



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC NO. 87 OF 2007

IN THE MATTER OF JACOB MULIJO OMBITO ----- DECEASED

AND

IN THE MATTER OF PETITIONER (NOW DECEASED) – AGNES SANYA OMBITO

AND

IN THE MATTER OF HOSEA MAKHONDO MANASI-----APPLICANT

AND

IN THE MATTER OF MARYGRET NGORE MUGELE &

IBRAHIM OPIYO MALLO----- RESPONDENTS

RULING

1. This cause relates to the Estate of Jacob Mulijo Ombito (Jacob) who died on 28th September 1982. At the time of his Death, Jacob was the registered proprietor of land described as Samia/Buburi/305.
2. This court is moved by a Summons for Revocation or Annulment of Grant dated 11th September 2007. In that Summons the Court is asked for an order that-

Grant of Letters of Administration Intestate for the estate of one JACOB MULIJO OMBITO who died on 28.8.1982 and he Grant issued on the 3rd December, 1987 confirmed on the 8th September, 1988 via Busia Resident Magistrate Court Succession Cause No. 48 of 1987 to the Petitioner one AGNES SANYA OMBITO (now deceased) be revoked or annulled.

3. The Revocation or Annulment is sought on the grounds that the Petitioner concealed to the Court material particulars and/or fact. That the Petitioner deliberately listed her own son Christopher Wandera (also now Deceased) as a beneficiary when he was not. In addition, that the learned Magistrate who made the Grant did not have Pecuniary jurisdiction to do so. Lastly that the procedure for issuance of the Grant was defective both in form and substance.
4. The Persons named as Respondents to the application are Mary Gret Ngore Mugele and Ibrahim Opiyo Mallo. The latter responded by way of a replying affidavit sworn on 29th March 2010. The contents of that Affidavit shall be discussed in the course of the Court Decision.
5. The Application was filed by Hosea Makhondo Manasi (Hosea) who passed on during the pendency hereof on 27.7.2011. So by an order made on 10th October 2013, the current Applicant, Wycliffe Ouma Manase(Wycliffe) was allowed to step into his shoes after the Court was satisfied

he was a holder of a Limited Grant for the purpose. The Summons was disposed of by way of oral evidence but as the Respondents did not attend Court, notwithstanding evidence of service, only the Applicant and his one witness testified.

6. The evidence before court is that Jacob was the father of one Grace Ombito Gori (hereinafter Grace). Grace was the mother of Hosea. Jacob had a brother called Washington Ombito (Washington). And Washington was the husband to Agnes Sanya Ombito (Agnes). Agnes was the mother to Christopher Wandera (Christopher) while the Respondent herein are the administrators of the Estate of Christopher. That is the relationship of the cast in this dispute. Many of them are now dead. These are Jacob, Grace, Hosea, Washington, Agnes and Christopher.
7. The case for the Applicant is that in his lifetime Jacob was the registered owner of Samia/Buburi/305, while his brother Washington was the registered owner of Samia/Buburi/298. It was the evidence of the Applicant (but which is disputed by the Respondents) that Washington predeceased Jacob. There is undisputed evidence that when Jacob died, Grant to his Estate was issued to Agnes in Busia Resident Magistrate's Court P & A Case No. 48 of 1987. In the order for confirmation dated 8th April 1988, the two heirs and their respective shares are said to be-

Grace Ombito Gori – 4.0 hectares

Christopher Wandera – 2.6 hectares

The grievance of the Applicant is that Christopher was not a beneficiary to the Estate of Jacob and ought not have benefited from the Estate. That further, Agnes took advantage of Grace who was elderly and illiterate.

8. The story goes on. Agnes caused Samia/Buburi/305 to be divided into two portions namely Samia/Buburi/915 and Samia/Buburi/916. The former was registered in the name of Christopher. This is the contentious piece. Upon his death, the Estate of Christopher devolved on the Respondents. It was the evidence of the Applicant that the Respondents have sold Samia/Buburi/915 and the family of the Applicant is now facing eviction.
9. Although the Respondents never gave oral evidence the 1st Respondent filed a replying affidavit on 29th March 2010. The Court is obliged to consider this Affidavit evidence but will treat it as untested because it was not subjected to cross-examination. The consequence of which, the weight to be given to it may be downgraded. Basically, the 1st Respondent states that Christopher was entitled to the disputed land and Grace was present and participated in the proceedings that led to the Grant being issued to Agnes. The 1st Respondent further challenged the Applicant to prove that the value of the Estate exceeded Kshs. 100,000/- and the defect in form or substance of the Petitions. The 1st Respondent further averred that Washington died in July 1984, a date after Jacob and so challenged the Applicants' contention that Washington pre-deceased Jacob.
10. As noted earlier the main players to this dispute are now dead and were in fact dead before the commencement of these proceedings. The person accused of wrongfully causing a portion of the Estate of Jacob to go to Christopher is Agnes. Agnes is now dead but the date of her death is not stated by the Applicants. But as to Grace, this Court is able to find it in the documents filed herein. In the Applicant's list of documents dated 19th January 2009 is a copy of the Grant of Letters of Administration Intestate to the Estate of Grace Ombito Gori in Busia Succession case No. 138 of 2006. In it the date of death of Grace is indicated to be 25th October 2004.
11. The Applicants' stance is that Agnes took advantage of the illiteracy and old-age of Grace to steal a march on her in the proceedings relating to the Estate of Jacob. The contention of the Respondents is that Grace participated fully and willingly in the proceedings. Now, the Grant to the estate of Jacob was issued on 8th September 1988. This would be about 16 years before Grace died. In the years before her death, Grace does not appear to have taken issue with the manner in which Agnes had dealt with the Estate of the Deceased. The Applicant does not explain why, in her lifetime, Grace did not seek the Revocation or Annulment of the Grant made to Agnes. Further the Applicant does not explain why that Application was brought only after Grace had died. In the absence of these explanations, this court is not persuaded that the Distribution of the Estate of Jacob was not without the concurrence of Grace.

12. A second issue is whether the Subordinate Court was bereft of Pecuniary jurisdiction to entertain proceedings in respect to the Estate of Jacob. Section 48 of the Law of Succession act provides:-

1. **Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49 of this act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.**

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

At the time the proceedings to the estate of Jacob were commenced and finalized no High Court had been established in Busia. The onus was on the Applicant to prove that in 1987 and 1988 the Pecuniary value of Estate of Jacob exceeded the sum of Kenya Shillings one hundred thousand (100,000/-). This is because his contention that it exceeded that sum was expressly denied by the 1st Respondent. On this aspect of his case, the Applicant failed to provide any evidence at all. His contention is therefore not proved.

13. The other ground in support of the Application was that the procedure for the issuance of the Grant was defective in form and substance. The Applicant did not point out any such defect and this Court was unable, on its own, to find any.

14. As would now be evident, the Summons of 11th September 2007 is for dismissal. It is hereby dismissed with costs.

Dated, signed and delivered at Busia this 23rd day of November 2015.

F. TUIYOTT

J U D G E

In the presence of :-

Oile –C/Assistant

Otsula H/b for Sitima for Applicant

N/A- for Respondents