



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO. 85 OF 2006**

**IN THE MATTER OF THE ESTATE OF:**

**THE LATE STEPHEN GETUNO MICHOMA ..... DECEASED**

**BETWEEN**

**EVANS EDWARD MICHOMA ..... APPLICANT**

**AND**

**JAMES MACHUKA MICHOMA ..... ADMINISTRATOR/RESPONDENT**

**RULING**

**Introduction**

1. This matter relates to the estate of Stephen Getuno Michoma who died on 11<sup>th</sup> June 2007 domiciled at Keumbu in Kisii County. He was survived by a wife, Monica Gesare Michoma, who also passed away on 26<sup>th</sup> December 2010. Admittedly no petition has been made for the administration of Monica Gesare Michoma's estate. The Grant of Letters of Administration intestate to the estate of Stephen Getuno Michoma was issued to Monica Gesare Michoma and James M. G. Michoma. Among the several properties owned by the deceased is a one acre piece of land in Karen, Nairobi known as LR Number Nairobi/13838 Grant No. IR 71293. It is this piece of land that is at the centre of the dispute between the applicant herein, Evans Edward Michoma and his wife Damaris Nyokieyo Michoma on the one hand and the surviving administrator of the deceased's estate and his 6 siblings on the other hand.

**The Application**

2. By the chamber summons dated 7<sup>th</sup> January 2013 brought by the

***HC (KISII) SUCCESSION CAUSE NO. 85 OF 2006 (RULING)***

applicant Evans Edward Michoma, a beneficiary to the Estate of Stephen Getuno Michoma (deceased) pursuant to **sections 47, 58, 76 (a) (b) (c) and (d) of the Law of Succession Act Cap 160 Laws of Kenya, Rule 44 of the Probate and Administration Rules and Order 37 Rule 1 (a) and (b) of the Civil Procedure Rules, 2010**, the applicant seeks for orders that:-

- a. *The certificate of confirmation of grant issued on 15<sup>th</sup> October 2012 in favour of James M.G. Michoma be set aside or revoked.*

- b. *LR No. Nairobi 13838 be removed and/or expunged from the schedule of assets forming part of the Estate.*
- c. *Any other beneficiary be appointed as a co-administrator to compliment Mr. James M.G. Michoma in place of Monica Gesare Michoma (deceased).*
- d. *Costs of this application be provided for.*

3. The application is premised on grounds that the confirmation of grant was obtained through fraud, forgery and concealment of material facts. Applicant also contends that he did not sign the consent to confirmation of grant dated 6<sup>th</sup> October 2012 and that he was not invited to attend the hearing for the confirmation of grant. The applicant maintains that L.R. No.13838 situate at Karen Nairobi does not form part of the Estate of the late Stephen Getuno Michoma thus not available for distribution. He also avers that no application was made to substitute Monica Gesare Michoma as an administrator of the deceased's estate after she passed away on 26<sup>th</sup> December 2010.
4. In support of the application is an affidavit sworn by the applicant on 9<sup>th</sup> January 2013. He confirms that letters of administration to his late father's estate were issued to his brother James Machuka Michoma and his mother Monica Gesare Michoma (now deceased) on the 18<sup>th</sup>

February 2008. A copy of the Grant of Letters of Administration is annexed to the affidavit and marked "EM 1". He also states that no one has been appointed to replace their mother Monica Gesare Michoma as an administrator after her death on 26<sup>th</sup> December 2010.

5. It is the applicant's contention that he together with his wife live on LR No.13838 Grant Number I.R. No.71293 the plot they purchased for value from his late father and in respect of which a transfer was registered on the 24<sup>th</sup> October 1997. A copy of the said transfer is annexed to the affidavit as annexure "EM2". He further states that he took finance facilities using the said plot as a collateral to construct their matrimonial home and has recently taken another finance facility using the said property with Housing Finance Company Limited.
6. The applicant states that in early December 2012, he was called by his bankers and informed that there was a problem with his account. He went to the bank and was shown a copy of confirmation of grant dated 15<sup>th</sup> October 2012 which indicated that L.R. No.13838 was part of the Estate of his father and the same was to be shared equally with his brother Jared M. Michoma, a development which he says was a surprise to him as he had bought the said plot from his late father for the sum of Kshs.300,000/=.
7. The applicant states further that when summons for confirmation of grant were made supported by the affidavit sworn on 8<sup>th</sup> October 2012 by James Machuka Michoma it was purported that he gave consent to the confirmation of the said grant and the proposed distribution therein. The applicant says he was not involved at all when the matter came up

for confirmation. He has denied ever signing the said consent and/or appearing before Mr. Makori Advocate on 12<sup>th</sup> October 2012. He has stated that he lives and works in Nairobi unlike a good number of his siblings who are based overseas and therefore that there would have been no good reason why he would have consented to the distribution of his late father's estate in writing instead of appearing in court during the hearing of the application for confirmation of grant of letters of administration.

8. Based on the above allegations of misrepresentation, forgery and non-disclosure to the court of very material facts the applicant says his account has been suspended with the bank until the matter herein resolved. He maintains that Nairobi LR NO.13838 was not at the time of the death of his father part of his estate and therefore is not available for distribution as alleged.

#### Response to the Application

9. The application is opposed vide the replying affidavit sworn by James Machuka G. Michoma on 6<sup>th</sup> February 2013 wherein he states that he is the eldest son of the late Stephen Getuno Michoma

- and confirms that Grant of Letters of Administration intestate in respect of the deceased were granted to him and his late mother Monica Gesare Michoma on 18<sup>th</sup> February 2008.
10. He states that on the passing on of his mother on 26<sup>th</sup> December 2010, the family met in January 2011 and unanimously resolved that it was not necessary to appoint another co-administrator of the deceased's estate. Accordingly he was requested to continue to administer the estate solely.
  11. He further states that plot LR No.13838 IR NO.71293 Nairobi is part of the Estate of the late Stephen Getuno Michoma. That the late Stephen Getuno Michoma in the verbal will done in or about April 2002 gave the said property to Evans Michoma (applicant) and Jared Michoma the youngest brother, to be shared equally between the two.
  12. The Respondent also contends that the title of the land was given to the applicant Evans Michoma to enable him take a loan from his wife's employer for the purpose of constructing a home for themselves.
  13. It is the Respondent's case that Evans Michoma did not purchase the said plot for value at the purported consideration of Kshs.300,000/=. He (the Respondent) suspects that the transfer was fraudulent or was achieved by misrepresentation of material facts and especially because Evans Michoma did not object to the inclusion of the said property in the verbal will of the deceased yet he was present when the verbal will was made by deceased. The Respondent also says that Evans Michoma did not disclose to the family that he had bought the plot from his late father or that he had transferred the land to himself and his wife, nor that he had taken some loan against the title. In the mind of the Respondent, Evans Michoma's intention is to frustrate justice and the efforts of Jared Michoma, the youngest of the Michoma sons, to get his fair share of the deceased's estate as per their father's wishes.
  14. The respondent concludes by saying that his efforts to resolve the matter amicably have not borne any fruit as the applicant Evans Michoma has refused to attend family meetings including the memorial for their late father. The respondent requests the court to do a thorough interrogation of the facts and do justice by granting the will of his  
  
father in the matter over the Nairobi property.
  15. The Respondent has listed about nine (9) witnesses including himself, the area chief Jonathan Machoka Michoma, his (Respondent's) sisters and aunties. He has also listed the documents he is relying on in this case.
  16. In his further affidavit sworn in response to the Respondent's Replying Affidavit, dated 6<sup>th</sup> February 2013, Evans Edward Michoma denies the meeting of July 2011 and the allegations that the Respondent was to remain a sole Administrator of the deceased's estate after their mother died. He reiterates his earlier contention that he bought LR No.13838 IR No.71293 Nairobi from his father on 24<sup>th</sup> October 1997 and a transfer registered on the title. He denies that his father ever made a verbal will with regard to the above parcel of land in his presence and avers that he acquired the Karen plot for value and therefore suggestions of fraud or misrepresentation are misplaced and untrue. He further claims to have seen the documents relating to the summons for confirmation only after perusal of the court file and had he known of the existence of such documents earlier, he would have raised an objection at an appropriate time.
  17. The applicant claims that the issues of forgery and fraud raised in his application and affidavit have not been addressed at all by the Respondent/Administrator and no reference has been made to them in the Respondent's affidavits.
  18. In reply to the further affidavit James Machuka G. Michoma the Respondent states that the meeting he referred to was held in January 2011 and not July 2011 and to support his contention that the said  
  
meeting took place, the respondent's siblings who attended the meeting have given their statements to that effect.
  19. He states that the date on which the applicant says he bought the said parcel of land is different from the date shown on the purported sale agreement. He further confirms that his father the deceased made a verbal will in April 2002 in the presence of the applicant and his wife and that

they did not object to the said will. He states that the deceased signed the papers concerning the Karen plot in good faith to enable the applicant get a loan and he (the father) was categorical that the Karen land being LR 13838 IR No.71293 was to be shared equally between the applicant and Jared Michoma their last born brother. The Respondent opines that the best way of resolving the current impasse between himself and the applicant is for viva voce evidence to be taken by the court. He further states that the applicant herein has not disputed the distribution of other properties of the deceased and that by implication, he agrees there was a verbal will made by the deceased in or about April 2002.

### Submissions

20. Parties filed their respective written submissions and also highlighted the same when the application came up for inter partes hearing on 27<sup>th</sup> May 2013.

21. The gist of the applicant's submissions dated 26<sup>th</sup> March 2013 is that there is no dispute that by a transfer dated 22<sup>nd</sup> October 1997, the Karen plot was transferred to the applicant and the applicant's wife and the transfer above mentioned was duly registered against the title on 24<sup>th</sup> October 1997. The applicant also contends that there is no dispute

that the second administrator, Monica Gesare Michoma died on 26<sup>th</sup> December 2010, and that in the circumstances, there is good reason to warrant the granting of the orders sought, since confirmation of the grant was based on false consents and without keeping him in the picture.

22. On the other hand, the gist of the Respondents submissions is that the Karen plot forms part of the deceased's estate by virtue of the oral will made by the deceased in or about April 2002 to the effect that the said plot was to be shared equally between the applicant herein and Jared Michoma, the youngest of the Michoma sons. The respondent's case is also that the applicant consented to the application for confirmation of Grant by signing the requisite consent for confirmation.

### Issues for Determination

23. After hearing counsel on their oral submissions as they highlighted their written submissions, the following six (6) issues which generally cover the concerns of the parties herein present themselves for determination:-

- a. *Whether parcel known as IR NO.71293, LR, NO.13838 formed part of the deceased's estate;*
- b. *Whether the Respondent could administer the estate of the deceased as sole administrator or whether a second administrator should be*

*appointed in place of Monica Gesare Michoma (deceased);*

- c. *Whether consents purportedly signed on the 6<sup>th</sup> October 2012 and 12<sup>th</sup> October 2012 respectively were endorsed by the applicant;*
- d. *whether the grant confirmed on 12<sup>th</sup> October 2012 was as a result of concealment of material facts;*
- e. *Whether the grant as confirmed on 1<sup>5th</sup> October 2012 should be revoked; and*
- f. *Who bears the costs of this application.*

### Whether land parcel IR No.71293, LR NO.13838 formed part of the deceased's estate

24. The applicant's case is that since the plot in question was transferred to himself and his wife long before the deceased died, and a title document to that effect issued, the plot ceased to be part of the deceased's estate; that this was not part of the deceased's free property available to the administrators for distribution. Free property is defined under **section 3** of the **Law of Succession Act** to mean:-

**“In relation to a deceased person, means the property of which that**

**person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”**

25. The applicant submitted that the plot in issue having been sold for value in the year 1997, the same could not be distributed as part of the deceased's estate. Reliance was placed on **Re The Estate of Mwangi Kibirigwe (Deceased) [2012] e KLR** a decision made by a court of concurrent jurisdiction. In the case, the objector to the Grant of the Letters of Administration showed both by way of viva voce evidence and by affidavit evidence that the deceased, who was the registered owner of property known as LR No.8285/676 Kariobangi had sold the said parcel of land to the objector's father by an agreement dated 5<sup>th</sup> May 1981 (**Exhibit 1**) and that the objector's father had paid the full purchase price of Kshs.32,000/=. By an agreement dated 10<sup>th</sup> December 1989 (**Exhibit 2**) the objector purchased his father's interest in the property for Kshs.48,000/=, though no transfers were effected.

26. After hearing parties, the court, H.A Omondi J, reached the

### ***HC (KISII) SUCCESSION CAUSE NO. 85 OF 2006 (RULING)***

conclusion that though the property in dispute was registered in the name of the deceased at the time of his death, he had already sold and parted with its possession.

27. In the instant case, the applicant has shown, though the respondent and his siblings are not in agreement, that by the time the deceased died, the Karen plot had already been transferred and registered in his own name and that of his wife. That means that the said property was not free property for distribution within the meaning of **section 3** of the **Law of Succession Act** because the deceased could not have freely disposed of the same. He had already sold it and parted with its possession.

Whether the Grant confirmed on 12<sup>th</sup> October 2012 was as a result of concealment of material facts.

28. I find it necessary to deal with this issue at this point because it has a direct bearing on the first issue I have just concluded. The confirmation of Grant was based on consents allegedly signed by all the beneficiaries and presented to court by the Respondent/Petitioner. I have carefully scrutinized the said documents, particularly the signature of the applicant thereon. Unfortunately, the proceedings of 12<sup>th</sup> October 2012 are not on the file and such absence raises eyebrows. The applicant has averred at paragraph 11 of his supporting affidavit that as soon as it came to his notice that the grant had been confirmed without his participation, he filed a complaint with the police which complaint was recorded as OB NO.43 of 12<sup>th</sup> February 2013. The applicant alleges a fraud by the Respondent/Petitioner in confirming the grant.

29. To support his contention that he was not privy to the confirmation of Grant he relied on in **Re The Matter of the Estate of Abdulrahman Omari Cheko [2007] e KLR** in which the grant was revoked on grounds similar to those ventilated in the instant case.

30. In my humble view, the grant issued on 12<sup>th</sup> October 2012 was as a result of concealment of material facts, and it follows that the consents purportedly signed on 6<sup>th</sup> October 2012 and 12<sup>th</sup> October 2012 respectively were never endorsed by the applicant (see issue number (c) above). Without purporting to be a handwriting expert, the signature attributed to the applicant appearing on the above stated consents appears, to my naked eye, to be different from the applicant's signature appended to his two affidavits in this application and on the transfer dated 22<sup>nd</sup> October 1997. This may explain the missing court record in respect of the entire proceedings for confirmation of the grant. I will cause an investigation to be undertaken on this file to establish who may have been involved with the disappearance of the court records.

Whether the Respondent could administer the estate of the deceased as a sole administrator or

whether a second administrator should be appointed in place of Monica Gesare Michoma.

31. It is not in dispute that the Grant herein was given to the Respondent together with his mother Monica Gesare Michoma who died on 26<sup>th</sup> December 2010. The applicant contends that though it is not agreed that there is a trust over the disputed property, the respondent should have sought to have another administrator appointed after the death of their mother. In the mind of the applicant, the respondent used his position as sole administrator to include the

***HC (KISII) SUCCESSION CAUSE NO. 85 OF 2006 (RULING)***

disputed property as part of the deceased's estate in an effort to swindle the applicant and his wife of the property. In my considered view, and applying the provisions of **section 58 (1)** of the **Law of Succession Act**, it is only fair and just that the Respondent ought not to be the sole administrator of the estate of the deceased person.

Whether the Grant as confirmed on 15<sup>th</sup> October 2012 should be revoked.

32. As indicated earlier, there is no record of any proceedings either on 6<sup>th</sup> or 12<sup>th</sup> October 2012. Whoever tampered with the court record must have had an ulterior motive. If such a record were available, this court would have known who attended court for the hearing of the summons for confirmation of grant and whether such person(s) was(were) represented by counsel, and what the court may have said concerning the matter.

33. The applicant wants the grant revoked by dint of the provisions of **section 76** of the **Law of Succession Act** which reads as follows:-

**“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –**

- 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.”**

34. Whereas there may have been no problem in the initial petition for Grant of Letters of Administration in respect of the estate of the deceased, there now appears to be a problem. Either

one, two or more of the beneficiaries of the deceased's estate is (are) playing games for reasons only well known to themselves. It has come out clearly that the grant in this case, which included the Karen plot as a part of the deceased's estate, 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. It also appears to me that though the Karen plot being Grant No. I.R 71293 was included among the deceased's properties on Form P&A 5 dated 15<sup>th</sup> February 2006, the fact that the consent not to appear at confirmation on the part of the applicant may have been forged, I am inclined to agree with the applicant that the grant ought to be revoked for being tainted with fraud and concealment of material facts. I so order.

Who bears the costs of this application

35.The applicant wants the Respondent to bear the costs of this

application for the reason that he knowingly anchored facts that were not true which facts led to the proceedings. The respondent has not said anything about the costs. Having heard both sides to this dispute, and considering the fact that the parties herein are family who had enjoyed a healthy family relationship until this unfortunate incident cropped up, I direct that each party bears its own costs.

36.In the final analysis the Grant issued herein on 18<sup>th</sup> February 2008 and confirmed on 15<sup>th</sup> October 2012 be and is hereby revoked but with no order as to costs.

37.Regarding the Karen plot, it is my humble view that if any party feels aggrieved by the status quo, they should file a case before the Environment and Land Court for a proper determination of how the title passed from the deceased to the applicant and his wife.

38.It is so ordered.

**Dated and delivered at Kisii this 11<sup>th</sup> day of July, 2013.**

**RUTH NEKOYE SITATI**

**JUDGE.**

**In the presence of:**

**M/s Makori & Associates for the Petitioner/Respondent**

**Mr. Moracha for Oonge for Applicant**

**Mr. Bibu - Court Clerk**