



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO. 823 OF 2009
IN THE MATTER OF THE ESTATE OF GIBSON SENGETE MATOLO (DECEASED)
TABITHA KAVENGE MATOLO.....INTERESTED PARTY/APPLICANT

VERSUS

1. RHODA NDULULU SENGETE

2. DANIEL KASIMU GIBSON.....PETITIONERS/RESPONDENTS

RULING OF THE COURT

1. The Summons before the court is filed under **Section 76** of the **Law of Succession Act** and **Rule 44(1)** of the **Probate and Administration Rules**. The Summons seeks the following orders;

*a. The Certificate of Confirmation of Grant to **Rhoda Ndululu Sengete** and **Daniel Kasimu Gibson** issued on **27th February, 2012** be revoked and/or annulled.*

2. The applicant's case is that the said Certificate of Confirmation of Grant was obtained by concealment from this court of a material fact that there was already pending in the High Court at Machakos a case involving part of the same estate, and that the grant has become useless and inoperative through subsequent circumstances because the High Court in Machakos **ELC No. 309 of 2005 (O.S)** ordered that land parcel No. **Makueni/Konza South Block 1(Marwa) 46** be shared as follows:

i. 20 acres to the family of the applicant herein to be shared from where the applicant's family has developed.

*ii. The balance of 9.9 acres to the family of **Gibson Sengete Matolo** as he also has parcel No. 53.*

3. The application is supported by affidavit of **Alphonse Muema Mbindyo** sworn on **13th July, 2015**.

4. The respondents filed Grounds of Objection dated **10th November, 2015** and stated that the summons is supported by an affidavit sworn by an advocate who has no legal capacity to swear to contested matters and secondly that the application is incompetent, misconceived and bad in law. The respondents did not file a replying affidavit.

5. On **6th September, 2016** the summons came up for hearing and court directed parties to file submission to the summons. The advocates for the respondents were not in court. However, a notice of

mention on **6th October** to confirm filing of submission was served upon the firm of **E.K. Mutua & Co. Advocates** for the respondents. There is an affidavit of service filed herein on **4th October, 2016** to the effect. The said advocates did not attend the court and there was no explanation for their absence. The court then gave a ruling date, noting that the applicant's submissions were already filed.

6. I have considered the application. The confirmed grant sought to be revoked in the schedule on distribution of property seeks to have the above mentioned land registered in the names of the respondents in trust for other beneficiaries who do not include the applicant. The judgment dated **19th December, 2014** is in force as the same has not been reviewed, set aside or quashed and no appeal had been filed against it nor orders of stay granted by any court.

7. The respondents did not file any replying affidavit to the said summons save for grounds of objection dated **10th November, 2015**. The respondents submitted that the summons is supported by an affidavit sworn by an advocate who has no legal capacity to swear to contested matters. However, the applicant submitted that there is no prohibition against an advocate who of his own knowledge can prove some facts to state them in an affidavit on behalf of his client in line with **Order 19 Rules 3(1)** of the **Civil Procedure Rules**. The Applicant further submitted that the affidavit sought to be challenged contains statements on matters of fact which the respondents have not responded to and thus there exists no basis for the said matters being termed as being contentious. The applicant cited **Rule 9** of the **Advocates Practice Rules** which provides in **paragraph 2 of Rule 9** – ***“provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears”***. It follows from above that **Rule 9** of the **Advocates Practice Rules** does not give rise to an automatic bar to affidavits being sworn by Advocates who then also appears before the court for the hearing of matters in which the affidavits are adduced in evidence. The Rule allows advocates to swear affidavits on ***“formal or non-contentious matters of any fact in any matter”***. There is nothing contentious in any statements contained in the affidavit sworn on **13th July, 2015**. The respondents have not in support of ground 2 of the grounds of objection provided and/or expounded on the incompetence, misconceived or law which would guide the court in finding that the application is bad in law.

8. The Applicant relied on the cases of ***Court of Appeal of Kenya at Nairobi Case No. 354 of 2004 Pathi vs. Ali & others East African Law Reports (2005) EA (CAK)***, where it was held by the Court of Appeal that there is no Prohibition against an advocate who of his own knowledge can prove some facts to state them in an affidavit on behalf of his client. The applicant also cited ***Milimani Commercial Court of Kenya at Nairobi Case No. 532 of 2004 Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) East African Law Reports (2006)2 EA***, where the court held that if one party had made statements on matters of fact, and the other party did not respond thereto, there would be no basis for the said matters being termed as being contentious. The court further held that **Rule 9** of the **Advocates Practice Rules** does not give rise to an automatic bar to affidavits being sworn by Advocates who then also appear before the court for the hearing of matters in which the affidavits are adduced in evidence. The rule allows advocates to swear affidavits on ***“formal or non-contentious matters of any fact in any matter”***.

9. The upshot of the above is that the summons for revocation or annulment of the grant is allowed, with a further order that a fresh Certificate of Confirmation be drawn up incorporating the following;

- a. *20 acres to the family of the plaintiff/applicant to be shared from where the plaintiff/applicant has developed.*
- b. *The balance of 9.9 acres to the family of Gibson Sengete Matolo.*
- c. *Parties to be at liberty to apply for further directions.*

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

No appearance for the parties or counsel

Court Assistant – Mr. Munyao