REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2335 OF 2011

IN THE MATTER OF THE ESTATE OF REUBEN MAINA ELIJAH HENIA Alias REUBEN MAINA E. HENIA Alias REUBEN MAINA (DECEASED)

MWANGI GAKURI ……OBJECTOR/APPLICANT

V E R S U S

BERNARD KIGOTHO MAINA ….. 1ST ADMINISTRATOR/APPLICANT

DANIEL KAMAU MAINA……..……2ND ADMINISTRATOR/APPLICANT

R U L I N G

1. Mwangi Gakuru, the Applicant filed the Summons for revocation dated 18th August 2014, Seeking orders that the Grant of Letters of Administration to Bernard Kigotho Maina and Daniel Kamau Maina made on the 19th March, 2012 and confirmed on the 25th day of February, 2013, be revoked and/or annulled.

2. In the main, the application is premised on grounds 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. More specifically that the property known as L.R. 36/11/213 which was distributed vide the said confirmation of Grant to the Administrators Bernard Kigotho Maina and Daniel Kamau Maina on behalf of themselves and in equal shares for all the other beneficiaries, was owned jointly by the Applicant/Objector and the late Reuben Maina Elijah Heina and vide the doctrine of *jus accrescendi* was not available for distribution.

3. On 18th August 2014 Mwangi Gakuru swore an affidavit in support of his application and deponed that the deceased, Reuben Maina Elijah Henia, Alias Reuben Maina E. Henia, Alias Reuben Maina died on 28th February 1997. That the grant of Letters of Administration intestate of the said deceased which was made to Bernard Kigotho Maina and Daniel Kamau Maina respectively on 19th March 2012 and confirmed on 25th February 2013 was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case.

4. The Applicant asserts that the property known as L.R. 36/11/213, which was distributed vide the said confirmation of Grant to the Administrators on behalf of themselves and in equal shares to all the beneficiaries is jointly owned by himself and the deceased, and is not available for distribution.

5. The Administrators swore a joint replying affidavit dated 22nd September, 2015 in which they deponed that the deceased and the Applicant were business partners prior to the deceased's death and that they had acquired several properties together as tenants in common. Among them are L.R. 36/11/213 Eastleigh registered in their joint names and L.R. 209/4811/119 Mbotela which is in the Applicant's name. That the deceased and the Applicant verbally agreed to let the Applicant take the Mbotela property exclusively, while the deceased would take the Eastleigh property exclusively. That they developed the two properties together and the Applicant did take over the Mbotela property exclusively, letting it out and collecting the rent therefrom, while the deceased took over the Eastleigh property also exclusively.

6. The Counsels in the matter filed written submissions. Mr. Kahonge for the Applicant submitted that the material facts concealed from the court were that the deceased was not the sole registered owner of the suit parcel of land, and that vide the doctrine of jus accrescendi ownership of the suit property automatically devolved to the Applicant upon the demise of the deceased. He urged the court to allow the summons for revocation of grant and revoke the grant issued herein. He relied on the cases of **Isabel Chelangat vs Samuel Tiro (2012) eKLR** and **Republic v Funyula Land Disputes Tribunal & Another [2014] eKLR**.

7. Mr. Mugo for the Respondents submitted that from their joint affidavit the Applicant has never occupied the property in dispute, or paid any rents or bills arising from the property as all the receipts show that payments were made by the Respondents. That the Applicant's actions in not bothering with the property clearly show that the verbal agreement between the deceased and himself exists and that he was agreeable to the position even after the deceased's death.

8. Learned counsel argued that the Applicant denied being the registered owner of L.R. No. 209/4811/119 Mbotela, so that the verbal agreement between him and the deceased would not see the light of day, and so as to deny the beneficiaries of the Estate of the deceased their rights over the said property. Mr. Mugo further argued that the legal action available to the Applicant after the death of the deceased, was to request for the deletion of the deceased's name from the title document.

9. Counsel contended that the Applicant did not do this despite having an Advocate on record, because of the understanding between him and the deceased. That taking out the citations to the estate of the deceased shows that the Applicant wanted his half share of the property and this could only be achieved once the Administrators and other beneficiaries took out letters of administration of the estate.

10. Upon consideration of all the affidavits and submissions before me, I find that the issue for determination is to establish what the intentions of the Applicant and the deceased were in registering their property under joint ownership. Those intentions can be construed from the way they related with the property in question, or from any agreement they may have entered into subsequently concerning the said property.

11. It is common ground that the Applicant and the deceased bought property together and owned it jointly. Under the principle of survivorship or jus accrescendi the suit property would become the property of the Applicant following the death of the deceased. The interest of the deceased would be lost as it would fuse with the interest of the Applicant, and that interest would not be available for distribution as part of the Estate of the deceased. Consequently, the said property would not form part of the estate.

12. The principle of survivorship also known as jus accrescendi operates as was explained in the case of **Isabel Chelangat vs Samuel Tiro (2012) eKLR,** as follows:

> ***"A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single***

owner. Joint tenancy carries with it the right of survivorship and "four unities." The right of survivorship (jus accrescend) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence."

13. By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book Laws of Succession at page 3 states as follows:

"Property is capable of passing upon death other than by will. It may pass by survivorship……This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship…..The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants."

14. The Applicant produced a copy of an Indenture made on 7th November 1977 in relation to the suit property as proof that he has the right to the said property. He also stated that he was responsible for making payments in respect of Land Rates and utility bills for the suit property but did not produce such evidence. He urged that there was no proof or evidence by the Administrators on their several "unfounded and unproven allegations" regarding the suit property and the relationship between the Applicant and the deceased.

15. Mr. Mugo learned counsel submitted for the Administrators that they followed the process as required and a notice was published in the Kenya Gazette of 10th February 2012 in which objections were invited to be raised within Thirty (30) days of the notice, failure to which the Grant as petitioned would issue to the proposed administrators. After the expiry of 30 days the Grant was issued on 19th March 2012 and the Applicant did not raise any objection at this juncture as required.

16. According to the Administrators the standoff in this matter arose out of a misunderstanding relating to another property owned jointly by among others, the deceased and the Applicant being property L.R. 209/2763/7 in Gikomba. The Applicant and two other proprietors' names had been omitted in the Title document of this property. The Applicant made it a condition for release of the title for L.R. 36/11/213 to the Administrators, for his name only to be included in the Title L.R. 209/2763/7 Gikomba, leaving out other joint owners.

17. From the arguments before me I note that both the replying affidavit and the submissions on behalf of the Applicant, do not refute several pertinent assertions made by the Administrators concerning the suit property. The Applicant did not deny that after the death of the deceased he called the family of the deceased to a meeting and reiterated the verbal agreement he had entered into with the deceased, and confirmed to them that the Eastleigh property belonged to the deceased's Estate. Further that since the death of the deceased to date the Applicant has never set foot on the Eastleigh property, and it is the Administrators who have been managing it and paying all the rates and bills arising therefrom. It is pertinent to note that the deceased died 18 years ago on 28th February, 1997.

18. I also observe that among the properties listed in the assets of the deceased in the petition served upon the Applicant, vide the letter dated 29th November 2011 through his Advocates, was the suit property L.R. 36/11/213. The Applicant did not raise issue on any of the foregoing, assertions by the Administrators, or the inclusion of this property in the list of his assets.

19. From the evidence the Mbotela property is registered in the Applicant's name solely and he has been managing it exclusively and paying the rates and bills thereon. On the other hand, the Administrators produced evidence that all along they have managed and paid the rates and bills on the Eastleigh property without any interference from the Applicant, since the passing of the deceased eighteen years ago.
20. For these reasons I find that although the deceased and the Applicant held the suit property under joint ownership, their intention as can be construed from their own interactions with the properties, was for the Applicant to own Plot No. L.R. 209/4811/119 Mbotela exclusively, while the deceased owned L.R. No. 36/11/213 exclusively. In the premise I find that the application dated 18th August 2014 cannot be granted and is dismissed accordingly.

Costs to the Respondents.

SIGNED DATED and **DELIVERED** in open court this **27th day** of **January 2016**.

L. A. ACHODE

JUDGE