



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 86 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN OMOLLO OMANGA –  
DECEASED**

**THE REGISTERED TRUSTEES OF**

**THE NATIONAL COUNCIL OF CHURCHES OF KENYA .....APPLICANT**

**VERSUS**

**DAVID AMANGA OMOLLO ..... 1ST RESPONDENT**

**MIRIAM ENGESA OMOLLO ..... 2ND RESPONDENT**

**RULING**

These proceedings relate to the estate of **John Omollo Amanga**, deceased. A grant of letters of administration was issued to David Amanga Omollo and Miriam Engesa Omollo – the Respondents - pursuant to a petition filed herein on 22nd February 2012. The said grant was confirmed on 30th January 2013 and the asset described as LR East Kisumu/Dago/675 bequeathed to the two Administrators/Respondents in equal shares.

On 16th December 2016 the applicant herein filed a Summons for Revocation and sought to stay implementation of the grant and a restraining order from any dealings on the asset by the Respondents. The applicant also sought revocation of the grant and cancellation of all titles arising from the sub-division of the piece of land and any transfers subsequent thereto.

The summons for revocation is premised on grounds that -

**“1. THAT the grant was obtained fraudulently whereof the Petitioners deliberately concealed material facts to the court, to wit -**

**a. that the ownership of the only property forming part of the estate, being all that parcel of land known as East Kisumu/Dago/675 (hereafter the “subjectland”) was disputed;**

**b. that there existed a competing title to the property; and**

**c. that ownership of the disputed land was under active investigation by the CID and the National Land commission at as the time the administrators filed the petition.**

**2. THAT by virtue of the aforesaid facts, the subject land was not free property that could**

**form part of the deceased's estate and/or be distributed under the succession laws and succession court lacked jurisdiction thereof;**

**3. THAT the proceedings to obtain the grant herein were defective in substance as the petitioners failed to procure the publishing of the notice thereto in the Kenya Gazette as required under Rule 7(4) of the Probate and Administration Rules and/or published the same under false name to conceal the real identity of the deceased;**

**4. THAT from the foregoing, the petitioners knowingly and deliberately tricked the Succession Court to distribute the subject land and in so doing stole a march on the objector by removing the property from the jurisdiction of the investigating authorities;**

**5. THAT it is fair and just that the grant be revoked.”**

The Summons is supported by an affidavit sworn by Gregory Rapoi Okiru, the Applicant's Legal Officer. He deposes that the Grant herein was obtained fraudulently and through deliberate concealment of material facts in that whereas the Respondents listed LR East Kisumu/Dago/675 as forming part of the estate of the deceased the applicant held a valid title to the same – a fact which was well known to them. He deposes that the parcel of land was allotted to the applicant on 12th May 1975 and a title deed issued on 12th June 1997; That however when the applicant's workers went to fence the property they were confronted by a group of people who reckoned that the property belonged to their father but upon a visit to the Land Registry their title documents were found to be forgeries. He further deposes that nevertheless the Land Registrar referred the matter to the police for investigation. That thereafter another green card in the name of the deceased surfaced and it was suspected that the same was a forgery. However when the original title deed was produced to the Land Registrar he concluded that at face value, it was original. The Registrar therefore requested for time to examine and investigate the two title deeds and when he took no action the applicant sought help from the Commissioner of Lands. By then the respondents had applied for a grant of Letters of Administration. Counsel deposes that it is clear that the respondents did not disclose to this court that the title to the asset was disputed. He believes that this cause was

intended to steal a march on the applicant. He deposes that given the competing title and the investigations that were ongoing the piece of land was not the free property of the deceased. He took issue with the name attributed to the deceased in the gazette notice and avers that this was intended to mislead and further deposes that upon confirmation of the grant the respondents sold a portion of the asset to one Ochieng Tony Michael Maloba and upon learning of it the applicant registered cautions over all the the sub-divisions and the said Michael filed a suit – being **Kisumu Environment and Land Court Case No. 324 of 2014** seeking removal of the caution. By the time of bringing this summons that suit was still pending. He deposes that this application will have a huge bearing on the suit. He contends that had the applicant been aware of this petition she would have filed an objection and prays that the summons be granted.

In their joint replying affidavit the Respondents state that the piece of land known as LR East Kisumu/Dago/675 ceased to exist upon its sub-division and subsequent distribution to the beneficiaries and other interested parties and that these proceedings are therefore of no consequence. They depose that the asset was ancestral freehold land registered in their deceased father's name in 1967 and they have lived there since time immemorial; That the same being freehold property it could not have been available for allotment by the Government or any other body. They state that no fraud is disclosed in regard to this petition and that in all the papers they filed the deceased's name was stated as John Omolo Amanga and the misprint in the gazette notice cannot be the sole reason for revocation of the grant. They depose that in any event it is not alleged that they caused the Government Printer to deliberately misprint the deceased's names.

The application was canvassed orally with Mr. Mugo appearing for the applicant and Mr. Kassamani for the Respondents. I have considered their submissions fully.

**The issues for determination are:-**

- (a) Whether this court has jurisdiction to grant the prayers sought in the summons.**
- (b) Whether the proceedings to obtain the grant were defective.**
- (c) Whether the grant was obtained fraudulently by the making of a false statement or by the concealment from the court something material to the case.**
- (d) Whether the applicant is entitled to the orders craved.**

**DETERMINATION**

**(a) Jurisdiction**

Mr. Kassamani, Learned Counsel for the Respondents, submitted that this court is not the proper forum to litigate the issues between the Applicant and the Respondents as there is a case **Environment and Land Court Case No. 324 of 2015** pending before the Environment and Land Court. My finding is that the issues raised in this application are squarely within the jurisdiction of this Court. Section 76 of the Law of Succession Act empowers the court to revoke or annul a grant whether confirmed or not and sets out the instances when such orders may be granted. This Court is not being called upon to determine who between the applicant and the respondents is the owner of the property but whether the property was the free property of the deceased capable of forming his estate and therefore free for distribution to his heirs and also whether the proceedings to obtain the grant were defective in substance or whether there was fraud in obtaining the grant. It is my finding that this court has jurisdiction to determine the issues raised in the summons.

**(b) Whether the proceedings were defective**

Counsel for the applicant submitted that the proceedings were defective because whereas the name of the deceased is John Omolo Amanga the gazette notice referred to him as Jairo Omolo Amanga. Counsel also read mischief in this and contended that the same was calculated to mislead and it indeed did as the Applicant could not relate the cause to the deceased and as such the grant was obtained fraudulently. On his part Counsel for the Respondents submitted that the Respondents used the correct name of the deceased in all their documents and what he referred to as a misprint in the gazette notice is in itself not sufficient to revoke the grant.

I have perused the record and confirmed that the respondent's documents filed in court refer to the deceased as John Omolo Amanga. This includes the petition, the affidavits and even the Notice signed by the Deputy Registrar on 23rd February 2012 for purposes of gazette ment and I have therefore concluded that the name Jairo was an error on the part of the printer that had nothing to do with the respondents. The same did not render the proceedings to obtain the grant defective in substance and neither does it disclose fraud on the part of the respondents.

**(c) Whether the respondents made a false statement or concealed from this Court something material to the case.**

The applicant has demonstrated that by the time the respondents petitioned for the grant of letters of administration there was a simmering dispute in regard to the property LR East Kisumu/Dago/675. Whereas the Respondents held a title deed in their father's name the applicant also had a title deed for the same parcel of land. This was known to the respondents because as narrated by the applicant's Legal Counsel, the respondents had on several occasions thwarted the applicant's attempts to fence the property. The dispute concerning the two "**apparently**" valid title deeds had, according to the applicant, been referred to the police as well as the then Commissioner of Lands and the matter was yet to be determined. As such there was uncertainty as to whether this parcel of land was the free property of the deceased. The applicant has indicated that because of the name used in the gazette notice it was not in a

position to tell whether the cause advertised in the notice was in respect of the deceased in the dispute. The requirement for the notice is provided for under Rule 7(3) of the Probate and Administration Rules and its purpose is to invite objections. It is therefore very important that the particulars in the notice are correct. In this case the name of the deceased was stated to be Jairo instead of John and it is understandable that the applicant could not have attributed that notice to the deceased in this cause. On the other hand the respondents had a duty to inform the court that whereas the property was registered in their late father's name there was another party laying claim to it. They could have done this by filing an affidavit as provided in **Rule 16(1) of the Probate and Administration Rules**. The applicant's claim to the property is "something material to the case" and concealment from the court of something material to

the case is one ground upon which a grant may be revoked or annulled – see **Section 76(c) of the Law of Succession Act**. The fact that the property has since been sub-divided is immaterial as the court may revoke a grant whether confirmed or not. It is clear that by rushing to this court to petition for letters of administration the respondents were simply seeking to extinguish the applicant's claim to the property.

**(d) Whether the applicant is entitled to the orders sought**

Ordinarily a court would ask the applicant why it did not file an objection to the making

of the grant or why it did not file a protest to the confirmation of the grant or file a statement as provided under Rule 16(1), Rule 17(1) and 40(6) of the Probate and Administration Rules. However as I have stated the name of the deceased in the gazette notice was misleading and it is understandable that the Applicant did not take the necessary steps. On the whole it is my finding that the grant having been obtained by concealment from the court of something material to the case the applicant is entitled to the orders sought.

Accordingly this Court makes **Orders** as follows:-

**(a) The confirmed grant be and is hereby revoked and all subsequent sub-divisions of LR East Kisumu/Dago/675 rescinded.**

**(b) Should the investigations being conducted on the suit before the Environment and Land Court determine that it is the estate of deceased as opposed to the applicant that is entitled to this property the respondents may petition for a grant afresh.**

**(c) The costs of the summons for revocation shall be to the Applicant.**

**Signed, dated and delivered at Kisumu this 3rd day of August 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

N/A for the Objector/Applicant

N/A for the Respondent

Evon – Court Assistant