



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 168 OF 2007**

**IN THE MATTER OF THE ESTATE OF NAFTALI OBWOGI BASIGWA**

**REDEMPTOR MORAA OBWOGI.....APPLICANT**

**VERSUS**

**CHARLES MAROMA BASIGWA.....RESPONDENT**

**JUDGMENT**

**Background**

**1. NAFTALI OBWOGI BASIGWA** (hereinafter "the deceased"), who died on 17<sup>th</sup> November 2005 was the eldest son of **Johnson Basigwa** (hereinafter "Johnson") also deceased. It is alleged by the petitioner herein that following the death of Johnson, his said eldest son, the deceased herein, secured the registration of his (Johnson's) properties into his name under unclear circumstances and without filing any succession cause. Following the death of the deceased herein, grant of representation in respect of his estate was on 21<sup>st</sup> April 2008 made to his brother Charles Maroma Basigwa (hereinafter "the petitioner") which grant was subsequently confirmed on 22<sup>nd</sup> May 2009, as follows:

<b><u>Name</u></b>	<b><u>Description of property</u></b>	<b><u>share of Heirs</u></b>
Charles N. Basigwa	L.R. Bassi/Masiga/464	1.3HA
Redemptor Moraa Obwogi	L.R. Bassi/Masiga/464	0.92HA
Margaret Wangui Basigwa	L.R. Bassi/Masiga/464	0.74HA
Kennedy Basigwa	L.R. Bassi/Masiga/463	0.97HA
Pacifica Kwamboka King	L.R. Bassi/Masiga/463	1.18HA
Sarah Bosibori	L.R. Bassi/Masiga/463	0.9HA
Alice Basigwa	L.R. Bassi/Masiga/463	2.4HA
Redemptor Moraa Obwogi	A/C. No. 081019916	
Margaret Wangui Basigwa Redemptor Moraa Obwogi & Margaret Wangui Basigwa	Barclays Bank Kisii Branch	To be shared equally Between

2. The beneficiaries of the estate of the deceased were listed in the P & A 5 form as follows:

- a. Charles Maroma Basigwa – Brother aged 50 years.**
- b. Sarah Bosibori – Daughter in-law**
- c. Kennedy Basigwa- Brother**
- d. Alice Basigwa – Mother**
- e. Redemptor Moraa Obwogi – widow**
- f. Margaret Wangui Basigwa – widow**
- g. Pacifica Kwamboka King – Daughter in-law**

3. The assets of the deceased's estate were also listed in form P & A as follows:

- a. Land Parcel No. Bassi/Masige/469**
- b. Land Parcel No. Bassi/Masige/463**
- c. Kisii Municipality Block 11/45**
- d. Barclays A/C No. 081019916- Kisii Branch**
- e. Barclays A/C No. 000024079-Kisii Branch**

4. In an application dated 24<sup>th</sup> May 2012, the petitioner successfully sought orders to amend the certificate of confirmation grant issued to him on the basis that he had inadvertently omitted the following assets from the list of assets to be distributed:

**LR No. Bassi/Masige/469 and**

**LR No. Kisii Municipality Block 11/45**

5. Through an application dated 12<sup>th</sup> May 2014, Redemptor Moraa Obwogi, the applicant herein, filed the instant application in which she seeks orders for revocation or annulment of grant issued to the petitioner herein. It is the said application dated 12<sup>th</sup> May 2014 that is the subject of this judgment.

#### **Summons for revocation/annulment of grant**

6. In the application dated 12<sup>th</sup> May 2014 brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules, the applicant sought the annulment/revocation of the grant issued to the petitioner herein on 21<sup>st</sup> April 2008 and confirmed on 9<sup>th</sup> May 2014 on the grounds that:

- 1. The proceedings to obtain the grant by the administrator/petitioner Charles Maroma Basigwa on 9<sup>th</sup> May 2014 were defective in substance without consent and or confirmation from the applicant or other parties.**
- 2. The grant was obtained fraudulently by the making of false statement by the petitioner/administrator by concealment from the court of something material to the case that land parcel NO. KISII/MUNICIPALITY/BLOCK 11/45 has been in occupation by the widow of Naftali Obwogi Basigwa as a family home.**

**3. The grant was obtained by means of trickery misrepresentation and untrue allegation of facts essential in point of law as to who was to succeed the estate of Naftali Obwogi Basigwa and by so doing has intermeddled in the estate and the applicant as the widow of the deceased Naftali Obwogi Basigwa has been greatly prejudiced and has been denied her due share in the above purported transfer of land parcel number.**

7. The application is supported by the applicant's affidavit sworn on 12<sup>th</sup> May 2014 wherein she avers that she is aware that this succession cause was filed by her brother in-law Charles Maroma Basigwa and that a grant was issued after which all the family members of Johnson Basigwa including the petitioner got their respective shares of the ancestral land at Magonga.

8. She further states that at the time the succession case was filed, some of her late husband's properties were not listed as they had not yet been identified since the deceased had properties all over the country and hence, the succession cause remained open in terms of the schedule of assets.

9. She claims that the petitioner had taken advantage of her ill health to intermeddle in the estate of the deceased by cutting down and selling trees on the ancestral land and had gone ahead to allocate to himself, LR. NO. Kisii municipality Block II/45 (hereinafter "the suit plot") by fraudulent means.

10. She reiterates that her deceased husband was survived by the following heirs:

**i. Redemptor Moraa Obwogi (widow)**

**ii. Robert Nyabuto Basigwa (son)**

**iii. Titus Mogusu Basigwa (son)**

**iv. Juliet Kerubo (daughter)**

**v. Catherine Bosibori Obwagi (daughter)**

11. She contends that the interest of the said heirs had not been factored in the succession cause which was a fact that the petitioner had concealed from the court.

12. She further avers that she resides on the suit plot which is her family home as shown in the land rates payment receipts which she attached to her affidavit and marked as "RMO2"

13. The applicant's case is that the petitioner cannot claim to have secured an interest in the suit plot without the consent of the deceased's family members and therefore it was in the interest of justice that the proceedings of 9<sup>th</sup> May 2014 be recalled, amended, revoked and or annulled so that the petitioner can be removed from the succession cause and in his place, the applicant be listed as the beneficiary/wife of the deceased.

### **Petitioner's response**

14. In his replying affidavit dated 11<sup>th</sup> August 2014, the petitioner deposes he is the son of Johnson and that the deceased herein was his eldest brother. He states that following the death of their father (Johnson Basigwa) in the year 1994, the deceased Naftali Obwogi Basigwa, took over the administration of their father's entire estate and that following the death of the deceased herein, the family members held a meeting that was also attended by the petitioner and in which meeting he was nominated to be the administrator of the estate of the deceased whose assets were listed as follows: -

**i. LR. NO. Bassi/Masige/469**

**ii. LR. NO. Bassi/Masige/463**

**iii. LR. NO. Kisii Municipality Block II/45**

**iv. Barclays Bank Acc. No. 181019916 Kisii Branch**

**v. Barclays Bank Account No. 000024079- Kisii Branch.**

15. He further avers that all the assets and beneficiaries of the estate of the deceased were then listed in the form P & A5 filed in this succession cause but that he noted that during confirmation, the suit plot was erroneously omitted from certificate of confirmation of grant thereby prompting him to make an application for its rectification.

16. He further states that all the beneficiaries consented to the proposed mode of distribution of the deceased estate as shown in the consent affidavit marked as “CMB-3”.

17. It is the petitioner’s case that the grant of letters of administration and the confirmation thereof were properly and procedurally obtained with the requisite consent of all the beneficiaries and further that there was no fraud, false statement or concealment of facts in the entire process.

18. He further contends that all the assets listed in form P & A5 belonged to his late father, Johnson Basigwa, and only passed to the deceased as the administrator of the estate of the their father as shown in the extract of the register of Kisii District Lands Office marked as “CMB4”

19. The petitioner further deposes that after a lengthy family meeting convened by their paternal uncles and step mother in which the applicant was also in attendance, it was agreed that the applicant and her children were to get LR No. Central Kitutu/Daraja Mbili/613 which is a commercial plot measuring 0.34Ha while the other family members were to share the suit plot. The petitioner maintained that both the suit plot and LR No. Central Kitutu/Daraja Mbili/613 belonged to his father Johnson Basigwa and that the deceased only registered himself as the owner as an administrator of their late father while awaiting the distribution of the whole estate.

20. The petitioner contends that it was only after he got registered as the owner of the suit plot in trust for the other beneficiaries that the applicant unsuccessfully approached him with a request that she sells the said plot to her at a throw away price of Kshs. 200,000/=, that she got infuriated and filed the instant application. He states that the applicant is dishonest about her claim that he has intermeddled with the estate of the deceased as he conducted the entire succession cause with the consent and notice of all the family members including the applicant.

21. In his further replying affidavit sworn on 14<sup>th</sup> November 2014, the petitioner reiterates that the suit plot belonged to his father Johnson Basigwa and that he, Johnson, at one time even secured a loan using the said title.

#### **Applicant’s further affidavit**

22. In her further affidavit dated 10<sup>th</sup> October 2014, the applicant avers that the estate under succession is the estate of Naftali Basigwa and not Johnson Basigwa and further that no evidence has been adduced to show that Naftali Basigwa’s estate was being administered on behalf of Johnson Basigwa.

23. She states that all the property listed in the succession cause belongs to her late husband Naftali Basigwa and therefore she should be allowed to take over the administration of his estate.

#### **Oral Evidence**

24. Parties agreed to canvass the application dated 12<sup>th</sup> May 2014 by way of oral evidence after filing their respective witnesses’ statement.

25. PW1, Redemptor Moraa Obwogi testified that the estate under succession belongs to her late husband

Naftali and therefore she was the one entitled to administer it as the petitioner was her brother in-law and therefore not a beneficiary to the said estate. She added that she lived on the suit plot which was purchased by her late husband in the 1970s.

26. On cross examination, she conceded that the suit plot was initially registered in the name of Johnson Basigwa but that it was the deceased who paid for its purchase. She however did not produce any documentary evidence in support of the claim that the suit plot was purchased by the deceased and neither was she able to tell the court who the owner of the plot was. She also conceded that the suit plot was listed in form P & A5 list of assets and further confirmed that a family meeting was held following her husband's demise in which the distribution of the property of Johnson that had been registered in the deceased's name was discussed.

27. She explained that the deceased registered himself as the owner of the ancestral land belonging to Johnson so as to stop potential land grabbers from grabbing it. She denied knowledge of any family meeting convened for purposes of discussing the filing of succession cause and claimed that the petitioner stepped in to file the instant succession case due to her ill health at the time and added that the petitioner concealed the distribution of the estate from her.

28. PW2 was the applicant's son Titus Mogusu Basigwa. His testimony was that the petitioner became the administrator of the estate of the deceased due to the applicant's ill health having suffered stroke in the year 1982. He stated that the applicant lives on the suit plot which is registered in the deceased's name and on which she is the one who has all along been paying land rates.

29. He added that the deceased secured the registration of the ancestral land belonging to his grandfather (Johnson) so as to protect it from being grabbed.

30. On cross examination, he stated that his grandfather, Johnson, was a businessman who was capable of purchasing his own property. He denied knowledge of any family meeting in which the petitioner was nominated to obtain grant in respect to the deceased's estate. He also stated that he was not aware that all the assets listed in form P & A5 were to be distributed by the court.

31. Upon being shown the green card in respect to the suit plot, he conceded that it indicated, at entry No. 2, that Johnson Basigwa was its owner as at 1973 but that the deceased became its owner in the year 2000 even though they did not have an allotment letter or any sale agreement to show that Johnson sold the suit plot to the deceased.

32. He confirmed that Johnson died in 1994 while the suit plot was transferred to the deceased in 1998.

33. On re-examination, he stated that Johnson initially owned LR NO. Kisii/Daraja Mbili/613 before the same was transferred to the deceased on 10<sup>th</sup> August 1983.

#### **Petitioner's evidence**

34. DW1 was the petitioner, Charles M. Basigwa. His testimony was that his father, Johnson Basigwa had 2 wives and 6 sons including the deceased herein.

35. He listed Johnson's property as:

**LR. No. Bassi/Masige/463**

**LR. No. Bassi/Masige/469**

**LR. No. Kisii/Municipality Bock II/45.**

**LR. No. Central Kitutu/Daraja Mbili/613**

36. He stated that the deceased herein, Naftali Basige was buried on LR. No. Central Kitutu/Daraja Mbili/613 and that the suit plot was not the applicant's matrimonial home.

37. He confirmed that he filed this succession case in respect to the brother's (Naftali's) estate because Naftali acted as a trustee of their care father's estate and that it was only upon the death of Naftali that they discovered that he had actually registered all the family property in his name and further that when he in 2001 placed a caution on the suit plot when he discovered that Naftali had intentions of selling it. He referred to the suit plots green card which showed that Naftali got its registration on 20<sup>th</sup> June 1999 long after their father had died in 1994 and without filing any succession cause.

38. He also stated that after the death of the deceased herein, the family met and appointed one Robinson Basigwa as the administrator of his estate and that the applicant herein also attended the said meeting but that the said Robinson died before filing the succession case after which he was in 2007 appointed to file the same.

39. He confirmed that he filed the succession cause herein he included all the assets and beneficiaries of the estate in form P& A5 and stated that he was at a loss as to how the deceased secured the transfer of the entire estate of Johnson into his name without filing a succession case.

40. He maintained that it was after the confirmation of the grant issued to him that he realised that the suit plot had been omitted from the certificate thereby prompting him to apply for the rectification of the grant.

41. On cross-examination, he stated that his father Johnson was employed as an assistant chief and was also a businessman and was thus capable of acquiring his own properties. He confirmed that the applicant resides on the suit plot and that Johnson had in 1983, prior to his death transferred LR No. Central Kitutu/Daraja Mbili/613 to the deceased. He also confirmed that the consent to distribute the deceased's estate was signed by all the beneficiaries including the applicant.

42. DW2 was George Bagaka Mocheche the petitioner's uncle and the step brother to Johnson Basigwa. His testimony was that Johnson bought the suit plot in 1966. He stated that he chaired the family meeting in which one Robinson Kingi (also deceased) was nominated to file the succession cause and that the applicant attended the said meeting. Robinson Kingi however died before filing the succession case after which the petitioner was appointed the administrator.

43. His testimony was that the suit plot belonged to the entire family of Johnson and not the deceased, Naftali. On cross examination, he stated that Johnson constructed a house on the suit plot in 1996 which house was rented out but that after the year 1999, the applicant moved in to stay at the suit plot, a move which was opposed by the family of Johnson. He confirmed that there was no dispute in all the other properties except the suit plot and that at no time did the family agree to give the suit plot to the applicant.

44. DW3 Alice Kemunto Nyachoti was the petitioner's step mother and Johnson's widow. Her testimony was that the suit plot belonged to her late husband (Johnson) who died in 1994. She stated that all the title deeds of her deceased husband were in her custody after his death but that the deceased later asked her to give them to him only for her to discover later that the deceased had transferred all the titles to his name.

45. She confirmed that Charles was unanimously nominated by Johnson's family to file the instant succession cause in respect to the estate of the deceased in a meeting that was also attended by the applicant. Her case was that the suit plot formed part of the estate of Johnson.

46. On cross-examination, she stated that the entire family of Johnson desired that the suit plot to be shared equally among all the beneficiaries of Johnson's estate.

47. On re-examination, she stated that Johnson was capable of acquiring his own property but that the deceased changed the ownership of the deceased's property into his name and this is why the entire family now claim entitlement to the suit plot. This marked the close of the defence case after which both

parties agreed to file written submissions before judgment.

### **Analysis and determination**

48. I have carefully considered the application for revocation of grant, the petitioner's replying affidavits, the oral evidence tendered during the hearing and the parties' respective submissions.

49. The main issue for determination is whether the applicant is entitled to the orders for the revocation of grant sought. Underlying the main issue herein is the question of whether or not the suit plot was the deceased's own exclusive property or property that he held in trust for the entire family of Johnson Basigwa (also deceased).

50. Section 76 of the Law of Succession Act, on which the instant application was founded, stipulates as follows on the circumstances under which a grant may be revoked:

**“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 concealment from the court of something material to the case.**

**c) That the grant was obtained by means of 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 a longer period as the court had ordered or allowed or**

**ii) To proceed diligently with the administration of the estate.**

**iii) To produce to court within time prescribed any such inventory or account of administration as is required or has produced any such inventory or account which is false in any material particular.**

**e) That the grant has become useless and in operative through subsequent circumstance.”**

51. In the instant case, it was not disputed that the deceased herein, Naftali Basigwa during his lifetime, secured the registration of the property of his father (Johnson) into his names after the death of the said Johnson albeit, under my clear circumstances.

52. According to the applicant, the transfer and registration of Johnson's property into the deceased's name was intended to protect the said property from being grabbed by certain unnamed land grabbers. The rest of Johnson's family members, who included his step brother (DW2), son (DW1) and widow (DW3) stated that they did not understand why the deceased decided to transfer Johnson's property to his name.

53. It is as a result of the realisation that the deceased had acquired the property of Johnson that the family held a meeting after the deceased's death and decided that the best course of action would be to appoint one of the brothers of the deceased, in this case one Robinson Kingi, to pursue the succession in respect of deceased's estate so that the property of their father Johnson, could be shared equitably amongst them. It

is noteworthy that the applicant also attended the family meeting wherein the said deliberations were made. However, the said nominee administrator Robinson died before filing the succession cause thereby leading the family to settle for the petitioner herein as the administrator of the deceased estate.

54. I note that the succession proceedings were undertaken with the full knowledge and consent of all the family members of Johnson, including the applicant herein, as shown in the consent affidavit dated 12<sup>th</sup> February, 2008 wherein they deposed that they had consented to the applicant to take out letters of administration in respect to the estate of the deceased. In a similar fashion, all the beneficiaries of the deceased's estate also signed a consent affidavit of distribution dated 2<sup>nd</sup> February 2009 ratifying the mode of distribution proposed by the petitioner.

55. I have perused the form P & A5 form filed by the petitioner herein on 12<sup>th</sup> February, 2008 and I note that the following people were listed as the deceased's heirs:

- a. Charles Maroma Basigwa – brother.**
- b. Sarah Bosibori – daughter in law**
- c. Kennedy Basigwa- brother**
- d. Alice Basigwa- mother**
- e. Redemptor Moraa Obwogi – widow**
- f. Margaret Wangui Basigwa – widow**
- a. g. Pacifica Kwamboka Kingi- Daughter.**

56. The assets were also listed in the said form as:

- a. Land parcel No. Bassi/Masige/469.**
- b. Land parcel No. Bassi/Masige/463.**
- c. Kisii Municipality Block II/45.**
- d. Barclays Account No. 081019916- Kisii Branch**
- e. Barclay Account No. 000024079- Kisii Branch.**

57. As I have already stated in this judgment, grant of letters of administration was issued to the petitioner herein on 21<sup>st</sup> April 2008 and confirmed on 22<sup>nd</sup> May 2009 as set out at the beginning of this judgment.

58. I note that trouble however started after the petitioner applied and obtained orders to rectify the certificate of confirmation of grant on 9<sup>th</sup> May 2014 as it is then that the applicant filed the instant application in which she claims that petitioner took advantage of her ill health to intermeddle with the estate of her late husband and to allocate himself the suit plot in a fraudulent manner.

59. Upon considering the evidence tendered by both parties and their witnesses including the documents that they relied upon, I find that there was indeed a consensus between all the family members of the deceased that the petitioner files the instant succession cause as shown in the consent affidavit, dated 12<sup>th</sup> February 2008 signed by all the beneficiaries listed in form P & A5. The fact that all the beneficiaries including the applicant herein, signed the consent affidavit lends credence to the petitioner's position that a family meeting chaired by DW2 and also attended by DW3 nominated him (petitioner) to file the succession case. This nomination was also mentioned in the chief's letter dated 14<sup>th</sup> February 2008 that

accompanied the petition for the grant of letters of administration.

60. It is therefore my finding that the applicant's claim that the petitioner took advantage of her illness to file the succession cause in respect to her husband's estate fraudulently and by concealment of material facts was not only not proved to the satisfaction of this court, but was also dishonest and contrary to the overwhelming oral and documentary evidence on record.

61. I find that the petitioner made a full disclosure of all the assets of the deceased including the suit plot and all the people entitled to the benefit from the estate of the deceased. It is also my finding that the petitioner's evidence/explanation on the circumstances under which he became the administrator of the estate of the deceased (Naphtali) who was his brother is plausible and credible as it was supported by documentary evidence which clearly showed that all the parcels of land, that were the subject of the succession cause including the suit plot, were previously registered in the name of his father Johnson, but were upon his death, under unclear circumstances, transferred into the name of the deceased. The applicant did not explain, to the satisfaction of this court, under what circumstances her husband, (the deceased herein) got registered as the owner of all the property belonging to Johnson. I do not accept the explanation that the deceased did the transfer into his name to protect the land from being grabbed as it was not revealed who, if any, wanted to grab the said land. The applicant's claim that the deceased purchased the suit plot from an unnamed seller was also not proved by any tangible evidence whatsoever. The bottom-line however, was that the suit plot belonged to Johnson upto and including the time of his death in 1994 only for the deceased to acquire it under unclear circumstances in 1999, 5 years after the death of his father.

62. My take is that the deceased may have acted in good faith, albeit un-procedurally, to register his father's property into his names with a view to distributing the same to his siblings at a later date only for the cruel hand of death to take him before he could accomplish this mission. It is therefore my finding that the deceased held all the property listed in the schedule of assets in the form P&A5 in trust for all the family members of Johnson including the applicant.

63. The deceased's aforementioned intentions notwithstanding, the matter at hand requires a determination and it is my finding that the no material has been placed before me to satisfy me that the conditions set for the revocation of grant under section 76 of the Law of Succession act have been satisfied.

64. It is therefore my finding that the instant application lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs considering that the warring parties in this cause are close family members.

65. My further finding is that all the assets listed in the form P & A5 are assets that previously belonged to the estate of the deceased Johnson and should therefore be distributed to all the beneficiaries listed in form P & A5 in equal shares or in shares that shall be mutually agreed upon by all the beneficiaries.

**Dated, signed and delivered in open court this 26<sup>th</sup> day of July, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

N/A for the petitioner

Mr. Sagwe for the Respondent

Omwoyo: court clerk