine the 3rd issue and question touching on ground No 2 on the age of the alleged owner of the land subject of succession proceedings by both the objector and the Respondent herein. The issue of the consent allegedly given by Martha Atieno Otoyó on 22/11/2016 to the Appellant to carry out succession in respect of Ogola Otoyó who died on 6/4/1982, yet it is the same Martha Atieno Otoyó who had petitioned for letters of administration in respect of the Estate of the Late Ogola Otoyó who died on 20/11/1979 is quite mysterious. In my view, there is every possibility that there are two different persons in the name of Ogola Otoyó because one person cannot die at two different times.

76. However, as the land in dispute is the same and is said to have belonged to the same person Ogola Otoyó who died on two different occasions, the best option for the trial court and this court as a first Appellate court is to revoke the grant issued to the Appellant and allow parties to go back to the drawing board to ventilate their grievances.

77. On the part of the Appellant, he alleges fraud on the part of the Respondent. If that be the case, then the Appellant has an opportunity to file suit before a relevant court to challenge the title issued to the Respondent pursuant to a sale and transfer made by the now deceased Martha Atieno Otoyó.

78. In my humble view, as the Respondent already had title to the disputed land, whether acquired rightly or otherwise, he requires no letters of administration to object to the grant issued to the appellant, unless it was shown that the land was still registered in the name of Martha Atieno Otoyó in which event, the succession process would have been commenced by the appellant in respect of the Estate of Martha Atieno Otoyó and not Ogola Otoyó.

79. What the Objector needed to demonstrate was that *prima facie*, the parcel of land named by the Petitioner was not part of the deceased's free property and therefore not available to the Administrator of the Estate and that the Objector would lose his right to the property to which he was the registered proprietor, upon the transfer in his favour, upon purchase from Martha Atieno Otoyó. The Petitioner/Appellant would then have the right to be heard on the allegation that the sale and transfer of the said land was fraudulent. This is so because **Section 26 of the Land Registration Act** stipulates that a registered proprietor's title can only be defeated in accordance with the Act. The section provides:

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the personas proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except; -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party;

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

80. In my view, to hold that the Respondent had no *locus standi* in the matter, is tantamount to denying the Respondent an opportunity to ventilate his grievance before a court of law as contemplated in **Article 50(1) of the Constitution** that: -

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

81. Therefore, it is my finding and holding that as the Objector had an identifiable stake and a legal interest in the property subject of the succession proceedings conducted by the Appellant, he had an interest in those proceedings and therefore the **locus standi** and he did not require any other separate grant to give him **locus standi** to challenge the succession proceedings commenced by the Appellant.

82. On ground no 2, I have already found that albeit a minor can be registered as proprietor of land, but such registration of a minor must be clearly stated in the register that the proprietor is a minor since a minor would not have the capacity to transfer title to any person. However, in this case, the appellant failed to demonstrate that the person in the name Ogola Otoyoy who was registered owner of the title on 8/6/92 was one and the same person as Ogola Otoyoy who died on 6/4/1982.

83. A person could not have been registered as proprietor of land after his death. Even the Assistant Chief's letter of 28/9/2016 could not cure the defect. Accordingly, ground no 2 and 3 fails and the same are hereby dismissed.

84. One the ground that the trial court erred in finding that the Petitioner included the property which was the Objector's property yet the official search filed dated 12/3/2016 shows that the deceased was the registered owners, I have already, in my analysis found that the deceased could not have been the registered owner of property long after his demise. Secondly, that in any event, as at the time the grant was issued to the appellant, on 17/4/2017 the said property, as described on the Search Certificate issued on 12/3/2016, had already been transferred to the Respondent on 31/3/2017 and therefore by virtue of **Section 26(1)(a) of the Land Registration Act**, a registered proprietor's title can only be defeated in accordance with the Act.

85. This is because such registration or certificate of registration **shall be taken by all courts as prima facie evidence that a person named as proprietor of the land is the absolute and indefeasible owner subject to encumbrances, easements and conditions.....except on the ground of fraud, misinterpretation to which the person is proved to be a party or where such certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.** Accordingly, ground 5 of the appeal fails and is dismissed.

86. The court further observes that the parties in the oral submissions tended to adduce fresh evidence of which in the view of this court is irrelevant at this stage as this court is not determining ownership or occupation of the suit land. Such issues are in the province of the Environment and Land Court.

87. Therefore, on what orders this court should make, the court finds that on the whole, the appeal has no merit and the same is dismissed. The Appellant has an opportunity to challenge the title which is registered in favour of the Respondent vide proceedings before a court of competent jurisdiction. Accordingly, the ruling of the trial court is upheld. The grant stands revoked.

88. The respondent shall have costs of the summons for revocation of the grant in the court below and of this appeal.

89. Orders accordingly.

Dated, signed and Delivered in open court at Siaya this 26th Day of November, 2018.

R.E. ABURILI

JUDGE

In the presence:

Mr Mbeka h/b for Ayoo See Advocate for the Appellant

Joseph Oyuch Owiti Respondent in person

CA: Brenda and Modestar