



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO. 248 OF 2013**

**IN THE MATTER OF THE ESTATE OF NYANG'AU ONYARI (DECEASED)**

PRISCAH NYARESO OKINYI.....PETITIONER

VERSUS

JUSTUS A. M. SIGAH.....OBJECTOR

COUNTY GOVERNMENT OF NYAMIRA.....INTERESTED PARTY

**RULING**

1. By an application dated **15<sup>th</sup> October, 2013** brought under **Section 76 Law of Succession Act and Rule 44 Probate and Administration Rules Cap. 160 Laws** of Kenya, the Objector herein sought orders as follows:
  1. **That the succession cause was filed in a court without jurisdiction.**
  2. **That the Petitioner failed and/or neglected to disclose to the court all the beneficiaries of the estate of the deceased.**
  3. **That the petitioner failed and/or neglected to obtain the consents of all the beneficiaries of the estate of the deceased.**
  4. **That the petitioner used a false and/or fraudulent death certificates of the deceased to file he petition.**
  5. **That costs of this objection be borne by the petitioner.**
2. The said application is supported by the Objector's affidavit in support of summons for the Revocation or Annulment of Grant **dated 15<sup>th</sup> October, 2013.**
3. In the said affidavit, the Objector depones that the grant was obtained irregularly and fraudulently because the petitioner filed the succession cause before the **Resident Magistrates court at Keroka** yet the court lacked the Pecuniary Jurisdiction to hear and determine the matter as the estate was worth in excess of **Kshs. 10 million.**
4. The Objector further deposes that the Petitioner concealed from the court the true identity of all the beneficiaries and that he did not seek the requisite consent of all the beneficiaries before filing the succession cause.
5. The Objector states that the Petitioner fraudulently obtained the deceased's death certificate and did not get the consent of all the beneficiaries prior to the distribution of the estate which distribution did not cater for the interests of all the rightful beneficiaries whom he listed as follows:
  - i. **William Bosire – son to the deceased.**
  - ii. **Justus A.M. Sigah and his siblings who are the grand children of the deceased being the sons**

**of Samuel Sigah who was son to the deceased.**

**iii. Esther Nyangau Gekonge – daughter to the deceased.**

6. The Objector stated that his siblings and himself being grandchildren of the deceased had been disinherited from that father's land/estate through the skewed distribution of the deceased's estate and hence he prayed for the revocation and/or annulment of the grant issued to the Petitioner.
7. On 25<sup>th</sup> November, 2013, this court issued orders to preserve the status quo prevailing in respect to the deceased estate comprised of **East Kitutu/Mwamangera/545** pending the hearing and determination of the objection proceedings.
8. On 17<sup>th</sup> July, 2015, this court also allowed an application by the Interested Party (County Government of Nyamira) to be enjoined in this suit.
9. The Petitioner was represented by M/s Rogito Isaboke advocates while E. Asati advocate acted for the Interested Party.

#### **Petitioners Replying Affidavit**

10. In response to the Objector's application, the Petitioner on **29<sup>th</sup> October, 2013** filed a replying affidavit in which she deponed that **Land Parcel No. East Kitutu/Mwamangera/545** (*hereinafter in this judgment was referred to as the suit land*) was registered in her name jointly with her sister one **Anne Kwamboka Oenga** after the successful conclusion of the succession case.
11. The Petitioner added that the deceased who was her father, had prior to his death distributed and transferred **Land Parcel No. East Kitutu/Mwamangera/544** to his two sons namely **Bosire Nyanga'au** and **Samuel Siga (deceased)**. It is the Petitioner's averment that the deceased had 2 wives and had therefore allocated his land to each wife/house and that Samuel Siga the father of the Objector together with his brother Bosire Nyang'au were allocated **Land Parcel, No. East Kitutu/Mwamangera/544**.
12. The Petitioner claims that since her mother did not have any sons with the deceased, the deceased had appointed her to be in charge of the suit land.
13. According to the Petitioner, the Objector does not live on the suit land and neither does he have any proprietary interest on the said land.
14. The Petitioner further depones that the Objector was fully made aware of the filing of the Succession Case, and that the Objector should concern himself with **LR. No. East Kitutu/Mwamangera/544** which is registered in the joint names of the Objector's father Samuel Siga (deceased) and his brother Bosire Nyangau.
15. The Petitioner stated that she held the suit land for herself and in trust for her other sisters and that she did not violate any provision of the law when she applied for the grant of Letters of Administration.

#### **Interested Party's replying affidavit**

16. In a replying affidavit sworn on **28<sup>th</sup> July, 2015** by one **Thomas Atunga Sagwe**, the Interested Party's Chief Officer in the Department of Environment, Water, Energy, Mining and Natural Resources, the Interested Party depones that it purchased the suit land from the Petitioner on **16<sup>th</sup> September, 2013** after conducting a search which established that the Petitioner was the registered owner thereof. He adds that following the said purchase, the land was subsequently transferred to the interested party who on **31<sup>st</sup> October, 2013** secured a title for the same.
17. The Interested Party's deponent also gave information regarding the genesis of the Petitioner's ownership of the suit land as narrated to him by the Petitioner. He stated that the Interested Party intended to develop the suit land after purchasing it.
18. Soon after filing this application dated 15/10/2013, the Objector simultaneously filed another application on the same day seeking orders for preservation of the Suit Land from being transferred, sold and/or alienated pending the outcome of the objection proceedings.
19. On **17<sup>th</sup> October, 2013**, this court ordered the maintenance of the status quo prevailing on the suit land pending the hearing of the main application for preservation of the deceased's estate. The

said orders for maintenance of the status quo were subsequently extended on 29<sup>th</sup> **October 2013** and 11<sup>th</sup> **November 2013**, however, on 25<sup>th</sup> **November, 2013**, this court issued orders for the preservation of the Suit Land from being transferred or alienated pending the outcome of the objection proceedings.

20. On 5<sup>th</sup> **December 2014**, the parties herein agreed to canvass the application for revocation and/or annulment of grant by way of written submissions.

#### **Objectors written submissions**

21. The Objector submitted that the **Lower Court at Keroka** lacked the requisite pecuniary jurisdiction to handle the succession cause since the suit land is valued at more than **Kshs. 10,000,000/=** yet the court's jurisdiction was then limited to **Kshs. 100,000/=**. The Objector relied on the decision of **Musinga J. *In K. Napukuyok Naibartur Ketian –vs- Matian Ole Kisarigol and Francis Paipai Keitany Kisii Succ. Cause No. 199 of 2008*** in which it was held;

**“.....Jurisdiction is the padlock of any court decision and without it the decision cannot stand, it has to fall. In WILSON KENYENGA VS JOEL OMBWORI Appeal No. 96 of 1998, the court of Appeal held that the question of jurisdiction is a matter which a court can and should take cognizance of whether or not the matter is raised by any party. Likewise, Magistrate's courts ought to diligently consider and reasonably place a value on the disclosed asset of an intestate when an application for grant are made before them. That should be done even where the stated value is not more than Kshs. 100,000/=. If a Magistrate's court is of the view that the gross value of the deceased estate is more than Kshs. 100,000/= the court should either refuse which application or ask the Petitioner to provide the valuation report of the estate. That way there will be a reduction in the number of unnecessary applications that are made before the High court for nullification of grant made by courts without jurisdiction.”**

22. Objector also reiterated the fact that the Petitioner did not obtain the consent of all the beneficiaries prior to the filing of the application for grant of letters of administration which is a mandatory requirement **under Rules 26 (2) and Rules 40 (8) of the Probate and administration Rules**.

23. The Objector further submitted that the Petitioner concealed from the court, the true identity of all the rightful heirs and beneficiaries of the deceased's estate. The Objector added that Petitioner did not seek or obtain the consent of all the beneficiaries on the distribution of hectors prior to the confirmation of the grant.

#### **Petitioner's written submissions.**

24. The Petitioner repeated the averments contained in her replying affidavit in her submissions and stated that the Objector was not a beneficiary of the deceased since he was supposed to pursue his own deceased father's land **Parcel No. East Kitutu/Mwamangera/544**.

25. The Petitioner therefore contended that the Objector was pursuing the wrong estate as the suit land belonged to the Petitioner and one Anne Kwamboka Oenga. The Petitioner further added that the Objector had no capacity to demand a share of the deceased's state since he was not a dependant of the deceased, but a grandchild; by virtue of being the son of the Petitioner's brother one Samuel Sigah (deceased).

26. The Petitioner argued that the deceased had, prior to his death, already divided his land among his children with the Objector's late father Samuel Sigah and brother Bosire Nyangau getting LR. No. East Kitutu/Mwamangera/544 and the Petitioner's getting the suit land.

27. According to the Petitioner, the Succession cause before the Keroka Court was properly conducted and a fair decision rendered.

#### **Submissions for the Interested Party.**

28. The Interested Party submits that the Objector has no locus standi to file the objection proceedings since he is not a direct beneficiary to the estate of the deceased by virtue of being the deceased's grandson. Furthermore, the interested party reiterated that the deceased had prior to his death, subdivided his land among his two wives with the Petitioner's family getting the suit land and the Objector's family getting **LR. NO. EAST KITUTU/MWAMANGERA/544**.
29. It was the contention of the Interested Party that the Objector did not fit in the description of being a dependant of the deceased in terms of **Section 29 (b) of the Law of Succession Act** which states as follows:

**“Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.”**

30. The Interested Party argued that it lawfully purchased the suit land from the Petitioner on 16<sup>th</sup> September, 2015 and thereafter secured registration as the owner on 31<sup>st</sup> October, 2015 and that by dint of the provisions of **Article 40 of the Constitution**, it had the right to acquire and own property of any description in Kenya.
31. The Interested Party cited **sections 24 and 25 of the Land Registration Act No. 3 of 2012** which provides inter alia, that a person registered as the proprietor of land has absolute ownership rights and privileges appurtenant thereto.
32. The Interested Party further stated that he now holds an indefeasible title to the said land by virtue of the **provisions of Section 93 (1) of the Law of Succession Act Cap 160 Laws of Kenya** which provides as follows:

**“A 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.”**

33. It was the interested party's case that the revocation or annulment of grant herein will not serve any useful purpose because by virtue of the Provisions of **Section 93 (1) of the Law of Succession Act**, the interested party's title cannot be affected by any revocation of the grant.
34. According to the interested party, it was an innocent purchaser of the suit land without notice who had secured title and vacant possession.
35. The Interested Party sought the dismissal of the application dated 15<sup>th</sup> October, 2015 with costs.

### **Analysis and determination**

36. Upon considering the application dated 1<sup>st</sup> October, 2013, the response filed and submissions made by the parties, I note that the key issues that require my determination are as follows:
- a. **Whether the grant was obtained fraudulently or by concealment of the true identities of all the beneficiaries of the deceased.**
  - b. **Whether to Senior Resident Magistrates Court had jurisdiction to entertain the succession case.**
  - c. **Whether the Objector herein being a grandson to the deceased, is entitled to claim the estate of his grandfather.**
  - d. **Whether the Interested Party's interest in the suit land is valid and indefeasible.**
37. The Objector has sought the revocation and/or annulment of the grant issued to the Petitioner on 15<sup>th</sup> July 2013.

**Section 76** of the Law of Succession Act provides for instances under which a grant of

representation may be revoked as follows:

**“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.”**

38.The Objector has claimed that the grant was obtained fraudulently and by concealment of the true identity of the all the beneficiaries of the estate of the deceased. He claims that the Petitioner deliberately left out the two sons of the deceased from the succession case one of whom was Samuel Sigah his late father and his uncle one Bosire Nyang’au.

39.I have perused the record of **Keroka SRM Succ. Cause NO. 6 of 2011** and I have noted that the chief’s letter which accompanied the application for grant of letters of administration mentioned only the 2 petitioners as the children of the deceased. Clearly therefore, the two sons of the deceased were left out of the succession. The omission amounts to concealment of material facts from the court for which a claim for a Revocation of grant would be allowed.

40.The Petitioner has alleged that the sons of the deceased **SAMUEL SIGAH (deceased)** and **BOSIRE NYANGAU** – had been given other land by the deceased being **LR NO. EAST KITUTU/MWAMANGERA/544** before he died and therefore the Objector (Samuel Sigah’s son) had no basis for claiming the suit land which was earmarked for the Petitioners.

41.I have perused the search certificate in respect to **LR. NO. EAST KITUTU/MWAMANGERA/544** and I note that it was on 17<sup>th</sup> July, 1970 registered in the names of **BOSIRE NYANGAU** and **SAMUEL SIGA** during the first registration. At no time did the said land belong to the deceased so as to entitle the Petitioner to state that he had given it to his sons prior to his death.

42. Even assuming that the said **LR. NO. EAST KITUTU/MWAMANGERA/544** belonged to the deceased and he had given it to his sons during his life time, that would not legally entitle other beneficiaries from excluding the sons from inheriting other property of the deceased in his intestacy.
43. The Objector also contested the Pecuniary Jurisdiction of the Kericho Senior Resident Magistrate's court while stating that the suit property is valued at **Kshs. 10,000,000/=** yet the jurisdiction of the Lower Court is limited to **Kshs. 100,000/=**. The Objector did not furnish the court with a valuation report to confirm the value of the suit land so as to entitle him to object to the court's Jurisdiction. However, by virtue of the fact that the Petitioner has admitted having sold the suit land to the Interested Party for the sum of Kshs. 4,000,000/= on 16<sup>th</sup> September, 2013 when the sale agreement was made, one can safely say that the Objector's claim that the Lower Court lacked Pecuniary Jurisdiction to handle the succession was merited. The lower court acted without jurisdiction and on this ground alone, this application for annulment of grant should succeed.
44. Turning to the title on the suit land held by the Interested Party, the said Interested Party has argued that it is a bona fide purchaser without notice whose ownership rights are not only protected and recognized by **Article 40 of the constitution, Section 23 and 24 of the Land Registration Act No. 3 of 2012 and section 93 (1) of the Law of Succession Act**.
45. In an ideal situation, the Interested Party's argument would have been plausible and indeed its title would have been indefeasible had it not been that its registration was secured and obtained on 31<sup>st</sup> October, 2013 at the time when this court had already granted orders on 17<sup>th</sup> October, 2013 for the maintenance of the status quo on the suit property pending the outcome of these objection proceedings.

The word status quo is defined by *Blacks Law Dictionary, 9<sup>th</sup> Edition at page 155 as "state in which" that is "the situation that currently exists."*

*Ballentines Law Dictionary by Jack G. Handlerat at page 522 defines the same word as "the existing state of affairs; things as they are."*

In this case therefore when the court on 17<sup>th</sup> October, 2013 ordered that the status quo be maintained, it is expected that the circumstances of the suit land, including its ownership at the time the order was made was to be maintained. An order for maintenance of status quo is mainly meant to preserve the existing state of affairs.

46. In my view therefore, the order to "maintain status quo" meant that even the ownership of the suit land ought not to have changed hands pending the outcome of these proceedings.
47. I note, from the court record that the order to maintain the status quo was duly served on the advocates for the Petitioners on 24/10/2013 and it was therefore an act of bad faith and blatant disregard of lawful court orders for the Petitioner to have gone ahead and transferred the suit land to the interested party on 31<sup>st</sup> October, 2013 in the face of a court order to the contrary. Looked at critically, the transfer in my view, was intended to circumvent, steal the match and/or pre-empt the outcome of these objection proceedings and this court cannot therefore sanction an act purely intended to disobey its own orders by upholding the registration of the Interested Party on the suit land.
48. It is worthy to note that at the time the orders to maintain the status quo was made on 17<sup>th</sup> October, 2013, the Interested Party had not been enjoined to these proceedings and was thus not a party to this case. However, the Petitioner who transferred the title to the Interested Party was fully aware of the court orders which orders she chose to ignore.

The Petitioner has opposed the Objector's application on the basis that he is not a direct beneficiary of the deceased but rather a grandson who, according to the Petitioner does not have a locus standi to object to the issuance of grant. The Objector has on his part stated that he has an interest in the suit land since, his father who had a direct interest over the same is deceased. Under those circumstances, I find the Objector has a valid claim over the suit land and the issue of whether or

not his father had already received his share of the deceased's estate before the deceased died are issues to be determined at the confirmation and distribution of the estate, in the presence of all the beneficiaries. My position is fortified by the observation of Musyoka J. In the matter of the estate of Veronica Njoki Wakageto (Deceased) [2013] eKLR, where stated as follows:

**“Under part V, grand children have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parent, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time the grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”**

In the instant case, the Objectors own father is one SAMUEL SIGAH is deceased and I find that the Objector is in order and justified to step into his father's shoes and claim directly whatever share of the deceased's estate was due to his father.

49. From my foregoing analysis of this case, I come to the conclusion that the application dated 15<sup>th</sup> October, 2013 has and make orders as follows:

- a. Summons for revocation of grant dated 15<sup>th</sup> October, 2013 is hereby allowed. Consequently the grant issued to the Petitioner herein on 4<sup>th</sup> December, 2012 and confirmed on 16<sup>th</sup> December, 2012 is hereby revoked and/or annulled.
- b. A fresh grant shall be issued in the joint names of the Petitioner and Objector herein.
- c. The title to the suit **Land No. East Kitutu/Mwamangera/545** and currently held by the Interested Party is hereby cancelled and shall revert back to the names of the deceased herein **NYANG'AU ONYARI**.
- d. All the beneficiaries are at liberty to file an application for confirmation of the grant or affidavits of protest should they deem it necessary.
- e. The Interested Party is at liberty to register its interest in the suit land as a purchaser in the fresh confirmation of grant proceedings to be filed by the beneficiaries.
- f. Bearing in mind the nature of this case, I make no orders as to costs.

50. It is so ordered.

**Dated, signed and delivered in open court this 18<sup>th</sup> day of April, 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Petitioner
- Soire for the Objector
- Omwoyo court clerk