

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Succession Cause 36 of 1988

IN THE MATTER OF THE ESTATE OF CHILIKONA WELEMUSAYA LEVI OSWAKO –
(DECEASED)

B E T W E E N

RICHARD WEKESA PETITIONER/RESPONDENT

V E R S U S

TADAYO WAKHUNGU NATEMBEYA .. OBJECTOR/APPLICANT

A N D

CHILIKONA WELEMUSAYA INTERESTED PARTY

R U L I N G

In his application dated 8th June, 2009 the Objector is seeking orders that an order of inhibition be issued in respect of land title numbers **BUNGOMA/NDALU/566, 567, 568** and **569**, that the grant issued by the court and confirmed on 4th April, 2000 be annulled and that all changes made on the status of plot No. **BUNGOMA/NDALU/162** be reversed. The is supported by the objectors affidavit sworn on 8th June, 2009.

Mr. Khakula, counsel for the objector submitted that there were two Succession Causes. One filed in Kitale, vide Succession Cause No.51 of 1987 where the grant was confirmed on 13th October, 1988. The petitioner filed the current Succession Cause in Kakamega in 1998 after the earlier grant in Kitale had been confirmed. The Kitale Succession cause was consolidated with the Kakamega one.

Counsel further submitted that there was High Court Civil Case No.57 of 1980. The applicant complained to the police and the

petitioner was charged for perjury. If the Grant issued in Succession Cause No.36 of 1988 is dispensed with then the Kitale Succession Cause shall remain. Although the respondent has appealed, the fact still remains that there was perjury until the appeal is heard and determined.

Mr. Fwaya, counsel for the respondent opposed the application. Counsel submitted that Directions were not given as required by **Rule 44 (3)** of the Succession Act. The property was shared amongst the beneficiaries. The respondent filed Appeal No.59 of 2009 which is still pending in court. If the grant is nullified and the appeal becomes successful then the order of nullification will have to be reversed. The judgement of the criminal case did not overturn the decision issued in the civil case.

Counsel for the respondent further submitted that there are five similar applications pending before this court. These applications are dated 18th February 2002, 22nd March, 2006, 14th June, 2006, 16th July, 2007 and the current application. The other applications have not been withdrawn.

I have seen the other applications relating to the same issue of revocation of the Grant herein. **Rule 44 (3)** of the Probate and Administration Rules require that before an application for nullification of grant is heard, directions shall be given by the court so as to enable all those having interest in the matter are served. In the current application, there is no evidence that all beneficiaries have been served. In the application dated 22nd March, 2006, the Objector has given a list of fifteen beneficiaries. The same number of beneficiaries is listed in the affidavit in support of petition of Letters of Administration before the Kitale court sworn on the 22nd day of December, 1987.

I do find that the procedure for an application for revocation of grant was not followed. There was no direction that the matter was to proceed by way of affidavit evidence. All the beneficiaries of the estate need to be informed. The application is therefore premature.

For the interest of justice and since there is a judgement of the lower court that the respondent obtained the grant through perjury, I will grant prayer 2 of the application dated 8th June, 2009 relating to the registration of inhibitions in respect of plot numbers **BUNGOMA/NDALU/566, 567, 568 and 569**. The Objector is at liberty to either use the applications pending herein relating to the same issue or file a fresh application that will have to follow the laid down procedures. In the meantime, prayers 3, 4 and 5 of the application dated 8th June, 2009 are dismissed. Each party shall meet his own costs.

Delivered, Dated and Signed at Kakamega this 12th day of November, 2009

SAID J. CHITEMBWE

J U D G E