



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
PROBATION AND ADMINISTRATION CAUSE NO. 334 OF 2012
IN THE MATTER OF THE ESTATE OF WALTER OUMA OFUGU.....DECEASED

AND

WILBRODA NABWIRE OKETCHAPPLICANT/OBJECTOR

VERSUS

SALOME AJIAMBO OKUMURESPONDENT/PETITIONER

RULING

(Summons for revocation or annulment of grant dated 10th March, 2014 as amended on 12th January, 2015)

1. This ruling is the subject of the summons for revocation of grant dated 10th March, 2014 and amended on 12th January, 2015. Through the amended application, the Applicant Wilbroda Nabwire Oketch seek orders as follows:

- “1. The Grant of Letters of Administration made to SALOME AJIAMBO be revoked or annulled.**
- 2. That costs of this application be provided for.”**

2. The application is supported by the grounds on its face as follows:

- “i) The proceedings to obtain grant of letters of administration were defective in substance.**
- ii) The grant was obtained by means of untrue allegations of facts essential in point of law for issuance of a grant.**
- iii) The respondent has no inheritance rights over L.R. SAMIA/BUJWANGA/1054 nor is she a beneficiary in the estate of the title holder of the said piece of land, namely, Jacob Ofugu Sirima.**
- iv) Citation proceedings were fraudulently commenced and concealed from the applicant.**
- v) The applicant has procedurally substituted her late husband and is now the legal administrator of the estate of Jacob Ouma Sirima in respect of L.R. SAMIA/BUJWANGA/1054 in place of her late husband Walter Ouma Ofugu.**

vi) Issuance of citation and grant issued to the respondent are of no legal effect as they are merely academic in substance.

vii) Anybody claiming an interest in L.R. SAMIA/BUJWANGA/1054 should deal with estate of Jacob Ofugu Sirima, and not that of Walter Ouma Ofugu who was merely an administrator of the said estate.

viii) Any dealing in the said piece of land after death of Jacob Ofugu Sirima otherwise than in accordance with a confirmed grant of his estate, if any, is but intermeddling in that estate and no registrable interest could be conferred upon such person, who is but an intermeddler.”

3. The application is also supported by affidavits sworn by the Applicant on 10th March, 2014 and 12th January, 2015.

4. The Respondent/Petitioner Salome Ajiambo Okumu opposes the application through the affidavits she swore on 29th April, 2014 and 10th March, 2015.

5. As requested by the advocates for the parties herein, I write this ruling having had the benefit of perusing the file in **Busia H. C. Misc. Cause No. 20 of 2012 In the Matter of the Estate of the deceased Walter Ouma Ofubu and Salome Ajiambo Okumu v Wilbroda Nabwire Okech**. In their affidavits, the parties have referred to various documents which they have not exhibited. In order to enlighten myself I have perused the only document within my reach being **Busia H. C. P&A 59 of 2005 In the Matter of the Estate of the deceased Jacob Ofugu**. The Applicant has referred to this matter in her affidavits.

6. A reading of the affidavits filed herein discloses that the deceased Walter Ouma Ofugu to whose estate these proceedings relate was the son of the late Jacob Ofugu. For ease of reference I will henceforth refer to Walter Ouma Ofugu as the deceased and his late father Jacob Ofugu as Jacob.

7. The deceased passed away on 1st November, 2009. Prior to his demise, the deceased had commenced and concluded succession proceedings vide Busia H. C. P&A No. 59 of 2005 in respect to the estate of Jacob. Jacob had passed away in 2005.

8. The Respondent herein is the daughter of Charles Kafero Onyiemba who is said to have bought four acres of land being a portion of L.R. No. Samia/Bujwanga/1054 from the deceased. At that time the said parcel of land was registered in the name of Jacob.

9. Through Busia Misc. Cause No. 20 of 2012, the Respondent cited the Applicant to accept or refuse letters of administration in respect of the estate of the deceased. The Applicant did not respond to the citation. On 24th July, 2012, Kimaru, J ordered the Applicant to file a petition seeking a grant of letters intestate in respect to the estate of the deceased within 45 days and in default the Respondent be at liberty to petition the Court for the same. The Applicant did not comply with the order.

10. The Respondent subsequently commenced these proceedings and on 19th November, 2012 a grant was issued to her in respect of the estate of the deceased. The grant was confirmed on 14th November, 2013 with the schedule indicating that the deceased was to get 4 acres out of Samia/Bujwanga/1054.

11. Through the instant application the Applicant seeks a revocation of the grant of letters of administration made to the Respondent in respect to the estate of the deceased. Her case is that L.R. No. Samia/Bujwanga/1054 belonged to her father-in-law (Jacob). She avers that after the demise of her husband she applied and was allowed in Busia H. C. P&A 59 of 2005 to substitute her husband (the deceased) as the administrator of the estate of Jacob.

12. It is the Applicant's case that unknown to her, the Respondent had secretly commenced these proceedings to be allowed to administer the estate of her deceased husband. She avers that she was not

served with the citation (Busia H. C. Misc. Cause No. 20 of 2012) through which the Respondent was authorised to petition to administer the estate of the deceased. It is her case that when her advocate perused the file containing the citation proceedings it emerged that the citation order had been served on the Assistant Chief who had stamped and received it but had not served the same on her.

13. The Applicant avers that the land in question belonged to Jacob and the deceased was only an administrator. Further, that although the Land Disputes Tribunal had directed the Respondent to commence succession proceedings it had no jurisdiction to deal with the estate of a deceased person.

14. The Applicant asserts that she is the legitimate person to administer the estate of Jacob having been lawfully substituted for the deceased. Further, that the confirmation of a grant of letters of administration issued to the Respondent is in conflict with the letters of administration issued to the deceased. Also that the Respondent in obtaining the grant did not disclose to the Court that the Applicant had applied to substitute the deceased. She therefore prays for the annulment of the grant issued and confirmed to the Respondent.

15. The Respondent's reply is brief. She states that these proceedings relate to the estate of the deceased and she knows nothing about the estate of Jacob.

16. On the allegation that the citation order was not served on the Applicant, the Respondent avers that she knows nothing about the service of the pleadings as she is not the one who effected the same and in any case the Court must have been satisfied with the service before issuing orders.

17. The Respondent avers that at the time she commenced the citation proceedings she was not aware that the Applicant had commenced parallel proceedings. It is her case that the Applicant may indeed not have been aware of the sale of the land to her father as the Applicant was married by the deceased long after the transaction had been completed and the deceased found them already settled on the land. It is her case that she has already obtained her entitlement of four acres and the balance of the land has been registered in the name of the deceased.

18. Section 76 of the Law of Succession Act, Cap. 160 (L.S.A.) which provides for revocation or annulment of grants states:

“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 justify the grant notwithstanding that the allegation was made in ignorance or in advertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material

particular; or

(e) that the grant has become useless and in operative through subsequent circumstances.”

19. In order for an applicant to succeed in having a grant revoked or annulled he/she must establish that one, some or all the grounds provided in Section 76 exist.

20. In Busia H. C. P&A 59 of 2005, the Respondent made an application dated 29th August, 2011 seeking that the grant made to the Petitioner therein who is the deceased herein be rectified by substituting his name with that of the Applicant (Wilbroda Nabwire Oketch). That application was allowed on 6th May, 2013. The basis of the application was that Walter Ouma Ofugu had passed away and could not execute the transfer documents in order to complete the succession process in respect to the estate of Jacob. The grant issued to the deceased in respect to the estate of Jacob was confirmed on 5th May, 2009 and the deceased died shortly thereafter on 1st November, 2009 as per the certificate of Death No. 196636 issued on 16th December, 2009.

21. As per the certificate of search dated 5th January, 2011 in respect of L.R. No. Samia/Bujwanga/1054, the parcel of land was transmitted to the deceased on 23rd September, 2008 and on 30th September 2008 a restriction had been placed on the same by the Respondent's father.

22. The transmission to the deceased was in contravention of Section 55(1) of the L.S.A. which prohibits distribution of any capital assets constituting a net estate before confirmation of grant. Be that as it may, that error can only be blamed on the deceased and the lands office as the Respondent had nothing to do with the transmission of the property from the name of the late Jacob to his son (the deceased herein). What is however clear is the fact that by the time the Applicant was applying to substitute the deceased, the process of transmitting the only property in the estate of Jacob was already complete and there was no basis for the Applicant to seek to substitute the deceased as the administrator of the estate of Jacob.

23. The citation proceedings taken out by the Respondent through Busia H. C. Misc. Cause No. 20 of 2012 were proper as the property she was interested in was already registered in the name of the deceased.

24. There is evidence in Busia HC Misc. Cause No. 20 of 2012 that the Respondent was issuing the citation based on an award made to her in Busia Land Dispute No. 146 of 2011 and adopted as a decision of the Court on 28th December, 2011. Although it is indicated that a copy of the order of the Court had been annexed, the same is not in the Court file.

25. The Applicant alleges that the same was an illegal order as the Respondent could not have proceeded against the deceased who had passed away in 2009. However, the Applicant never commenced judicial review proceedings against that decision and neither did she appeal against it. In any case it appears that what the Land Disputes Tribunal did was to only direct that succession proceedings be commenced.

26. In the citation proceedings the Respondent stated why she was citing the Applicant to take letters of administration to the estate of the deceased. She was interested in the estate as the daughter of a purchaser. She attached to her application a letter from the Assistant Chief of Busembe Sub-Location showing the persons who had survived the deceased. One of them is the Applicant who was indicated as the widow of the deceased. There is therefore no basis for arriving at the conclusion that the Applicant failed to disclose material information to the Court.

27. The question as to whether the Applicant was served with the citation is one that ought to have been addressed in the matter carrying the citation proceedings. In allowing the Respondent to take out letters in respect to the estate of the deceased, the learned Judge must have been satisfied that the Applicant had been served but had failed to respond to the application. In any case, the Respondent was allowed to commence these proceedings in July, 2012 whereas the Applicant was substituted for the deceased in May, 2013. The Respondent's petition was advertised in the Kenya Gazette of 28th September, 2012 and

the Applicant is deemed to have been notified of the same. These proceedings cannot in the circumstances be said to have been defective in substance as they were commenced and concluded in the manner provided by the law.

28. In the written submissions dated 25th January, 2017, counsel for the Applicant claims that the sale agreement between the deceased and the father of the Respondent cannot be enforced for the following reasons:

- i) The deceased had no capacity in 1984 to enter into the land sale agreement with the father of the Respondent since the land in question belonged to his father;
- ii) The deceased had not yet taken out letters of administration for the estate of his late father when he purported to sell the land;
- iii) The Respondent cannot purport to enforce a contract between her living father and the deceased as she was not a party to the agreement and neither did she produce a power of attorney to give her authority to act for her father;
- iv) That even if the contract was enforceable it is null and void for lack of the consent of the Land Control Board within the six months statutory period;
- v) The most the Respondent can get out of the estate of the deceased is refund of the money paid by her father as purchase price and only upon production of a power of attorney executed by her father authorizing her to claim the money;
- vi) The deceased could not exercise his power as an administrator of his father's estate retrospectively to validate a contract he entered into when he had no capacity and which did not receive the consent of Land Control Board; and
- vii) The enforcement of the alleged land sale agreement of 1984 is subject to the Limitation of Actions Act.

29. With respect to the Applicant's counsel, I note that these are issues that were only raised through submissions and they cannot be said to form part of the pleadings. Submissions simply highlight what a party's case is all about. The real case is found in the pleadings and where the pleadings do not contain what is found in the submissions, the court cannot consider the issues taken up through submissions. In any case, this application only shows that the Applicant is interested in nullifying the sale agreement between the deceased and the father of the Respondent. In my view, this is a matter that has left the jurisdiction of this Court into the province of the Environment & Land Court.

30. From the documents that have been placed before this Court there is nothing to make me find that the grant made to the Respondent is one for revocation under Section 76 of the L.S.A. She hid nothing from the Court. Any flaw in the sale agreement between her father and the deceased can only be subjected to scrutiny before the right forum.

31. If the Applicant has any issues with the order issued in the citation proceedings, then that is a matter for an appellate court. She could also have asked to review the said order but she has not done so. In my view that order cannot be the subject of discussion in this matter.

32. In summary, the application has no basis and the same is dismissed. Costs follow the event. The Respondent will have costs of the application from the Applicant.

Dated, signed and delivered at Busia this 30th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT