



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 59 of 2011

BEN KUMBUTI WASILWA OBJECTOR/APPLICANT

VERSUS

SHIKUKU MASON SITERA PETITIONER/RESPONDENT

EVERLYNE NAKHUNGU JUMA APPLICANT/RESPONDENT

RULING

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The Summons for Revocation of Grant dated 22nd June, 2012, brought under S.76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It is filed by the Objector who seeks the following main orders:-

- That the Petitioner/Respondent be prevented, by way of temporary injunction from dealing with the deceased person's estate pending the hearing and determination of this summons.
- That grant of Letters of Administration intestate to the estate of the late Wilson Wachenda Mason issued to Shikuku Mason Sitera on 12th May, 2011 and confirmed be revoked.
- That costs of this summons be awarded to the Objector/Applicant.

The summons is premised on the following grounds:-

- (i) A grant of letters of administration intestate of the estate of the deceased was issued to the Petitioner/Respondent on 12th May, 2011 and thereafter confirmed.
- (ii) The Petitioner/Respondent listed parcel of land Kakamega/Chekalini/238 as part of the estate of the deceased.
- (iii) The Objector/Respondent is the lawful registered owner of the parcel of land Kakamega/Chekalini/238.

(iv) The Petitioner/Respondent caused the entire parcel of land to be listed in as part of the estate of the deceased absolutely in her name without disclosing the interest of the Objector/Respondent.

(v) The Registration of the said parcel of land solely in the name of the Petitioner/Respondent as the absolute owner was done fraudulently and/or illegally through concealment of material facts relating to the interest of Respondent/Applicant.

(vi) The Petitioner/Respondent fraudulently obtained/procured the Chief's letter indicating that the said parcel of land was part of the estate.

(vii) The Objector/Applicant will suffer irreparable loss should the grant be not revoked.

It is further supported by the affidavit of the Objector sworn on 22nd June, 2012. The gist of the deposition in the affidavit is that the Petitioner listed parcel No. **KAKAMEGA/CHEKALINI/238** as part of the estate of the deceased whereas the same is registered in the name of the Petitioner since 1979. That in that year the Objector entered into an agreement with the deceased to exchange **PLOT NO. 485 SURUNGAI** with the subject Plot No. **KAKAMEGA/CHEKALINI/238**. That the latter plot was charged to Settlement Fund Trustees from whom the Objector had secured a loan. That the Objector repaid this loan and the plot was directly transferred into his name by the Settlement Fund Trustees.

It is further deponed that the initial exchange agreement was on a gentleman basis but it was formalised (put in writing) on 24th December, 1986. That in the latter agreement, the deceased instructed the Objector to transfer **PLOT NO. 485 SURUNGAI** directly to one Joel Kakai who had purchased it from the deceased at Ksh. 8,000/=, a fact that is and was within the knowledge of he deceased's family. That the original register to L.R. No. **KAKAMEGA/CHEKALINI/238** has closed after the said parcel of land was sub-divided into three parcels as follows:-

- Kakamega Chekalini/2582 – measuring 6.0 Ha. in the name of the Objector
- Kakamega/Chekalini/2583 – measuring 0.8 Hactares in the name of Gladys Chilikona Tawayi and
- Kakamega/Chekalini/2584 measuring about 1.2 Hectares in the name of Solomon Ihachi Shibelenye.

That further, the Petitioner obtained a letter from the Chief which indicated that the object plot was part of the deceased family, which letter the Objector alludes is a forgery. That in the essence therefore the grant was obtained through concealment of materials facts and should be revoked.

There are two Respondents who acted in person. The first Shikuku Mason Sitera is the Petitioner herein. He has filed a Replying Affidavit sworn by himself on 24th September, 2012. He depones that no objection was lodged by the Objector claiming interest in the estate within the stipulated thirty (30) days. That he never concealed vital information to the court at the time of obtaining grant of Letters of Administration.

The 2nd Respondent, Everlyne Nakhungu Juma has opposed the application vide a Replying Affidavit sworn and filed by herself on 24th September, 2012. She depones that the application has no merit and should be dismissed in that the objector is not able to prove that the Chief's letter is a forgery. That the allegation of the forgery of the Chief's letter was reported to the police and the police exonerated the Petitioner. That the family of the deceased was given the authority to obtain grant of Letters of Administration vide **BUNGOMA HIGH COURT CIVIL APPEAL NO. 66 OF 2000**. That she has placed caution on the sub-divided plots numbers **KAKAMEGA/CHEKALINI/2582, 2583 and 2584**. That simultaneously with this application the Petitioner has filed **KAKAMEGA HIGH COURT CIVIL CASE NO. 111 OF 2011** in which he seeks an eviction order against the 1st Respondent from the sub-divided plots as well as the nullification of the new numbering arising from the subject plot.

The application was heard before me on 17th December, 2012 by way of oral submissions. Miss Kiplimo

argued the application on behalf of Mr. Omusundi for the Objector while both Respondents were in person. The parties reiterated contents obtained in the Supporting Affidavit and Replying Affidavits respectively. In addition though, the 1st Respondent added that his late father Wachenda Mason bought the subject land in 1963 and that he never transferred it to anybody until 1998 when ownership devolved to the Land Settlement Trustees.

The 2nd Respondent on the other hand submitted that she had come to court as an interested party but during her submissions, she described the deceased as her father. I therefore conclude that she is one of the dependants of the deceased which fact is vindicated by Certificate of confirmed grant herein. According to her, her late father transferred Plot No. 438 to the Objector in exchange of plots numbers 485 and 134. The last two plots jointly measured about seven (7) acres while plot No. 238 about eight (8) acres. She submitted that her father fulfilled his part of the bargain but the Objector failed to transfer plot Nos. **485** and **134** to her father. That in the instance it is only fair that the Objector gets back Plot Nos. 285, 485 and 134 as he obtained Plot No. 438 through fraudulent means. She said that she lodged caution on the 3 plots sub-divided from plot No. 238 as the Objector should not lay a claim on them.

I have appraised myself with the application, Supporting Affidavit, the Replying Affidavits and the submissions made by the respective parties.

Under Section 76 of the Law of Succession Act, a grant may be revoked or annulled on any of the following grounds:-

“(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

The relevant part of this Section is (b) and (c) in that it is submitted by the Objector that the Petitioner failed to disclose the fact that Plot No. **KAKAMEGA/CHEKALINI/238** was not part of the estate of the deceased at the time of his death, and so should not have been included for distribution in the confirmed grant. And further the Objector forged the letter from the Chief in which it is indicated that the said Plot No. **KAKAMEGA/CHEKALINI/238** was part of the estate of the deceased.

It is no doubt that the grant herein was issued to the 1st Respondent on 12th May, 2011. It was confirmed on 9th February, 2012. Among the properties for distribution in the Certificate of Confirmation of a Grant is the Plot No. **KAKAMEGA/CHEKALINI/238**. The same was to be registered in the names of the Administrator Shikuku Mason Sitera, to hold in trust for the mentioned beneficiaries. The beneficiaries listed include:-

- George Mason Ochenda
- Everlyne Nakhungu Juma
- Grace Makokha Ochenda
- Jotham Juma Mason

Annexed to the Supporting Affidavit is a Letter of Consent marked BKW4 which transferred the subject land to the Objector. The bundle of documents comprising annexure BKW6 shows that the Objector was repaying the loan owed to the Settlement Fund Trustees. Once the loan was fully repaid, discharge of the charge was issued by the Settlement Fund Trustees on 10th December, 1999. The same is marked BKW7(a). Subsequently a transfer was effected as per the Transfer of Land in Settlement Scheme marked BKW7(b). The same shows that the land was presented for registration on 11/1/2000. The title deed was then issued on the same date, 11/1/2000 and is marked BKW2.

There is also a letter from the Chief – Chekalini Location (BKW9) dated 22/06/2012 denouncing that he even wrote the letter dated 4/2/2011 on whose strength, partly, the grant was issued.

There is no doubt that Plot **KAKAMEGA/CHEKALINI/238** was sub-divided into three, giving rise to Plots **KAKAMEGA/CHEKALINI 2582, 2583 and 2584** marked as annexures RKW3(b), (c) and (d) respectively. The three titles were issued on 4th May, 2006 in respect of Plot **2582** and 29th April, 2008 in respect of Plots **2583 and 2584**.

The Petition herein was lodged sometime in March, 2011 when the ownership of the subject land was in the hands of third parties as opposed to the deceased. Indeed in a letter dated 3rd March, 2010, the Lugari District Land Adjudication and Settlement Officer, wrote a letter to Registrar, High Court, Eldoret with the information that Plot No. 238 was initially allotted to Wachenda Mason (the deceased) who later on 14th August, 1979 transferred it to Ben K. Wasilwa who executed his charge on 3rd January, 1980. The author further confirmed that Mr. Ben Kumbuti Wasilwa “**was officially discharged from this office on 11/1/2000 to allow him present the same documents (discharge and transfer) to the Lands Registry for obtaining a land Title Deed**”.

The same position therefore obtained, that the Petitioner was in the picture that plot **KAKAMEGA/CHEKALINI/238** could not be included as assets of the deceased. A search of the land must have confirmed this position. Factually therefore, the Objector had no basis of filing an objection in court. As such, it is true to say that the Petitioner deliberately concealed from court material evidence which would have assisted the court in not including the said plot as part of the estate of the deceased. It is not sufficient for either of the Respondents herein to state that the Objector did not fulfill his end of the bargain in the agreement with their father. If that is the position that obtains to date, they should seek redress elsewhere other than in this cause.

Both Respondents herein referred court to the Judgment in **BUNGOMA HIGH COURT CIVIL APPEAL NO. 79 OF 1999**, in which they said the objector herein lost. The 2nd Respondent in particular submitted that this Judgment gave the family of the deceased the green light to petition for grant of letters of administration in respect of Plot No. 238. This Judgment was annexed to the Replying Affidavit of the 2nd Respondent. The same relates to an award of Land Disputes Appeals Committee, which the High Court found was wrongly adopted as the Judgment of the Chief Magistrate's Court , Bungoma contrary to Section 7 (2) of the now repealed Land Disputes Tribunal Act, Act No. 18 of 1990. The Judgment has no relevance to the issues for consideration in this application.

I have also seen a copy of the plaint, verifying affidavit, statement of the Plaintiff and the 1st Defendant in **KAKAMEGA HIGH COURT CIVIL SUIT NO. 111 OF 2011** annexed to the 2nd Respondent's Replying Affidavit. The main prayer in the plaint is for order of cancellation of the titles resulting from the sub-division of plot **KAKAMEGA/CHEKALINI/238** which are numbers **2582, 2583 and 2584**. In my very considered view, this suit cannot be used to hold at ransom the prayers sought in the application herein.

In the result, I must find for the Objector as the grant herein was obtained by concealing material facts

which would have enabled the court to arrive at a reasonable decision.

In the matter of the **ESTATE OF GEOFFREY NDUNGU GATHOGA (DECEASED) JAMES GATHOGA NDUNGU & ANOTHER -VS- MARY WANJIKU GATHOGA (2005) e KLR** – the grant was revoked on account that the Respondent failed to be “**candid and transparent to the court to enable it to make an informed and reasonable decision after being alerted to all the relevant facts**”.

Also in the **RE: ESTATE OF EVARITUS NJAGI MUGO (DECEASED) (2008) e KLR** court held that because the Petitioner proceeded to obtain the grant of representation of the estate of the deceased without disclosing all the facts concerning matters material to the case the grant would be revoked.

I do accordingly revoke the grant herein confirmed on 9th September, 2012 on grounds of concealment of material facts. Costs to the Applicant.

DATED and DELIVERED at ELDORET this 28th day of March, 2013.

G. W. NGENYE - MACHARIA
JUDGE

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In the presence of:

Mr. Ng'eno Advocate for the Objector/Applicant

Present in person for the 1st Respondent/Petitioner

No appearance for the 2nd Respondent – represented by 1st Respondent, her brother