



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 151 OF 1989

**IN THE MATTER OF THE ESTATE OF THE LATE CORNEL OKUMU MANYURU
(DECEASED)**

AND

JOHN WABWIRE ONIALA -----PETITIONER/RESPONDENT

VERSUS

PETER OKUMU

KELESENJIA NAFULA MANYURU -----OBJECTORS

AND

ALEX RATEMO NYANGA

FRANCIS GILBERT MWOLLO BWIRE

JOHN ANTON MBANDA

DAVID OBUYAH OGADU

M.P.OKUMU MBANDA-----INTERESTED PARTIES

CHRISTOPHER RATEMO

JACOB MBANDA MBANDA

FABIAN LUBEMBE IMBWAGA

OKUMU MICHAEL JEREMU

RULING

1. Following the Death of Cornel Okumu Onialla (the Deceased), who died Intestate on 2nd June 1988, John Wabwire Oniala (The Petitioner) was granted Letters of Administration to his Estate on 5th July 1990. That Grant of Probate was confirmed on 18th January 1991.
2. Some 23 years later, on 28th October 2014, the Objectors have sought Revocation of that grant in a Summons in which they pray that:-

1. **That this application be certified urgent and heard on priority basis.**
2. **That the Application dated 10.7.2014 be marked withdrawn.**
3. **That leave be granted to serve the Petitioner by registered post at his last known address.**
4. **That pending the hearing and determination of this application there be registered a restriction on titles/registers created on subdivision of Bukhayo/Mundika/395 i.e. parcel No. 4225 to 4234.**
5. **That the grant issued to John Wabwire Oniala on 5.7.1990 and confirmed on 30.1.1991 or any other herein be and is hereby annulled/revoked.**
6. **That a fresh grant be issued to the objectors.**
7. **That all subdivision/partition and subsequent registration resulting from LR Bukhayo/Mundika/395 be cancelled and Bukhayo/Mundika/395 restored in the names of the deceased – Chornel Okumu.**
8. **That this court do grant such just reliefs.**
9. **That costs be provided for.**

3. At the time of his death the only property belonging to the Estate of the Deceased was Bukhayo/Mundika/395. After Confirmation of Grant, the Petitioner caused that land parcel to be subdivided into 10 portions and had nine of them transferred to nine Third Parties. Only Bukhayo/Mundika 4230 remained in the name of the Petitioner. Even that portion is charged to National Bank of Kenya. The nine Third parties are named as Interested Parties herein. Following service by way of Advertisement (with leave of the Court) in Standard Newspaper only the 2nd and 8th Interested Parties responded.

4. In an Affidavit sworn on 28th October 2014, the 2nd Objector avers that she is the only Widow to the Deceased and mother to the Petitioner herein. In paragraph 7 of her affidavit she named the following as the persons who survived the Deceased as at 1988:-

- | | |
|---------------------------------------|----------------------------|
| a. Kelesenjia Nafula Manyuru – | Widow (alive) |
| b. Leonida Wekesa Okumu – | Daughter (deceased) |
| c. John Wabwire Oniala | son - (unknown) |
| d. Faustine Anyango Okumu | Daughter (alive) |
| e. Resila Ouma | Daughter (Deceased) |
| f. Florence Inganga Okumu | Daughter (alive) |
| g. Roseline Okumu | Daughter (Alive) |
| h. Matilda Okumu | Daughter (alive) |
| i. Emily Auma Okumu | Daughter (alive) |
| j. Josephine Okumu | Daughter (Alive) |
| k. Peter Okumu | Son (Alive) |

5. It is the contention of the 2nd Objector that prior to the filing of the Petition, the Petitioner did not obtain the consent of those survivors to the presentation of the Petition. I believe this averment because I have perused the entire Court file and have not seen any filed consent.

6. I also accept the contention by the Objectors that another good reason that would entitle them to an order of Revocation is that the order of confirmation extracted by the Petitioner was at variance with the order made by Court on 18th January 1991. In fact the variation was very substantial. On that day the Hon. N.A. Oundu RM ordered as follows:-

ORDER: The grant of probate confirmed. The estate namely land parcel Bukhayo/Mundika/395 to be shared equally among John Wabwire Oniala, Machilda Okumu Justine Auma Okumu, Josephin Okumu and Peter Okumu. Kelecensia Nafula Okumu to hold M O, J O, J O and P O's shares in their behalf (trust) till they attain the age of 18 years i.e. majority(sic) age.

In the Certificate of Confirmation the Petitioner named himself as the sole heir. That Certificate was a fraudulent departure from the Court order above.

7. This Court therefore finds merit in the Objectors application that the Court issued to the Petitioner on 5th July 1990 and confirmed on 30th January 1991 should be revoked. A related issue, then is, what is to happen to the transfers made to the nine Third Parties.
8. Two of the nine presented themselves to Court and explained how they obtained title to their land. Fabian Lubembe Imbwaga (the 8th Interested Party) explained that on 24th February 1991, he and one Charles Ooko jointly purchased 0.82 of land then a portion of Bukhayo/Mundika/395 from the Petitioner at a consideration of Kshs. 16000/-. A copy of the sale agreement was shown to Court. They settled on the land and the purchased portion was hived from plot 395 and designated Bukhayo/Mundika/4233. They contend that they have occupied the land since the said purchase. Ownership of Bukhayo/Mundika/4233 was transferred to them on 21st March 1991.
9. The Petitioner also sold a portion of Bukhayo/Mundika/4226 to one Francis Mwolo Bwire. Francis Bwire was named as the 2nd Interested Party herein. From an Affidavit sworn by one Willy Catherine Bwire on 17th October 2015, Francis Bwire died on 10th April 2013 and the said Willy is the Widow and Administrator to his Estate. It is the testimony of Willy that the late Francis purchased the portion from the Petitioner in 1991 and thereafter fenced it off and occupied it peacefully until 2011 when the Objectors destroyed the fence and chased away their workers.
10. Willy then lodged a complaint with the County Land Registrar Busia who carried out investigation and prepared a report. The report was shown to Court.
11. The evidence is that Bukhayo/Mundika/4226 is now transferred to Jadida Investment Limited following a Court order on the Distribution of the Estate of Francis. Willy is a Director of that Company.
12. The argument by Willy and the 8th Interested Party is that the transfers to Francis and to the 8th Interested Party respectively are protected by the provisions of Section 93 of the Law of Succession Act which provides that:-

93 (1) A transfer 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 he commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

The two have shown that the purchases were from the then appointed Administrator. The Purchases were in 1991. The Purchasers then took occupation soon thereafter and occupation has continued since. The 8th Interested Party made the following uncontroverted averment in paragraph 13 of his affidavit;

That, at no time did the Objectors herein, who reside next to this make any effort to evict or destroyed our boundary around this parcel of land and chased away us or our workers from the sold land.

While for the Estate of the 2nd Interested Party their peaceful occupation was interrupted in 2011 after the death of Francis. This is what the Land Registrar observed in his report:-

The family of John Wabwire Oniala have taken advantage of his absence to frustrate CATHERINE BWIRE from accessing the estate of her late husband. It will be necessary that CATHERINE BWIRE acquires a court order to enable my office restore the original boundaries of her late husband's estate. To do this, the hostile parties will have to be deterred by the court and the same person be permanently enjoined from interference with the quiet occupation and use of the parcel by CATHERINE BWIRE. There will be need for police officer to accord my office security during the exercise.

13.The evidence is Bukhayo/Mundika/4226 was transferred to Francis on 3rd May 1991 while Bukhayo/Bundika/4237 was transferred to Fabian on 21st March 1991. The Transfers were made by a person to whom Representation had been made. There is no evidence that the Interested Parties were not innocent purchasers for value. The purchases happened 23 years before Proceedings of Revocation were mounted. The purchasers took possession of the purchased portions in 1991. The Objectors were well aware of this occupation since 1991. The Objectors have not explained why they did not mount their complaints earlier. I have to reach the conclusion that the interests of the 3rd Parties deserve the protection availed by Section 93 of the Law of Succession Act.

14.What about the other Interested Parties. None of them responded to the Application for Revocation. They are said to have been served by way of Notice published on 9th September 2015 in the Standard Newspaper at page 37 of that paper. This Court granted leave for Substituted Service after considering the Objectors application of 25th February 2015. In support of that Application, the 2nd Objector swore an affidavit in which she said;

“That non of the Interested Parties do reside or use the land” (My emphasis)

The above statement was made in respect to all the Interested Parties including the 2nd and 8th Interested Parties

15.From the evidence of Willy, (for the 2nd Interested Party) and the 8th Interested Party it may not be entirely true that none of the Interested Parties reside on the land. If I was to hold on behalf of the Objector then it would mean that I reverse the ownership of the land parcels currently registered in the names of the various third parties. That is no doubt a drastic order. But I now entertain a doubt as to whether, in view of the evidence of occupation that has emerged from Willy and the 8th Interested Party, this Court should have acceded to the Objectors request for Substituted Service.

16.This Court takes a position that the other Interested Parties must be given a fair chance of presenting their side of the story. For that reason I direct that the Objectors do serve their summons for Revocation personally upon the remaining Interested Parties including National Bank of Kenya. This Court shall shortly appoint a hearing date when the other Interested Parties shall be heard.

17.For now, I dismiss the Objectors Application for cancellation of the current entries to Bukhayo/Mundika/4233 and Bukhayo/Mundika/4226. Further and Final orders shall await a determination of the Interests of the remaining Third Parties. Each Party shall bear his own costs.

Dated, signed and delivered this 24th day of May 2016

F. TUIYOTT

J U D G E

In the presence of:-

.....C/Assistant

.....for the Objectors

..... for the Interested Parties

.....for the Petitioner