



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Succession Cause 7 of 2008**

**IN THE MATTER OF THE ESTATE OF TAKALETI OMUSEBE WANGATIA – DECEASED**

**BETWEEN**

**CASSIM WANGATIA OMUSEBE .....PETTIONER/RESPONDENT**

**V E R S U S**

**BAKARI WANGATIA OLUOCHI ..... OBJECTOR/APPLICANT**

**KENYA COMMERCIAL BANK LIMITED ..... INTERESTED PARTY**

**RULING**

The objector, **BAKARI WANGATIA OLUOCHI** in his application dated 8<sup>th</sup> February 2012 is seeking an order that the interested party be restrained from auctioning land parcel number **E.WANGA/LUBINU/785** which is part of the deceased's estate. The application is also seeking orders of revocation of the grant issued to the petitioner **CASSIM WANGATIA OMUSEBE**. The application is supported by the applicant's affidavit sworn on the 8<sup>th</sup> of February 2012 and a further affidavit sworn on the 20<sup>th</sup> of February 2012.

Mr. Ondieki, counsel for the applicant submitted that the grant was obtained fraudulently and the petitioner subsequently charged the property to the interested party. The petitioner failed to service the loan and that made the interested party to advertise the property for auction. The deceased was an uncle to the applicant and the land was registered in 1966 in trust for all the families. The respondent on his part relied on his replying affidavit sworn on the 20<sup>th</sup> of February 2012. The respondent contends that the applicant has his own land plot number **E.WANGA/LUBINU/781** that was left by his deceased father. That plot is about seven acres and the applicant is pursuing the suit land which is only 0.5 acres. The respondent maintains that he is not a beneficiary to the estate of the deceased.

In his supporting affidavit the applicant maintains that he is utilizing the suit property and on or about 13<sup>th</sup> of April 2010 he received a demand letter from the firm of Samba & Company Advocates demanding that he remove his crops from the suit land and give vacant possession. The applicant further contends that he has lived on the suit land throughout his life and that his late father **OLUOCH OMUSEBE** was a brother to the petitioner's father **TAKALETI OMUSEBE**. The applicant's father was mentally sick and **TAKALETI** got registered as the proprietor of the suit property. The late **TAKALETI OMUSEBE** allowed the applicant to utilize the suit land. The elders of the clan met and allowed him to utilize the land.

On his part the petitioner maintains that the applicant's father was registered as the owner of plot number **E.WANGA/LUBINU/791** measuring 7 acres and the suit land belonged to the petitioner's father.

The green card for plot number 791 annexed to the petitioner's affidavit show that it was opened on the 17<sup>th</sup> of May 1966. Similarly plot number 795 measuring 0.5 acres was opened on the same date 17<sup>th</sup> May 1966. The former plot was registered in the names of **OLUOCHI OMUSEBE** while the later plot was registered in the names of **ROMANI WANGATIA**. It is the petitioner's position that **ROMANI WANGATIA** is the same person as **TAKALETI OMUSEBE WANGATIA** the deceased herein. The proceedings herein show that the petitioner secured a loan from the interested party of KShs.300,000/= as

per the affidavit of **JANE ORUMOI**, an officer working with the interested party sworn on the 8<sup>th</sup> of May 2012. For the applicant to succeed in this application he has to satisfy the court that the grant was obtained fraudulently and/or that the petitioner concealed some facts to the court. No directions have been taken on that aspect of the application. With the regard to the order seeking an injunction indirectly in the name of stopping an auction, the applicant has to show that he has a prima facie case with a probability of success and that he will suffer an irreparable loss should the orders not be granted. The interested party maintains that the applicant lacks the locus standi to bring the application.

The basis of the applicant's claim is that the suit land is ancestral land and that the late **TAKALETI OMUSEBE WANGATIA** was registered in trust for the family. It is his position that his late father was mentally sick and that is why **TAKALETI** was registered as the proprietor. The main issue arising from the applicant's position is how come his late father was registered as the proprietor of plot number **E.WANGA/LUBINU/791** yet he was mentally sick. The registers for the two plots were opened on the same day way back in 1966. The applicant has not explained why all along he has not claimed a portion of that land. From the demand letter from the firm of C. O. Samba & Company Advocates it is clear that there are no houses on the land and the applicant has been using the land to cultivate some crops. It is clear that the land belonged to the late **TAKALETI OMUSEBE** and the petitioner being a son of the deceased was the rightful person to obtain the letters of administration. Although the Green Card for the suit land does indicate that there is a possibility that the petitioner got himself registered on the 13<sup>th</sup> of August 1987 as the proprietor of the land before the grant was issued on the 6<sup>th</sup> of March 2008 and confirmed on the 25<sup>th</sup> November 2008, I do find that that cannot form the basis of granting the applicant's prayer to stop the auction. It is clear that if the property is auctioned the prayers of revocation of the grant will be overtaken by events but such prayers should not form the basis of denying the interested party the right to realize the security after having advanced a facility to the petitioner. The petitioner was validly registered as the proprietor of the suit property and the interested party lawfully advanced him a loan facility. The petitioner is the son of the deceased and was entitled to file the succession cause.

The upshot of the above is that prayer(b) of the application dated 8<sup>th</sup> February 2012 seeking restraining orders against the interested party is hereby dismissed with costs to the respondents (petitioner and interested party). The rest of the prayers in that application shall be determined through the normal process whereby directions shall be taken on how the application shall proceed.

**Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of July 2012.**

**SAID J. CHITEMBWE**  
**J U D G E**