

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Succession Cause 114 of 1990

IN THE MATTER OF THE ESTATE OF SWERERI MASAMBU - DECEASED

AND

JOASH JIVET BUSU.....APPLICANT

AND

EZEKIEL MASAMBU AZANGU.....RESPONDENT

RULING

The Applicant, Joash Jivet Busu, disclosed in his application dated 10.1.2004 that in 1968, he bought the land comprised in the title No. Kakamega/Bumbo/302 from one Swareri Masambu Azangu who died intestate on 27.12.1985 before transferring the said land to him. The deceased is said to have been a bachelor. The Applicant averred in his application that he took possession of the land in 1965 and proceeded to plant tea and coffee on it. He also resided on it and also allowed the deceased to live on it as the latter had no where else to go.

When the deceased died, one Ezekiel Masambu Azangu applied for and obtained a Grant of letters of Administration on 9.8.90 to manage the estate of Swareri Masambu. The grant was confirmed on 18.5.1993 and Ezekiel Masambu Azangu became the heir of the said land absolutely.

The applicant deponed in his affidavit in support of his application that the said Grant was obtained by Ezekiel Masambu Azangu through fraud in that the latter falsely alleged and purported to be the son of the Swareri Masambu Azangu who had no son and had died a bachelor. The applicant also alleged in the application that Ezekiel Masambu Azangu failed in his application for the grant of letters of Administration to disclose all the facts relating to both the deceased and the fact that the land in question had been sold to the applicant who was residing on it and had developed it extensively. On this basis, the applicant sought revocation and annulment of the Grant. He also sought orders that the transfer of the said land to Ezekiel Masambu Azangu be cancelled and another Grant be issued to him and the land be transferred to him.

In his replying affidavit sworn on 2.3.2004, the Petitioner, Ezekiel Masambu Azangu conceded that the deceased was his uncle and had no wife or child at the time of his death. He contended that the deceased had during his lifetime invited the Petitioner to live with him on the said land and upon the death of the deceased the Petitioner became the heir of the said. He averred that the Applicant did not have a right superior to his to apply for Grant of letters of Administration.

In his replying affidavit, the Petitioner also averred that the Applicant had filed in this court H.C.C.C. No. 42 of 1999 (OS) claiming the said land on the basis of the doctrine of adverse possession. He further contended that the application was defective and had failed to comply with Order XVIII. A copy of the pleadings in Kakamega H.C.C.C. No. 42 of 1999(OS) was annexed as exhibit No. EMA 1. It was instituted by the Applicant against the Petitioner qua administrator of the estate of the late Swarere Masambu. It seeks declaratory orders only.

When the application came up for hearing on 16.11.2004, Mr. Michael Owuor advocate appeared for the Applicant. He reiterated most of the aforesaid matters appertaining to the Applicant's application. He also pointed out that the application for the Grant of Letters of Administration by Petitioner had told a lie as it contained various falsehoods including the allegations that the Petitioner was the son of the deceased.

Mr. Shitsama, Advocate, appeared for the Petitioner during the hearing. In his submissions, relying on his client's replying affidavit, Mr. Shitsama conceded that the applicant was a purchaser of the said land but was not a blood relative. He contended that if he had a claim, the Applicant should have directed it to the estate of the late Swareri Masambu. He submitted that the application was an abuse of the process of the court.

I have carefully perused the application and the replying affidavit. The court has power under section 76 of the Law of Succession act, Cap 160, to revoke or annul at any time a grant of representation whether or not it has been confirmed. The main thrust of the Applicant's application is that the Petitioner falsely alleged in the application for the Grant that he was the son of the deceased Swareri Masambu and failed to disclose that the Applicant was a purchaser in possession. Can it be said under section 76(b) of the Succession Act 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 or under section 76 (c) of the said Act that the Grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant? It is common ground that the petitioner was a relation of the deceased. It is also common ground that there was no consanguinal relationship between the Applicant and the deceased. The Applicant's claim on the basis of adverse possession or as a purchaser did not diminish or take away the right of the Petitioner to seek or obtain the Grant of Letters of Administration in the said estate nor did the incorrect description in the absence of any other closer relative, add anything to the right of the Petitioner to seek and obtain the Grant. In the circumstances of this

case, it cannot be said that the grant was obtained fraudulently because nothing really turned on the incorrect description. Being the closest blood relative of the deceased, the Petitioner would still have been entitled to seek and obtain the Grant. The fact that the Applicant was a purchaser and was in adverse possession to the deceased before he died and to the deceased's successor in title, namely the Petitioner, did not entitle him to seek or obtain the Grant in preference to the Petitioner who was related to the deceased by blood.

In his application the applicant kept mum about the fact that he had instituted HCCC No. 42 of 1992 seeking the title to the said land on the basis of adverse possession. That cannot be said to be exhibition of complete candour. The Applicant has no legitimate claim in so far as administration of the estate of the deceased is concerned. The fact that he is or may have been in adverse possession to the title of the deceased and the Petitioner as successor in title does not confer on him any right to seek or obtain the grant in priority to the Petitioner who is a blood relation of the deceased. He is however entitled to pursue his claim in HCCC No. 42 of 1999 (OS). Lack of success in this application does not in any way affect the merits of his claim in the said suit. There is no legal basis shown for annulling or revoking the grant much less appointing the Applicant as the Administrator of the estate of the deceased.

In these circumstances, the application fails. It is dismissed. Each party shall bear its own costs.

Dated at Kakamega this 27th day of December 2005.

G.B.M. KARIUKI

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