



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE 183 OF 2000**

**IN THE MATTER OF THE ESTATE OF AGNES KEMUNTO AYIENDA-DECEASED**

**AND**

**OYARO AYIENDA ..... PETITIONER**

**VERSUS**

**JOHN ABONGO.....OBJECTER**

**JAMES MANYURA ..... INTERESTED PARTY**

**RULING**

JAMES MANYURA brought this application under S.76 of the Law of Succession Act and rule 44(1) of The Probate and Administration rules seeking Court to revoke grant issued to OYARO AYIENDA on 5<sup>th</sup> May 2004, on the grounds that the grant was obtained fraudulently by making false statement and concealing some material facts and that it was defective.

The tussle between the parties is over ownership of parcel No.Mwakibagendi/226. The applicant alleges to have bought the said parcel from one ABONGO ARISI sometimes in 1980. He contends that this fact was not disclosed to court during the confirmation of the grant.

The history of the piece of land as I understand it is that it at one time belonged to the father of the petitioner OYARO AYIENDA.

He died in 1988 and the petitioners mother one AGNES KEMUNTO AYIENDA filed a Succession Cause in respect of his Estate. That piece of land was thereafter transferred to AGNES. AGNES died in 1996 and the petitioner filed this cause in respect of her Estate. On 6<sup>th</sup> June 2001 one JOHN ABONGO ARISI filed an objection in the matter. The hearing of that objection proceeded before P. K. BIRECH then a Commissioner of Azize. Five witnesses gave evidence before the said Commissioner. However he left the station before he finalized the hearing. Thereafter parties opted to proceed from where the matter had reached. However on 6<sup>th</sup> May 2004 parties recorded a consent in court whereby the objector withdrew his objection and the grant which had been given to the petitioner confirmed. On 17<sup>th</sup> May 2004 the present objector filed his objection. The petitioner had filed an application on 14<sup>th</sup> March 2004 seeking the grant which had been issued to him on 3<sup>rd</sup> October 2000 confirmed. That is the application which provoked the objections raised by ABONGO which were later withdrawn.

Mr. Anyona who presented the application said the confirmation was not proper as the beneficiaries were not shown. The petitioner did not tell court that the current objector was also a beneficiary. ABONGO had given evidence and stated that he had sold the land to him.

The application was opposed. Mr. Gekonge submitted that it was frivolous. He said that OBONGO did not sell the disputed parcel to the objector in 1980. By then OBONGO was a minor and therefore had no capacity to sell the land. In any case the registered owner of the land was still alive then as he died in 1988.

I have carefully evaluated the application and the submissions.

The objector's main contention is that he had bought the piece of land from ABONGO ARISI in 1980 and as such he should have been indicated as one of the beneficiaries. However this point don't seem to hold. It was deponed that in 1980 ABONGO was a minor. The objector never contraverted that averment and one would therefore believe it is true. If ABONGO was a

minor in 1980 then he could not have sold the land to the Objector as alleged.

Another facts raised in the replying affidavits which was not contraverted is that in 1980 the owner of that parcel of land was still alive. He died in 1988. ABONGO then, even if he was an adult would not have had powers to sell what he did not own. The objector did not claim to have bought the parcel from ABONGO's father who was the owner of the land.

Another issue is that the Objector came to court only after ABONGO had withdrawn his objection. The petition was filed in the year 2000.

The objector was aware of it since he was even a witness for OBONGO during the hearing of his objections. He did not stake any claim over the Estate of the deceased Agnes Kemunto. He did not state that at any time he dealt with Agnes Kemunto over the said parcel. It is therefore clear that he had no claim over the Estate of Agnes. Neither did he have any over the Estate of her husband. His claim seems to be against OBONGO and that should be ventilated in another cause but not in this cause in respect of the Estate of AGNES KEMUNTO.

Mr. Anyona took issue in the way the grant was confirmed.

Indeed as he said the confirmation was as per the earlier application the petitioner had made for confirmation in March 2004 before Abongo filed his Objection. There was an affidavit supporting that application.

It stated that the petitioner was the beneficiary of his mothers Estate.

There was nothing wrong with that application or the supporting affidavit.

If the petitioner transferred some property to a 3<sup>rd</sup> party that would not be a ground to revoke the grant.

From the foregoing therefore I find application has no merit.

The application is dismissed with costs.

Dated 2<sup>nd</sup> October 2006.

**KABURU BAUNI**

**JUDGE**

Delivered in presence of

cc. Mobisa

for Applicant/Objector

for Respondent/Petitioner.