



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

MISC.CIVIL APPL.NO.205 OF 2012

TOBIAS ONYOYO OGUTU - APPLICANT/OBJECTOR

VERSUS

MARGARET SIMBA OKIRI - RESPONDENT/PETITIONER

RULING

Margaret Simbi Okiri the applicant herein through a Petition for grant of letters of administration intestate dated 11th September 2011 presented the Petition for the estate of Simeon Okiri Bolo in her capacity as the wife of the, deceased. She indicated in her Petition that the deceased had no other dependants/beneficiaries. The Petition was gazetted in the Kenya Gazette of 9th September 2011 under gazette Notice No.11165. Consequently, the applicant obtained a grant of letters of administration intestate on 29th September 2011 over the deceased and which was **L.R. No.East Karachuonvo/Kobuya/1062** hereinafter also known as suit land.

On 20th June 2012 the respondent herein Tobias Onyoyo Ogutu filed summons for revocation of grant under **Section 76(a) (b) & (c)** and **Rules 44 and 73** of the **Probate and Administration Rules** seeking the following prayers:-

- 1.That the honourable court be pleased to revoke/annul the grant of letters of administration issued to the Petitioner on 29th September 2011 by Oyugis Principal Magistrate's Court.**
- 2.The court be pleased to revoke and annul the registration of 25th October 2011 relating to land parcel No.East Karachunvo/Kobuva/1062 vesting the entire parcel into the name of Margaret Simba Okiri and order rectification be issued rectifying the register to reflect the interest of the applicant herein as a purchaser of the portion of the suit land.**
- 3.That this Honourable Court do annul and revoke the title deed issued to one Margaret Simba Okiri with regard to suit land.**
- 4.That the Honourable Court do issue and order nullifying and revoking any other title which have emanated from the subdivision of the suit land.**
- 5.That the Honourable Court do issue an order to the District Land Registrar, Rachuonyo District to issue a title deed to the Applicant with regard to the purchased portion of the entire suit property.**

The above application by the respondent was premised on the following grounds:-

i)That the grant as obtained was based in misleading information.

ii)That the grant was obtained fraudulently by concealing from the court the fact that the applicant was a beneficiary and has an interest as a purchaser of a portion of the suit land having purchased a portion measuring 1.3 ha.

iii)That the petitioner/respondent did not list to the court all the survivors of the deceased Simeon Bolo Oluri.

iv)That the applicant is entitled to his share of the suit land as a purchaser.

v) That the Oyugis Principal Magistrate's Court did not have the jurisdiction to preside over the Petition for this Grant and grant the same.

The above summons for revocation was opposed by the applicant's replying affidavit dated 2nd August 2012 where she deponed that:

- the respondent was not a beneficiary, heir, dependant of the Estate of Simeon Okiri Bolo (deceased) who died on the 5th September 1996.

- The respondent has not evidenced any sale agreement either between him and deceased.

- The document purporting to evidence sale does not show that the deceased was partly privy to any land sale agreement, either with the applicant or the applicant's purported benefactor.

- That the purported document which has been relied upon by the applicant herein to found the allegations of sale of land by the deceased, was made and /or authored on 13th February 2003 yet the deceased died on the 5th September 1996.

In a judgment dated 20th January 2015 Sitati J, held:

1. The respondent application to revoke/annul the grant does not hold any water since the respondent has not demonstrated his interest in the deceased's estate.

2. The grant of letters of administration issued in the 29th September 2011 to the applicant be and are hereby revoked as the said grant was obtained fraudulently.

3. The registration of 25th October 2011 relating to the suit land vesting the entire parcel into the name of Margaret Sirnba Okiri be revoked.

4. The suit land be and is hereby ordered toto the names of Ondaba Gai, Timon Obuya and Okiri Bolo respectively.

Sitati J, also noted the following:

'Moreover according to a copy of the official search dated 8th June 2012, the suit land was originally registered in the names of Ondaba Gai, Timon Obuya and the deceased each acquiring 9 1/2, 1/4 and 1/4 share respectively. The respondent's forms applying for letters of administration do not state the share of her deceased husband but she states that she is obtaining grant of letters of administration for the entire suit land. The question that arises here is what happens to shares of the survivors of the estate of Ondaba Gai and Timon Obuya if at all the said proprietors are dead?.....In my humble view this indicates that there is something fishy about the transfers and new registrations because it is not possible for the certificate of official search to read that the respondent owed the suit land in May and then 3 proprietors are shown to own the same suit land in the following month.'

It is the above judgment that has triggered the instant application by the applicant herein Margaret Simba Okiri in an application for summons for review of judgment dated 12th May 2015 under **rules 49, 63 & 73 of the Probate and Administration Rules and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules 2010** for orders that:

1. Spent.

2. Spent.

3. The Honourable Court be pleased to review rescind, vary and/or set aside the judgment and decree of this Honourable Court rendered on the 30th day of January 2015, more particularly, the portion and/or limb whereby the Honourable Court revoked the Grant of letters of administration on account of fraud and directed the transfer of the title in respect of LR. No: East Karachuonyo/Kobuya/1062 (*hereinafter referred to as the suit property*) into the names of Ondaba Gai, Timon Obuya and Okiri Bolo respectively.

4. Consequent to prayer 3 hereof being granted, the Honourable court be pleased to reinstate and/or restore the Grant of Letters of Administration hitherto issued in favour of the Petitioner/applicant.

5. Such further and/or other orders be made as the court may deem fit and expedient.

6. Costs of the instant application be provided for.

The above application was supported by a supporting affidavit from the applicant herein deponing that the deceased was the proprietor of the suit property having been registered in the name of deceased during the adjudication and demarcation process, that notwithstanding the respondent commenced summons for revocation of grant whereby he contended that he was purchaser of the property belonging to and registered in the name of the deceased.

She further deponed that in the course of filing the summons for revocation of the grant, the respondent herein other than including the details of the suit property also included and factored in details of another property namely L.R.No.East Karachuonyo/Kobuya/1372 belonging to and registered in the joint names of Ondaba Gai, Timon Obuya and Okiri Bolo respectively. However, the said property LR. No. East Karachuonyo/Kobuya/1372 does not form part and parcel of the Estate of the deceased. Consequently, that the Honourable Judge proceeded to and made decision taking into account L.R. No. East Karachuonyo/Kobuya/1372 as opposed to the suit property. Hence, the applicant has contended that the finding by the Honourable Judge that the suit property was registered in the joint names of three (3) persons was factually erroneous and incorrect. As a result the grant of letters of administration issued in her favour was revoked, in the absence of any legitimate cause/basis and the suit property which formed the estate of the deceased has since been decreed transferred and registered in the names of 3 persons who have no connection and attachment to the deceased.

The above application was opposed by the respondent vide a replying affidavit dated 5th June 2015. In his replying affidavit the respondent has deponed that the above application lacks merit. It is introducing new facts and issues not dealt with in the main summons for revocation of grant and that he did not introduce L.R.No.East Karachuonyo/Kobuya/1372 in his summons for revocation of Grant as alleged letters of grant were issued.

He further deponed with regard to land parcel No.**East Karachuonyo/Kobuya/1062** that the judgement of the court was clear as the matter was the suit property and not land parcel No.**East Karachuonyo/Kobuya/1372** and that the grant revoked was obtained fraudulently as regards the suit property.

Lastly he averred that any rectification that would be necessary is to the effect that the title of the suit property to revert to the name of the deceased was the sole registered proprietor of the suit property and

the grant to remain revoked for all purposes and that L.R. No.East Karachuonyo/Kobuya/1372 registered in the names of Ondaba Gai, Timon Obuya and Okiri Bolo was not the subject of the summons for revocation of grant since it was not part of the title in the grant as issued to the applicant.

When the matter came before me on 9th June 2015 it was agreed by consent that the above application be argued by filing and exchanging written submissions. The applicant has duly filed his written submissions but the respondent did not bother to file his written submissions.

I have now read the applicants Notice of motion, his supporting affidavit and the respondents replying affidavit. I have also considered the written submissions. What the applicant is seeking for is a review of the judgment of Sitati J, delivered on 30th January 2015 where the judge ordered:-

•Revocation of grant of letters of administration on account of fraud and transfer of the title in respect of LR No EAST Karachuonyo/Kobuya/1062(hereinafter referred to as the suit property in the names of Ondaba Gai, Timon Obuya and Okini Bolo respectively.

•That the Honourable Court be pleased to reinstate/restore the Grant of letters of administration furtherto issued in favour of the applicant.

The only issue for determination in the application for review is whether the applicant has met the test set under the procedure for review of a judgment and or order of the court as imported by **Rule 63 (1) of Probate & Administration** which are as follows:

- a) There is a discovery of a new and important matter of evidence which after the exercise of due diligence was not within knowledge of or would not be produced by the applicant when the order or decree was made or
- b) On account of some mistake or error apparent on the face of the record
- c) Any other sufficient reason
- d) Application has been brought without unreasonable delay.

From the evidence contained in the supporting affidavit and the annexures (*green card*) attached thereto is undisputed fact that the deceased was the registered proprietor of the suit land on 10th May 1979. In addition, to this the deceased also held a title in common of land parcel No.Karachuonyo/Kobuya/1372 together with Ondaba Gai and Timon Obuya. The said registration of L.R.

No.Karachuonyo/Kobuya/1372 was done on 10th May 1979. This only means that the suit land and L.R.No.Karachuonyo Kobuya/1372 are two distinct pieces of land owned by deceased one as a sole proprietor (*suit land*) and the other under common ownership (L.R. No.Karachuonyo/Kobuya/1372).

I therefore agree with counsel for the applicant's contention that there is no relation between the suit land and L.R. No.Karachuonyo/Kobuya/1372 and thus variation of the order of court directing the transfer of title in respect of the suit land into the names of Ondaba Gai, Timon Obuya and Okiri Bolo respectively would be appropriate in this circumstances.

Secondly as to whether this court should reinstate/restore the Grant of Letters of Administration issued in favour of the Applicant. I will reject this prayer by the applicant's advocate for the following reasons:-

- a) As I have indicated above, the applicant petitioned for grant of letters of administration and was subsequently issued with the said grant of letters of administration intestate or 21st September 2011. It is to be noted that when the respondent filed for revocation of grant that was issued to the applicant the applicant did not file in his annexures a confirmation of the said grant.
- b) On the other hand, the certificate of official search dated 2nd May 2012 clearly shows that the suit land

was registered in the applicant's name on 25th October 2011! This is clear contravention of **Section 71** of the **Law of Succession Act** which stipulates as follows:

‘ 71(1) After the expiration of a period of six months or such shorter period as the court may direct under Subsection (3), from the date or any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.’

Furthermore, the certificate of confirmation which the applicant finally managed to annex in the instant application seeking review clearly shows it was obtained on 27th September 2012.

This is a clear pointer and indication that the applicant transferred or transmitted the suit land in her name before confirmation of grant and is therefore guilty of intermeddling with the estate belonging to the deceased. Sitati J, was therefore correct in her judgment by stating that the applicant intermeddled (dealt) with property of the deceased before confirmation of grant which is contrary to **Section 45** of the **Law of Succession Act**. I note that the applicant did not file a further replying affidavit to rebut the respondent's annexure (certificate of official search) to the suit land in the summons for revocation of grant judgment and decree.

In the circumstances I will partly allow the applicants application for review of the judgment and decree of Sitati J, dated 30th January 2015 under the following terms:

- i) The grant of letters of administration issued on the 29th day of September 2011 to the applicant, be and are hereby revoked as the Applicant dealt with the deceased property before confirmation of grant.
- (ii) Further the registration of 25th day of October 2011, relating to the suit land vesting the entitled parcel into the name of Margaret Sirnba Okiri (applicant) be revoked.
- (iii) The suit be and I hereby ordered to revert to the name of Simeon Okiri Boco (deceased).

Each party to bear own costs.

Dated, signed and read in open Court at Nyamira this 27th day of November, 2015.

HON. C.B. NAGILAH

JUDGE

In the presence of:

Onchwang'i for the Applicant

Bunde (absent) for the Respondent

Omayio —Court clerk