



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.448 OF 2011

IN THE MATTER OF THE ESTATE OF OKEMWA KIRIAGO
(DECEASED)

HENRY NYAKOE NYANCHOKA.....APPLICANT

-VERSUS-

JOEL OMANGA OKEMWA)

PRESTOR OKEMWA).....OBJECTORS

RULING

1. The application dated **10th February 2015**, is made by **Henry Nyakoe Nyanchoka, (herein applicant)**, against **Joel Omanga Okemwa** and **Prestor Okemwa (herein, respondents)** and seeks orders for revocation and/or annulments of the grant issued to **Joel Omanga Mogute**, on **20th August 2013**, and confirmed on **14th March 2014**, vide **Succession Cause No. 172 of 2013** at the Principal Magistrate's Court at Rongo.

The application is brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules and is based on the grounds that the said grant was issued and confirmed by a court without jurisdiction hence null and void "*ab-initio*".

That, the material succession cause was filed without the consent of all beneficiaries of the estate of the deceased. That, the succession cause was filed irregularly as there was already the present succession cause No. 448 of 2011 at the High Court in Kisii respecting the estate of the same deceased person. That, the High Court at Kisii also issued a grant of letters of administration respecting the same estate of the deceased **Okemwa Kiriago**, meaning that two grants for the same estate are in existence contrary to the law and public policy. That, **Joel Omanga Mogute**, concealed material information and fraudulently obtained the disputed grant.

These grounds are fortified by the averments and annexures in the supporting affidavit dated 10th February 2015, deponed by the applicant.

The first respondent, **Joel Omanga Okemwa**, who appears to be the person **Joel Omanga Mogute**, opposes the application on the basis of the averments contained in the replying affidavit deponed by himself dated 21st September 2015.

2. The application proceeded by way of affidavit evidence as directed by the court on the 12th November

2015. In that regard written submissions were filed by the applicant through the firm of **J.O. Soire & Co. Advocates**, and by the respondents through the firm of **S.M. Sagwe Advocates**.

From the said submissions and the grounds in support of the application, the basic issue arising for determination is whether the grant dated 20th August 2013 obtained and confirmed at the Rongo Magistrate's Court was proper and lawful.

Under **Section 76** of the **Law of Succession Act** (Cap 160 Laws of Kenya), a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the proceedings to obtain the grant were defective in substance or if 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 *inter alia*.

Herein, it is contended by the applicant that the disputed grant was issued and confirmed by the Magistrate's court at Rongo which was not possessed of necessary jurisdiction to do so. This would therefore imply that the proceedings to obtain that grant were defective in substance for want of jurisdiction.

3. It cannot be gainsaid that any proceedings instituted in a court without necessary jurisdiction would be defective, void and null *ab-initio* for jurisdiction is everything

There is no dispute that the disputed grant was issued by the Magistrates court at Rongo, but whereas the applicant contends that the court did not have jurisdiction as the estate of the deceased had a value not in excess of Kshs.100,000/= the respondent contends that the court had jurisdiction seemingly under **Gazette Notice No. 9330** of **5th July 2013**. In their submissions, the respondent imply that it was upon the applicant to prove that the estate was valued at more than Kshs.100,000/=. This implied that they do not dispute the fact that a Magistrate's court could only handle succession causes only if the value of the estate was Kshs.100,000/= and below. Indeed that jurisdiction of the Magistrate's court in succession cases was donated by **Section 48** of the Law of Succession Act which clearly indicated that such jurisdiction would be exercised if the gross value of the estate did not exceed one hundred thousand shillings. It was therefore up to the respondents to prove to the Magistrate's court that the value of the material estate fell below Kshs.100,000/=: before they could move the court for grant of letters of administration.

4. There was no such proof. All that the respondents did when applying for the grant at the magistrate's court was to given an estimated value of Kshs.100,000/=: without showing how they arrived at the figure. It is doubtful whether a portion of land measuring 3.86 hectares would in this part of the country be worth Kshs.100,000/= and below.

It is apparent that the respondents misled the magistrate's court at Rongo on the value of the estate and caused the court to issue the disputed grant and eventually confirm it.

By applying for the grant in a court which clearly had no jurisdiction, the respondents initiated defective proceedings in a manner which may well be said to have been fraudulent and more so, considering the fact that the respondents or first respondent may not have obtained the pre-requisite consent to make the application and was very aware of the existence of the present succession cause which had been filed earlier than the succession cause at Rongo given that he fully participated in the present case and was aware that the Rongo court had issued an unlawful grant prior to this court issuing a subsequent lawful grant dated 21st November 2014, which is pending confirmation and in which he is one of the beneficiaries.

5. The first respondent objection to the present application is very much lacking in merit and is hereby overruled.

It beats reason as to why the respondents or the first respondent is bent at perpetuating an illegality in his opposition to this application. The best he could do was to join hands with the applicant and work

towards confirmation of the grant issued by this court on 21st November 2014, or if he is aggrieved by the grant apply as by law established to have it revoked.

Otherwise, the present application is merited and is allowed to the extent that the grant issued on 20th August 2013 and confirmed on 14th March 2014 by the Magistrate's court at Rongo vide **Succession cause No. 172 of 2013** be and is hereby revoked.

Both the applicant and the respondents shall bear own costs of this application.

It is accordingly ordered.

J.R. Karanja

Judge

[Read and signed this 28th day of January 2016].