



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 926 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE JOEL OGOLLA OLUM (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT BY:

JOANES ONDEGO OYWECH.....APPLICANT

VERSUS

ALEX OMONDI OGOLLA.....RESPONDENT

RULING

The deceased to whose estate these proceedings relate is Joel Ogolla Olum. The certificate of death filed herein indicates he died on 7th December 2006 at the age of 58 years. He was domiciled at a place called Karabok, Osiri. On 18th December 2014 this court issued a grant of Letters of Administration Intestate to his sons Alex Omondi Ogolla and Gideon Opiyo Ogolla. On 19th October 2015 the grant was confirmed and the assets comprising the estate to wit LR. No. Kisumu/Kanyawegi/4646, LR. No. Kisumu/Kanyawegi/4656, LR. No. Kisumu/Kanyawegi/4650 and LR. No. Kisumu/ Kanyawegi/6144 devolved to Alex Omondi Ogolla, the respondent. Before me is a summons for revocation filed by Joanes Ondego Oywech who claims to have purchased the asset described as LR. No. Kisumu/Kanyawegi/ 4646 from the deceased. The grounds for his application are that the Certificate of Confirmation was obtained fraudulently and that the distribution did not take into consideration that he had purchased this asset from the deceased. He has annexed a letter dated 24th July 1988 as proof of purchase. The letter is written by Joel Ogolla to the District Land Adjudication Officer, P. O. Box 1228, Kisumu. The same informs the District Land Adjudication Officer about the sale of Plot No. 4646/Kanyawegi/Sub-location/Kisumu to the applicant by Joel Ogolla Olum and his wife Monica Ogolla at a consideration of Kshs.5,000/=. In the letter the seller(s) undertakes firstly not to claim the land back from the purchaser who is a first buyer and secondly to transfer the whole land to him when the area is fully registered. In his supporting affidavit sworn on 6th March 2017 the applicant deposes that upon entering into the sale agreement he took possession of the land and constructed a home where he resides todate. He deposes that the land was not transferred to him because the Land Adjudication Officer advised them to await registration thereof so that they could obtain Land Control Board Consent. When the land was finally registered in the year 2005 they could not effect the transfer as the deceased was ailing and could not attend the Land Control Board. The following year the deceased succumbed to his illness. The applicant further deposes that he patiently waited for the deceased's kin to take out Letters of Administration so that he could lay claim to the parcel he had purchased as he did not want to pressure them. Unfortunately when they filed this cause it was done secretly and now the respondent is intent on evicting him and has had him charged in a

Maseno court so as to intimidate him to surrender the land. He further accuses the applicant of attempting to sell the land and of deliberately excluding him from the Succession Cause.

The applicant filed grounds of opposition as well as a Notice of Preliminary Objection. In the grounds of opposition it is contended that this application is vexatious and an abuse of the court process, that the applicant has no locus standi, is meddling with the property of the deceased and that his claim is fraudulent and/or unlawful. These grounds are reiterated in the Notice of Preliminary Objection.

Ideally the summons for revocation should have been heard through viva voce evidence but the Advocates for the parties canvassed the same by way of oral submissions. Miss Oketch who appeared for the applicant submitted that they were only interested in the prayer for revocation of the grant. She stated that the applicant purchased the parcel of land in issue and the next step was transfer of the land which did not happen because the land was under adjudication. She contended that the applicant has been in occupation of the parcel of land for the last twenty nine years. She further submitted that even after the process of adjudication was completed the transfer could not be effected as the deceased was ailing and the respondent here was a minor. Miss Oketch reiterated the averment by the applicant that the respondent obtained the grant secretly and submitted that that amounted to concealment of material facts which under Section 76(b) of the Law of Succession Act is a good ground for revocation. She urged this court to find that the grant dated 15th October 2015 was obtained contrary to the law and in bad faith and so revoke it.

Mr. Ayayo, for the Respondent submitted that the applicant has no locus standi as he is not a beneficiary. He contended that the grant was obtained after a gazette notice which invited objections. On the sale he submitted that the same does not qualify as a sale agreement under the law and as such it does not confer the applicant any rights. He stated that once a title deed has been issued as is the case here, it can only be challenged in the Environment and Land Court and that has not been done. He further submitted that the applicant is meddling with this asset and the matter has been taken before the Maseno Court and the Environment and Land Court where it is still pending. He termed this application as an attempt to fraudulently go around the cases. He urged this Court to dismiss the application.

In reply Miss Oketch, for the applicant submitted that under Section 76 any party can bring a summons for revocation of grant and that the applicant here qualifies as he is a beneficiary of the estate.

From the pleadings and submissions of the parties the following issues arise for determination:-

(a) whether the applicant herein has locus standi to bring these proceedings;

(b) whether the letter dated 24th July 1988 to the adjudication officer (annexture "JOO-2") qualifies as an agreement for sale of land.

(c) whether the applicant is entitled to the prayers sought.

I have no difficulty determining issue (a) and (b) in the positive. It is my finding that a purchaser is a creditor who under Section 66 of Law of Succession Act is one of the persons to whom a grant of Letters of Administration can be issued. Since the applicant alleges to have purchased this asset from the deceased and is therefore a creditor he has locus standi to bring these proceedings.

As to whether the letter dated 24th July 1988 qualifies as a sale agreement I find that it does. Section 3(3) the Law of Contract Act requires that for any suit to be brought upon a contract for the disposition of an interest in land the said contract must be in writing, signed by all the parties thereto and attested by witnesses who are present when the contract was signed by the parties. The letter dated 24th July 1988 meets all these requirements. It clearly names the vendor and the purchaser, the land parcel, the consideration and the signatures of the parties, is attested by witnesses. It is clearly a sale agreement. In any event the respondent filed grounds of opposition only and did not adduce evidence to rebut that there was a sale agreement between his father, the deceased, and the applicant herein. It is my finding therefore that there was a sale agreement and that the letter referred to qualifies as a sale agreement for purposes of

these proceedings.

As to whether the applicant is entitled to the prayers sought it is my finding that he is not. Much as there was a sale agreement between the applicant and the deceased the same was voided by their omission to obtain the consent of the Land Control Board. Section 6(1) of the Land Control Act makes it mandatory for parties to a sale agreement to obtain both a consent for the sale and for the transfer of the land. The applicant has deposed that this was brought to their attention by the Land Adjudication Officer. He was therefore aware of this requirement. Section 8(1) of the Land Control Act provides that the application for consent must be made within six months of the agreement. It is understandable that they could not obtain the consent immediately or within six months of entering into the sale agreement as the process of adjudication was not completed. However he did testify that the process was completed in the year 2005. the deceased died one year later. He does not state when exactly he found the deceased ailing and bed ridden. In any event the Land Control Act makes no exception for when one or both parties are ailing. Instead it provides that failure to obtain consent renders the transaction void for all purposes and at Section 7 provides that whatever consideration was paid recoverable as debt. Section 22 of the Act makes it an offence to enter into or remain in possession in furtherance of the avoided transaction. The only way the applicant can go round these clear provisions of the law is by proving either that this land was not in a controlled area or that the President had by notice in the Gazette exempted the land in issue from the provisions of the Land Control Act as provided in Section 24 of the Act. He has done neither. He has by his own admission shown that they were required to seek the consent once the process of adjudication was concluded and the land transferred. As the transaction was avoided the asset remained the free property of the deceased and hence part of his estate and hence available to be distributed to the beneficiaries of his estate. The record does not disclose any defects in the proceedings or any concealment of facts or indeed any fraud. The application for revocation of the grant therefore has no merit and is dismissed with costs to the respondent.

Signed, dated and delivered at Kisumu this 29th day of June 2017

E. N. MAINA

JUDGE

In the presence of

Mr. Odumbe for Odeny for the Applicant

Mr. Mwamu for Ayayo for the Respondent

Court Assistant – Serah Sidera