



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**SUCCESSION CAUSE NO. 600 OF 2009.**

**IN THE MATTER OF THE ESTATE OF MWISUKHA NDAKWA (DECEASED)**

**AND**

**KHALUMU SHITANDA )**

**DAUDI LUMBASI ) ::::::::::: PETITIONERS/RESPONDENTS.**

**VERSUS**

**NABOTH AMBULWA MWISUKHA ::::::::::: OBJECTOR/APPLICANT.**

**R U L I N G.**

1. The Notice of Motion dated 14<sup>th</sup> December, 2015 came for hearing via viva voce evidence and the court after hearing the concerned parties reserved same for ruling.
2. The same motion seeks prayers that:-
  - (i) Spent;
  - (ii) *The plot No. 15 Shikutse indicated in certificate of grant be cancelled and a new certificate of confirmation of grant be issued to the petitioner and costs;*
3. The same is supported by the affidavit sworn by Naboth Ambulwa Mwisukha on 14<sup>th</sup> December, 2015.
4. The application is opposed by the petitioners via a replying affidavit of Daudi Lumbasi, second petitioner sworn on 20<sup>th</sup> September, 2016.
5. The applicant case is that certificate of confirmation of grant was issued dated 16<sup>th</sup> September, 2014 where it erroneously indicated the estate property are S/Kabras/Lukume/922, 922, 1037 and 882. Parcel No. 922 was indicated twice instead of 922 and 923. That plot 15 Shikutse market is not appearing anywhere in the certificate of confirmation of grant since already the title documents are in his name and he is the one who pays plot rates vide attached demand notice from the Kakamega County Council dated 21<sup>st</sup> March, 2011.
6. He filed the instant application as he learned that the 1<sup>st</sup> petitioner was acquiring said plot via fraudulent means in another certificate of confirmation of grant dated 27<sup>th</sup> July, 2015. He avers that he

was given the plot by his deceased father thus he seeks the certificate dated 27<sup>th</sup> July, 2015 to be revoked, cancelled and or annulled.

7. In his testimony in court he reiterated the above content of his supporting affidavit. He called one witness to support his case who informed court that the appellant's deceased father told him that the applicant was to pay rates/rents then amounting to Ksh. 10,000/= and own the plot. He was then the market chairman.

8. The second petitioner Daudi Lumbasi, step brother to the applicant opposed application via his replying affidavit and confirmed deceased estate to be composed of S/Kabras/Lukume/922, 923, 882 and 1037. The same has been shared to each one of the beneficiaries with the marked boundaries. As regards plot No. 15 Shikutse market, he avers that same was given to the 1<sup>st</sup> petitioner, his step mother by the deceased. He denied the claim by the applicant that he was given the same plot by the deceased

9. He reiterated the same facts in his testimony in court. His case was supported by petitioner No. 1, her son Francis Mutula Mwisukha and one witness called to testify. After closure of the respective parties case, the court retired to prepare a ruling

### **Analysis and determination.**

The issues arising are that;

Whether the application has merit?

What are the appropriate orders in the circumstances of the instant matter?

The provisions of cap 160 LSA stipulates that;

**“ ..... Annulment or cancellation of grant may be done by the court anytime on courts motion or an application.” (see section 76 of L.S.A Cap 160).**

10. The appellant has to demonstrate set grounds therein including the proceedings to obtain grant were defective, the grant was obtained on reliance on false statements, non-disclosure or concealment of important matter or information.

11. The appellant in this case complains that the composition of the deceased estate in the certificate indicates parcel No. S/Kabras/Lukume/922 twice instead of 922 and 923.

12. Secondly, the second certificate of 27<sup>th</sup> July, 2015 is fraudulent as it adds plot No 15 Shikute market as part of the estate and gives it to the 1<sup>st</sup> petitioner while it is still in his name.

13. The record reflects that by a ruling of 15<sup>th</sup> May, 2014 George Dulu, J. confirmed grant in this cause and approved distribution in terms of affidavit of Francis Mutula Mwisukha and Naboth Mwisukha sworn/ dated 3<sup>rd</sup> December, 2012.

14. The same judge signed the certificate of confirmation of grant dated 16<sup>th</sup> September, 2014. The affidavit relied to confirm the grant sworn on 3<sup>rd</sup> December, 2012, did not contain plot No. 15 Shikutse Market. Thus the certificate signed by Dulu Judge did not contain the same in distribution of the declared estate. Only parcels No. S/Kabras/Lukume/922, 922 (error), 882 and 1037.

15. The subsequent certificate confirming grant dated 27<sup>th</sup> July, 2015 signed by Sitati, J. added plot No 15

Shikutse market. However, it shows the confirmation date to be the same date 15<sup>th</sup> May, 2014 reflected in the one signed by Dulu, J. there is nowhere in the record the Dulu J certificate dated 16<sup>th</sup> September, 2014 was cancelled, annulled or revoked to give room for issuance of the subsequent certificate dated 27<sup>th</sup> July, 2015.

16. It is not denied that the plot No. 15 Shikutse Market is in the name of the applicant. The 1<sup>st</sup> petitioner has not challenged Dulu, J order of confirmation of grant and resultant certificate thereof. The allegation that the applicant transferred to himself the said plot No. 15 has to be investigated. The 1<sup>st</sup> petitioner can raise same issues with the County Government responsible to challenge transfer or lodge case in the Environment and Land Court to nullify transfer of the plot to the applicant's names.

17. Meanwhile, the court finds that the certificate dated 27<sup>th</sup> July, 2015 is not valid and therefore cancelled. The certificate signed by Dulu, J dated 16<sup>th</sup> September, 2014 is the valid certificate. The said certificate shall be corrected. The errors noted of repeating No. S/Kabras/Lukume/922 to indicate only one 922 and the second one to read S/Kabras/Lukume/923. The distribution to remain the same for:-

S/Kabras/Lukume/922, 923, 882 and 1037.

18. Plot No. 15 Shikutse shall not be included in the certificate of grant. Parties bear their own costs.

**SIGNED, DATED and DELIVERED** this 13<sup>TH</sup> day of **DECEMBER**, 2016.

**C. KARIUKI.**

**JUDGE.**

**In the presence of:-**

.....**In person** .....**for the Petitioners.**

.....**In person** ..... **for the Objectors.**

.....**Anunda** ..... **Court Assistant.**