



No. 2737

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO. 43 OF 2009
IN THE MATTER OF THE ESTATE OF SIGARA MANGANA...DECEASED

AND
THOMAS
ONGONDO.....APPLICANT

-VERSUS-
NYASORO MANGANA & 4
OTHERS.....RESPONDENTS

RULING

Before me is an application dated 16th August, 2010 and filed in court on the even date. The applicant is one **Thomas Ongondo**. The application seeks the revocation of the grant issued to one, **Nyasoro Mangana**, the respondent on or about the 19th may, 2009 in respect of the estate of **Sigara Mangana**, deceased. The deceased passed away on or about 25th may, 1992. Besides the revocation of the grant, the applicant also prays that the subsequent titles illegally acquired by **Josephine Nyabonyi Marionga** for **Central Kitutu/Daraja mbili/3146**, **Margaret Moraa Totse** for **Central Kitutu/Daraja mbili/3145**, **John Onsongo Mayongi** for **Central Kitutu/Daraja mbili/3147** and **Zebedeo Ombasa Nyasoro Manga** for **central Kitutu/Daraja mbili/3144** be cancelled.

The application was expressed to be brought solely on the grounds that the grant of letters of Administration intestate was obtained fraudulently by the making of false statement and by the concealment from the court of facts material to the case and the same was materially defective in substance.

In support of the application, the applicant deponed that he was a joint owner of all that piece or parcel of land known as **Central Kitutu/Daraja Mbili/1377** with the deceased **Sigara Mangana**, since 1979. His

co owner, the deceased passed on sometimes on 25th may, 1992. Upon such demise her interest in the suit premises in law, vested in him. However, when the respondent petitioned for the grant of letters of administration intestate with regard to the estate of the deceased, he concealed that fact and proceeded to obtain the grant exclusively and without at all mentioning his interest in the suit premises therein. Subsequently, and even before having the grant confirmed, the respondent proceeded to clandestinely subdivide the suit premises into four portions and illegally transferred them to **Josephine Nyabonyi Marionga, Margaret Moraa Totse, John Onsongo Mayongi and Zebedeo Ombasa** and had them issued with respective new title deeds. From the foregoing, the applicant deponed, it was abundantly clear that the suit premises were not part of the estate of the deceased as it did not belong to her solely or at all at the time of her demise.

When served with the application, the respondent reacted through **Mr. G.J.M Masese Esq**, by filing grounds of opposition, in which he contended that the application was defective in form and substance, the titles issued to **Josephine Nyabonyi Marionga, Margaret Moraa Tsotse, John Ongongo Mayogi and Zebedeo Ombasa** were indefeasible under section 93 of the **Law of Succession Act** and the four were not even parties to the application. That the name of the applicant was struck out as a beneficiary of the estate of **Sigara Mangana** because there was no legal basis for his inclusion in the title as he is not a relative of the deceased. The respondent did not follow up the grounds of opposition aforesaid with a replying affidavit.

When the application came before me on 19th November, 2010 for further directions, **Mr. Mbicha** and **Mr. Masese**, learned counsels for the applicant and respondent respectively agreed to canvass the application on the basis of the affidavits, on record and thereafter file and exchange written submissions. This was subsequently done. I have since read and considered the respective written submissions.

As I see it, the battle herein is between the applicant and the respondent, **Nyasoro Mangana**. The other respondents, **Josephine Nyabonyi Marionga, Margaret Moraa Totse, John Onsongo Mayongi and Zebedeo Ombasa** hereinafter “**the 4**” are mere pawns in this rather intricate web pitting the applicant against the respondent aforesaid. Much as the applicant has prayed that the titles which have since been issued to the four be cancelled, that is not possible in an application of this nature. This application is merely concerned with the revocation and or annulment of a grant. The grounds for such an action are clearly spelt out in section 76 of the **Law of Succession Act**. We are not at all bothered with the consequences that may ensue following the order of revocation and or annulment if granted. I hope that by making such request, the applicant was not oblivious to the provisions of section 93 (1) of the **Law of Succession Act** which are to the effect that “.....***A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act....***” Therein therefore lies the answer to the applicant’s demand that the titles deed issued to four be cancelled.

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 on the 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 to 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.....”.

From the foregoing it is quite clear that any person with an interest in the estate of a deceased person can apply for the revocation of a grant provided he/she brings such an application within the above parameters. Such an applicant need not be a beneficiary nor a dependant of the deceased contrary to what **Mr. Masese** stated in his written submissions. Thus, merely because the applicant is neither a beneficiary nor dependant of the deceased does not in itself oust his right to mount this application. I entirely agree that the four beneficiaries of the subdivision of the suit premises were not parties to the Succession Cause that is now being challenged. However I do not agree with their submissions that they have still not been made parties to this application. Indeed they have, since by the initial directions of this court issued on 15th October, 2010, I directed that the instant application be served on the respondent and all beneficiaries of the estate of the deceased. The four were beneficiaries of the estate by virtue of their acquisition of parcels of land from the subdivision of the suit premises that formed part of the assets of the deceased's estate.

The applicant has hinged his application on fraud perpetrated by the respondent in the process of petitioning and obtaining a grant of letters of Administration intestate with regard to the deceased's estate. An allegation of fraud is a very serious indictment. Therefore courts require a high degree of proof of such allegation. The degree of proof is much higher than in ordinary civil cases but not as high as in criminal cases. It is thus somewhere in between the two standards of proof. Has the applicant discharged that heavy burden in the circumstances of this case? I think so.

It is common ground that the land parcel, **Central Kitutu/Daraja mbili/1377** which was the only immovable asset of the deceased was registered in the joint names of the deceased and the applicant . It is also common ground that the respondent **Nyasoro Mangana** was the only son of the deceased .When his mother aforesaid passed on, he proceeded to seek and obtain the grant on the basis that his deceased mother was the sole owner of the said parcel of land. Form P & A 5 filed with the petition attests to that fact. Yet a certificate of official search dated 29th December, 2008, similarly filed with the petition categorically shows that as at 27th march, 1986 the proprietors of the parcel of land were **Mrs Sigara Mangana** and **Thomas Ongondo**. It is instructive that the said petition was presented in court by a firm of advocates **Messrs Anyona Mbunde &Co. Advocates**. The respondent cannot therefore be heard or seen to feign ignorance as to the status of the proprietorship of the suit premises. It was eminently clear that the suit premises were jointly owned. Sections 102 and 103 of the **Registered Land Act** provides that where land, lease or charge is owned jointly , no proprietor is entitled to any separate share in the land, and consequently on the death of a joint proprietor, his or her interest shall vest in the surviving proprietor or surviving proprietors jointly. This is the essence of section 102(1) of the said Act. On the other hand section 103 (1) of the same Act is to the effect that where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. Unfortunately the title deed exhibited does not state whether the suit premises was owned by the applicant and deceased jointly or in common.

My attention has been drawn to a suit filed in this court by the respondent and applicant against the four being HCCC.NO. 117 of 2010 in which among other prayers, they seek the cancellation of the titles held by the four. I have also seen a letter from the chief, Kisii township dated 2nd march, 2008 filed with the

petition which is not flattering of the applicant. Perhaps that case will settle the issue of proprietorship of the suit premises between the deceased and applicant at the time the deceased passed on. It is not for this court to do so in these proceedings. Either way however, the rights of the applicant as a joint owner or proprietor in common had to be taken into account and recognized by the respondent when he petitioned for the grant. That he failed to do so deliberately though he had information in his possession to that effect not only smacks of fraud but also concealment from court of material facts.

From the record, it is apparent that the temporary grant was obtained on 19th may, 2009. It has never been confirmed. One then wonders how it was possible that the respondent would have proceeded to distribute the estate of the deceased on unconfirmed grant. It is therefore patently clear again that the respondent dealt with the estate of the deceased fraudulently and in flagrant breach of the law.

That being my view of the matter, I allow the application dated 16th August, 2010 in terms that the grant of letters of administration intestate made to the respondent on 25th may, 1992 be and is hereby revoked. There shall be no orders as to costs.

Ruling dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE