



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 547 OF 2005
IN THE MATTER OF THE ESTATE OF
SAMUEL NDALO WAMBARE (DECEASED)

BETWEEN

ANTONY IAN OUMA alias

ANTHONY IAN OMONDI.....APPLICANT

AND

JOYCE PENINA ADHIAMBO.....1ST RESPONDENT/PETITIONER

FRANCIS OUMA NDALO..... 2ND RESPONDENT

RULING

1. The application before the court is a summons for revocation of grant dated 9th December 2015. It has been brought by **Anthony Ian Ouma** also known as **Anthony Ian Omondi** (“Anthony”). The corpus of his case is that his claim to the estate was not disclosed by the petitioner.
2. It is not in dispute that the deceased Samuel Ndolo Wambare (deceased) had four children; **Peres Atieno, Francis Ouma Ndalo** (“Ndalo”), **Philip Omondi** and **Joyce Peninah Adhiambo** (“Joyce Penina”). Anthony is the son of Philip Omondi who is deceased.
3. These proceedings were commenced by Joyce Penina who cited Ndalo on the ground that he had refused or neglected to take out letters of administration for their deceased father who died on 9th November 1998. She named herself and Ndalo as the only surviving beneficiaries in the affidavit filed in support of the citation. She also stated that the deceased left behind two properties; Kisumu/Manyatta A/3298 (“Plot 3298”) and Kisumu/Kasule/3332 (“Plot 3332”).
4. In due course Joyce Penina was allowed to file petition and was issued with a grant of letters of administration intestate on 12th November 2007. The grant was confirmed on 5th November 2008 with Joyce Penina taking Plot 3298 and Ndalo taking Plot 3332.
5. In no time, Ndalo applied for revocation through the summons dated 8th March 2009 on the ground that he had already applied for succession of the deceased's estate in **Kisumu High Court Succession No.**

389 of 2008 and the grant therein issued and confirmed in his favour wherein he inherited Plot 3298.

6. The issue of the two grants concerning the deceased's estate was resolved on 4th November 2020 when the parties recorded a consent revoking the grant issued in **Kisumu Succession Cause No.389 of 2008**. In addition, Ndalo was appointed a co-administrator with Joyce Penina.

7. Ndalo once again filed the application dated 10th March 2009 to revoke the grant issued to Joyce Penina and reverse the transfer of Plot 3298 to her. Chemitei J., in his ruling of 26th October 2015, dismissed the application. He ordered that Plot 3298 remain with Joyce Penina. Ndalo lodged an appeal to wit; **Kisumu Court of Appeal Civil Appeal No. 547 of 2005**. The appeal was dismissed with an order that Plot 3298 remain in the custody of Joyce Penina.

8. What is before me concerns the interest of Anthony. He is a direct beneficiary of the deceased as the only child of the deceased's son. It is clear that both Joyce Penina and Ndalo never disclosed that Anthony was a beneficiary of the deceased's estate. The duty of disclosure is paramount in succession proceedings. Both parties were aware of his interest and choose not to disclose it. Under **section 51** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**, an applicant for letters of administration is required to include information as to, "*(g) the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.*" [Emphasis mine]

9. Penina Joyce did not mention that her brother had left behind a child when she commenced these proceedings. When Ndalo filed his petition and also continued to litigate his interests, he did not mention the fact that his brother's child was alive and entitled to a share of the estate. Penina Joyce and Francis as co-administrators are both guilty of material non-disclosure. Since there was material non-disclosure, this court is entitled to revoke the grant under **section 76** of the **Law of Succession Act** which provides that the court may revoke a grant issued on the grounds, *inter alia*, that it was obtained by fraud or concealment of material facts.

10. The issue then is what remedy should this court give? The case of Joyce Penina is that she was given Plot 3298 by her father in view of the fact that she was ill and could not get married. Ndalo disputes this and contends that Plot 3298 is the only property left by their father as he had sold Plot 3332 to settle certain debts of the deceased. These issues are not new and were resolved by Chemitei J., in his decision which was affirmed by the Court of Appeal. He held as follows;

(a) That Plot 3298 was advanced to Joyce Peninah as a gift under **section 31** of the **Law of Succession Act**.

(b) That Plot 3332 was sold by Ndalo without taking out letters of administration in contravention of the **Law of Succession Act**. In Judge's words, "*it was his responsibility to sort out issues with the purchasers.*"

11. In the middle of all this was their brother's child, whose interests were not disclosed and whose interest as a child at the material time remain paramount in any consideration by the court. If support for this position were required, it is to be found in **Article 53(2)** of the **Constitution** which states that, "*A child's best interests are of paramount importance in every matter concerning the child.*" The other pertinent law is the **Children Act No. 8 of 2001** and in particular **section 4(3)** thereof which reiterates the general principal.

12. This court cannot shut its eyes to this injustice nor absolve the parties of their responsibility to their brother's child because circumstances have changed or because the Court of Appeal determined the issues. Had full disclosure been made, the High Court and Court of Appeal would no doubt have taken steps to protect the applicant's interest.

13. Revocation of the grant issued would serve no purpose as the 2nd respondent has already disposed of

Plot 3332. He stated that he owns Kisumu/Kasule/3297 on which he had permitted Anthony to put up temporary accommodation. Both respondents have land while the applicant has nothing to show for his inheritance. Doing the best I can in order to remedy the applicant's injury, I shall order both respondents to give the applicant a portion of their property which they hold.

14. I therefore order as follows:

(a) Joyce Penina Adhiambo shall transfer to Anthony Ian Ouma alias Anthony Ian Omondi 1/4 share of Plot KISUMU/ MANYATTA/3298.

(b) Francis Ouma Ndalo shall transfer to Anthony Ian Ouma alias Anthony Ian Omondi 1/4 share of Plot KISUMU/KASULE/3297.

15. In light of the nature of the matter, there shall be no order as to costs.

DATED and DELIVERED at KISUMU this 24th day of October 2016.

D. S. MAJANJA

JUDGE

Mr Abande instructed by Abande and Associates Advocates for the applicant.

Ms P. Odoyo, Advocate instructed by the 1st respondent.

The 2nd respondent in person.