



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 398 OF 2012

(ALSO KNOWN AS SUCCESSION CAUSE NO. 12 OF 1991)

IN THE MATTER OF THE ESTATE OF THE LATE MUTANDA WERE...DECEASED

AND

CATHERINE NYAORO ALOO.....1ST APPLICANT/OBJECTOR

LUCY ANYANGO ONYANGO.....2ND APPLICANT/ OBJECTOR

VERSUS

OWINO MUSUMBA.....RESPONDENT/PETITIONER

AND

GRACE NEKESA.....INTERESTED PARTY

RULING

(SUMMONS FOR REVOCATION OF GRANT DATED 15TH MAY, 2011)

1. This ruling answers the Objectors' summons or revocation for annulment of grant dated 15th May, 2011. The application is brought under Section 76 of the Law of Succession Act, Cap 160, rules 44 and 73 of the Probate & Administration Rules, sections 28, 119 and 143 of the Registered Land Act, Cap 300 (now repealed) and sections 1A and 3A of the Civil Procedure Act. Through the application, Catherine Nyaoro Aloo (the 1st Objector) and Lucy Anyango Onyango (the 2nd Objector) pray for orders as follows:

“1. That the grant of letters of administration to Owino Musumba herein and confirmed on 12.5.1993 be and is hereby revoked forthwith.

2. That the registration of Owino Musumba Mutanda as an administrator on 25.5.1993 and Owino Musumba Mutanda and Grace Nekesa on 25.5.1993 as owners and the subdivision on 24.5.1995 of land parcel LR Marachi/Bumala/219 creating land parcels Marachi/Bumala/1357 and 1358 is hereby cancelled.

3. That all resultant parcels created from land parcel L.R.Marachi/Bumala/219 including Nos. 1357 and 1358 or any other are hereby cancelled so as to restore L.R.Marachi/Bumala/219 in the names of Owuor Aloo, Henry Onyango and Mutanda Were.

4. That there be stay of proceedings in Busia PMCC 241 of 2013 between Owino Musumba & Grace Nekesa versus Nyaoro Aloo and Kolina Onyango pending the hearing and determination of this objection.

5. That a fresh grant be issued jointly to the Petitioner and Objectors.

6. That a restriction/inhibition be placed on land parcel L.R.Marachi/Bumala/1357 and 1358 or any [parcel] created from Marachi/Bumala/219 pending the hearing and determination of this objection.

7. That costs be in the Estate.”

The application is supported by grounds on its face and the affidavit sworn by the 1st Objector on 15th May, 2011.

2. The Respondent/Petitioner, Owino Musumba opposed the application through an undated replying affidavit filed in court on 7th December, 2016. Grace Nekesa, the Interested Party did not respond to the application notwithstanding her unwavering attendance in court throughout the period this matter came before me. From a perusal of the documents filed in court her fate is tied to that of the Petitioner.

3. On 18th September, 2014 a consent was recorded as follows:

“The summons for revocation of 15th May, 2011 is partly compromised as follows:-

(1) The titles to Marachi/Bumala/1357 & 1358 are hereby cancelled.

(2) Title to Marachi/Bumala/219 is hereby restored to its pre-25th May 1993 position.

(3) Parties are at liberty to move court in respect to prayer (4), (5) and (6) of the application of 15/05/2011.

(4) Costs in the cause.”

4. When the matter came up before me for the first time on 20th July, 2016 Mr. Fwaya for the Objectors/Applicants informed me that Prayer No. 4 of the application had been compromised through an order of stay obtained in the lower court in the case indicated in that prayer.

5. A look at Prayer No. 6 shows that the same was addressed through the consent recorded on 18th September, 2014. It was a prayer meant to preserve the property in dispute pending the hearing and determination of the summons for revocation of grant. In any case parcels numbers Marachi/Bumala/1357 and 1358 are no longer in existence and there is no way restriction or inhibition can be placed on non-existent titles. As such, the prayer is no longer an issue for determination in this ruling.

6. The decision in regard to Prayer No. 5 which seeks the appointment of the Petitioner/Respondent and the Objectors/Applicants as joint administrators is very simple. I, however, need to say what I make of the entire application before proceeding to make my decision on the issue.

7. A perusal of the affidavit of Catherine Nyaoro Aloo, the 1st Objector and the replying affidavit of Owino Musumba, the Petitioner shows that L.R. No. Marachi/Bumala/219 was registered on 11th February, 1971 in the names of Owuor Aloo, Henry Onyango and Mutanda Wire. The remark against the names of each of the three proprietors is **“one third share.”** This can only mean that each of the three proprietors was entitled to one third share of the 10.2 hectares being the size of Marachi/Bumala/219. This was not lost on the Land Office officers as per the third entry on 25th May, 1993 Owino Musumba Mutanda was **“to have one third of Mutanda Wire”** and Grace Nekesa was **“to have a life interest.”** Entry No. 4 of 24th May, 1995, however, put everything in a spin as the title deed was closed on partition upon issuance of new numbers being 1357 and 1358.

8. It is the Objectors' case that the registration of the new numbers disinherited Owuor Oloo and Henry Onyango who are said to also be deceased. It is the Objectors undisputed averment that the 1st Objector has obtained a limited grant of letters of administration Ad Litem for the estate of John Owuor Aloo vide **Busia H.C. Succession Cause No. 115 of 2010** whereas the 2nd Objector who is the daughter of Henry Onyango has obtained a limited grant of letters of administration Ad Litem vide **Busia H.C. Succession Cause No. 114 of 2010**. Their case is that they are entitled to the shares of their deceased relatives in L.R. No. Marachi/Bumala/219.

9. The Respondent/Petitioner avers that the Objectors are not entitled to the orders sought as Owuor Aloo and Henry Onyango were intruders and unrelated to his deceased father Mutanda Were. Further, that the Objectors acquiesced to the grant issued to him as they never took any action for over twenty years. It is his case that the application for grant was duly gazetted. He also asserts that the Objectors took over ten years from the time **Busia C. M. C. C. No. 241 of 2003** was filed before commencing these objection proceedings. It is therefore the Respondent's case that the application has been brought after inordinate delay and without any good cause.

10. The Objectors responded by telling the Court that they only knew of the disinheritance when the Respondent/Petitioner sought their eviction in the lower court. It was also the Objectors' position that there is no time limit for filing objection proceedings in a succession cause.

11. A perusal of this file clearly shows that L.R. No. Marachi/Bumala/219 was registered in the names of Owuor Aloo, Henry Onyango and Mutanda Were. Each was entitled to a third share of the parcel of land measuring 10.2 hectares. The Respondent claims that Owuor Aloo and Henry Onyango were intruders but he never provided any prove in support of this claim. The court will therefore go by the registration documents and conclude that each of the three proprietors were entitled to an equal share of the land.

12. The only question that remains is whether to issue a fresh grant in the names of the Petitioner and the Objectors. My answer is in the negative. Owuor Aloo and Henry Onyango have their separate estates. In the interest of the beneficiaries and whoever else wishes to lay claim to those estates, there is need to have the estates go through the full process provided by the Law of Succession Act, Cap 260.

13. In the circumstances of this case, I order that the Petitioner and the Objectors will jointly appoint and meet the expenses of a surveyor who shall carve out one third of the restored L.R. No. Marach/Bumala/219 which shall be registered in the name of the Petitioner, Owino Musumba as the administrator of the estate of Mutanda Were. In doing so, the surveyor shall take into account the positions on which the families of the three deceased persons and those claiming under them have settled on the land. The remaining portion of the land shall

remain in the names of Awuor Aloo and Henry Onyango and the same shall be subjected to transmission proceedings by their families in the manner provided by the law.

14. These proceedings would not have been necessary had the Petitioner/Respondent acted fairly and justly. He will therefore meet the Objectors' costs. It is so ordered.

Dated, signed and delivered at Busia this 31st day of January, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT