



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 206 OF 2010**

**IN THE MATTER OF THE ESTATE OF ALFRED KESSAH OMBOKO (DECEASED)**

**SARAH ATHIENO ..... APPLICANT**

**VERSUS**

**PAMELA AYIEKO MUYODI.....1<sup>ST</sup> RESPONDENT**

**EPHRAIM MURAMBA.....2<sup>ND</sup> RESPONDENT**

**RULING**

By the application dated 24/9/2013, Sarah Athieno, the applicant herein seeks the following orders against the two respondents Pamela Ayieko Muyodi and Ephraim Muramba;

**Prayers 1, 2, and 3 are spent.**

- 4. That pending the hearing and determination of this cause, the court do restrain the administrators (respondents) by themselves or their agents from intermeddling, dealing with, disposing, transferring or wasting the parcel of land known as Nakuru Municipality 1/993 (Langalanga) (Plot 548 Race Track);**
- 5. That upon hearing of this cause, the applicant be registered as the proprietor of the said parcel of land;**
- 6. That the confirmed grant of letters of administration issued to the respondents be revoked and or annulled and property Nakuru Municipality Block 1/993 be removed from the list of the assets of the estate of the late Kessah Alfred Omboko.**

The application is supported by grounds found in the body of the application and further grounds contained in the supporting affidavit of the applicant sworn on 24/9/2013. It is the applicant's contention that the confirmed grant was obtained by concealment of material facts from the court; that Plot Nakuru Municipality Block 1/993 does not form part of the deceased's estate. The applicant deponed that the deceased was her son; that in 2002 she asked her in law, one Patrick Odundo to persuade her son, the deceased, to acquire a plot in Nakuru so that he could move with his family from Mtito Andei where he was working; that the said Odundo introduced her to one Jacob Asava, owner of the land Block 1/993 who was the original allottee of the said plot. The purchase price was Kshs.350,000/- and she withdrew Kshs.400,000/- from her account in Barclays Bank as evidenced by the Bank Statement Ex.2; that to persuade her son to move the family to Nakuru she had the plot transferred into his name (deceased) as shown in the sale agreement Ex.3; that Patrick Odundo oversaw the construction of the plot on her behalf

and later, the deceased transferred the property back to her name in 2009 as per agreement dated 22/10/09 (Ex.4) and the advocate wrote to the Municipal Council of Nakuru for the consent to transfer the property to the applicant which was granted (Ex.5a & b). She further deponed that she has been paying rates (Ex.7) and that the said property belongs to her and does not form part of the deceased's estate.

The application was opposed and two affidavits were sworn by the respondents on 4/10/2013. The 1<sup>st</sup> respondent gave the history of what has transpired between the applicant and herself since the death of the deceased. It is apparent that the relationship between the applicant and 1<sup>st</sup> respondent has not been good and the 1<sup>st</sup> respondent had to file CMCC 1415/09 to be allowed to bury the deceased. Thereafter, the applicant filed this cause with another person by name Emily Siteyian Mutentei claiming to be the only beneficiaries of the deceased's estate and omitted the 1<sup>st</sup> respondent and her children. It is not until the 1<sup>st</sup> respondent got wind of it that she came to court for revocation of that grant. As respects the disputed plot, the 1<sup>st</sup> respondent deponed that she has always resided on the said plot which the deceased purchased and developed by a loan facility from National Housing Corporation and a certificate of clearance was issued Ex.PAM 14. She also exhibited the building plans (PAM 15) and she claimed to have supervised the buildings herself and doubted that the deceased would built the houses only to transfer them to the mother.

As pointed out earlier, it is the applicant who filed this cause with another person by name of Emily Siteyian Mutentei seeking to be the appointed administrator of the deceased's estate but failed to disclose the existence of a wife (1<sup>st</sup> respondent) and the children. The 1<sup>st</sup> respondent got wind of the matter and sought to be appointed administrator in their place.

The matter was before this court and the court proceeded to hear the matter ex parte after it was satisfied that the applicant and co-applicant, Emily Siteyian, had been served but failed to respond to the protest filed by the respondents. The court was satisfied that the applicant was served with the hearing notice but failed to reply or attend court and upon hearing the respondents' application proceeded to revoke the grant issued to the applicant (petitioner) and Emily Siteyian. In the said application the 1<sup>st</sup> respondent had listed the subject plot 1/993 as part of the deceased's estate. It is surprising that from the time the applicant was served with the respondent's application in 2012, she did nothing knowing that the land was listed as part of the deceased's estate, till over a year later, when she came up with this application seeking revocation of the grant issued to the respondent.

There are several issues that arise from this application. One question is why would the applicant first transfer a plot to her son the deceased, then after he has it developed and built houses in which he resides with his family and rents some, then transfer the plot and houses back to the applicant and deny his family, wife and children the benefit of the said property? The applicant exhibited the consent from the Municipal Council of Nakuru allowing the transfer of the suit property from the deceased to the applicant on 22/10/2009 and 18/11/2009. The question that will need to be determined is whether the transfer was regularly done and whether there was need for a resolution of the Council in accordance under **Section 78** of the **Local Government Act** which provides that all decisions had to be made by a majority of the members present at their meetings. The other question is who developed the said plots? The applicant claims to have done so with the help of Odundo although they have not exhibited any evidence to that effect. On the other hand, the 1<sup>st</sup> respondent claim, to have supervised the construction of the plot and has even exhibited the development plans and records from National Housing Corporation to show that the house was developed through a loan facility from the said corporation. As per the applicant, the said plot was bought for Kshs.340,000/-, developed and then sold for Kshs.200,000/- that does not seem to make sense. All these questions can only be answered if the case is determined through adducing of viva voce evidence.

The applicant seeks an order of injunction to bar the respondents from dealing, interfering, transferring or disposing of the suit land. An injunction is an equitable remedy and he who comes to equity must come with clean hands. This court cannot overlook the applicant's conduct when she first filed this cause, which conduct has already been alluded to. The applicant wanted to lock out the wife and children of the deceased from benefiting from the estate. Has the applicant changed and come with clean hands now?

After asking all these questions, so that this matter is determined fairly:-

- (1) The court declines to revoke the grant at this stage;
- (2) The court however, grants an order to preserve the deceased's estate and restrains the respondents from disposing, or transferring the suit land to herself or any other person pending the hearing of this application;
- (3) The 1<sup>st</sup> respondent will continue to reside in the said plot and collect rents for her use and that of the deceased's children as she has been doing;
- (4) The applicant will not interfere with the 1<sup>st</sup> respondent's enjoyment and possession of the said suit property till this application is heard and determined;
- (5) This court further directs that the issue of revocation be determined by way of calling viva voce evidence;
- (6) Costs be in the cause. It is so ordered.

**DATED and DELIVERED this 28<sup>th</sup> day of February, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Murimi for the applicant

Mr. Kisila holding brief for Ms Omwenyo for the respondent

Kennedy – Court Assistant