



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 744 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE ASMAN NAMBWAYA SHIBWABO.....DECEASED**

**AND**

**CHARLES OMERY KWANGOTO.....PETITIONER**

**VERSUS**

**HALIMA WANGA NAMBWAYA.....OBJECTOR**

**RULING**

1. The objector / applicant has filed an application dated 8<sup>th</sup> November, 2016 seeking for orders that:-

1) Spent

2) Spent

3) That the grant of letters of administration issued to the petitioner herein on 1<sup>st</sup> December, 2014 in respect of the estate of the deceased herein be revoked and or annulled and all the subsequent orders made pursuant to the said grant be set aside and this matter be stayed considering that there is already a certificate of confirmed grant from Bungoma Kadhis Court over the same subject matter as herein in Succession Cause Number 11 of 2015.

4) That upon granting order number 3 herein above this honourable court be pleased to make a declaratory order that any purported land sale agreement and especially the one entered between the petitioner herein, Haji Shibwabo Nambwaya and Rashid Mukanda Nambwaya on the 12<sup>th</sup> July, 2014 or any other date over the deceased's land comprised in land reference number North Wanga/Kholera/861 was illegal, null and void ab initial as there was no grant of letters of administration intestate in favour of the said vendors to have the locus standi and legal capacity to sell the said land.

5) That in the event the petitioner or his representatives who may be claiming through him disobeys the orders sought in prayer number 2 hereinabove, the officer commanding Mumias Police Station, Harambee Police Patrol Base or officers delegated under their command or any officers attached at the Assistant County Commissioner's office Matungu sub county be ordered to ensure that the said orders are executed and complied with.

6) That the petitioner be ordered to pay the costs of this summons.

7) Any other relief this honourable court deems fit and just to grant.

2. The application is premised on the grounds on the face of the application and supported by the affidavit of the applicant.

3. The applicant contends that she is a widow to the deceased herein. That the petitioner herein has no relationship with her late husband. That the petitioner fraudulently filed this succession cause without her knowledge and consent after colluding with two sons of the deceased, Haji Shibwabo Nambwaya and Rashid Mukanda Nabwaya. That the said sons have sold part of the estate of the deceased to the petitioner while they do not possess any grant of letters of administration on the estate of the deceased thereby disinheriting the applicant and other beneficiaries of the estate. That she ranks higher in law and fact to file and take out letters of administration than the petitioner who is a total stranger and intruder to the estate of the deceased. That the petitioner's actions amounts to intermeddling with the deceased's property. That the deceased was a muslim and she had already taken out grant of letters of administration to the estate of the deceased at the Kadhis' court at Bungoma vide succession case No. 11 of 2015. Therefore that the grant of letters of administration issued to the petitioner should be annulled and revoked.

4. The application was opposed by the petitioner through his relying affidavit deponed on 13<sup>th</sup> February, 2017 and vide the affidavits of the two sons of the deceased, Haji Shibwabo Nambwaya and Rashid Mukanda Nambwaya. The three contend that the estate of the deceased was sold to the petitioner with the consent of the objector (applicant). That they and the objector all gave consent to the petitioner to file a succession cause, fund the case and to administer the estate of the deceased.

5. The two sons of the deceased state that the petitioner has paid them a total of Kshs. 1,700,000/= for the land the family sold to him. That all the family members shared out the money and used part of the money to educate their younger brother and sister. The two brothers now state that they are surprised that their mother, the objector, has disowned the whole process. Haji attributed this turn of events to what he called mental instability of his mother.

6. The petitioner and the two sons of the deceased, Haji and Rashid, annexed to their affidavits copies of land sale agreements entered into between the three of them.

7. The court has perused the court file. The file indicates that the petition for grant of letters of administration by the petitioner was accompanied by a letter from the chief and a consent of the beneficiaries consenting to the letters of administration being granted to the petitioner herein. The chief's letter named the beneficiaries of the estate as:-

- Alima Wanga Nambwaya

- Charles Omery Kwangoto

- Haji Shibwabo Nambwaya

- Rashid Mukanda Nambwaya

- Juma Siro

- Musa Opini

8. The said consent indicates to have been signed by the petitioner and thumb printed by the objector and Haji Shibwabo and Rashid Mukanda. The same declared that the petitioner herein was a son to the deceased.

9. The petition was also accompanied by an affidavit in support of petition for letters of administration intestate form P & A 5. It declared that the petitioner herein was a son to the deceased.

10. The petition itself form P & A 80, stated that the petitioner was presenting the petition in his capacity as "son of the deceased".

11. After a grant of letters of administration was issued to the petitioner, the petitioner filed summons for confirmation of grant. It was accompanied by a consent to confirmation of grant that indicates to have been signed by the petitioner and thumb printed by the objector herein and the above said Haji and Rashid.

12. The objector/applicant now denies that she ever at any time gave consent to the petitioner to file the petition. She contends that she never participated in the alleged sale nor received any proceeds of money realized from the sale. She denies that the proceeds of sale was used to pay school fees for any of her children as alleged by Haji and Rashid. She contends that the documents she is alleged to have thumb printed are a forgery.

### Submissions

13. The advocates for the objector, **Elizabeth Chunga & Co Advocates**, in their submissions reiterated what the objector averred in her various affidavits. The advocates stated that the petitioner herein had no relationship with the deceased. That the objector never gave consent to the petitioner to file the succession cause. The petitioner had no capacity to file the succession cause as he was a stranger to the estate of the deceased and impersonated himself as a son to the deceased. That the act of the objector's sons of selling the estate to the petitioner when they did not have grant of letters of administration amounted to intermeddling with the estate of the deceased. That the objector could not have signed a consent in the matter allowing the petitioner to be given a confirmed grant of letters of administration yet she had filed another petition for letters of administration before the Kadhi's court over the same estate at Bungoma Law Courts. The advocates submitted that the petition was filed without consent of the objector and the grant obtained through concealment of material facts. That the land sale agreements entered into between the petitioner and the deceased's sons outside the grant pertaining to the deceased's land was illegal, null and void. The act of intermeddling with the property borders on criminal offences punishable by law.

14. The advocates cited the case of **Absaile Kagali Ndeda Vs Herbert Getenya Ndeda & Another, Kakamega succession cause No. 317 of 2009**, where this court held that an intermeddler of an estate cannot enforce an illegal agreement against the estate of a deceased person.

15. The advocates for the objector, **Onindo Onindo & Associates Advocates**, submitted that the sale of the land to the petitioner was initiated by the objector and supported by her and her sons. That the parties gave consent to the petitioner to file the succession cause. That it was on that strength that the area chief issued a letter to the petitioner for purposes of filing the succession cause. That as the objector participated in the process, she is estopped from bringing these revocation proceedings. That the petitioner filed the succession cause in court with clean hands and with no ill intentions whatsoever. That the petitioner was even allowed to transfer the land to himself without any impediment. That it was with the consent and co-operation from the family members of the deceased that the administrator would take up the entire process of administration of the estate of the deceased. That it is surprising that the objector moved to the Kadhi's court while her sons

were signing sale agreements with the petitioner.

16. The advocates submitted that the objector cannot argue that she ranks first in priority to succeed her husband when she participated in the process as commenced by the administrator and benefitted from the money paid by the administrator. That none of the children of the objector has come out to support her in these proceedings. That the petitioner in filing the succession cause did not deceive the court in any way.

17. The advocates cited the case of **Beth Kari & Another Vs M’Nyeri M’ Rimunya (2013) eKLR** where it was held that a court is required to take a broad view of justice and take into account all the necessary circumstances, factors and principles and be satisfied at the end of the exercise that it has acted justly.

### **Determination**

18. The questions for determination are:-

- 1) Whether the objector participated in the process of selling the land in issue to the petitioner.
- 2) Whether the objector gave consent to the petitioner to file the succession cause.
- 3) Whether the grant issued to the petitioner was obtained fraudulently.

19. The deceased in these succession proceedings had passed on when the petitioner bought part of the estate from the sons of the deceased. The petitioner and those who sold the land to him contend that the objector participated in the process of selling the land to the petitioner. The objector denies having done so.

20. The sale agreements annexed to the affidavits of the petitioner and the vendors indicate that the payments for the sale of the land were made between 12<sup>th</sup> July, 2014 and 30<sup>th</sup> July, 2016. The agreements were made on various dates at the offices of two advocates, **D. Akwala Advocate** and **Momanyi Birundu Advocate**. Each of the agreements is indicated to have been witnessed by some people none of whom was a beneficiary to the estate of the deceased. In all the sale agreements that were placed before the court the objector was not a party to them nor was she present when they were entered into. The question then is why the objector was not made a party to the agreements if she had indeed consented to the sale. Why was she not even called to witness the agreements? Why would the sellers call total strangers to the estate to witness the sale instead of calling the beneficiaries to the estate? This is a clear manifestation that the land was sold to the petitioner by Haji and Rashid behind the back of the objector. There is nothing to prove that the thumb prints on the consent forms belong to the objector. There is nothing to prove that the objector benefitted from the money paid by the petitioner to the vendors.

21. The consent form to the making of a grant filed with the petition is dated 26/8/2014 while the consent to the confirmation of grant is dated 23/7/2015. Both documents are indicated to have been thumb printed by the objector. The certificate of confirmation of grant issued by the Kadhi’s court at Bungoma indicates that the said matter was filed there in 2015. Why would the objector give consent to the petitioner to file a succession cause at Kakamega and then move to file another succession cause at Bungoma?

22. When applying for grant of letters of administration the petitioner declared that he was a son to the deceased. He declared the same thing in his affidavit in support of summons for confirmation of grant. The petitioner has admitted in his replying affidavit to the objection proceedings that he is not even a relative to the deceased, leave alone being a son to the deceased. The petitioner then obtained the grant by making of a false statement that he was a son to the deceased. That the petitioner made such a false statement supports the assertions by the objector that she did not give consent to the petitioner to file the succession cause. The petitioner and the sons to the objector must have colluded and forged documents to show that the objector had given consent to the objector to file the succession cause.

23. In law, the objector as the widow to the deceased ranked in priority to anybody else in filing for grant of letters of administration. Section 66 of the law of Succession Act (Cap 160 Laws of Kenya) states that:

*“ when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-*

*(a) surviving spouse or spouses, with or without association of other beneficiaries,*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V;*

*(c) the public trustee and*

*(d) creditors.*

24. The petitioner did not buy the land from the deceased and he was therefore not a creditor to the estate of the deceased. The petitioner could not rank in preference to the objector in applying for grant of letters of administration.

25. Even if there was an agreement between the parties for the petitioner to file a succession cause on behalf of the beneficiaries of the estate of the deceased, the petitioner could not apply for the same in priority to the objector unless the objector renounced her right to apply for

letters of administration intestate as required by Rule 18(1) of the Probate & Administration Rules. The objector was required to sign form 98 of the first schedule to the Probate & Administration Rules renouncing her said right. The objector in this case did not sign such a form. The act by the petitioner to apply for grant of letters of administration when the objector had not renounced her right to do so was an illegality.

26. The petitioner bought land from the estate of the deceased from sons of the deceased who at the time of sale did not possess grant of letters of administration to the estate par 32.

27. The advocates for the petitioner in their submissions stated that the estate has been transferred to the petitioner. The objector stated in her further supporting affidavit sworn on 21<sup>st</sup> February, 2017 stated that the petitioner has entered into the land and ploughed it. Section 45 of the law of succession Act states that:- “ (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

28. When the petitioner bought the land, he arranged with the vendors that he will file a succession cause. The petitioner therefore knew that the vendors did not have a grant of letters of administration when he bought the land from them. The petitioner has thereby inter meddled with the estate of the deceased by buying it from persons who have no grant of letters of administration , by taking possession of it and by transferring it to himself. The petitioner and the people who sold him the land are guilty of intermeddling with the estate of the deceased. In **In the matter of the estate of Veronica Njoki Wakagoto (deceased) 2013 eKLR**, Musyoka J. said the following in relation to Section 45 of Law of Succession Act:

*The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.*

29. In this matter the sale agreement between the petitioner and the vendors was illegal and was in contravention of the law. The petitioner cannot purport to enforce an illegal agreement against the rights of the objector.

30. The documents filed in support of the petition shows that the deceased had left behind two minor sons. Where there are minors in an estate, a grant of representation cannot be issued to a single person as a continuing trust is bound to ensue. Section 58 of the Law of Succession Act provides that:-

(1) Where a continuing trust arises:-

(a) No grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the public trustee or a trust corporation.

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.

31. In this case there were minors who were beneficiaries to the estate. It is clear from the provisions of sections 58, 71 (2A) and 75 A (1) of the Laws of Succession Act that an administrator of an intestate estate cannot deal with an estate single handedly where there is a continuing trust. The petitioner, even if he had a right to apply for a grant of letters of administration, was required to appoint one other person to protect the interests of the minors failing which the court would appoint a person(s). The petitioner proceeded to intermeddle with the estate where there was a continuing trust.

32. Section 76 of the Law of Succession Act states that:-

*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.

33. Rule 73 of the Probate and Administration Rules grants the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

34. The petitioner and his accomplices, Haji and Rashid are guilty of intermeddling with the estate of the deceased. The petitioner obtained the grant fraudulently by making of a false statement that he was a son to the deceased. There is another grant issued by the Kadhi's court over the same subject matter. The estate cannot be distributed if the petitioner is in illegal occupation of the estate and when he has transferred the estate to himself. For these reasons the grant ought to be revoked. It is at the same time imperative for the court to make orders to revert the land to the deceased so as to enable smooth distribution of the estate. The petitioner should wait until when the estate is distributed for him to claim his due from those he bought land from.

35. In the foregoing the application by the objector is merited. The court thereby makes the following orders:-

*(1) The grant of letters of administration issued to the petitioner herein on 1<sup>st</sup> December, 2014 in respect to the estate of the deceased herein is hereby revoked and annulled.*

*(2) All subsequent orders made pursuant to the said grant are hereby set aside and any subsequent action and/or transfer made in respect to land parcel North Wanga/Kholera/861 pursuant to the said grant is hereby annulled and revoked.*

*(3) The title to land parcel North Wanga/Kholera/861 is hereby ordered to revert to the deceased **Asman Nambwaya Shibwabo**.*

*(4) The purported sale of land parcel North Wanga/Kholera/861 by Haji Shibwabo Nambwaya and Rashid Mukanda Nambwaya to the petitioner herein is hereby declared to be null and void.*

*(5) The petitioner is ordered to vacate forthwith any occupation of land parcel North Wanga/Kholera/861 and/or any land resultant from the subdivision of the said land parcel, if any, and if he or his representatives refuses to do so the Officer Commanding Mumias police station is hereby ordered to ensure compliance with the order.*

36. In this matter, it is the law of succession that was applicable. I am satisfied that I have acted justly.

Orders accordingly. The petitioner to bear the costs of the application.

**Delivered, dated and signed in open court at Kakamega this 22<sup>nd</sup> day of November, 2018.**

**J.NJAGI**

**JUDGE**

In the presence of:

No appearance .....for Petitioner

Mrs. Change.....for Objector

George.....Court assistant

**Parties**

Petitioner- absent

Objector- absent