



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 14 OF 2015

(FORMALLY SUCCESSION CAUSE NO. 56/20111-MACHAKOS)

IN THE MATTER OF ESTATE OF OISESOI TIPANGO, DECEASED

SELINA TIPANGO.....APPLICANT

VERSUS

EMILY WAMBUI ISHMAEL.....1ST RESPONDENT

GEORGE K GITHUKU.....2ND RESPONDENT

NICHOLAS MBUGUA.....3RD RESPONDENT

MARY NYAMBURA KINYANJUI.....4TH RESPONDENT

JUSTUS M KARIUKI.....5TH RESPONDENT

JOHN N KARIUKI.....6TH RESPONDENT

ROSE MUENI MAITHA.....7TH RESPONDENT

LAND REGISTRAR, KAJIADO.....8TH RESPONDENT

RULING

Introduction

1. The deceased herein, Oisesoi Tipango died on 14th July 1975, domiciled at Upper Matasia Sub Location. Before his death, the deceased was the registered owner of land parcel number Ngong/Ngong/682. On 24th October 1979, the land was registered to one Stephen Oisesoi Tipango (deceased) in trust for his three brothers (Sipoi Oisesoi Tipango, Kombe Oisesoi Tipango and Siasai Oisesoi Tipango) who were minors at that time.

2. On 29th November 2011, the Applicant/Petitioner petitioned the High Court at Machaon at Yogis for Grant of Letters of Administration Intestate. The Applicants Selina Tipango, William Tipango and Sipoi Tipango described himself in Form P&A 5 as daughter and sons of the deceased.

3. The petition for Grant of Letters of Administration being cause No.526 of 2011 was published in the

Kenya Gazette vide Gazette Notice No.10731 of 2nd September 2011. The Grant was issued on 29th November 2011. On the 6th June 2013, the Grant was confirmed and the deceased's estate shared out as follows:-

- *Siboi Tipango – Ngong/Ngong/3768 –1 .85 acres*
- *Richard Tipango – Ngong/Ngong/3768 –1 .85 acres*
- *Selina Tipango – – Ngong/Ngong/3768 – 3.35acres*
- *William Sisai Tipango- Ngong/Ngong/3768- 1.85 acres*
- *Daniel Lesisa Tipango- Ngong/Ngong/3768- 1.85 acres*
- *James Lekini Tipango/ Ngong/Ngong/3768-1.85 acres*

The application

4. By summons filed before this court on 21st June 2013, the applicant herein Rose Mueni Maitha moved the court under **sections 47, 76 (a)(b)(d) ii) &(e)** of the **Law of Succession Act, Cap 160** of the **Laws of Kenya** (the Act) and **Rule 44 (1) &(2)(a) & (b), 49 & 73** of the **Probate and Administration Rules (the Rules)** for revocation or annulment of the Grant of Letters of Administration Intestate issued to Selina Tipango, William Tipango and Sipoi Tipango herein on 29th November 2011 and confirmed on 6th June 2013 vide Machakos High Court Succession Cause No.526 of 2011. The applicant also sought to restrain the administrators or their agents from producing and or registering the said grant to the Registrar, Lands Office at Ngong so as to register by transmission, any transfer, or disposing, alienating, selling or evicting the applicant/her agent from entering, breaking into violently or otherwise demand vacant possession with the use of the said grant and specifically land parcel No Ngong/Ngong/ 5388 measuring approx. 2.62 acres (as excised from the larger parcel of land known as Ngong/Ngong/3768.

5. The other Applicants Mary Nyambura Kinyanjui, Nicholas F. K. Mbugua, George Kanyongo Githuku, Emily wambui Ishmael and Wilson Kariuki Njachu by summons filed on 25th June 2013 moved the court under section **47, 76(b) (c) of the Law of Succession Act, Rule 44(1) & (2), 49 & 73** of the probate and Administration rules for revocation or annulment of the Grant of Letters of Administration Intestate issued to Selina Tipango, William Tipango and Sipoi Tipango herein on 29th November 2011 and confirmed on 6th June 2013 vide Machakos High Court Succession Cause No.526 of 2011. And that the Administrators of the estate of Osiesio Tipango be restrained from registering the Certificate of the confirmed grant with the Land Registrar Kajiado North at Ngong. Additionally the Administrators be restrained from sub dividing, selling, transferring, charging, evicting the applicant or in any other way dealing with the suit property. The Applicants in their supporting Affidavit aver that they are purchasers for value in the suit property.

6. Rose Mueni Maitha's Application is supported by the grounds appearing on the face thereof. It is averred in the said grounds that the Grant herein was obtained fraudulently and is on the basis of material non-disclosure in that there exist other unnamed dependents and or beneficiaries; that there exist material non-disclosure of the true owner of the subject asset therein; that the asset therein is not available or not in existence for distribution and or confirmation; that the grant as it is useless and inoperative through subsequent circumstances. In addition, the application is supported by an affidavit sworn by on 21st June 2013. She states in the said affidavit that she seeks revocation in her capacity as a widow and purchaser for value; that she was issued with certificate of confirmation of grant of the estate of her late husband which the late husband purchased from the Stephen Oisesoi Tipango (deceased) sometimes between 1977-1981.

7. She further depones that upon completion of payment of the purchase price, an application for the consent of Land Control Board was lodged on 19th Feb 1982 at Oloolaiser Divisional Land control board LCR NO 138/82 which consent the board approved on 11th March 1982 subject to a restriction that no dealing is to be registered against the said title until Sipoi Oisoi Tipango, Kombe Oisoi Tipango and Siasai Oisoi Tipango who were minors by then have attained the age of maturity.

8. Rose Mueni further deponed that after approval by the consent board all respective parties took possession of their respective portions and status quo has remained up to date. Save that after demise of her husband the Sipoi Oisoi Tipango, Kombe Oisoi Tipango and Siasai Oisoi Tipango have refused to participate in any resurvey or issuance of the respective title documents which situation led the deponent to institute proceedings at the Kajiado District Land Tribunal and an award in case No NTC 042/07/2008 was made in her favour and the same subsequently confirmed as a decree of the court in Land Tribunal Dispute case No 26 of 2009 at the SRM's Court in Kajiado.

Response to the Application

9. The Respondent Selina Tipango, swore a replying affidavit dated 12th July 2013 in opposition to the summons for revocation. Her case is that she is the co-administrator of the estate of Oisesoi Tipango who died intestate on 14th July 1975. He depones that the applicants are calling upon the court to determine issues of existence or ownership of parcel of land and purchaser's interest which she believes the court has no jurisdiction and that this matter can only be entertained by the Environment and Land Court; That other than those named in the application for confirmation, there exists no other dependents and or beneficiaries to the estate of the deceased. Selina's case is that except for Rose Mueni Maitha and Wilson Kariuki Njachu, none of the other applicants have annexed in evidence the agreements for sale and thus cannot maintain any suit in the absence of proof of any written and signed agreement.

The respondent also depones that the parcels Ngong/Ngong/5386, Ngong/Ngong/5388, Ngong/Ngong/5390 and Ngong/Ngong/5392 do not exist and have never been registered and that the estate of Oisesoi Tipango still comprises of the undivided parcel title No Ngong/Ngong/3768.

Parties' submissions

10. The Applicants filed their written submission dated 27th June 2016 and 20th June 2016.

11. Counsel for Rose Mueni Maitha submitted that the grant issued on 6th June 2013 was obtained fraudulently without the knowledge of the Applicant who was a beneficial owner by virtue of a valid sale transaction.

12. Counsel also submitted that the Applicants concealed material facts that there was a pending succession cause at the High Court at Nairobi being Cause No 607 of 2000. Counsel adduced evidence of copies of pleadings and sworn affidavits of respondent's herein-Selina Tipango. (Exhibits marked as ***'RMM 9(a) & (b)'***)

13. Counsel further submitted that the Respondent failed to disclose that there were Judicial Review proceeding Misc. Civil Cause No. 215 of 2011 instituted by the said Respondent in an attempt to quash the decree by the Kajiado Magistrates Court in case No 26 of 2009 adopting the decision of the Land Board Tribunal.

14. Counsel advanced the principle that if the proceedings were irregular Ab Initio, then all proceedings before the court are null and void. He quoted the authority by **Nambyue J** advanced in ***Estate of Aggrey Otieno Ambala (deceased) [2011] eKLR***

"...it is clear that there has been a clear presence and evidence of a blatant flouting and trampling of the law exploitation of situations for personal gain and in the process leaving proceedings in an embarrassing position. Failure to act firmly against those illegalities and irregularities will amount to a serious abdication of the seat of justice. Secondly leaving the matter as it is will open a can of worms or a Pandora's box and will continue the status quo of stalemate presenter prevailing."

15. Counsel proceeded to state that the Learned Lady Justice was inclined to take the same position, whilst in reference of a decision of Hon. Nyamu J (then) sitting in the case of ***Republic =vs= The***

Business Premises Rent Tribunal Respondent Lenco Investments Limited Interested party and Samina Investments Limited ex parte Applicant Nairobi Misc Application Number 562 of 2007 decided by Nyamu J as he then was now JA, in which the learned Judge encountered nullities and illegalities. At page 39 line 8 from the top in the said own ruling the learned Judge is said to have made the following observations and or gave the following guideline on how to deal with nullities and irregularities when encountered in the judicial process.

- 1. A nullity is a nullity and always remains a nullity.**
- 2. If nullities are condoned by the courts of law, they are capable of clogging the justice system, erode its effectiveness and respect of the rule of law.**
- 3. Failing to act in the circumstance would be a serious abdication of the seat of justice.**
- 4. The principle to be observed is the principle that no litigant should be allowed to benefit from irregularities or nullities since these would be against the policy of law.**
- 5. Nullities are defects and cobwebs in our legal system which if allowed to remain would discredit and litter, derail the administration of justice in accordance with the law.**
- 6. It would be unjust for the court not to intervene in the face of a nullity where the tribunal and the lower court had no jurisdiction from the word go.**
- 7. Where preservation of the status quo is a threat to the rule of law, the conscience of this court, the spirit and its sense of justice cannot allow the preservation of the status quo.**
- 8. It cannot be good law to allow a party benefit from a blatant violation of the law**

16. Counsel submitted two other authorities; In the matter of the Estate of **Nzuta Mutavi Maandu(deceased) [2016] eKLR and Joseph Moswagi Mabeya & 4 others [2016] eKLR** where in both cases, concealment of material facts leading to fraudulent obtaining of grants led to revocation of the said grants.

17. Counsel for the other Applicants submitted facts to the effect that the grant was obtained fraudulently by the making of false statements and concealment of material facts to the case. In support of his submission **Anor Vs Kennedy Otieno Odeni [2014] eKLR** (In the matter of the estate of Doto Owino) Majanja J stated;

“The identities of the beneficiaries and their interests in the estate are material facts and once it is established their interests were concealed, the grant of representation issued is flawed. The petitioner did not disclose the fact that the deceased had other heirs other than himself and his brothers.”

And In the Matter of **Joel Ngitu Kingangi (deceased) Cause No 1973 of 1994** Musyoka J stated;

“I am satisfied that the application before me reaches the threshold set by Section 76 of the Law Succession Act for revocation of grants, to the extent that it was not disclosed that the deceased had a daughter, Susan Karugi Gichuki, also deceased, who had children of her own. The non-disclosure of this information amounted to concealment of facts and a misrepresentation, making the process of obtaining the grant defective. The grant made on 7th December 1994 is therefore liable to revocation.”

Respondent’s submission

18. Counsel for the Respondent submitted that the issues raised by the Environment and Land Court. The counsel also submitted that there is a pending case at the ELC Court at Nairobi Cause No. 1268 of 2013.

He relied on the case of *Dr. Leonard Kimeu Mwanthi Vs Rukaria M'Iriungi [2013] eKLR.*

“The litigation in this matter has seen parties litigate for the same subject matter both under the Civil Procedure and the Law of Succession. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why Legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example of Succession of a deceased estate becomes protracted and parties keep hovering from the civil court to the succession cause.”

The Law of Succession Act was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries. If there is any claim of civil nature against a deceased's estate, a claimant is supposed to file a civil suit against the administrators of the deceased's estate. Involvement of claimants of civil obligations or others in matters of the administration of a deceased estate causes delays and difficulties in resolving them within the regime of the law of succession.

“...It is not in dispute that the appellant was not laying a claim on the deceased's estate as a beneficiary. He was claiming a defined share of title according to a sale agreement and a registered interest as per copy of a title deed which he claimed he owned 16/31 of the land.”

Determination and Analysis

19. In analyzing the matter before me, what provisions of the law will I then rely on in order to determine this petition?

20. Section 47 *the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.*

21. Section 76 *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 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.

22. I will then proceed to consider whether the application before me reaches the threshold set by sec 76 of the Law of succession Act.

23. I have considered the law and the submissions. The issue that arises for determination is whether there was concealment of material facts in obtaining the grant of Letters of Administration issued to the respondent Selina Tipango, William Tipango and Sipoi Tipango.

24. There is abundant evidence on record to show that the respondent obtained the Grant of Letters of Administration Intestate in relation to the estate of Oisesoi Tipango through fraud and false misrepresentation of facts. The Respondent failed to disclose that the subject asset in dispute was subject to a pending cause in the High Court Nairobi being cause No 607 of 2000. Additionally, the Respondent failed to disclose that she and William Siasai Tipango had made an application for grant of letters of Administration against the estate of Stephen Oisesoi. From the record, it is very clear that the land had since devolved from Osiesoi Tipango to Stephen Osiesio Tipango.

25. The petitioners had petitioned the High Court in Succession Cause No. 607 of 2000 at Nairobi to administer intestate the estate of Stephen Oisosei Tipango. The letters of Administration intestate dated 18/7/2000 duly issued by High Court Nairobi. That fact was not disclosed while applying for fresh Letters of Grant to the same estate at Machakos High Court in Succession Cause No 526 of 2011. In the application for Letters of Administration intestate filed at Nairobi in the year 2000, the petitioners had provided for and recognized the beneficial interest of the applicants in the summons for confirmation of grant which was never prosecuted in any event. (See further affidavit of Selina Tipango dated 2nd August 2005).

26. In an affidavit filed in court on 10/6/2002, the petitioners SelinaTipango and William Tipango deponed as follows under paragraph 4:

“That the deceased was not married and prior to his death he had sold most of his land to the following people who have occupied the same to date and have built permanent structures:

1. **Wilson Kariuki Njachu**
2. **Emily Wambui Ismael**
3. **George Kunyongo Githuku**
4. **Herman Kinyanjui Kimani**
5. **Jacob Mutuku Maitha**
6. **Nicholas F.M. Kangethe”**

27. The petitioners on the same affidavit ascertained and identified the shares and beneficial interest as particularized in paragraph 6 of their affidavit.

28. I also take judicial notice that on 19/3/2009 Rose Mueni Maitha the applicant lodged a claim of ownership and occupation with Ngong Division Land Dispute Tribunal Case No. TC 065/01/09. The Land Tribunal ruled in favour of the applicant and directed all restrictions to the parcel of land be removed to enable a subdivision of the share applicable to the applicant be registered. That summons for confirmation of grant in Succession Cause No. 607 of 2000 at Nairobi petitioners deponed to support existence of the applicants/purchasers interest in the estate of the deceased.

29. On 26/7/2011 a decree adopting the Ngong Land Dispute Tribunal decision was issued by the Senior Resident Magistrate Court Kajiado. That decision by the Land Tribunal at Ngong and subsequent adoption as a judgement of the court has not been appealed or reviewed by any other person including the petitioners/administrators of the estate of the deceased. That the decision of the Land Tribunal and subsequent court order ought to have been disclosed to the court at the succession cause at Machakos.

30. Pursuant to a court order the District Surveyor conducted a subdivision to excise and alienate the shares appropriately in favour of Rose Mueni. That subdivision received the necessary Land Control Consent dated 10/3/1982 and by the grant of consent a mutation of the title subject matter of that

application was filed at the land registry.

31. The import of the consent was that LR. Ngong/Ngong/3768 was subdivided and new numbers issued in compliance with the decision of Land Tribunal Ngong which later was adopted as a court order by the Senior Resident Magistrate's at Kajiado.

32. It is not disputed that Jacob Mutuku Maitha who had purchaser's interest passed away leaving Rose Mueni Maitha as widow to administer the estate. That Rose Mueni Maitha petitioned for letters of grant of administration in Succession Cause No. 186 of 2010 at Machakos High Court. In that succession cause a certificate of confirmation of grant was issued in favour of Rose Mueni Maitha for LR. Ngong/Ngong/3768. This property from the letters of grant is the same that petitioners applied and were issued with letters of grant to administer for the benefits of the beneficiaries of the deceased's estate.

33. The question which begs for an answer, by the time petitioners applied for certificate of confirmation of a grant dated 6/6/2013 at Machakos High Court; was Ngong/Ngong/3768 available in its original form for distribution? The answer is NO because the character of the property had changed vide subdivision to implement a court order.

34. As can be deduced from the documentary evidence, the petitioners/administrators made fraudulent and untrue allegations of fact that Ngong/Ngong/3768 was free property of the deceased to be distributed to the dependants. The petitioners acknowledge in their affidavit that during the lifetime of the deceased Stephen Oisesoi Tipango sold part of his land to third parties whom they recognized as having a beneficial interest in their application in Succession Cause No. 607 of 2000 at Nairobi Family Division.

35. It is also a fact that the petitioners filed summons for confirmation of grant at Nairobi where the beneficial interest of the applicants was factored in, but for reasons not recorded, the application was abandoned midway. The petitioners/administrators of the estate of the deceased instead of confirming the Letters of Grant intestate in Succession Cause No. 607 of 2000 at Nairobi moved to Machakos High Court and filed fresh application in Succession Cause No. 526 of 2011. The application to petition for Letters of Grant at Machakos High Court was on similar facts and property inventory to that filed in Nairobi in the year 2000. That fact was never disclosed by the petitioners at Machakos High Court. Was that not a concealment of a material factor provided for under Section 76 of the Act? The answer is YES.

36. It is also a fact that under oath the petitioners in their supporting affidavits for Succession Cause No. 607 of 2000 recognized the sale of the deceased property to third parties while he was alive. Was that fact concealed from the High Court at Machakos during the filing of fresh summons for issuance of Letters of Grant? Your guess is as good as mine. The logical inference to be asked from these set of circumstances is whether the petitioners were in a mission to disentitle the purchasers' interest for value bequeathed during lifetime of the deceased. It is a fact that some of the applicants were allowed vacant possession at the time of sale by the deceased, pending compliance of transfer of title in their respective shares.

37. The Respondent was well aware of the purchasers interest at all times when taking out the grant of letters of administration and yet again, this was never disclosed to the court.

38. In furtherance of the Respondents fraudulent allegations, and as correctly submitted by counsel for the applicants the respondent purported to administer the estate of Oisesoi Tipango yet she listed and shared Ngong/Ngong/3768 which did not belong to the said person at the time of application for the grant. There is evidence which is uncontroverted to that effect and with regard to the registered owners of parcel Ngong/Ngong/3768 and parcel Ngong/Ngong/682.

39. This court will not then endorse an illegality. Relying on the principles set by Nyamu J in **Republic vs= The Business Premises Rent Tribunal Respondent Lenco Investments Limited Interested party and Samina Investments Limited exparte Applicant Nairobi Misc Application Number 562 of 2007** and the provisions of section 76 of the law of Succession Act.

40. In applying Section 76 of the Act, I am satisfied that the proceedings to obtain the grant at Machakos High Court were defective and illegal in substance. The petitioners' application was tainted with falsehood concealment from the court something material to the succession cause petitioning for letters of grant in respect of the estate of the deceased. The affidavit in support both at the initial adjudication and at the stage of summons for confirmation, the grant was obtained by means of an untrue allegation of facts as to fall short of the threshold required by the Law of Succession for issuance of letters of grant of administration.

41. The law is very vigilant that a grant which is issued in contravention of the law is useless and inoperative for an intent and purposes. In my view when I evaluate this case, I could see a conduct bordering an intent to commit a criminal offence of obtaining letters of grant through false pretence by the petitioners. The averments in their affidavit while petitioning for letters of grant in the year 2000 at Nairobi and the affidavit at Machakos High Court attest to this fact. Reliance by the petitioners on a restriction order is neither here nor there. That contention does not afford them a defence to this application under Section 76 of the Succession Act.

DECISION

42. In the circumstances and reasons advanced by the applicants, I am satisfied that a case against the petitioners has been established under Section 76 of the Succession Act. On that basis there is a justifiable cause for the grant of letters of administration issued to the petitioners on 6/6/2013 in Succession Cause No. 526 of 2011 be revoked or annulled forthwith. Accordingly, summons dated 21st June 2013 and 24th June, 2013 is hereby allowed and the following orders shall abide the revocation/annulment of the grant:

- (i) A declaration that the petitioners obtained the grant by intentional and deliberate false statement of facts and concealment of material facts and information from the succession court.
- (ii) The administrators directed to surrender and deliver to the Deputy Registrar the certificate of confirmed grant issued to them on 6/6/2013.
- (iii) That the applicants be accorded the opportunity to file objection/protest to the distribution of the estate of the deceased in which the petitioners are administrators within 45 days from today's date.
- (iv) A permanent injunction restraining the administrators from dealing with the properties to the estate of the deceased until further orders from this court or any other court with equal status.
- (v) The costs of this application be borne by each party.

It is so ordered.

Dated and delivered in open court at Kajiado on 14th day of October, 2016.

.....

R NYAKUNDI

JUDGE

Representation:

Mr. Githuka for the respondents

Mr. Kamau and Mr. Karinga for the applicants

Mr. Mateli Court Assistant