



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**MISC CIVIL SUIT NO. 3 of 2018**

**IN THE MATTER OF THE ESTATE OF AMINA WAKIO JUMA**

**MWAKINCHILELE also known as AMINA BINTI ABDALLA**

**AND**

**IN THE MATTER OF THE ESTATE OF JOHNSTONE CHAWANA MAGHANGA**

**BETWEEN:**

**ALFRED MAGHANGA CHAWANA.....APPLICANT**

**AND**

**SWALEHE KASSIM KISOI.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR TAITA TAVETA.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The Court has before it an Application filed under Certificate of Urgency seeking ex parte Orders against both the Respondents. The Application is dated 28th February 2018 and was filed on 1st March 2018. The form of the Application suggests that the Applicant was seeking final orders without the Respondents having an opportunity to be heard.

2. The Application seeks orders THAT:

*"1. This application be certified as urgent and its service be dispensed with in the first instance.*

*2. The the 1st respondent be compelled to surrender Land TITLE Deed - Parcel No. Taita-Taveta/Upper Kariakor/8 to the 2nd respondent*

*3. That the 2nd respondent be compelled to transfer the subject land parcel as per the Certificate of confirmation of a Grant issued by the High Court of Kenya at Voi on 31st January, 2018*

*4. That the costs of the application be provided for."*

3. The Grounds relied upon appear on the face of the Application and are that:

"1. The Applicant is the administrator of the estate of the late Amina Wakio Juma Mwakichilele alias Amina Binti Abdalla who is the registered proprietor of parcel of land title no. Taita-Taveta/Upper Kariakor/8.

2. The 1st respondent falsely presented himself to the 2nd respondent's office claiming to be the administrator of the subject land parcel and was issued with the said land title deed

3. That the 2nd respondent erroneously issued the 1st respondent with the said land title deed having falsely presented himself as the administrator of the subject land parcel

4. The Certificate of Confirmation of a Grant in respect of the subject land was issued on 31/1/2018 but the 2nd respondent is yet to transfer the subject land title as per the certificate of confirmation of grant.

4. The Applicant has also filed a supporting affidavit on which he relies. In that Affidavit he states that he is the administrator of the estate of late Amina Wakio Juma Mwakichilele Alias Amina binti Adballa who is the registered proprietor of the parcel of property in dispute. He says he was issued with letters of Administration and a Certificate of Confirmation of Grant on 31st January, 2018. In fact, the Applicant did Petition for letters of administration and the letters of administration issued were issued to two individuals, the Applicant and his mother Flora Ngumbi Chawana. She is the purported beneficiary under the Certificate of Confirmation and she is the person in whose name the property was to be registered. She has not participated in the Application at all.

5. The Applicant relates that he attempted to have the property in dispute registered in the name of his mother and that he was informed by the Land Registrar that he (the Land Registrar) had erroneously issued the title deed to the First Respondent. In fact, no title deed was ever issued in the name of the First Respondent. The Applicant says on oath that the First respondent "*had falsely presented himself as the administrator of the land parcel*". He does not explain how he knows that is what happened. He also says that the Land Registrar wrote to the First Respondent "*ordering him to surrender the title deed...*" There is no timescale given to these events however the Applicant relies on his **Exhibit AM 3**. Exhibit **AM-3** is a letter from a Sego Manyarkiy, Land Registrar Taita Taveta District demanding that the First Respondent surrender the title deed with which he was issued on 3rd August 2017. The author asserts that the First Respondent made false assertions and the title deed was issued "erroneously". The Letter contains the threat that unless its directions are complied with, criminal proceedings will be instituted. Exhibit **AM 4** shows that the First Respondent replied to the threatening letter by asserting that he challenged the assertion that the title deed was obtained through illegal means. He states in the letter dated 13th February 2018 that "*I personally presented my documents in the lands office in voi for me to acquire the title deed which I was given ... after the lands officer carefully checked all my documents...*" Those documents included the last will of Amina Abdalla (Amina Wakio Juma Mwakichilele) who was his grandmother. He said that in the Will he was given authority over the property in dispute and he inherited it. Exhibit AM 5 shows that on 23rd February 2018 the Land Registrar wrote to "**THE OCS VOI**" requesting that the OCS assist the Administrators of the deceased to get back their title.". That request is interesting as it does not include a request that the Police make the appropriate inquiries. The OCS Voi did not comply with that request, if in fact the letter was ever sent.

6. The Certificate of Urgency came before Hon J. Kamau J for hearing on 1st March 2018. She declined to certify it as urgent. She ordered the Applicant to serve the Respondents. She listed the matter for direction on 9th April 2018. The First Respondent was not served until 4th April 2018 which was just before Easter Weekend and so he was unable to obtain any legal advice or assistance. He requested more time to deal with the Application.

7. It seems that the Matter was fixed for directions on the ex parte application of the Applicant without the authorisation of the Hon Deputy Registrar or anyone acting on his behalf. In the circumstances, the Respondents were not served with any notices. On 4th June 2018, the Matter came before the Court as currently constituted. Unsurprisingly, the Respondents did not attend since they had not been notified. The Court directed that the matter be re-listed and Hearing Notices be served on the Respondents. The Lands Registrar was also directed to attend Court with the relevant file. To his credit he did so. Mr Sego Manyarkiy informed the Court that it was correct that the First Respondent did attend the Offices of the Lands Registry and he was issued with a title deed. The documents he produced were a Letter from the Chief and a Will. Mr Manyarkiy also explained that in fact there was no mistake or fraud because the title deed issued was issued in the name of the Deceased who was the original owner of the property. He has filed an Affidavit on 9th August 2018, as directed by the Court, setting out his version of events. The Applicant informed the Court that he too had an original copy of the Will naming his father as sole beneficiary.

8. On that date the Court made the following order:

*"1. Confirmation of Grant stayed pending validation of the Will of the Deceased*

*2. Both Parties to attend Court with their own copies of the original will on 17th July 2018*

*3. Summons do issue to ensure the attendance of Mr Swahle Kassim Kiso on that day..."*

9. The Court eventually heard from the First Respondent on 17th July 2018. He informed the court that he did not understand why he was being called to a case at Court. He was not informed of any proceedings before. He said that the Deceased was his grandmother in that she was the sister of his maternal grandmother. He said he was the heir of the Deceased. He said that he knew the Applicant's Father. He was a tenant of Amina Binti Abdalla and who owed arrears of rent. He was removed and the property he occupied seized. The matter was dealt with through an advocate.

10. In his Affidavit Mr Manyarkiy states; "*THAT I swear this affidavit to confirm to this court that nothing fraudulent or wrong has been done as far as parcel No. TAITA TAVETA/UPPER KARIOKOR/8 is concerned.*".

11. The Applicant and First Respondent on 26th July 2018 submitted the following documents to the Court:

#### Applicant

(1) Laminated Copy of document alleged to be the original will of Amina Binti Abdalla dated 10th May 1985 purporting to bear the thumb print of the Deceased and the signature of the beneficiary, said to be sworn before the "Resident Magistrate's Court" in Voi.

(2) Document purporting to be original death certificate of Amina Abdalla Deceased Serial No 378413 dated 18th May 1993 issued on the 16th September 1997 which records the date of death as 16th April 1993 when the Deceased was said to be 40 years old at the time of her death.

(3) Laminated Copy of a Letter dated 4th September 2013 from a B. Mwanzi claiming to be the Town Clerk of the Municipal Council of Voi setting out that the beneficiary of the Deceased Amina's property was Mr. Johnstone. Chawana Maghanga of P.O. Box 18, Voi.

#### First Respondent

(1) Note relating to criminal report against the Applicant's Father for forgery (OB No 42/2/09) Complaint made by First Respondent c/o P.O. Box 29 VOI. He complains that he was given a forged death certificate for Amina Juma by the Voi Kariokor Land Committee which was produced by Johnson Chawana who was laying claim to the property in dispute.

(2) Laminated Copy of a document purporting to be the true death certificate of the Deceased Amina Juma who is said to have died on 27th June 1994 aged 75 years after suffering from cerebral malaria. That certificate was issued on 12th April 2018 together with an earlier copy of the same document issued 16th September 2008 (Serial No 375268). In one the occupation of the Deceased is "Village Elder" and in the other it is recorded as Elderly"

(3) ID Surrender Form form dated 16th September 2008 showing that the Deceased was born in 1919 and died on 27th June 1994. together with a copy of the surrendered ID card.

(4) Copy Burial permit Serial No C 867228 dated 27th June 1994;

(5) Letter from Minister of Lands to Commissioner of Lands dated 20th February 1985 authorising him to arrange for direct allocation to the 57 colonial allottees together with a receipt dated 7th march 1960 showing allotment to the Deceased Amina Binti Adballa

(6) Copy Letter from Town Clerk to District Lands Office dated 3rd April 2001 Reference NOV/10/26/(71) confirming that the Deceased Mrs Amina Juma was the bona fide owner of Plot No 4 Upper Kariakoo, together with a copy of her will.

(7) The Copy of the Will shows that it was drawn by a R.M. Kitologo Advocate and was signed by Amina Juma by affixing her left thumb print. In it she expressly bequeaths her two properties and household items to the First Respondent absolutely. It also expressly states that *"In this will I renounce any claim made by Johnstone Chawana Mganga upon my house above referred to. I state categorically that any document purported signed by me were done so when I was not of any disposing mind due to long illness"*. This copy of the will is dated 18th September 1978. It is said to have been sworn before the a Resident Magistrate in Mombasa on 15/09/1978.

(8) A copy of a Caveat Emptor prepared by the First Respondent and/or his lawyer on 31st July 2014, dated 28th September 2015 and filed at the Law Courts on 1st October 2015.

12. The First Respondent also filed a Replying Affidavit but for reasons which are unclear it is not stamped. In it he sets out that he is the Grandson of the Late Amina Wakio Juma Mwakichelele. He says he is her heir pursuant to her will dated 24th September 1993. He explains that Plot No 4 described in earlier documents was surveyed on 24th June 2001 and the parcel was given a new No namely TAITA TAVETA/UPPER KARIAKOR/8 (the Property in dispute). That suggests the property in dispute did not bear that number until 2001. He states he is also heir to other real property. He says that he began construction on the property in dispute in September 2008 but Johnston Chawana orchestrated and/or incited others to demolish the house at night. As a consequence of a report to the Police Johnstone Chawana was arrested and charged before the SRM's Court at Voi for malicious damage to property contrary to Section 339(1) of the Penal Code. **Case No. 827 of 2008.** At paragraph 8 of the Affidavit the Deponent states that Johnstone Chawana was a tenant of his late grandmother. he defaulted on payment of rent and was evicted and his salary attached for non-payment of rent. He never paid the outstanding rent. The Deponent states, "Even after being charged for malicious damage in 2008, the same Johnstone Chawana, in 2009 went on to forge documents.." one example given is the death certificate No 378413 issued on 16th September 1997 when he recorded the deceased as having died on 16th April 1993 aged 40 years when she was still alive. That forgery was reported to the Police. Johnstone Chawana was arrested and charged but the matter was not completed before Johnstone Chawana died on 11th October 2014.

13. The Deponent also states that he collected the title deeds after the village elder announced that they were ready for collection. The Letter received from Sego Manyarkiy was received a year and a half later.

14. The First Respondent also says that he was shocked to learn that the Widow of Johnstone Chawana, FLORAH NGUMBI CHAWANA filed a Succession Case No 1 of 2014. He says he had no notice of those proceedings. He also says that the death certificate and other documents used by Alfred Maghanga Chawana and Florah Ngumbi Chawana are the same forged documents produced by Johnson Chawana. It is his prayer that the orders made in the Succession Cause are revoked.

15. In order to decide whether or not the Applicant is entitled to the Prayers in the Application the Court must make findings on the allegations made by the First Respondent. The Court takes cognisance of the fact that there was nothing wrong in relation to the issuance of the title deed in the name of the Deceased pursuant to the Development Plan for the Area.

16. The starting point must be the Petition. The Petition was filed by Johnstone Chawana Maganga on 20th June 2014 he was applying for Probate with Written Will annexed. The documents he annexed were (1) a copy of the death certificate recording that Deceased had passed on 16th April 1993 aged 40 years. If that was true she would have been around 10 years old when she acquired the property in dispute. The Court has now received evidence that she was alive on that date. In the circumstances, that document cannot be conclusive evidence without further inquiry. The Petitioner (Johnstone) alleged that the Deceased left a Will dated 13th May 1985 but at that time the property may have had a different number. An original copy of the Will was not lodged with the Court for the purposes of verification. What is attached is a copy certified by an Advocate. The copy is illegible and what purports to be the seal of the Resident Magistrate does not seem to bear the Court of Arms. The alleged beneficiary has also signed the Will. The Schedule of Assets also omits two other properties owned by the Deceased.

17. The Learned Judge did not go through any process of verification of the Will before she issued Letters of Administration. She did not ask for sureties to protect the Estate. In addition, from the record it appears she did not question why there were no members of the direct family of the Deceased named in the Petition or the consents. The process that was followed was (1) Johnstone Chawana filed a Petition. The Petition was defective. There was no original will and there were no sureties.

18. Thereafter, Johnstone Chawana passed away. His Widow and Son made what seems to be an oral application to be substituted and that prayer was granted. Again, that process was defective because (1) the substitution was done without any process of administration on the Estate of Johnstone Chawana. There were no letters of Administration, nor were there any letters of administration ad litem issued. In the circumstances the Applicants there had no locus to be substituted. Further, and more importantly, the process of obtaining letters of administration is a process whereby the Court must ascertain and verify the bona fides of the proposed administrators. It is a right *in personam*. The Court must decide whether the individual Petitioner is a fit and proper person to administer the Estate. That is not a characteristic that is inherited automatically. Therefore there cannot be substitution into a petition simply by reason of being a widow or son.

19. The Court was then charged with ascertaining whether any other proceedings existed for the same estate. Again that process was flawed. The inquiry sent to the Principal Registry by the Executive Officer of this Court contains numerous typing errors. The most fundamental being that the name of the Deceased was misspelled and incomplete. In addition the address used is the same as the Petitioner but that was not correct. In addition, if the First Respondent is to be believed the date of death is also incorrect. Therefore any verification received to say there were no proceedings cannot be relied upon. In the circumstances, the First Respondent has good grounds for asking the Court to revoke the Letters of Administration that were issued.

20. Moving onto the issue of the Certificate of Confirmed Grant. Having issued the Letters of Administration by the flawed process set out above in November 2017, the same Court confirmed the Grant on 29th January 2018, the same Court. That was much earlier than the prescribed 6 months period. The Applicant did not use Form C 109 as required and the Court gave no reasons why the Applicant should not have to wait 6 months. Interestingly, the Schedule of Assets values the estate at KShs.300,000 yet it was issued in and proceeded in the High Court. Again, the record shows that the Court simply assumed that the property of the Deceased Amina Juma had automatically vested in Johnstone Chawana and was available for distribution to his heirs without any need for them to apply for probate/letters of administration of that Estate. It is clear that approach was followed because when the Learned Judge called for the consents of the siblings of the Applicant she did not call for the consents from the blood relatives and descendants of the Deceased Amina Juma namely the First Respondent and his family.

21. In the circumstances, it is clear to the Court that the First Respondent was excluded and knowingly so in the succession proceedings of an Estate to which he asserts that he is entitled, in which he could be a dependent and thereby challenge any disposition. The Applicant participated in that exclusion and in effect the misleading of the Court. He cannot show clean hands.

22. For those reasons, this Court has no option but to revoke the Letters of Administration issued on 2nd November 2017. The Certificate of Confirmation of Grant confirmed on 29th January 2018 and issued on 31st January 2018 is also revoked. Any steps taken and disposition or attempted disposition are stayed and reversed hereby.

23. In the circumstances of those orders, the Applicant has no locus to demand the orders he seeks in his ex-parte Notice of Motion. The Application dated 28th February 2018 and filed on 1st March 2018 is dismissed with costs.

24. It is further ordered that this matter be referred to the County Criminal Investigating Officer for a **full** investigation inquiring into which of the documents produced to the Court are true documents and which are forgeries. Further as to the authors of such forgeries and what, if any criminal proceedings have been pursued against them. The results of that investigation to be reported to this Court. Such report to be filed on or before the 20th day of January 2019.

25. A copy of this Judgment and Order to be served on the Lands Registrar and a further copy of the Order to be served upon the County Criminal Investigating Officer.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**SIGNED DATED AND DELIVERED ON THIS the 22nd day of November 2018.**

In The Presence of :

Court Assistant: Simon Tsehlo

Applicant: Mr Alfred Chawana Maghanga in person

1st Respondent: Mr Swalehe Kassim Kisoi in person

2nd Respondent: No Appearance