



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION NO. 1010 OF 2012.

**IN THE MATTER OF THE ESTATE OF ABAKALWA ANDABWA
WAKHU ::::::::::::::::::::::::::::::::::::::: DECEASED.**

AND

MELSA MATENDECHERE MUSAMBA::PETITIONER/RESPONDENT.

VERSUS

JOSEPH KATAKA ANDABWA ::::::::::::::::::::::: OBJECTOR/APPLICANT

R U L I N G.

1. The deceased herein Abakalwa Andabwa Wakhu died on the 10th of October, 1969, at Shitari sub-location in Kakamega.
2. Grant of letters of administration were issued to Melsa Matendechere Musamba on the 2nd December, 2013 and the same confirmed on the same day after the court heard the petitioner's application dated 20th May, 2013, brought under certificate of urgency. A letter from the Assistant Chief Shitari sub - location dated 5th September 2012, was to the effect that the petitioner was the sole heir of the deceased's estate.

The application

3. Joseph Kataka Adaba the objector/applicant herein filed an application by way of Notice of Motion dated 7th May, 2015 under certificate of urgency seeking the following orders:-

(i) Spent

(ii) That District Land Registrar be ordered to cancel, revoke or nullify Title Deed (sic) for Land Parcel Marama/Lunza/596 issued to Amere Shabanji Opukah and be reverted back (sic) to original (sic) names of the deceased Abakalwa Andabwa Wakhu and register the same in the applicant's name.

(iii) THAT costs be provided for.

4. The application is supported by the affidavit of the applicant, Joseph Kataka Adaba who claims to be the administrator of his deceased brother's estate. He deposes in paragraph 3 of his affidavit that Land Parcel No[***particulars withheld***] belonged to his deceased brother whom he claims died without leaving behind a child or a wife surviving him.

5. In paragraph 4 of his affidavit, the applicant deposes to have stayed on the said parcel of land since he was born and that he was the one who buried his deceased brother. He further deposes in paragraph 5 of his affidavit that the petitioner herein filed the petition for grant of letters of administration without his consent or knowledge and was issued with the same, and a certificate of confirmation of grant was issued to her. He adds that the petitioner is not a beneficiary of the deceased's estate since she is a daughter to the deceased's brother by the name Namale Andabwa (deceased) where she can benefit as an heir if she so wishes.

6. The applicant also avers that the petitioner/respondent secretly and fraudulently acquired the above mentioned parcel of land in her names and sold the same to one Amere Shabanji Opukah in whose name it was transferred.

7. In his evidence before court, the objector/applicant testified that his brother Abakalwa Andabwa Wakhu died and left L.R. No. [particulars withheld] measuring 2.6 hectares which constitutes the estate of the deceased. The said land was then registered in the petitioner's and Shabanji Opukah's name whom he doesn't know. His prayer is for the above parcel of land to be re-registered in the deceased's name as the deceased had no children or wife.

8. He explained on cross-examination that the petitioner's mother was married to his elder brother Namale Andabwa Wakhu and that the petitioner is married and lives on a different piece of land. He maintained that the deceased herein had no children and added that the petitioner did not cultivate the land in issue which he was cultivating. He denied ever trying to sell the said land.

The respondent's response

9. The respondent/petitioner filed a replying affidavit on 21st October, 2015, opposing the application. She maintained that she is the administrator of Land Parcel No. [particulars withheld]. She deposes that the applicant is her uncle and he owns L.R.[particulars withheld] . She also avers that the land in issue belonged to her father, Abakalwa Andabwa Wakhu, the deceased herein, and her mother Nerea Andalia also deceased.

10. She deposes in her affidavit that since her birth in 1946 she has known the land in issue as theirs and that as the surviving heir of the deceased, she is the rightful person to inherit his estate. She adds that her late mother Nerea Andalia lived and worked on the land in issue throughout her life in marriage. She avers that the objector/applicant has never worked on the land in issue but only attempted to sell the same twice in 1974 to Habil Malika and Johnstone Lutta Okutoyi. She avers that her mother protested against Habil Malika and that she, the respondent, protested against Johnstone Lutta Okutoyi in 2004 and thereafter she continued to work on the suit land up to the time she sold it.

11. In paragraph 12 of her affidavit, she gave the reason for selling the land in issue to Amere Shabanji Opukah as being due to lack of strength in farming because of age and that she had another parcel of land. She prays that the court stops any further use of the land until the matter is heard and determined.

12. In her evidence, the respondent reiterated what is contained in her affidavit in that she is the sole heir of the deceased's estate.

13. On cross-examination by the objector/applicant, she maintained that she was the daughter of the late Abakalwa (the deceased).

Analysis and determination of the application

The issue for determination is if this court can order the cancellation, revocation or nullification of the title deed issued to a 3rd party herein.

14. In this case the respondent/petitioner was granted letters of administration which were also confirmed by the High Court on 2nd December, 2013. The said letters of administration have not been revoked,

annulled or contested in any way. The petitioner therefore remains the bona fide administrator of the deceased's estate for all intents and purposes.

15. Section 82 (b) of the law of Succession Act provides as follows:-

“Personal representatives shall subject only to any limitation imposed by the grant, have the following powers:-

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties all or any part of the assets vested in them as they think best:

Provided that

(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased and

(ii) no immovable property shall be sold before confirmation of the grant”.

16. The petitioner/respondent herein sold the suit land to one Amere Shabanji Opukah and the title to the said land was registered in the purchaser's name on 15th July, 2014 as per copies of the official search and green card marked “JKA 3 (a) & (b)” attached to the objector/applicant's affidavit. The petitioner/respondent was within her rights to sell the said land as she was the administrator of the deceased's estate. The grant of letters of administration had been confirmed as at the time the transaction took place.

17. The objector/applicant's application and orders sought cannot be granted as prayed. He has not applied for revocation or annulment of the grant of letters of administration to the deceased's estate as required in law. Since the objector/applicant alleges that the petitioner/respondent applied for and obtained letters of administration secretly and fraudulently, he should have sought for the revocation of the grant on the grounds that he has cited and then apply for the cancellation or revocation or nullification of the title deed of the Land Parcel No. [particulars withheld] issued to Amere Shabanji Opukah.

18. Section 76 of the Law of Succession Act provides for the revocation or annulment of grant in the following terms-

"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) that the grant was obtained by means of an 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 longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

19. In conclusion, the sum total of the foregoing is that the objector/applicant's application dated 7th May, 2015 lacks merit and the same is dismissed with costs to the petitioner/respondent.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this28TH day of**JANUARY**,.....2016.

NJOKI MWANGI

JUDGE

In the presence of

.....Applicant/Objector

..... Petitioner/respondent

..... Court Assistant