



IN THE HIGH COURT

AT KISUMU

SUCCESSION CAUSE NO. 910 OF 2004

IN THE MATTER OF THE ESTATE OF

DEBORA AUMA OGODO (DECEASED)

AND IN THE MATTER OF APPLICATION BY

BETWEEN

KENNEDY OKOTH OGODO.....APPLICANT

AND

THOMAS AOMO.....1ST PETITIONER/ RESPONDENT

OLIVER ODOYO OUKO.....2ND PETITIONER/RESPONDENT

RULING

1. The application for consideration is the summons for revocation dated 12th November 2014. The applicant, Kennedy Okoth Ogodo (“Kennedy”) seeks to revoke the grant issued to Thomas Aomo (“Thomas”) and Oliver Odoyo Ouko (“Oliver”) on 21st January 2005 and confirmed on 20th January 2007 in respect of the estate of Debora Aumo Ogodo (“the deceased”) who died on 19th September 1995 at Songhor Sub-location within Kisumu County. Her only property; KISUMU/SONGHOR/103 (“Plot 103”) was shared equally between Thomas and Oliver.

2. The broad ground for seeking to revoke the grant is that the petitioners secured the grant through fraud, forgery, misrepresentation and non-disclosure of material facts. Before I deal with the factual issues, I will set out the uncontested matters regarding the family genealogy.

3. The deceased was the wife of the family patriarch, late James Ogodo (“Ogodo”). Ogodo had two other wives; Monica Ogodo (“Monica”) and Doris Ogodo (“Doris”). Material to these proceedings is that the deceased begot four children; the late Paul Ouko Ogodo, Silvia Ogodo, Ludia Ogodo and the 1st petitioner, Thomas. The late Paul Ouko Ouko Ogodo (“Paul”) is the father to Oliver, the 2nd petitioner. Monica, the mother to Kennedy, had a total of 8 children while Doris Ogodo begot 8 children.

4. The dispute between the parties concerns Plot 103. Kennedy contended that Ogodo bought Plot 103 which he registered in the deceased’s name. Thereafter, he constructed a house for the deceased and Monica. It is his case that the petitioners ought to have disclosed that Monica and her children were beneficiaries of the deceased as Plot No. 103 was purchased by Ogodo but registered in the deceased who held it in trust for the family. Kennedy (PW 1) testified and called one other witness, Samuel Okonjo

Ouko (PW 2). Thomas (DW 1) testified and his case was supported by his son, James Otieno Aomo (DW 2). The parties filed depositions and witness statements which I have considered.

5. Kennedy testified that during his lifetime, Ogodo bought two parcels of land; KISUMU/SONGHOR/99 (“Plot 99”) and Plot 103. He registered Plot 99 in his own name while Plot 103 in the name of the deceased. Thereafter Ogodo settled the house of Doris on the land while on Plot 103, he settled the deceased and Monica. When Ogodo and the deceased passed away Monica was left on the land. Kennedy also told the court that he had constructed his home on Plot 103. He also confirmed that Thomas had also built his home on the plot and was cultivating part of it.

6. Kennedy testified that neither he nor his mother had any other parcel of land, a fact recognised by Thomas when he applied to petition this court for letters of administration. He told the court that the letter dated 20th September 2004 by the Chief, Tamu Location to this court recognised him and his mother as being entitled to part of Plot 103 although this issue was not discussed by the family.

7. Paul’s son, PW 2, supported Kennedy’s case. He told the court that his father had two wives; Hellen Awiti and Josphine Ouko. His mother Hellen was settled on Plot 102 while Josphine was settled on another parcel of land. He further testified that the 2nd petitioner, Oliver, was his step brother from his father’s second house. His position was that Plot 103 belonged to the family and it ought to be divided between the deceased and Monica.

8. Thomas (DW 1) told the court that the Ogodo family used to reside in Nyakach before him and his brother, Paul, decided to purchase 5 plots in Songhor Settlement Scheme so that the family could move there. Plots 97, 98 and 102 were registered in the name of Paul while Plot 99 was registered in the name of Ogodo. Plot 103 was registered in the name of the deceased while he was left with Plot 99. He further told the court that both Monica and Doris were settled on Plot 99, measuring about 14 acres, with each house getting about 7 acres each. He confirmed that indeed the children from both houses had settled on the land. He maintained that Kennedy was entitled to 2 acres on Plot 99 in addition to his own property he had purchased. In reference to the Chief’s letter dated 20th September 2004, he testified that the Chief merely recognised the parties who were residing on the land at the time.

9. Thomas also testified that due to tribal clashes in the area, Ogodo invited both Monica and Doris to Plot 103 to construct their homes and whereas Doris decided to go back to Plot 99, Monica remained despite being asked by her husband to go back and as a result himself, Monica and Kennedy were in occupation of Plot 103. Thomas maintained that Kennedy had no claim to Plot 103.

10. DW 2 supported his father’s case and maintained that the children of Monica and Doris were already provided for in Plot 99 and that all their children had built their houses except Kennedy who was laying claim to Plot 103.

11. Under **section 76(b)** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** the court may on application or on its own motion revoke a grant of representation on the ground that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law. It is incumbent upon the party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds for the court to revoke the grant of representation.

12. In order to succeed in his claim, the applicant had to establish that Ogodo intended that the Plot registered in the name of deceased be held in trust for the family. The issue of proving a trust has been the subject of judicial comment. In **Wambugu v Kimani [1992] 2 KLR 58** and **Muiruri v Kimemia [2002] 2 KLR 677**, the Court of Appeal held that a trust must be proved by evidence. In **Mbothu & others v Waitimu & 11 others [1980] KLR 171**, the Court observed thus:

The law never implies, the court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention

of the parties to create a trust must be clearly determined before a trust will be implied.

13. In this case, the applicant avers that Plot 103 belonged to the Ogado and but was registered in the deceased's name as a trustee on behalf of the entire family hence it ought to be distributed as a family asset. When asked in cross-examination how the Plot 103 was acquired by Ogada, he could not tell how it was acquired save that his mother lived there and he had constructed his house on the property. Thomas gave a clear account of how Plot 103 was purchased by the deceased's sons and registered in her name. His testimony was corroborated by the fact that Ogado's two houses had been provided for in Plot 99 while the deceased was left with Plot 103. Thomas also provided evidence that he continued to pay the purchase price for the plot to the Settlement Fund Trustees even after the deceased's death.

14. The letter dated 20th September 2004 includes a statement by the Chief that the land is to be divided between Thomas, the family of Paul, Monica and one Robert Odhiambo Amimo who was said to be a purchaser. In light of the evidence I have set out regarding Plot 103, the letter does not take the applicant's case any further. In fact, in his deposition sworn on 13th November 2014, Kennedy contended that the letter was a forgery and could not be relied upon.

15. The totality of the evidence is that Plot 103 was purchased by Thomas and Paul and registered in the deceased's name. Ogada had settled the house of Monica and Doris on Plot 99 that Kennedy was well provided for under his mother's house. I find and hold that Kennedy has failed to establish that there was fraud, concealment of material facts or non-disclosure of material facts. He clearly is not a son of the deceased nor has he established any discernable claim to Plot 103.

16. In short, Kennedy Okoth Ogado has not proved his case to the required standard. The summons for revocation of grant dated 13th November 2014 is dismissed with costs.

DATED and DELIVERED at KISUMU this 19th day of September 2017

D. S. MAJANJA

JUDGE

Mr Omondi instructed by M.M. Omondi & Company Advocates for the applicant.

Mr Mwamu instructed by Mwamu and Company Advocates for the petitioners/respondents.