



**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA AT KAKAMEGA**

**Succession Cause 45B of 1990**

**JAMENY MUDAKI**

**ASAVA .....PETITIONER**

**VERSUS**

**BROWN OTENGO ASAVA**

**ARTHUR MWANZI ASAVA.....OBJECTORS**

**RULING**

The Petitioner and the Objectors are brothers. Their mother, Kezia Delitsu, died on 26.08.83 leaving a parcel of land situate near Mbale market measuring 0.37 of a hectare. The land is comprised in land title No. Kakamega/Mbale/532. The Petitioner, Jeremy Mudaki Asava, applied for the Grant of Letters of Administration intestate for the estate of their deceased mother on 10<sup>th</sup> April 1990. In their Summons for revocation of Grant dated 11-2-2003 the objectors averred that the Grant made on 17-12-1991 to Jeremy Mudachi Asava, the youngest of the three brothers and confirmed on 3<sup>rd</sup> September 2002 in his favour as the sole heir to the said parcel of land No. Kakamega/Mbale/532 was obtained surreptitiously without the knowledge of the Objectors. They averred that each of the three brothers was entitled to 1/3 share of the said plot. The Petitioner had however concealed the fact that the Objectors were also heirs. In an attempt to explain the possible reason for the Petitioner's fraudulent behaviour, the objectors stated in their affidavit sworn on 10-2-2003 in support of the Summons for the revocation of the Grant that although their father, one Luka Asava who died in 1948 left three other parcels of land known as Kakamega/Lyadyuwa/1268, 1265 and 1269 which were inherited by the 1<sup>st</sup> and 2<sup>nd</sup> Objectors and the Petitioner respectively, the Petitioner sold his parcel No. Kakamega/Lyadyuwa/1269 to the first Objector.

The Petitioner denied the allegations made by the Objectors in his replying affidavit sworn on 8-9-2003 and contended that the application for the revocation of the Grant was defective and *res judicata* in view of SRM Misc.Civil Application No. 74 of 2002 a copy of which the Petitioner annexed. It was a copy of a temporary interlocutory order which did not furnish much light on the issue of *res judicata*.

He hedged giving a full answer to the allegation by the Objectors that he had inherited land title No. Kakamega/Lyadyuwa/1269 from their father and sold it to the 1<sup>st</sup> Objector. His allegation that the parcels inherited by the objectors and the Petitioner from their father Luka Asava were excised from their father's land was not supported by evidence and on the balance of probabilities, I prefer the affidavit evidence of the Objectors to that of the Petitioner. The latter's allegation that the Summons for revocation of the Grant was in bad faith was not substantiated and no evidence of bad faith or particulars thereof were given in the Petitioner's affidavit nor did the petitioner controvert the fact that he secretly petitioned for the Grant and concealed the fact that the objectors were also sons of the deceased and were alive and were entitled to inherit. That the matter was gazetted was no answer to the allegation.

Mr. Nyikuli learned counsel for the Objectors urged the court to allow the objectors' application.

After a careful perusal of the application and the replying affidavit, and after due consideration of the submissions by Mr. Nyikuli, I am satisfied that the requirements of section 76 of the Law of Succession Act, Cap 160 have been met in that the objectors have shown to my satisfaction that the grant was

obtained fraudulently by the making of a false statement namely that the Petitioner was the only surviving son of the deceased when that was not the case. That statement also amounted to concealment from the court of something material to the case. It was besides the point that the Petition was gazetted. In the circumstances, I revoke and annul the Grant of Letters of Administration made to the Petitioner on 17-12-1991 as well as the confirmed grant. The objectors shall have the costs of the proceedings.

*Dated at Kakamega this 13<sup>th</sup> day of July, 2006.*

**G. B. M. KARIUKI**

**J U D G E**