



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 82 OF 2013

GEORGE AYUNGO OKELLO.....APPLICANT

VERSUS

MAURICE OTIENO OLAMBO

HERINE ATIENO OCHOLA.....RESPONDENTS

RULING

These proceedings relate to the estate of John Adega Otieno alias Adega Otieno, deceased, who died on 2nd November 2010 domiciled in Memba Sub-location. A grant of Letters of Administration intestate was issued to Moris Otieno Olambo and Herine Atieno Ochola on 6th May 2013. The administrators applied for confirmation of the grant on 17th December 2013 but they did not attend court on 14th March 2014 and confirmation was postponed. The grant is therefore yet to be confirmed.

On 6th March 2014 George Ayungo Okello, the applicant filed a summons for revocation of the grant. This Court heard the Summons by way of viva voce evidence.

The applicant claims to have purchased a portion of **L.R. Siaya/Kabong/269** which comprises the estate of the deceased from the deceased at a consideration of Kshs.51,000/= which he duly paid. However the deceased died before he could transfer that portion to him. He testified the deceased was not married and had no children. Upon the death of the deceased he informed the deceased's closest surviving relatives among them the two administrators that he had purchased the said portion but they were not willing to take out letters of administration. He therefore cited them in **Kisumu Succession Cause No. 252 of 2012** whereupon they filed this Succession Cause. It is his contention that they did so secretly without involving him and as such they obtained it fraudulently and the grant should be revoked. He called Charles Odhako Orimba (PW1) and George Silvester Simito Owuor (PW2) who both testified that they attested the sale agreement between him and the deceased and confirmed that he paid the purchase price in full. The applicant produced a burial permit, sale agreement, letter from Assistant Chief of Kobong Sub-location dated 19th August 2012 and a citation served upon the respondents to Accept or Refuse Letters of Administration Intestate dated 10th April 2012 (EXB P.1-4).

The Summons for Revocation were vehemently opposed with the respondents contending that being the closest surviving kin of the deceased they are entitled to the letters of administration. They both deny they were privy to the alleged sale agreement between the applicant and the deceased and contend that if there was such an agreement they would have heard of it.

The applicant as well as the Respondents were represented by Counsel. However only Mr. Anyumba, Advocate for the applicant, filed written submissions.

Section 66 of the Law of Succession Act gives this Court the final discretion as to the persons to whom a grant shall be made. The section however provides the court with a guide on the order of preference which is -

- (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**

Section 76 of the Law of Succession Act provides that a grant whether confirmed or not can be revoked in the following circumstances -

“76. 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 inadvertently;**
- (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 has ordered or allowed; 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 inoperative through subsequent circumstances.**

It is my finding that in this cause none of those circumstances have been proved. The applicant concedes that the respondents are the closest kin surviving the deceased. He did in fact inform this Court that he cited them to take out Letters of Administration. Being the closest surviving kin of the deceased they rank higher in priority to him under Section 66 of the Law of Succession Act. Rule 26(1) of the Probate and Administration Rules require a person seeking Letters of Administration to inform those in a higher or equal order of preference to him. The applicant does not rank either the same degree or in priority to the respondents and as such it cannot be said that the procedure for obtaining the grant was defective. Having cited them to take out letters of administration he cannot now turn around to say that they did so secretly. He was aware they could do so and there is evidence that they followed the procedure set out in the Probate and Administration Rules. They did not conceal any material facts when applying for the grant. As he alleges he purchased a portion of the asset comprising the estate he could have filed a protest to confirmation instead of seeking to revoke the grant which was properly issued to the respondents. In any

event even were this Court to consider his application as a protest it would not succeed. This is because whereas he has exhibited a sale agreement between him and the deceased and proved on a balance of probabilities that he paid a consideration of Kshs.51,000/= he has not exhibited a Letter of Consent of the Land Control Board which is mandatory in transactions relating to agricultural land. Without that consent the sale is void under Section 9(2) of the Land Control Act. In fact Section 22(b) of the Land Control Act makes it an offence for any person to take possession or occupy of such land without first obtaining the consent. Section 7 of the Land Control Act provides that such a person is entitled to a refund of the purchase price. As the consent of the Land Control Board to transfer this land to the applicant was not obtained the sale agreement was void and the applicant is only entitled to a refund of the purchase price which he paid to the deceased from the administrators of his estate. The application for revocation of the grant is dismissed for lack of merit.

As there is an application for confirmation that has been pending this Court has confirmed the grant and distributed the estate in the manner set out in paragraph 8 of the affidavit sworn by the administrators on 17th December 2013. The sum of Kshs.51,000/= paid by the applicant to the deceased is a charge to his estate and the applicant being a creditor must be paid by the administrators. As for this application each party shall bear his own costs. It is so ordered.

Signed, dated and delivered at Kisumu this 31st day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Ms Aron for Applicant

N/A for Respondents

Court Assistant – Serah Sidera

Applicant