



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.233 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE

YOHANA AKHWINYERA MAKAMU alias MAKAMU AKHUNYERA....DECEASED

AND

MARY TSIALEKA KANIRAPETITIONER

VERSUS

MARY SHIVACHI.....OBJECTOR

RULING

1. The objector herein, Mary Ayuma Anyonje, has filed an application dated 14th November 2012 seeking that the grant of letters of administration issued to the petitioner herein, Mary Tsialeka Kanira, in respect of the estate of Yohana Akhwinyera Makamu and confirmed on the 3rd March 2010 be annulled/revoked on the grounds that:-

(a) The petitioner concealed the filing of this suit disregarding other beneficiaries who are also the grand children of the said Yohana Akhwinyera Makamu (deceased).

(b) Thereafter filing and confirmation of the same, the petitioner has hurriedly disposed off and is in the process of disposing off the remaining part to cause the left out beneficiaries irreparable damages.

(c) This hounourable court do warrant beneficiaries a remedy by issuing orders and cancelling the previous sale of the estate till the issues appertaining the same are addressed in court.

2. The application is supported by the affidavit of the objector in which she depones that the petitioner concealed the true registered owners of the estate and also the legitimate beneficiaries by indicating herself alone as the sole beneficiary of the estate. The application was opposed by petitioner on grounds stated in her replying affidavit.

Background to the application:

3. The objection relates to the estate of the late Yohana Akhwinyera Makamu who was the father to the petitioner. The father to the petitioner had two brothers – Kubunduku Shinami and Musungu Shinami. The three brothers were registered as joint owners in common of land Parcel No. Kakamega/Savane/523. The objector herein is a wife to the son of the late Kubunduku Shinami, the late Peter Shivachi. After the

death of the three brothers, the petitioner filed this succession cause so as to get the 1/3 share of her father's estate from land Parcel No. Kakamega/Savane/523. She was issued with a grant of letters of administration in respect to the estate of her father. She made an application for confirmation of grant in which she proposed that land Parcel No.Kakamega/Savane/523 be distributed with the 1/3 share of Kubunduku Shinami being registered in his name, the 1/3 share of the petitioner's father being registered in the petitioner's name and the 1/3 share of Musungu Shinami being registered in the name of his son Paul Ambale. A certificate of confirmation of grant was issued to that effect. The petitioner proceeded to sub-divide the land. Three title deeds were issued – Kakamega/Idakho/Savane/1990, 1991 and 1992 in the respective names of the petitioner, Paul Ambale and Kubunduku Shinami. The petitioner subsequently sold her portion of land to one Siriakus Bulemi Chungani.

Case for objector:

4. The objector says that the deceased herein Yohana Akhwinyera Makamu was the father to the petitioner and one Selina Malesi Ondeko. That the petitioner misled the court that she was the only heir of her father's estate when she knew that she had a living sister by the name Selina who also deserves a share of the estate. The objector further argued that the petitioner was supposed to undertake succession proceedings touching solely on the estate of Yohana Akhwinyera Makamu but she proceeded to intermeddle with the estate of Kubunduku Shinami and Musungu Shinami. That Musungu Shinami is the father of Jeconia Ochieng Omami and Isaiah Ooko Omamo. That Paul Ambale who inherited the share of Musungu Shinami is not known to the family. She argued that the registration of Kubunduku Shinami as the owner of Parcel No.1992 in the year 2010 was fraudulent since it would mean tht he infact executed transfer documents when he had died 30 years before. She argued that the undivided share of Yohana Akhwinyera Mukamu in plot No.523 should devolve to his two surviving children Selina Malesi Ondeko and the petitioner. That the undivided share of Kubunduku Shinami in the said parcel of land should devolve to her, the objector and that the undivided share of Musungu Shinami should devolve to his two children Jeconia Ochieng Omamo and Isaiah Ooko Omamo. She urged the court to annul the process leading to the sub-division of the said parcel of land and restore the same to the joint names of the three deceased brothers.

Case for petitioner:

5. The petitioner stated that at the time when she filed this succession cause, the three brothers had died. That she duly informed the objector of the filing of the succession cause but the objector was uncooperative. That Musungu Shinami had left behind a son called Paul Ambale. That she agreed on the stated mode of distribution with Paul Ambale. That the 1/3 share given to Paul Ambale was the share meant for his late father Musungu Shinami while the 1/3 share given to her was the share of her late father. That the remaining 1/3 share left in the name of Kubunduku Shinami is the share entitled to the objector. That she sold her share to one Siriakus Buleni Chugani. Therefore that the applicant should be satisfied with her share.

The evidence:

6. In her evidence in court, the objector stated that the late Yohana Akhwinyera Makamu had two children – Selina Malesi and Mary Thialeka (the petitioner). She said that Musungu Shinami had 3 children – Jeconea Omamo, Isaiah Ooko and a woman she could not recall the name. She said that Paul Ambale is not a son to Musungu Shinami.

The petitioner on the other hand stated in her evidence that she was the only child of her father. She denied that she has a sister by name Selina Malesi. She said that the late Musungu Shinami had 5 children including Paul Ambale.

On his part, Paul Ambale stated in his evidence that he has 4 brothers from his father. He said that he and the petitioner proceeded with the succession cause because the objector refused to co-operate with them.

Submissions by Advocates:

7. The advocates for the objector, K.N. Wesutsa & Co. Advocates, submitted that the question before the court is whether the land in issue, Kakamega/Savane/523 could be distributed in these proceedings relating to the estate of the late Yohana Makamu in the manner carried out by the petitioner. He submitted that as each brother had undivided shares in the said parcel of land, they were tenants in common. That **section 61(1)** and **91(5)** of the Land Registration Act No.3 of 2012 provides that in the event a tenant in common dies his undivided share is to be treated as part of his estate to be administered by his legal representative. Therefore that in respect to these succession proceedings, only the undivided share of the late Yohana Makamu could be considered for distribution. That the undivided shares of the late Kubunduku Shinami and the late Musungu Shinami will have to be dealt with in separate probate and administration proceedings regarding their individual estates. That the effect is that the sub-division of Plot No.523 into plots numbers 1290, 1291 and 1292 has to be nullified and prevailing status quo restored pending distribution of the undivided share of the late Yohana Makamu amongst his beneficiaries.

8. The advocate for the petitioner, J.J. Mukavale, submitted that the objection lacks merit in that Selina Malesi Ondeko, Jehonia Omamo and Isaiah Ooko Omamo have not raised any complaint in these proceedings. That even if Jeconiah and Isaiah raised any complaint it would be a land dispute between them and Paul Ambale in respect to their father's share of the land.

Determination:

9. The questions for determination are:-

(1) Whether the petitioner is the sole beneficiary of the estate of the late Yohana Akhwinyera Makamu.

(2) Whether the estate of Kubunduku Shinami and Musungu Shinami can be dealt with in the manner done by the petitioner.

(3) whether this court is functus official as fresh title deeds have been issued to the land in issue.

10. The objector deponed an affidavit dated 19th January 2015 in which she stated that Yohana Makamu Akhwinyera was survived by one Selina Malesi Ondeko and the petitioner herein. She further deponed that Musungu Shinami was survived by Jeconia Ochieng Omamo and Isaiah Ooko Omamo. The court record indicates that on the 5th February 2015 Selina Malesi Ondeko and Isaiah Ooko Omamo filed a letter in court authorizing the objector herein to act for them in this succession cause. There is also in court record a chief's letter dated 28th October 2013 in which the chief of Iguhu location lists the beneficiaries of the three deceased brothers to include Jeconia Ochieng Omamo, Isaiah Ooko Omamo and Selina Malesi Ondeko.

11. The petitioner denies that she has a living sister by name of Selina Malesi. However I do not believe that the petitioner is telling the truth on the issue. The petitioner did not reply to the objector's affidavit dated 19th January 2015 where it was deponed that the petitioner has a living sister. She has not brought forth any evidence to challenge the chief's letter dated 28th October, 2013 that mentions the beneficiaries of the estate of Yohana Makamu to include Selina Malesi. Selina has given written authority to the objector herein to represent her interests in this succession cause. The petitioner has not commented anything on the said authorization letter. The inevitable conclusion to be drawn is that the petitioner has a surviving sister by name Selina Malesi Ondeko.

12. In her application for grant of letters of administration, the petitioner indicated that she was the only heir to the estate of Yohana Akhwinyera Makamu. This has been proved to be a lie. The petitioner hence concealed some material facts to the court when she filed the succession cause.

13. The objector says that she was not made aware of the filing of the succession cause by the petitioner. The petitioner on the other hand says that the objector was made aware of the filing of the succession cause but that she refused to co-operate with the petitioner to proceed with the matter. However there is

no citation filed with the court to indicate that the objector was made aware of the filing of the succession cause. In the premises I find that the petitioner did not involve the objector in filing the succession cause.

14. This succession cause only relates to the estate of Yohana Akhwinyera Makamu. However, in the cause of the petitioner distributing the estate of her father, she went out of her way to give the estate of Musungu Shinami Makamu to one Paul Ambale. Neither the petitioner nor the said Paul Ambale had at the time taken out grant of letters of administration intestate in relation to the estate of Musungu Shinami. It is an offence under section 45 of the Law of Succession Act, (Cap 160), for any person to take possession of and to intermeddle with the free property of a deceased person before a grant of letters of administration have been taken out in relation to the deceased's estate. **In the matter of the estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR**, Musyoka J had the following to say in respect to **section 45** of the Law of Succession Act:-

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

Paul Ambale admitted in his evidence that Musungu Shinami was survived by 4 other brothers. The handing over of the estate of Musungu Shinami to Paul Ambale before a grant of letters of administration were taken out was therefore a criminal act.

15. The advocate for the objector submitted that since title deeds have been issued, the only recourse open to the beneficiaries is for them to file a civil suit against Paul Ambale. However **section 76** of the Law of Succession Act grants powers to the court to revoke a grant whether the grant has been confirmed or not. The section states that:-

“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).....

(d).....

(e).....

16. The petitioner herein obtained the grant in relation to her father's estate by concealment from the court of the fact that she has a living sister by name Selina Malesi Ondeko. The grant was therefore obtained fraudulently by concealment of a material fact from the court. To make matters worse, the petitioner (mis)used the grant issued to her to illegally hand over the estate of Musungu Shinami Makamu to Paul Ambale.

17. The petitioner has since sold her resultant parcel of land Kakamega/Idakho/Savane/1290 to one Siriakus Mulemi Chengani. **Section 93(1)** of the Law of Succession Act provides that:-

“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

18. The Court of Appeal has affirmed that courts have powers to invalidate fraudulent dealings in intestate property despite the provisions of section 93 of the Law of succession Act. In Musa Nyaribari Gekuno & 2 others vs Miyienda & Another, Kisumu Civil Appeal No.2 of 2014 (2015) eKLR, the Court of Appeal quoted with approval the following passage by Justice K.H. Rawal (as she then was) in her judgment in In Re Estate of Christopher Jude Adela (deceased) where she stated that:-

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interests and rights of the beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

The court therefore has powers to invalidate title deeds that have been acquired fraudulently in contravention of the provisions of the Law of Succession Act.

19. In the foregoing, I find that there are enough grounds in support of the application for annulment/revocation of the grant. The objector has shown that the grant was obtained fraudulently by concealment of a material fact. The process leading to the sub-division and issuance of title deeds from land Parcel No.Kakamega/Savane/523 was fraudulent in that the grant that kicked off the process was obtained fraudulently. The petitioner misused the grant issued to her to illegally distribute property that did not belong to her late father. I thereby make orders that:-

(1) The grant of letters of administration intestate issued to the petitioner herein on 7th May 2009 and confirmed on 3rd March 2010 is hereby revoked and annulled.

(2) All subsequent dealings in land Parcel No.Kakamega/Savane/523 pursuant to the issuance of the annulled grant are hereby invalidated.

(3) The land in issue to revert to its original owners i.e. Kubunduku Shinami, Musungu Shinami and Makamu Akhunyera.

Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 21st day of September, 2017.

J. NJAGI

JUDGE

In the presence of:

Miss Atieno H/B Kundu - for applicant/objector

Wambani - for respondent/petitioner

George - court assistant

Applicant/ObjectorAbsent

Respondent/PetitionerAbsent