

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 164 OF 1988

IN THE MATTER OF THE ESTATE OF MAKHUYI SHIVIKA DECEASED

JOSEPH SHITSUKANE PETITIONER (DECEASED)

AND

PROTUS MMBOYI IMONJE OBJECTOR

AND

REGINA SHILESI INTERESTED PARTY

RULING

In his application dated 15.2.2011 the applicant is seeking the revocation of the grant issued to the petitioner on the ground that the grant was obtained fraudulently and through concealment of material facts. The application is supported by the objector's affidavit sworn on the same date. The interested party filed a replying affidavit sworn on the 10.6.2011.

Parties agreed to file written submissions. The applicant contends that his late father **PETER IMONJE MUSUNGU** bought a portion of land measuring 1¼ acres from the petitioner's late father sometimes in May 1978. The applicant resides on that portion of land. The applicant's father died in 1994 and he filed succession cause number 119 of 2012 and he was issued with a limited grant. The interested party is claiming a portion of land that was created from the original plot number **IDAKHO/SHISESO/578** yet that portion belong to the applicant. The applicant has been living on that portion of land to date. On her part the interested party submits that the original plot number **IDAKHO/SHISESO/578** was divided into four portion namely **KAKMEGA/SHISESO/1747** to **1750**. Plot number 1750 was registered in the name of **GABRIEL MUKHUYU** who is now deceased and was the husband to the interested party. The applicant filed proceedings before the Ikolomani Land Disputes Tribunal and got judgment in his favour but the interested party filed before the Kakamega High Court Judicial Review number 45 of 2005 and the decision of the Land Disputes Tribunal was overturned.

The record shows that a grant was issued on the 19.3.1992 and the same was confirmed on the 28.9.1993. The original plot number was divided into four portions each measuring one acre. It is not clear why the applicant took all this long until 2011 when he made his application for the revocation of the grant. The applicant is also fighting only the interested party who simply inherited her husband's share of the estate. The application seeks to revoke the entire grant and yet the other beneficiaries are not involved. Should it be established that indeed the applicant's father was a beneficiary of the estate then the shares of the other three beneficiaries will have to be altered. This is one application which cannot be determined by way of written submissions. The applicant annexed in his written submissions a purported sale agreement dated 3.5.1978 which is in the Luhya language and the court cannot simply conclude that indeed the applicant's father bought land. It is also not clear to the court whether the applicant resides on the suit property. The applicant might have a valid claim but I do find that the claim cannot be determined by way of written submissions. That being the case I do hereby dismiss the application dated 15.2.2011 and grant the applicant leave to either file a similar application and involve all the beneficiaries or pursue his claim through other legal means. Each party shall meet his/her own costs.

Delivered, dated and signed at Kakamega this 25th day of July 2013

SAID J. CHITEMBWE

J U D G E