



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 416 OF 2008

IN THE MATTER OF THE ESTATE OF NDEGE OBANYI NYAMORA (DECEASED)

-AND-

MORAA NDEGEPETITIONER/RESPONDENT

- VERSUS -

EZEKIEL MAINDA APPLICANT/OBJECTOR

RULING

1. The application dated 15th February 2011, is made by **Ezekiel Mainda**, (Applicant), against **Moraa Ndege** (Respondent). It is premised on Section 76 of the Law of Succession Act (Cap 160 LOK) and Rule 44 of the Probate and Administration Rules.

An order for the revocation of the letters of administration dated **25th June 2009**, is herein sought by the applicant on grounds that the grant was obtained fraudulently by the making of a false statement or by concealment from the court material facts or by means of untrue allegations of facts on the part of the respondent.

2. The supporting affidavit dated 14th February 2011, fortifies the supporting grounds in addition to the applicant's sole evidence at the "viva-voce" hearing of the application.

The respondent is opposed to the application on the basis of the averments in her replying affidavit dated 4th March 2011, and her oral evidence at the hearing of the application.

Both parties in their respective testimonies reiterated the contents of their respective supporting and replying affidavits.

3. The applicant/objector's case was grounded on the brief facts that the deceased, late **Ndege Obanyi Nyamora**, was allegedly an uncle to the applicant and a brother to the applicant's late father, **Stephen Mainda Obanyi**, while the respondent was wife of the deceased and aunt to the applicant.

A land dispute over the land parcel No. West Mugirango/Siamani/2226 (Plot No. 2226) emerged between the respondent and the applicant's late father. The dispute was referred to a local land tribunal but seemingly the parties failed to agree on sub-division of the property. Consequently, the respondent took the matter to the Resident Magistrate's Court at Kisii being Civil Case No. 254 of 1999. Later, after the death of the applicant's father a burial dispute emerged between the respondent and the applicant's family. The respondent had sought an injunction to restrain the burial of the applicant's late father on the

subject property.

4. The burial case being Civil Case No. 24 of 2007 was allegedly decided against the respondent. She therefore moved to the High Court Kisii and filed HCCC No. 196 of 2010, in which she sought eviction orders against the family of the applicant. The case was pending hearing and determination when the application for grant of letters of administration respecting the estate of the deceased was made. The necessary grant was issued on 25th June 2009 and confirmed on 16th February 2010.

The applicant therefore applies for the revocation of that grant on account of fraud, false statements and concealment of material facts.

5. The respondent's case was that the deceased was her husband and after his death she filed this succession cause in which she obtained the impugned grant after providing necessary information and disclosing all relevant facts. In that regard, she provided the names of her sons as the beneficiaries. Her daughters were not included as they were married. She could not include the name of the applicant or his family members as they were not part of the family of the deceased although her area chief allegedly allowed them to occupy a portion of the subject estate property. This prompted her to file a civil suit against the applicant's father in 1999 but it remained unresolved due to the subsequent death of the applicant's father. She later filed another civil case against the family of the applicant after learning of their intention to bury the applicant's late father on the subject property. The court ruled that the burial could go on but the pending suit on ownership of the property should continue.

6. From the facts of the case and the written submissions by both sides, the basic issue arising for determination is whether the impugned grant was obtained by the respondent in a manner which was fraudulent or by the making of false statements or by concealment of material facts.

Clearly, this application is anchored on the ownership of the subject property but this is not the right forum to deal with such matter. It was indicated herein that the case pertaining to the ownership of the land is still pending. Therefore, the parties should be rest assured that the appropriate court shall ultimately decide the matter.

7. For now, our interest is the validity of the grant obtained by the respondent dated 25th June 2009 and confirmed on 16th February 2010.

The record shows that the grant itself was regularly obtained. The necessary pre-requisite procedures were satisfactorily undertaken. The letter from the chief signifying the beneficiaries was filed but it left out the daughters of the deceased. Only the sons of the deceased were mentioned as the beneficiaries. The explanation given for that omission by the respondent in this application was that the daughters were excluded because they are married women. This was not valid explanation as all the children of the deceased were beneficiaries of his estate and it mattered not that the daughters were already married. The respondent made a mistake in excluding her daughters (see, **Mary Rono Vs. Jane Rono & Another (2005)e KLR.**) It is however, apparent that no prejudice was occasioned to them. Otherwise they would have moved the court accordingly. They may have relinquished or forfeited their right to inherit their father's property.

8. The said property included the subject property Plot No. 2226. There was nothing precluding the respondent from listing the property as belonging to the deceased since the certificate of search dated 28th October 2008 exhibited herein indicated as much.

It was not necessary for the respondent to indicate in her application for the grant that the property was subject of a civil suit since it had already been registered in the name of the deceased as the absolute proprietor. Further, the search certificate indicated that a caution had been registered over the property by the applicant on the basis of an alleged beneficial interest in the same.

The allegations by the applicant that the respondent fraudulently obtained the grant or concealed material

facts in obtaining the same or made false statement in obtaining the same cannot hold if carefully viewed against the record in this cause.

9. Although the applicant claims an interest in the subject property cascaded from his late father and contends that the property belonged to his father, he provided no tangible evidence to prove the fact.

In any event, the registration of the property in the name of the deceased rebuts that claim of ownership unless it is shown in the right court that the registration was a mistake or fraudulent. As it was conceded by the respondent that there is a pending case of ownership of the property between her and the applicant it would have been prudent for her to acknowledge the case when she took out the summons for confirmation of the grant and probably withhold the intended distribution of the property until final disposal of the case. This is because the current status of the property and the distribution already effected by the respondent would be drastically upset should the case be decided against her.

10. Further, the certificate of confirmation of grant in as much as it relates to the subject property would be invalidated and all that was done on its strength would be declared null and void.

A look at the certificate shows that the property was shared between two sons of the deceased i.e Anderson Ndege and Samson Ndege.

Whereas this court sees no valid reasons to revoke the impugned grant, it is compelled by the reasons aforesaid to issue an order for the revocation of the certificate of confirmation of grant dated 16th February 2010.

The respondent would be at liberty to take out fresh summons for confirmation of grant as soon as the pending ownership dispute is resolved by the court.

11. In the end result, the application partly succeeds to the extent that the certificate of confirmation of grant be and is hereby revoked.

Each party shall bear their own costs of the application.

Ordered accordingly.

[Read and signed this 22nd day of November 2016].

J.R. Karanjah

Judge

In the presence of

Mr. Soire for Petitioner

Mr. Nyambati holding brief for Bosire for Objector

Njoroge/Limo CC