



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 990 OF 2011

IN THE MATTER OF THE ESTATE OF WILSON ABURA LILUMA ALIAS ABURA LILUMA  
.....DECEASED

AND

MOSES MUSA LUMITI ABURA.....PETITIONER

AND

DORCAS ASINYILWA BARASA.....APPLICANT

WEVASIRTY SACCO SOCIETY LTD.....INTERESTED PARTY

**J U D G M E N T**

**Introduction**

1. The deceased herein Wilson Abura Liluma died on 09.06.2008. His son Moses Musa Lumiti Abura petitioned for grant of Letters of Administration Intestate which was confirmed on the 29.07.2013 and property of the deceased as per the petition, distributed.

2. By summons for revocation or annulment of Grant dated 11.05.2015, Dorcas Asinyilwa Barasa one of the daughters of the deceased, has applied for the said grant to be revoked and/or annulled and land title Isukha/Shirere/41 restored by the cancelation of the new titles that were created therefrom. She claims that the grant was obtained secretly without her consent, participation or knowledge and that she was not present at the confirmation thereby rendering the proceedings defective in substance. She also claims that the petitioner concealed the fact that she was entitled to an equal share of the estate herein as daughter of the deceased which has led to a skewed distribution that has greatly disadvantaged her. She adds that the petitioner left out other property comprising the deceased's estate situated at Amalemba in Kakamega town. Her application is supported by her own affidavit filed together with the summons wherein she explains her relation with the deceased and re-emphasizes the grounds above. What I gather from the affidavit is that she was once married but the marriage did not work out and she was returned to her father by her husband. She has since stayed with her father (the deceased) on land parcel Number Isukha/Shirere/41. She depones that she was not notified of the proceedings herein, but she only came to know of the proceedings when she started seeing developers and surveyors on the land doing demarcations and building perimeter walls which have interfered with the portion she uses currently.

3. She adds that it was after she conducted a search that she learnt that she was given 0.09Ha out of the estate of the deceased which is a small portion compared to the shares of other beneficiaries and further that title number Isukha/Shirere/41 was no longer in existence since it had been partitioned into new numbers 6127,6128,6129,6130 and 6131.

## **Response**

4. In response to the application it is only the interested party who filed an affidavit. The interested party WEVARSITY SACCO SOCIETY joined the proceedings on 25.02.2016. Apparently, they bought a piece of land from one of the sons of the deceased after distribution and partitioning had been done. In his affidavit in response to the summons for rectification VICTOR KIPLAGAT KIPTANUI narrated how the Interested Party exercised due diligence before purchasing LR NO. Isukha/Shirere/6130 which was hived off from land parcel No. Isukha/Shirere/41. He explains in detail what they did after paying the purchase price and how they charged LR Isukha/Shirere/6130 to Kenya Union of Savings & Credit Co-Operatives limited to access a financial facility of Kshs.15,000,000/= which was to facilitate construction of their offices. He depones further that they are prejudiced with what is happening in this case because they had started the development on the said parcel and had entered into a contract with time being of the essence and that they had made payments to KRA and they are currently paying other subsequent payments monthly.

5. The Interested Party contends that being a savings and credit co-operative society the wider interest of contributing members has been brought into shambles

6. The deponent of the replying affidavit opines that the orders sought by the applicant DORCAS are untenable for the reasons stated at paragraph 17 of the replying affidavit and he wants the application dismissed. Paragraph 17 of the Replying affidavit reads this;-

(a) An absolute Title deed has been transferred from a completed Succession process that the Interested Party was neither a party to nor was not aware of either any alleged impropriety or intended illegality.

(b) The Applicant has failed to adequately state the place of the consent of distribution and let alone deny the applicability of the same

(c) That the court documents in the succession cause are an amplification of the fact that the Applicant is in breach of equity and discretion sought as per application dated 11<sup>th</sup> April, 2016 and orders from the said application are null and void.

(b) The Applicant should have been candid to the court to reveal the previous state of affairs as opposed to seek to breach the maxims of equity inter alia that; he who seeks equity must come with clean hands, equity follows the law and equity sees as done that which ought to have been done.

## **Submissions**

7. The application was canvassed by way of oral evidence and the parties later filed their written submissions. This court heard the witnesses and has also carefully read through the submissions and the application together with the affidavits and the decisions cited by both counsel.

8. The issues for determination are therefore as follows;-

(a) Whether the grant issued to the petitioner should be revoked

(b) Whether the new titles created from Isukha/Shirere/41 should be cancelled.

## **Determination**

9. In determining the 1<sup>st</sup> issue this court is guided by the law of Succession Act cap 160 laws of Kenya. Section 76 of the said Act provides for revocation or annulment of grant and states that 'A grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides on an 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) .....

(e) .....

10. A person who wants a grant to be revoked must demonstrate through concrete evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statements, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

11. It is clear from the pleadings and the evidence on record that the applicant Dorcas Asinyilwa Barasa did not sign the consent to the making or application for grant. She has testified to this fact by stating that **“regarding this Succession Cause, my brother never told me about it, I only learnt about it when surveyors came to my shamba in 2013. I have never signed any papers touching on this cause. If I had signed why would I be in Court?”**

12. The petitioner upon being shown the consent for distribution by Mr. Abok Counsel for the interested party testified as follows;’ **“ I also see this document- consent on distribution dated 22.05.2015. What I can say is that this document contains names that I did not include.....”**

13. He goes on to testify that **“these documents you are showing me DMFI – 1 are forged. My signature is forged.”** He maintains that he did not sign for the certificate of confirmation. The petitioner confirms the applicant’s claim by saying **“we came before the judge during certification. I came with Samson and Agnes. I did not inform Dorcas.”**

14. Thus the applicant herein was kept in the dark about the succession proceedings. It is true that she did not participate in the succession process. She was not consulted and everything happened in secret. I find that the applicant has demonstrated that she never signed any document giving consent to the succession cause herein. This fact was confirmed by the petitioner who has alleged forgery on documents that led to the grant. The applicant was also not invited to attend court during confirmation of grant. The interested party was never a party to the succession proceedings herein. They only came into the picture after purchasing a portion of the deceased’s estate being LR. No. Isukha/Shirere/6130. It comes out from the evidence by the petitioner that the interested party bought the said portion from Samson even before the Succession cause was completed. In his own words the petitioner stated thus. “It is also strange to me that Samson proceeded to sell the shamba before the entire succession was completed. Further Samson sold the shamba in secret although we had given the land to him”

15. It is true therefore that Samson intermeddled with the deceased’s property when he sold part of it to the interested party. Section 45 of the Law of Succession Act provides as that;- except so far as is expressly authorized by the Act or by any other written law or by a grant of representation under the Act, no person shall for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person.

16. It is thus an offence to intermeddle with the deceased property before confirmation of grant. The applicant has demonstrated to the satisfaction of this court that the grant was obtained secretly without her consent, participation or knowledge thereby rendering the proceedings defective in substance. She has also demonstrated that the petitioner concealed the fact that she was entitled to an equal share of the estate of the deceased herein as the daughter of the deceased. It has also come out clearly that the deceased had another portion of land which the petitioner did not disclose when filing the petition papers. This is the

land known as LR. Isukha/Shirere/593 which is situated within Amalemba Estate in Kakamega town along the Kakamega – Kisumu Highway. By deliberately omitting to include that parcel of land among the assets of the deceased, the Petitioner clearly contravened the provisions of the Act by withholding information that was critical for a just determination of the cause. The petitioner’s actions are liable to censure under the provisions of Section 76 of the Act.

**Conclusion**

17. On the basis of the above findings the applicant’s prayer for revocation of the grant issued to the Petitioner and confirmed on 29.07.2013 be and is hereby allowed. I now move to the issue of whether the titles that were created out of LR No. Isukha/Shirere/41 as a result of the confirmed grant should be cancelled. In my considered view, there cannot be any other answer to this question. In the case of **Alice Chemutai Too- vs - Nickson Kipkurui Korir & 2 Others [2005] eKLR, the** 1<sup>st</sup> respondent had fraudulently acquired title and charged it to the 3<sup>rd</sup> respondent. The court did not hesitate to revoke the said title and canceled the charge, despite the argument that cancelling the charge would set a dangerous precedent that would adversely affect the economy of this country. Mr. Abok, learned counsel for the Interested Party advanced a similar argument in this case, but I reject the same because a wrong must be called by its name and not camouflaged as a matter of public interest. It is not lost to the Court that whenever things go wrong in the Country, it is the same Public Mr. Abok talks about that suffers. Through this judgment this court is protecting the unsuspecting members of the public.

18. In any event, the evidence on record shows that the Interested Party acted with a degree of impunity by disregarding warnings given to it by the applicant’s advocates. Further the Interested party had notice when there was resistance to surveyors sent to carry out survey on the disputed parcel of land. In spite of that knowledge, the Interested Party hurriedly committed itself to purchasing the disputed portion of land.

19. In a nutshell, this court finds and holds that all transaction made pursuant to the revoked grant cannot stand and are hereby cancelled. Accordingly, the applicant’s summons for Revocation dated 11.05.2015 be and is hereby allowed in its entirety with costs to the applicant

Orders accordingly.

Judgment delivered, dated and signed in open court today at Kakamega this 21<sup>st</sup> day of September 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....for Applicant

.....for petitioner

.....for Interested Party

.....Mr. Lagat.....Court Assistant