



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 59 OF 1996

IN THE MATTER OF THE ESTATE OF ISMAEL ETOKHO WANGA

MUSA SIMBA ETOKHO.....PETITIONER/APPLICANT

VERSUS

HUSSEIN MWANZA ETOKHO.....OBJECTOR/RESPONDENT

JUDGMENT

1. There are two applications for determination in this matter. The first application is the one dated 28/12/2013 brought pursuant to section 45 and 47 of the Laws of Succession Act Cap 160. The petitioner/applicant seeks orders that:

1. ALL titles issued out of original land reference North Wanga/Mayoni/276 contrary to the confirmation of grant issued herein on 30/6/1998 be canceled.
2. ALL the survey work carried on land reference North Wanga/Mayoni/276 contrary to the confirmed grant be and are hereby annulled.
3. The Land Registrar and Surveyor Kakamega County do implement the confirmed grant issued in this cause by this court on the 30/06/1998.

2. The application is based on the ground that the Kakamega County Land Registrar and Surveyor cannot implement the orders of this court dated 26/12/2012 without the court ordering the cancellation and nullification of all titles arising out of the unlawful sub-division of land reference North Wanga/Mayoni/276. It is further supported by the affidavit of the petitioner/applicant Musa Sumba Etokho dated 28/12/2013 wherein he states that he was made joint administrators of the estate of Ismail Etokho (Deceased) together with Hussein Mwanza Etokho on the 26/03/1998.

3. He depones that a certificate of confirmation of grant setting out the beneficiaries of the deceased estate was issued on the 30/06/1998 as shown in the annexure "MSE1". He explains that on the 11/11/2009 this court issued an order to the District Land Registrar and the District Surveyor Kakamega District to implement the confirmed grant as shown in the annexure marked "MSE 2" and further that on the 26/09/2012 the court ordered District Surveyor and District Land Registrar Kakamega to visit the land North Wanga/Mayoni/276 (herein referred to as the suit land) and establish the original boundaries as shown in annexure "MSE 3" which orders were to be implemented within sixty (60) days as shown in annexure "MSE4). He adds that in an effort to comply with the court orders the Land Registrar found that the suit land had been grossly interfered with subdivided, distributed and shared in total disregard of the confirmed grant. He says that it is now necessary that all persons claiming any benefit in the land do attend court to state their claims before the court orders cancellation of all resultant parcels of land. He has annexed/attached an affidavit filed by his co-administrators showing the various claimants to the land as shown in the annexure marked "MSE5".

3. The application is opposed. I have seen on record a number of replying affidavits and grounds of opposition filed by the respondents and interested parties.

4. The second application for determination is the one dated 5/11/2014 brought by the 49th Interested Party under certificate of urgency seeking orders that

1. Spent
2. There be a stay of execution of orders of the court issued on the 27th September 2012 and 29th August 2013 pending the hearing and determination of this application.
3. The ruling and ex parte orders made on the 27th September 2012 and 29th August 2013 and all consequential orders thereof be reviewed, set aside and/or discharged.
4. The courts do make such further orders as it deems fit and appropriate in the circumstances.
5. The costs of this application be provided for.

5. The said application is premised on the grounds set out on the face of it and supported by the annexed affidavit of Patrick Sakwa Nyendwe sworn on the same date. Briefly he depones that the orders of 27/09/2012 and 29/8/ 2013 were obtained pursuant to material non-disclosure and it is apparent that there was an error on the face of the record. He depones further that he purchased property known as North Wanga/Mayoni/1287 being a sub-division of the mother title of the Suitland from Kasimiri Wesonga Ongoma and obtained a title thereon as shown in the annexure marked "PSN1". He adds that when he sought to transfer the property in order to secure his title there was no restriction on the mother title and the transaction was duly completed without any legal issue and that if restrictions had been placed on the extinct mother title the transfer and subsequent issuance of the title in his name would not have been possible. He maintains that Article 25 of the constitution guarantees him rights to a fair hearing which is not limited. He adds that the objector has been meddling in the estate of the deceased and cannot claim to be doing otherwise on the strength of the letters of administration granted. He depones further that he is aware of a permanent injunction against the objector in S.P.M.C.C No.132 of 2008 which orders and decree have not been vacated.

6. Patrick Sakwa Nyendwe also avers that the objector has used the letters of administration to dispose of part of the suit land to third parties and cannot thereafter claim the land back while he still holds on to the purchase price. He depones that he is aware that the objector has witnessed the sale of parcels out of the extinct suit land by his family members and it is in bad faith for him to subsequently claim the land back from innocent third parties. He states that he is also aware that the objector on the 15/03/1997 confirmed that the suit land had been divided and shared out amongst beneficiaries of the estate and therefore it is in bad faith for him to seek resurvey of the same at this point. He maintains that the applicant's cause of action against him and the orders sought should not be granted in the circumstances. He states that on or about the 26/03/1998 the court with the consent of the objector allowed Kasimiri Wesonga Ongoma to take his Sixty (60) acres of land from the estate herein and the objector swore an affidavit to that effect. He also states that he is aware that the objector participated in the subdivision of the suit land and that Justice Osiemo as he then was adopted the judgment in his ruling in favor of the plaintiff in H.C.C.C No.138 of 1983 which judgment has not been set aside. He depones further that this matter has been to the Court of Appeal in Kisumu vide Civil Appeal No.25 of 1996 where Esmail Etokho Wanga (Deceased) lost making his estate bound by the said judgment of the court of Appeal.

7. Patrick Sakwa Nyendwe is of the opinion that the orders sought by the objector for cancellation of the titles cannot be addressed in a succession cause without substantial prayers being sought in a civil suit. He claims that there have been no particulars of fraud pleaded against him thus the orders of the Court made on 27/09/2012 and 29/08/2013 ought not be executed for non-disclosure of material facts. He maintains that he is a purchaser for value without notice of fraud and based on the strength of the court order where parties have litigated for a long time. He says he is entitled to the fruit of justice. He adds that the orders sought by the objector cannot be executed without varying the orders in succession cause no 230 of 1996 which judgment and order has since been executed.

8. Briefly the responses and the grounds of opposition to the first application herein dated 28/12/ 2013 being that no one responded to the application dated 5/11/ 2014 save for the submissions. The 10th

Interested Party **RAMADHAN KANDIA MUYIKA** swore his replying affidavit on the 6/6/2014 wherein he deponed that he is the absolute registered owner jointly and severally with his two brothers Abdul Makero Muyika and Ismail Osinga Muyika of all that parcel of land known as L.R No. North Wanga/Mayoni/1248 measuring 4.98 hectares as shown in the title deed annexed and marked "RKM1". He adds that the said parcel of land was created out of the suit land and was lawfully and procedurally transferred to them by their father Mr. Hatibu Imbundu Muyika as a gift on the 29/5/ 2012 after having purchased the same from the deceased herein between the year 1979 and 1984 and after suing and successfully contesting Civil Suits against the objector and the petitioners herein as the administrators of the estate of Ismael Etokho (Deceased) in Kakamega S.P.M Civil suit Number 464 of 1998, a copy of the consent order dated 22/03/2001, an agreement dated 21/05/1993 which are marked "rmk2" , copies of the application to the land control board and transfer forms which have been marked "RMK3". He explains that the court at Bungoma in C.M.C.C. No.132 of 2002 restrained the objector from interfering in any way with the said land and at the time of his father's demise they had been using the said land for agriculture, and have their own residence there and have done substantial developments on it at the exclusion of the objector. He has annexed a copy of the decree and judgment in the said suit which he says were never set aside, lifted, varied, appealed against and are still in force. The same are marked as "RMK 4". He depones further that the boundaries/features on the ground were earmarked and that they never had any access land other than the portion measuring 4.98 Ha. He claims that if any subdivision has henceforth occurred the same was caused by the objector. He maintains that they legally own their parcel of land known as North Wanga/Mayoni/1248 which was acquired by his father as a bona fide buyer for value.

9. The 11th Interested Party Hassan Wanjala Wafula swore his replying affidavit on the 6/6/2014 in which he depones that he is the bonafide owner of L.R.No. North Wanga/Mayoni/1249 measuring 0.8 hectares as shown in the copy of the title deed marked "HWW2".He also states that the said parcel of land was created out of the deceased's suit land and that he bought the same from the deceased in 1990 at Kshs. 13,500/=. He stated that he lost the sale agreement in a robbery with violence incident. He states that the deceased together with the members of his family including the petitioner and the objector herein consented to the sale and that the portion that he bought was shown to him and the boundaries clearly marked by the deceased and the elders and that he immediately moved into the said land from Bunyala where he originally hailed from. He maintains that he stayed peacefully with the deceased herein who passed on six (6) years later after such sale and before fully transferring the said land to him. He adds that he has developed the said land and has built several semi permanent houses on it besides doing farming thereon. He maintains that he has a large family who number about 25 including his wives, sons, daughters and grand children and has buried some of his family members on the said piece of land. He maintains that he got registered and was issued with the aforesaid title deed after succession with the effort of this Honorable Court, the petitioner and the objector. He adds that he never flouted the procedure of registration and transfer but that all legal procedures were followed. He states that he has no other land and his title is genuine having lived on the said parcel for a period of 24 years.

10. The 31st Interested Party Romano Indwari Ambinga also swore a replying affidavit on the 6/5/2014 wherein he states that he is the owner of L.R. No. North Wanga/Mayoni/1269 as shown in the annexure marked "RIA 1". He depones that he got the land through a transfer and after valid consents duly signed (annexture "RIA 2 (a) and (b)" following an order from Mumias Court in award no. 28 of 2009 (Annexture "RIA3"). He claims that he exhausted all mechanisms of land acquisition and there was no interference as alleged and the transaction was effected way back in 1996 before the succession cause herein. He maintains that the orders sought should not be granted.

11. The 50th Respondent Phaniel Ngala Nambaka also filed his replying affidavit sworn on the 27/6/2014. He depones that he is the registered proprietor of the parcel of land known as L.R.No. North Wanga/Mayoni/1288 measuring approximately 1.20 hectares which was created from the suit land which formed the estate of the deceased. He states that he obtained the said title by way of transfer from Henry Nambaka Lunywere (see a copy of the title annexure "PNN1") who informed him that he had purchased the same from Kasimiri Wesonga Ongoma one of the heirs of the deceased herein who inherited and was entitled to 60 acres of land from the deceased estate and that it is the administrators of the estate of the deceased herein who processed and executed all the necessary documents and transferred L.R.No. North

Wanga/Mayoni/1288 to him. He has attached copies of the application for consent, the letter of consent and transfer duly executed by the said administrators and the title deed subsequently issued to Henry Nambaka Lunywere marked as “PNN2”, “PNN3”, “PNN4” and “PNN5” respectively. He maintains that they are innocent purchasers for value and their interest in the land is legal and is protected by section 93 of the Law of Succession Act and the applicant is stopped from interfering with his title or undoing what has already been lawfully and procedurally done by him. He maintains that upon transfer of the said parcel in 2008 he took exclusive possession thereof and has continued to utilize the same peacefully, openly, continuously and unimpeded to date. He wants the applicant’s application dismissed with costs.

12. Jethro Bernard Imili swore an affidavit on behalf of the 7th interested Party Adriano Muyale (Deceased) on the 03/07/2014. He obtained letters of administration for the estate of Adriano Muyale (Deceased) together with his (Adriano Muyale) son Isaac Avugana Muyale who has given him authority to swear the affidavit in succession Cause Number 185 of 2014 (see annexure “JB1” a copy of the said grant and the death certificate s/no. 866510). He depones that the land parcel number L.R.No. North Wanga/Mayoni/1245 measuring 0.85 hectares is registered in the names of the late Adriano Muyale as shown by the copy of the title annexure “JB2” and that the said parcel was as a result of a subdivision of the suit land which belonged to the deceased. He adds that the late Adriano Muyale bought the said land from the deceased’s estate herein in 1993 but while the deceased still was arranging to transfer the title to him he (deceased) died. Further that after the purchase of the said parcel of land Mr. Muyale was given vacant possession and occupied the said land which he has used peacefully for agricultural activities. He explains that boundaries differentiating Mr. Muyale's land and the other surroundings were also put up by the deceased herein, which boundaries have remained intact. By written agreements the late Adriano Muyale, who was his cousin, sold to him the title herein as shown by the annexed copies of the agreements and the Chief's letter dated 29/4/2014 marked as “JBI 3” but unfortunately Adriano Muyale passed on in 2004 before transferring the said land to him. He maintains that the late Adriano acquired the title herein legally hence the sale to him as a bona fide purchaser for value should be recognized. He wants the application herein dismissed.

13. This court notes that Patrick Sakwa Nyendwe also an Interested Party has filed grounds of opposition and Notice of Preliminary objection dated the 16/07/ 2014. He has also filed his replying affidavit dated the 05/09/2014 wherein he depones that the orders made herein were obtained pursuant to material non-disclosure and the same ought to be set aside or varied. He states that the affidavit by the applicant Musa Sumba Etokho dated 28/12/2013 in support of the applicants application does not bring out sufficient details of the true and correct position of the issues at hand. He states that the interests of Kasimiri Wesonga Ongoma and Pascal Onyango Otochi were duly admitted and recognized by the court of record. He explains that he was neither a party to the suit when the orders were made nor was he made aware of the proceedings and that he has been condemned unheard. He maintains that the suit property was shared and/or sub-divided in compliance with the confirmed grant and that the applicant herein fully participated in the same upon receipt of the purchase price see annexure “PSN1”. He claims that the applicant has used the letters of administration to lawfully administer the suit property and has sold portions of the property to third parties and is now misleading the court. See a copy of a sale agreement dated 18/0/2006 marked “PSN 2”. He also claims that the applicant witnessed the sub-division and subsequent sale of the original land known as L.R.North Wanga/Mayoni/276 see a copy of the sale agreement dated 28/03/2007 witnessed by the applicant marked “PSN3” and argues that it is wrong for the applicant to put a claim on the suit land which the family sold. He is urging this court to consider the orders issued by the court protecting the interests of Kasimiri Wesonga Ongoma and Pascal Onyango Otochi which orders have not been varied and/or set aside. Patrick Sakwa Nyendwe also explains that the applicants father Ismael Etokho Wesonga (Deceased) and Kasimiri Wesonga Ongoma's father inherited the suit land from Wanga Mwanza. Upon being shown his portion, Kasimiri Wesonga Ongoma's father planted trees along the common boundaries to separate his portion from that of the deceased but when the adjudication team visited the land the applicant’s father Ismael Etokho Wesonga (Deceased) caused all the land inherited from Wanga Mwanza also deceased to be registered in his name. He states that all along Kasimiri Wesonga Ongoma was working in Uganda and upon his return in 1967 claimed his share of the suit land from the applicant’s father so that he could obtain a title. He states that it was difficult for the applicant’s father to relinquish the portion to Kasimiri Wesonga Ongoma who then approached the area chief (Christopher Otsiemo) and the village elders who recommended that he be given his exact share. When

the applicant's father remained adamant and the matter was referred to the District Officer Mumias who recommended that Kasimiri Wesonga Ongoma files a suit in Kakamega Law Courts which he did being Kakamega HCCC No.138 of 1993 see the proceedings marked "PSN4" in which the court ordered a survey and it was found that Kasimiri Wesonga Ongoma was entitled to 61 acres. Patrick Waswa Nyendwe also avers that contrary to the results of the survey the court on the 30/10/1985 ordered that Kasimiri was only entitled to 30 acres out of the 61 acres. Kasimiri appealed to the Court of Appeal at Kisumu in Kisumu C.A No. 25 of 1986 (see pleadings marked "PSN5"). The appeal was allowed and the order of the trial court of 30/10/1985 set aside and the court directed that the suit be tried de novo by a different Judge or Commissioner of Assizes (see the order dated 22/10/1987 marked as annexure "PSN 6"). The case was then placed before Hon. Justice Osiemo as he then was who with the consent annexure ("PSN7") of the parties referred the matter to a panel of elders for arbitration on 17/09/ 1991. The panel of elders which was chaired by Vincent Nakhalo Wandera a District Officer comprised of Rachabu O.Okechi, Saidi W. Atemba, Lukha L. Wakhutu and Mohamed Wasiro. In its ruling the panel of elders awarded Kasimiri Wesonga Ongoma and Pascal Onyango Otochi 60 and 25 acres respectively a copy of the proceedings and ruling of the elders dated 7/1/1992 is marked "PSN 8". The applicant's father was dissatisfied with the said ruling and filed in court objection proceedings dated 24/06/999 to set aside the award ("PSN9") but the objection was dismissed by the court and the award was adopted and made a judgment of court ("PSN 10"). The deponent has referred to a letter dated 6/11/ 1992 ("PSN11") where the Advocate representing the applicants father Mr. Henry Lugulu in compliance with the orders of the court issued in HCCC Number 138 of 1993 wrote to the deputy registrar Kakamega Law Courts requiring Kasimiri Wesonga Ongoma and Pascal Onyango to pay survey fees to effect transfer of their portions to their respective names. He further explains that when the applicant's father died the children filed this succession cause and Succession Cause No.230 of 1996 which were later consolidated by consent where Hussein Mwanza Etokho and Musa Sumba Etokho were made joint administrators of the estate of the deceased Ismael Etokho Wanga. He adds that it was unanimously agreed that the claim of Kasimiri Wesonga Ongoma and Pascal Onyango Otochi for 60 and 25 acres respectively be recognized ("PSN13" and "PSN 14"). He states further that he is aware that there is a permanent injunction issued against the applicant in SPMCC No.132 of 2002 which is still valid and in force ("PSN 15"). He also claims that he is aware that on or about the 15/03/ /1997 the applicant confirmed to this Honourable Court that the suit land herein had been divided and shared out as agreed amongst the beneficiaries and it was therefore in bad faith for the applicant to seek a re-survey without a valid reason. It is also Patrick Sakwa Nyendwe contention that the applicant instructed the firm of Ayumba Associates to survey the suit property and subdivides it and that the applicant was personally present during the subdivision where he signed all necessary documents to facilitate the same see "PSN 17" the letter dated 25/03/1998. He adds that even before the commencement of the succession cause herein Kasimiri Wesonga Ongoma was recognized as a beneficiary of the deceased's estate by the Assistant Chief a fact which has not been controverted. See annexure marked "PSN 18". He claims to have purchased his own portion from Kasimiri Wesonga Ongoma and sought consent and obtained a title namely L.R No. North Wanga/Mayoni/1287 asper annexure "PSN19" and that there was no restriction registered against the suit property to defeat the purchase and subsequent transfer. He cites Articles 47 and 50 of the Constitution which provide for fair administrative action and hearing process. He claims that while the court was making ex parte orders pursuant to the application dated 14/03/2008 it failed to consider the replying affidavit of Hussein Mwanza Etokho sworn on the 17/04/2008 marked "PSN20". He claims the applicant's advocate has sworn several affidavits on contested matters and obtained ex parte orders contrary to the provisions of the law and based on misleading facts see "PSN21". He adds that the cancellation of the titles should not be granted because the notice of motion and the affidavit do not disclose any illegal or unlawful subdivision of his parcel of land. He further states that the applicant cannot seek cancellation of title when he has participated and benefited from the sale. He avers that the orders sought cannot be issued in a succession cause and that the court mandated to deal with the cancellation of titles is the Land and Environment court. He maintains that as an interested party and purchaser for value without notice of fraud and based on the fact that no particulars of fraud have been pleaded the orders sought by the applicant cannot issue in this succession cause and in the circumstances herein and the same can only be done through a substantive suit. He states that the court cannot issue the orders sought without varying and/or setting aside the orders issued in HCCC No. 138/1983 substantially affecting the suit land. He is of the view that section 45 and sections 47 of the Law of Succession Act are inapplicable in so far as the applicant's application dated 28/12/2013 is concerned as the Law of Succession Act does not recognize the

cancellation of titles as sought by the applicant.

14. The 2nd Petitioner/Respondent Hussein Mwanza Etokho swore a Replying Affidavit on the 06/06/2014. He depones that the applicant was his younger brother and that he passed on. He claims that the applicant's application was brought in bad faith, was a mere afterthought and aimed at frustrating the beneficiaries and lawful liabilities of the estate of the deceased herein. He further claims that the applicant is blatantly lying by alleging that various attempts to subdivide the suit land in compliance with the confirmed grant have failed due to greed and mischief of some parties. He maintains that the deceased property mainly consisting of the suit land was properly subdivided and distributed by the applicant himself without coercion or force after he (applicant) called a surveyor who surveyed the land in question and the applicant himself signed all the relevant documents for all the heirs, beneficiaries and liabilities who deserved the same. He has annexed copies of mutation forms dated 13/01/1997, a letter from the applicants surveyor dated 25/3/1998 an agreement dated 26/09/1996 and a copy of the persons who attended the survey meeting, a consent letter dated 08/10/1996 and an application from the Mumias Land Control Board being annexure "HME 1". He explains that this subdivision and survey of the deceased's land was a follow up to the deceased wish as he was desirous to share out his land and he had made good his wishes as the deceased also appeared before the Mumias Divisional Land Control Board. He explains that the suit of land was subdivided into 54 portions but as of now more divisions have occurred which have been done by the applicant who sold some portions to his new purchaser's see a copy of the sale agreement annexed and marked "HME 1 (a)". He also explains that during the survey of the suit land over 100 persons attended. He has attached a schedule of distribution at paragraph 10 and 11 of his affidavit. He states that the suit land does not exist on the ground and that it would therefore not be possible for the applicant to effect the orders sought. He adds that the applicant has already implemented the grant herein except that he has sold almost all of his share of the deceased's estates and before his death he was encroaching on others' land.

15. The 2nd petitioner/respondent also states that he is aware that the applicant was interfering with L.R. No. North Wanga/Mayoni/1251 and L.R.No.North Wanga/Mayoni/1258 belonging to James A.A Kusimba and Hatibu Muyika Imbudu who are bona fide buyers. He explains that many of the said liabilities who the applicant referred to as strangers acquired their respective portions of land by purchasing it from the deceased directly before his death (see the sale agreements annexure "HME2"). He explains further that the applicant signed all the relevant applications to the Land Control Board and the transfer forms in favor of the buyers. He depones that the liabilities sued the applicant in the Chief Magistrate's Court in Kakamega Civil Suit No 464 of 1998 and a consent order was issued to them to acquire title deeds. He states further that the applicant was restrained from grabbing L.R.No.North Wanga/Mayoni/1251 by a decree from Bungoma Chief Magistrate's Court Case Number 132 of 2002. He claims that plot number 4 at Makale market was sold by the applicant and his mother and all the proceeds there from were never shared out by the applicant as provided for in the confirmed grant. A copy of the sale agreement is annexed and marked "HME 3". He also states that the applicant dismantled the posho mill and the material of the building used to put up a house for his mother Saida Watako and the posho mill engine was also sold by the applicant and his brother who used the proceeds alone. He also claims that the applicant notoriously leased land to 3rd parties and constructed houses on Land Parcels L.R.No. North Wanga/Mayoni/1241 and 1242 which land ought to belong to the deceased's sons Issa Wanga Etokho and Saleh Ateya who have been rendered homeless. He contends that there is no pending estate for sharing and distribution as speculated by the applicant. He also wants the applicant's application dismissed.

16. Justus Kweyu Chuma also an interested party swore his replying affidavit on the 23/09/2014 wherein he depones that he is the legal owner of land parcel no. North Wanga/Mayoni/2127 measuring 1.20 ha as shown by the annexed copy of the title marked "JKC1" which was created out of the deceased's land parcel no. North Wanga/Mayoni/1257 which was registered in the names of the Objector/Applicant and the Petitioner/Respondent herein which was also created out of the suit land registered in the names of the deceased. He claims to have bought the said land from Peter Inguyesi Omukami vide an agreement dated 20/03/2009 who had purchased the same from one of the beneficiaries of the deceased herein Felix Ongoma Etokho annexure "JKC2" is the agreement. He maintains that the petitioner and respondent/objector agreed to transfer the said land and they also consented to the transfer. He also

maintains that the portion he purchased was shown to him by the objector, the petitioner and Felix Ongoma Etokho and that he moved to the said land immediately from his original home at Shianda. He has annexed copies of mutation dated 01/4/ 2009 and 29/01/2013 marked “JKC3 (a) and (b)” respectively. He claims to have stayed with his family peacefully with the objector and the petitioner until the objector herein passed on. He claims to have developed the said land extensively as shown in the photograph extracts marked “JKC4”. He maintains that he got registered and was issued with the title documents after the succession herein had been determined and that he never flouted any procedures of registration and transfer of title which procedures were followed with the help of the objector, the petitioner and the said beneficiary. He too wants the application dismissed.

17. Emmanuel Wanzala also an interested party swore an undated affidavit opposing the application herein which was filed in court on the 19/03/2015. He depones that he is the registered proprietor of land parcel number North Wanga/mayoni/1271 a copy of the title deed is marked “EW1”. He claims that the said parcel was sold to him by Ronald Ongoma. He claims that he has never participated in the proceedings herein which led to the issuance of orders of 27//09/2012 and 19/08/2013. He wants the orders on the survey of original land as well as application for revocation of title to be set aside as there is an r apparent on the face of the record. He is of the opinion that cancellation of title deeds can only be effected by the Lands and Environment Court. He also maintains that the rulings above were obtained by non-disclosure of material facts and that the land he purchased was a subdivision of the suit land which ceased to exist and that there were no restrictions, inhibition or caution whatsoever. He states that he is also aware of the injunction in Bungoma SPMCC132 of 2002”EW2” which he states is still binding. He contends that this court lacks jurisdiction to cancel the titles in view of Article 162 (ii) (b) of the Constitution and Section 13 of Lands and Environment Act no 19 of 2011. He claims estoppels against the applicant and supports the application by Patrick Sakwa Nyendwe dated 5/11/2014. He wants the application by the objector dismissed.

18. Ronald Kembu Ongoma also filed his replying affidavit which he swore on the 05/03/ 2014. He depones that he is the registered proprietor of Land Parcel No. North Wanga/Mayoni/1272 and that both administrators of the estate signed a transfer to him and he got a title. He adds that both the administrators acted pursuant to a certificate of confirmation issued by this court. He also states that his title is protected by law and cannot be canceled at the whims of the applicant who is pursuing selfish interests. He claims that the land registrar could not have been ordered to come to the land without involving all the parties and the order asking the registrar to visit the land was made in total disregard of his rights and in contravention of the law.

18. The 17th Respondent has also filed his grounds of opposition dated 28/03/ 2014 whereas the applicant filed grounds of opposition dated 28/05/ 2014 opposing the replying affidavit of the 31st Interested Party.

19. Pascal Onyango Otochi swore his affidavit on the 25/03/ 2014 wherein he deponed that he is the registered proprietor of Land Parcel No. North Wanga/Mayoni/1255 having obtained title thereto in the year 2003. He depones that he has been staying on the land and using it and was given the land by the administrators of the estate as his name was on the grant. He claims that when the order dated 24/12/2009 was obtained he was not served nor was he made a party to the cause. He has annexed the said order which is marked “OO1”. He claims to have been given 25 acres when the grant was confirmed and the same were transferred to him as per the grant. He states that he later subdivided his portion and transferred the same to his sons as follows:

1. Hussein Onyango – LR. No. North Wanga/Mayoni/1253
2. Sabina Wesonga - LR. No. North Wanga/Mayoni/1254
3. Charles Wanga - LR. No. North Wanga/Mayoni/1252
4. Joseph Onyango - LR. No. North Wanga/Mayoni/1256

20. Pascal Onyango Otoch avers that it is not legal for the court to recall titles without hearing all these persons. He depones that he came to know of the District Surveyors visit vide the letter dated 20/03/2014 which he received from the area Chief. See annexure “OO3” being a copy of the said letter. He is asking this court to stay the said visit till the application is heard inter parties. He also wants the orders of

21/08/2013 be set aside and the application which gave rise to the orders served and argued inter parties as he is likely to suffer if they are not stayed.

21. This Court ordered service of notice to be effected upon all the respondents and any other interested parties by way of advertisement in the daily nation of Monday 02/02/2015. Parties were also ordered to file and exchange written submissions together with their list of authorities. I see on record submissions by the following parties Petitioner/Applicant, 50th Interested Party, 49th Interested Party, Petitioner/Respondent, 7th,10th-11th 13th and 17th Interested Parties. I have carefully read through all the submissions which reiterate, in the main, the averments in the various affidavits and grounds of opposition.

22. After carefully considering the two applications, the replying affidavit, the grounds of opposition and the submissions made, the only issue. That falls for determination is whether all titles issued out of the suit land should be cancelled and therefore whether all the survey that was carried out on the suit land "contrary" to the confirmed grant should be annulled. What this means is that the confirmed grant herein should also be revoked and/or annulled

23. Section 76 of the Law of Succession Act provides that the grant of representation, whether or not confirmed, may be revoked or annulled at any time by the court either on the court's own motion or on an application an interested party. Such revocation/annul ant can be on any of the following grounds;- The proceedings to obtain a grant being defective in substance; the grant having been obtained by reliance on false statements. Non-disclosure or concealment of important matter or information; The person to whom grant was made having failed to apply for confirmation within the prescribed time or having failed to diligently administer the estate at having failed to produce to the court within the prescribed time any inventory or account of administration as required in law or produces an inventory or account which is false; and the grant having become unless and inoperative through subsequent circumstances. It is noteworthy that an application for revocation, whether made directly or indirectly as in the instant case, must be based on the above stated grounds, otherwise it fails.

24. In the instant case, the application dated 28.12.2013 is based on the ground that it is impossible to implement the orders of this Honourable Court made on 26.12.2012 because the sub division of the suit land was unlawful; further that the sub-division and distribution of the suit land was done in total disregard of the confirmed grant. Do these grounds fall within the ambit of the provisions of Section 76 of the Law of Succession Act?

25. The history of this case, which has not only been heard in the subordinate courts at Bungoma, Mumias and Kakamega, but also before this Honourable Court and the court of Appeal at Kisumu has convinced me beyond peradventure that the application dated 28.12.2013 has no legs to stand on. The applicant therein has all along fully participated in these succession proceedings and willingly and voluntarily signed and executed various documents to facilitate transfer of portions of the suit land not only to the beneficiaries but also to other third parties. The applicant has not given any cogent reason why the title emanating from the suit land should be cancelled and/or revoked. In effect, the applicant has not proved any of the grounds under Section 76 of the Law of Succession Act to warrant revocation of the confirmed grant to which he was a willing party

26. In any event, it is my considered view that the applicant should have been candid enough and brought his application by way of summons for Revocation of Grant as provided under Rule 44 of the Probate and Administration Rules instead of hiding behind a Notice of Motion. It thus section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules which are the cornerstone for applications for revocation of grant, whether such grant is confirmed or not.

27. It is also worth noting that the applicant's complaint concerns the apparent difficulty on the part of the District Land Registrar and the District Surveyor in carrying out an implementing the confirmed grant. It would therefore appear to this court that the applicant is saying that the confirmation of the grant was not taken through the correct process, but the record does not support him. As has been argued by those who are opposed to the application, this court is not the proper forum for the applicant to ventilate

his case for cancellation of titles that have been created out of a lawful process involving subdivision of the suit land after confirmation of the grant herein.

28. I also find and hold that the titles sought to be cancelled or revoked are protected by the provisions of Section 93(1) of the Law of Succession Act which provides that transfer of any interest in property, whether real or personal by the original personal representative remains unaffected by the revocation of the grant, even in cases where the purchaser has notice that all debts, liabilities and other expenses which take priority have neither been provided for nor discharged. What this means is that even if the applicant had satisfied the requirements of Section 76 of the Law of Succession Act for revocation of grant, the impugned titles would not necessary be cancelled and or revoked.

29. The true picture in this case is that the sub-division of the suit land was done by the applicant and his co-administrators. The documents availed to the court through the replying affidavits clearly show that the administrators were all present during subdivisions and sale of the various portions to the interested parties. The alleged difficulty on the part of the District Land Surveyor is only in the mind of the applicant. Hussein Mwanza Etokho, the applicant s co- administrator, admitted in his papers filed in Court that he and the applicant sold the parcels of land to the interested parties after confirmation of grant and not before.

30. I also note that the applicant in this case is now deceased. There is no evidence that he has been substituted. His claims therefore went to the grave with him.

31. In conclusion, I find and hold that the application dated 28/12/2013 lacks merit and the same is dismissed in its entirety. As for the application dated 05/11/2014 no papers were filed in opposition to it. That notwithstanding, this court declines to grant the orders sought as no useful purpose would be served by such orders.

I order that each party herein bears its own costs.

Orders accordingly;-

Judgment delivered, dated and signed in open court today 29th day of July 2015

RUTH N. SITATI

JUDGE

In the presence of ;-

.....Mr. Kasamali(present).....For The Petitioner

.....not present.....For 2nd Petitioner/Applicant

.....not presentFor 7th, 10th, 11th and 13th I.Ps

.....not presentFor 17th I.P

.....Not present.....For 44th I.P

,.....not presentFor 49th Objector

.....Mr. Lagat.....Court Assistant.