



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO. 219 OF 2010
IN THE MATTER OF THE ESTATE OF AKETCH JAGALO –DECEASED
AND
IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION
INTESTATE
BETWEEN
LIEWA JAGALO)
GABRIELOTUOMA)..... APPLICANTS
AND
ROSE ACHIENG OKETCH.....RESPONDENT
AND
GEORGE ORAGO ORANGO
)
CONSTANTINE DALMAS ONYANGO).....INTETESTED PARTIES

RULING

Liewa Jagalo & Gabriel Otuoma hereinafterreferred to as “**the applicants**” moved this Honourable court vide summons for revocation of grant dated the 18th day of May, 2010, seeking for the following orders:-

- “1. The instant application be certified as urgent and same heard Ex-parte in the first instance.***
- 2. The grant of letters of administration to the Petitioner/Respondent vide, Migori SRM Succession Cause No. 242 of 2002, be revoked and/or annulled.***
- 3. The Honourable court be pleased to declare all the process emanating, procured and/or based on the said illegal grant of the letters of administration to be illegal, null and void and of no legal effect.***

4. *Consequent to granting prayer (2) above, the Honourable court be pleased to direct the Land Registrar Migori Land Registry to cancel all the illegal and resultant titles emanating from L.R. Kanyamkago/Kawere 1/1219 , registered pursuant to the illegal grant and revert the title to its original form.*

5. *Costs of the application be borne by the Petitioner/ Respondent*

6. *Such further and/or other orders be made as this honourable court may deem fit and expedient.....”.*

The application was made on the grounds that the grant was obtained by fraud and without the consent of all the beneficiaries of the late **Akech Jagalo** hereinafter “**the deceased**”, the proceedings were defective in substance, the grant was obtained fraudulently and by making of a false statement or concealment of material facts, it was obtained by means of untrue allegation of fact, the Administratrix is incapable of administering the estate owing to existing grudge, the applicants are entitled to a substantial share of **Kanyamkago/Kawere 1/1219** being the only asset of the deceased estate which he held in their trust . It was not therefore part of the net estate of the deceased. **Rose Achieng Aketch**, hereinafter “**the Petitioner**” failed to include all the names of the beneficiaries of the estate of the deceased, the value of estate was in excess of Kshs. 1.5 million and therefore the principal magistrate’s court which issued the grant had no jurisdiction and that the applicants had by fraudulent conduct of the petitioner unlawfully been disinherited of their entitlement.

The affidavit sworn by the 1st applicant in support of the application merely expounded and elaborated on the above grounds. Suffice to add that the disputes originated from the succession cause , in Migori Law Court, to wit Migori SRM Succession Cause No. 242 of 2002 with regard to the deceased’s estate. The only asset of the estate was a parcel of land number **L.R.Kanyamkago/Kawere 1/1219**, registered in the name of the deceased hereinafter “**the suit premises**”. The applicants claim that the suit premises had been a family land of belonging to **Jagalo** family and the entire family had been living on the same though registered in the name of the deceased as trustee. By a court decree issued in KISII HCCC.NO.465 of 1994, the deceased was required to subdivide the suit premises to his brothers. However as at the time of his death, the suit premises had not been subdivided as decreed by the court and the same therefore remained as trust property.

However, upon the death of the deceased, the petitioner who was the 1st born daughter of the deceased successfully but secretly petitioned the court for grant of letters of administration intestate in Migori SRMCC No. 242 of 2002. She was duly appointed as the sole administratrix of the estate of her late father. Through transmission she caused the entire suit premises to be transferred and registered her name as sole proprietor. She subsequently caused the same to be alienated and sold to the interested parties as follows:-

i). **George Orago Orango-(2.8 Ha)**

ii). **Constatine Dalmas Onyango –(1.40Ha)**

The petitioner in response to the application stated that the applicants were her uncle and cousin respectively. The deceased was the registered proprietor of the suit premises. The deceased had 3 brothers; the 1st applicant, **Gabriel Otuoma Jagalo** and **Efanisto Jagalo**-deceased. In the lifetime of her father, the 1st applicant and his deceased brother resided in distinct portions of the suit premises. On the death of the deceased and having obtained the authority of her siblings, she petitioned and was issued with a grant of letters of administration intestate, in respect of the estate of the deceased. She had prior to that obtained a letter from the area chief confirming the true identities of the beneficiaries of the deceased’s estate, which comprised four daughters. Upon confirming the grant she involved the 1st applicant in the subdivision of the suit premises as he was entitled to a portion of the same measuring 3.43 Ha in accordance with the Decree issued in Kisii HCCC. NO. 465 of 1994. Eventually, the suit premises were subdivided into four portions which were registered in the names of the following:-

- **1st applicant, Kanyamgako/Kawere 1/3214(3.75 HA)**
- **George Orango Orago, Kanyamgako/Kawere 1/3212(2.80 HA)**
- **Zablon Kavata, Kanyamgako/Kawere/3212 (2.80 HA)**
- **Constatine Onyango Oile**

In view of the foregoing it cannot be true that the succession proceedings was conducted fraudulently, and without involving the 1st applicant. Further the 2nd applicant who is the son of the 1st applicant was not entitled to be consulted as he was not a dependant of the deceased. However, the 1st applicant has neither cultivated nor occupied the portion that is currently registered in his name. In view of the foregoing, the contents of the affidavit sworn by the 1st applicant is wrought and fraught with conscious and deliberate falsehoods, which are only meant to mislead the court.

The 2nd interested party swore an affidavit opposing the application as well. He deponed that on 4th July, 2006 he voluntarily entered into a sale agreement with the petitioner for the purchase of a portion of the suit premises. Prior to the agreement he had conducted a search at Migori District Land Registry which disclosed that the petitioner was the registered as the sole proprietor of the suit premises. The title had no encumbrances registered at the time. He purchased the portion for Kshs. 280,000/= . He subsequently attended land control board meeting and obtained the consent to the transaction. On 18th October, 2006, he was duly issued with a title deed to his parcel of land now known as **Kanyamkago/Kawere 1/3213**. Subsequent thereto he had put up his homestead where he resides with his family. He was therefore a purchase for value with no notice of any irregularity, illegality or fraud and his interest ought therefore to be protected.

On 15th February, 2011, the 1st interested party also filed a replying affidavit to the application. The affidavit was along the same lines as that of 2nd interested party save to add that after subdivision his parcel of land became **Kanyamkago/Kawere 1/3212** and had a title deed to the same. Since then he had taken possession thereof and commenced cultivation of sugar cane thereon which is contracted to South Nyanza Sugar Company limited. On 11th February, 2008, the 1st applicant and three others trespassed on his parcel of land aforesaid. He was compelled to file suit against them being Kisii HCCC.NO. 19 of 2008 which is pending . Otherwise as far as he was concerned, the transfer to him of his parcel of land effected by the petitioner as the legal administratrix of the estate of the deceased makes his title indefeasible, and therefore declaration sought in the application cannot issue in these proceedings, that the 1st applicant had a counterclaim touching and concerning same prayers in this cause as in KISII HCCC.NO. 19 of 2008.

When the application came up for further directions before me on 26th November, 2010, **Mr. Otieno, Mr. Nyambati , Mr. Oguttu and Mr. Onyango** respectively learned counsel for the applicant, petitioner, 1st and 2nd interested parties respectively, agreed that the application be heard on the basis of the affidavits on record and by submissions to be subsequently filed and exchanged between them. That was done.

Having carefully read and considered the application, rival affidavits and the annexures thereto, respective written submissions and the law, I am satisfied that this application must fail.

Under section 76 of the Law of Succession Act, a grant of representation whether or not confirmed can 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 the 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.....”.

On the face of it, the applicants have anchored their application on grounds (a) through to (d) above, all inclusive. It is trite law that he who alleges must prove the allegations he has made and presented to courts. There is nothing in the material presented before me that would remotely suggest that the proceedings to obtain the grant before Migori SRM's Court in Succession Cause number, 242 of 2000 were tainted as claimed by the applicant. It is instructive to note that those proceedings were not annexed in the application before me to assist me make such determination. What is annexed is only the petition itself. A perusal of the same does not disclose any defect. If anything it was properly drawn and filed it was duly Gazetted in the Kenya Gazette of 22nd July, 2005. The assumption behind Gazetting a petition in the Kenya Gazette is to enable people with objections such as the applicants to make their objections known before hand. There is also the underlying presumption that every Kenyan routinely read the Kenya Gazette if and when published. The applicant are taken to have been aware of the petition for a grant of letters of Administration intestate lodged by the petitioner. They had opportunity to raise the concerns they have raised in this application then. They did not and cannot now be heard to suggest that that petition was handled in secrecy or fraudulently by the petitioner. Neither can they claim concealment of material facts.

According to the affidavit in support of the petition the petitioner indicated that the deceased was survived by the petitioner, **Grace Anyango, Anna Otieno Aketch** and **Lilian Aketch**. These were his daughters. This fact has not been challenged by the applicants. On the other hand, the applicants are a brother and nephew to the deceased respectively. This fact too has not been rebutted by the applicants too. Under the Law of Succession Act the daughters aforesaid rank first in priority as against the applicants. The petitioner was not therefore bound to seek the consent of the applicants for her to petition for the grant of letters of administrate intestate with regard to her father's estate.

The grant was subsequently confirmed. It was then that the suit premises were transmitted to her. There is nothing irregular or defective about the process so far. Pursuant to the transmission as the legal administratrix of the estate, she offered to sell portions thereof to the interested parties. She went through the normal process for such transactions. She obtained the consents required from the land control board. I do not think that such consents would have been procured without the knowledge of the applicants. Infact from the supplementary supporting affidavit, the 1st applicant concede that he was a beneficiary of the same subdivision. He ended up getting **Kanyamkago/Kawere 1/3212**. However, he proclaims innocence by asserting that the petitioner, coerced him into parting with Kshs. 10,000/=, so that she could give him a portion of the suit premises and had threatened to sell the entire suit premise. In the process she forced him to execute numerous documents to facilitate the process and proceeded to register him as the owner of the aforesaid parcel of land. So that as far as the 1st applicant is concerned whereas he was given a portion of the suit premises, the same was given to him out of extortion, and simply, to pave way for the illegal acts of the petitioner. I do not believe an aota of all that the 1st applicant has proclaimed, simply because he had hidden that information in his first affidavit in support of the application. He only owned up after being confronted with the true position courtesy of the petitioner's replying affidavit. This fact flies in the face of the petitioner's allegations that the petitioner conducted the cause fraudulently and secretly. The 1st applicant signed the documents of transfer and must have

attended the land control board for its consent. How can he turn around and plead ignorance of the succession cause. If the 1st applicant can lie on such obvious matters, what else has he not been contrite? How could the petitioner singularly and being a lady at that have compelled the 1st applicant, a paternal uncle to accept a portion of the land against his wishes. I have not even heard him say he wishes to surrender back to the estate of the deceased the said parcel of land. To my mind the 1st applicant is an incredible liar and nothing he says should be believed.

The applicants has raised the issue of trust on the basis of the decree obtained in KISII HCCC.NO. 465 of 1994 in which it had been decreed that the deceased subdivides the suit premises to his brothers. On that basis the applicants claim that the suit premises was not free property and that therefore the applicants were dependants. Let me disabuse the 2nd applicant of the fact that he is in this proceedings in his own right. Being a son of the 1st applicant which fact was deponed to by the petitioner and has not been discounted at all by the applicants, he had no business at all in being involved in this application. He can only have a remedy perhaps against his father, the 1st applicant. Otherwise in so far as this cause is concerned he is a busy body. Passing off as **Gabriel Otuoma Jagalo**, would be real beneficially of the decree makes his case worse. In any event it appears the real **Otuoma** has memory lapse. I will say no more about him.

At the time of the death of the deceased, the suit premises were solely registered in his name. There was no note in the register that he held the suit premises in trust for himself and his brothers. He could therefore despite the decree aforesaid in his lifetime have disposed it off contrary to the submissions of the applicants. It was free property. In any event the said decree did not identify the applicants as dependants of the deceased. Further the mere fact that the 1st applicant and another brother sued the deceased for a portion of the suit premises is itself evidence, that they were not dependants of the deceased. A decree in a Civil matter unless specifically stated does not bestow upon third parties the status of a dependant with attendant rights and privileges. That is not the essence of section 29 of the Law of Succession Act as argued by the applicants. The issue of trust I think, cannot be ventilated in succession proceedings. That must be dealt elsewhere.

It has been conceded by both the applicants and interested party that there is Kisii HCCC.NO. 19 OF 2008. By way of counterclaim, the applicants have raised the same issues that form the bulk of this application. That is where their remedy lies and not in this cause. In any event, being the beneficiaries of the decree, nothing stops them from executing it against the estate of the deceased.

The applicants too have raised the issue of jurisdiction of Migori SRM's court in dealing with the cause. It is their contention that the value of the estate of the deceased was well above the pecuniary jurisdiction of that court which is Kshs. 100,000/=. In furtherance of that submission they rely on the sale agreements. I am unable to tell from the copies of the petition annexed to the supporting affidavit to the application whether that assertion is correct. The applicants have tactically avoided to annex the reverse side of form P & A 5 that deals with the value of the estate of the deceased. No reason is advanced for the omission by the applicants. That being the case, the assertion merely remains that, a mere allegation. In any event, the sale agreements were entered into well after the succession proceedings. Even if the petitioner had indicated the value of the estate as being Kshs. 100,000/= to the Chagrin of the applicants, the court was bound to proceed with the petition on that basis. It was not enjoined by law to commission or carry out any valuation in respect of the suit premises to satisfy itself as to exact value of the suit premises before presiding over the cause.

Finally, under section 93 of the Law of Succession Act, the interested parties are expressly shielded. Their interested in their respective parcels of land aforesaid cannot be challenged or impugned even if the grant is revoked. The validity of their transfer cannot be affected by revocation of grant. The interested parties bought for value from the petitioner their respective portions of land. That purchase and subsequent transfer to them of the suit premises is protected expressly by section 93 of the Law of Successions. Accordingly prayers 3 and 4 in the face of the application cannot issue.

In the ultimate, I find the application unmerited. Accordingly, it is dismissed with costs to the petitioner and interested parties.

Ruling dated, signed and delivered at Kisii this 8th April, 2011.

ASIKE-MAKHANDIA
JUDGE