



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2853 of 2003

IN THE MATTER OF THE ESTATE OF CHRISTOPHER JUDE ADELA (DECEASED)

REBECCA VERONICA ADELA APPLICANT

VERSUS

PRISCA KHATAMBI KIBUKOSYA RESPONDENT

SAMUEL KARAMBA WAINAINA.....INTERESTED PARTY

RULING

Before the court is an Amended Summons dated 17th March 2008 for revocation or Annulment of grant of Letters of Representation and certificate of confirmation issued by the court in this cause. The Cause is premised under section 76 of the Laws of Succession Act (Cap. 160) {hereinafter referred to as (the Act)}, rules 44(1), 49, 63 and 73 of the Probate and Administration Rules (made under the Act) and section 72 of the Interpretation and General Provisions Act (Cap 2).

It seeks inter alia the prayers for revocation and/or amendment of the grant of certificate of confirmation dated 9th November 2004 issued to Prisca A. Khatambi Kibukosya and rectification of the entries made in the Register of Land in respect of L.R. No. 209/11358/203 to the said Prisca and subsequent sale and transfer to the interested party herein.

As per the record of the cause Prisca filed the Petition for grant of letters of representation on 8th October 2003. She averred that she is a widow of the deceased and did not mention any other beneficiaries in her petition. The grant of Representation intestate was issued in her names on 15th December 2003. The deceased left only one asset which is L.R. No. 209/11358/203.

On 31st March, 2005 Prisca, as such administrator, by a Deed of Assent transferred all her rights, title and interest of the deceased to herself as a sole beneficiary of the estate and curiously released herself as a personal representative of the estate from all obligations pertaining to the said property. The property was then registered in her name on 22nd April, 2005.

The certificate of confirmation was issued on 9th November 2004. However I do note that the court copy of the certificate is not signed.

The Applicant Rebecca then filed summons for revocation dated 24th October 2005 which was responded

to by Prisca vide her replying affidavit sworn on 3rd November 2005. She averred in opposition that as a registered owner she had indefeasible proprietary right on the property.

Rebecca then swore a supplementary affidavit on 25th January, 2006. As per Rebecca's case, she was married to the deceased on 3rd June, 1972 (a marriage certificate was annexed) and as per Prisca she was married to the deceased under customary law on 29th July, 1999 and further stated that she stayed together with the deceased as man and wife upto 9th October 2002, at South B Estate in Nairobi. This fact has been traversed by Rebecca in her supplementary affidavit. Prisca in support of her claim only relied on the separation cause pending between the deceased and Rebecca and, as contended rightly, and, I agree that that fact by itself cannot make her a wife and sole beneficiary excluding the children of the deceased.

While this application was pending, the parties through their counsel exchanged correspondence on settlement of the issue, as from September 2006.

The daughter of Rebecca also obtained an interlocutory restraining order against Prisca which was issued on 10th April, 2007.

But Rebecca thereafter came to know that Prisca has, while communications on settlement were being exchanged, transferred the property to the interested party herein on 12th February 2007 and hence the Amended application which is before the court.

The pleadings thereafter were allowed to be served on Prisca and interested party by way of advertisement in the local news paper as directed by the court.

Neither Prisca nor the Interested Party responded to these services and hence the application was heard ex-parte.

It was contended that the certificate of confirmation of grant was obtained fraudulently and by concealment of material fact.

Rebecca had been married to the deceased since 3rd June, 1972 and that fact has been established appropriately by production of the marriage certificate. It is also shown sufficiently that Rebecca has been staying with the deceased at a premises in Parklands notwithstanding a brief separation. In any event, that fact has been duly observed by the court in earlier part of this ruling.

As against that, Prisca has alleged that she has been married to the deceased under customary law on 29th July, 1999. This contention has not been proved at all by Prisca. It is also evident that their relation did not beget any child.

Furthermore, I cannot presume the marriage under common law during subsistence of a marriage which was monogamous in absence of the proof of solemnization of the customary marriage as alleged and in event no evidence is led in that respect. In the case of Lucy Mwendwa Muuru Versus Tony Githuku (HCCS No. 7 of 2002, unreported,) this court, followed the principle set out by the Court of Appeal in the case of M. -Vs- V (2008) 1 KLR at Page 313. it was held by Court of Appeal that:-

“The presumption of marriage covers two aspects;

That the parties have capacity to enter into a marriage and that they did so in effect.”

The court in short stated that the new marriage would be null until the previous marriage had been brought to an end by a final decree of Divorce and that the most the parties could achieve was a state where they intended to marry when free to do so:

Prisca knowing very well of the existence of Rebecca and her children took advantage of her temporary absence in the country and obtained the grant and confirmation of the grant of letters of Administration

fraudulently and by concealing the material facts.

In the premises aforesaid, it is clear that Prisca cannot be declared as a wife/widow of the deceased, that she did not have any right to file the petition and thus the grant issued to her and later confirmed to her on the basis of her status as a widow have to be nullified and I hereby annul the same.

As if this was not enough, when Rebecca filed the original application for revocation, Prisca through her counsel seemingly showed her intention to negotiate with Rebecca and during pendency of the objection proceedings, went behind Rebecca's back and sold the property to the interested party. This act of her definitely smacks of clear fraud. This act further breaches the protection of *lis pendens* stipulated in sec. 52 of the Indian Transfer of Property Act.

Madan J. (as he then was) in the case of *Mavji -Vs- U.S. International University and Another* (1976) KLR 185 at 202 held:-

“it would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The court must protect the status quo.”

In the case of *Consolidated Bank of Kenya V/S Usafi Services Ltd.* (Civil Appeal No. 195/06. unreported) the court of Appeal held:

“The doctrine of *lis pendens* is necessary for the final adjudication of the matter before the court and in the General interest of public Policy and good and effective administration of Justice. It therefore overrides section 23 of the Registration of Titles Act and prohibits a party from giving to the other, pending the litigation, rights to the property in dispute so as to prejudice the other”.

Section 23 of the Registration of Title Act (Cap 281) is held to be overridden by the principle of *lis pendens*.

Moreover the said section 23 itself stipulates that the validity of the title of a property can be challenged on the ground of fraud. In this cause, Prisca did not have any right as a beneficiary in law and thus her action to transfer the property in her name and subsequent transfer by her to an interested party when this cause was pending is illegal, null and void.

This leaves me with provisions of section 93(1) of the Laws of Succession which on the face thereof preserves the validity of transfer of interest in immovable or moveable property made to a purchaser by a person to whom representation has been granted notwithstanding subsequent revocation or variation of the grant either before or after the commencement of the Act.

Then section 93(2) of the Act stipulates that the transfer of immovable property to a purchaser by the personal representative of the estate cannot be invalidated by reason only that the purchaser may have a notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

These provisions shall have to be closely looked at. As per my considered view, section 93(1) of the Act talks of “Interest” for immovable or moveable property and section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a *Carte blanche* of absolute immunity against challenges to transfer of immovable properties of

estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.

The action by Prisca in this cause is one of such actions which this court cannot accept as proper or encourage the same. Prisca has all along '*stolen March*' over Rebecca and has deprived the right beneficiaries of the enjoyment of their own rights as such beneficiaries.

In the premises aforesaid, I do order that the grant of representation issued on 15th December 2003 and certificate of confirmation issued on 9th November 2004 be and are hereby revoked.

To avoid further delay I order that a fresh grant of representation be issued to Rebecca without the necessity of filing a fresh petition.

I further direct the Registrar of Land to rectify the entries made in the Register of Land in respect of L.R. No. 209/11358/203 indicating transfer by transmission in the names of Prisca A. Khatambi Kibukosya and subsequent sale and transfer in the names of Samuel Karamba Wainaina and direct that the Registrar to revert the property in the names of Christopher Jude Adela the deceased herein.

I also order that the Respondent Prisca shall pay costs to the Applicant Rebecca.

Orders Accordingly

Date, Signed and Delivered at Nairobi this **28th September, 2009.**

K.H. RAWAL

JUDGE

28.9.2009