



REPUBLIC OF KENYA



**In re Estate of David Makari (Deceased) (Succession Cause
312 of 2010) [2023] KEHC 20781 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 312 OF 2010**

DK KEMEL, J

JULY 21, 2023

BETWEEN

GERITA NAKHUMICHA SITATI 1ST OBJECTOR

DAVID MAKARI SITATI 2ND OBJECTOR

DAVID KIZITO SITATI 3RD OBJECTOR

AND

JANE SIMIYU RESPONDENT

JUDGMENT

1. The objectors' summons dated May 18, 2018, seeks a revocation of grant issued to the Petitioner herein on May 17, 2012. The application is grounded on the fact that the grant was obtained fraudulently and or by making of a false statement and or concealment from the court of material information. That the objectors are daughter in law and grandchildren of the deceased herein respectively. That the petitioner is daughter in law to the deceased who obtained the letters of administration without obtaining the other beneficiaries' consent.
2. That upon obtaining the grant of letters of administration, the petitioner fraudulently transferred land parcel Bokoli/Chwele/358 which is being occupied by the deceased's sons and his family. The objectors also accuse the petitioner of using forged documents to obtain letters of administration.
3. The petitioner filed a replying affidavit to the summons. Therein, she depones that the objectors have no interest in the estate since the objectors are widow and sons of the deceased's son who have not obtained grant to the deceased's estate.
4. She deponed that she obtained grant and transferred land parcel Bokoli/Chwele/358 which measures one acre and the rest of the deceased beneficiaries have their shares of the estate elsewhere.



5. The application was canvassed by way of *viva voce* evidence. Allan Babu Onyango, the Land Registrar Bungoma County testified as OB-PW1 and his testimony was in relation to the deceased's parcels of land comprised in Bokoli/Chwele/337 and 358.
6. He testified that in relation to Bokoli/Chwele/358, the Green Card was opened on August 25, 1964 in the deceased's name and that the second entry of 2006 related to a caution by the petitioner while the third and fourth entries were on August 13, 2013 by way of a transmission to the petitioner's name.
7. In relation to parcel Bokoli/Chwele/337, the Green card was opened on August 25, 1964 in the deceased's name while the second entry in 2013 related to Zebedee Sitati Makari. He stated that he could not ascertain how the registration was effected. He added that subsequently, there was subdivision of the parcel to several portions which were subsequently closed on subdivision.
8. David Kizito Sitati, OB-PW1 stated that he resides on the disputed parcel of land which he termed as family land to which he is entitled to inherit. That he is the son of the Zebedee Sitati Makari.
On cross-examination, he stated that the Petitioner's husband is Amona Jembe Simiyu who was his uncle while the deceased was his grandfather. He denied that his father Zebedee Sitati Makari was allocated a portion in Bokoli/Chwele/337. He denied that the Petitioner's husband was allocated a portion in Bokoli/Chwele/358. He denied selling his portion on parcel Bokoli/Chwele/337.
9. OB PW2 Gerita Nakhumicha Sitati testified that she is the 1st objector. She denied having lodged the objection since she had been duped to sign a document. She stated that she wants the summons for revocation of grant herein dismissed because she is not the one who filed it.
On cross-examination, she denied having any issue with the Petitioner and that she suspects that it was David Kizito and his mother who lodged the objection. She stated that the 3rd Objector is her stepson while the 2nd objector is her own biological son. She maintained that the 3rd Objector sold off his portion of land.
10. OB-PW3 David Makari Sitati on his part adopted the 1st objector's testimony. On cross-examination, he stated that he has no claim against the Petitioner and that he has not filed any affidavit or filed any document against the petitioner.
11. Pet PW1 Jane Simiyu adopted her statement dated July 26, 2022 which is largely a reiteration of the petitioner's case summarized above as contained in her replying affidavit.
On cross-examination, she stated that parcel 358 had been allocated to her late husband. She stated that she did not involve the objectors as they had their own separate parcels of land. She maintained that she obtained the title lawfully on August 13, 2013 and that her brother in law Zebedee gave her the go ahead to lodge the succession so as to get the land belonging to her husband.
On re-examination, she denied defrauding the family members as they had no interest in her husband's plot number 358.
12. Pet PW2 Jackson Wetosi stated that the deceased herein passed on in the year 1967 leaving behind six sons. That the petitioner's husband was given land parcel Bokoli/Chwele/358 and the petitioner's husband later bought himself land elsewhere. Upon his relocation to his new parcel, Zebedee took advantage and ploughed the land. He stated that from the above, land parcel 358 ought to be transferred to the petitioner's husband.
On cross-examination, he stated that the Petitioner's husband was allocated parcel 358 and that the petitioner later filed this cause in order to get the one acre on plot 358.



13. Upon close of the respective cases, parties filed written submissions. The petitioner filed hers dated April 17, 2023 while the 3rd objector's are dated April 16, 2023. The same have been considered.

Analysis and determination.

14. This being an application for revocation of grant, the relevant provision of the law is section 76 of [cap 160](#) which provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
 - (b) 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;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances.
15. In the matter before me, there is no dispute that the petitioner took and indeed obtained letters of administration to the deceased's estate who at his demise had two parcels of land namely; Bokoli/Chwele/337 measuring approximately 16 acres and Bokoli/Chwele/ 358 measuring approximately one acre.
16. According to the land registrar (OB-PW1), the two parcels have already changed hands in that parcel No 337 has undergone several subdivisions while parcel No 358 has been transferred in the petitioner's name. It is also not in doubt that the petitioner ordinarily followed the channels and had the parcel transferred to her name. Further, according to the said land registrar, there is no evidence of how land parcel Bokoli/Chwele/337 was transferred and sub divided into several portions.
17. That being the case, I am to determine whether the process undertaken by the petitioner leading up to the issue of the grant was proper. It is not in question that the petitioner is the deceased's daughter in law while the objectors are daughter in law and children as well by virtue of the late Zebedee Sitati Makari (deceased) who was the deceased's son.



18. Section 29(a) of the Act defines who a dependant to an estate is. The Section provides that;
 - the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
19. The objectors as well as the petitioner do not fit this description of dependants. Nonetheless, case law has stated that for a grandchild to be able to inherit from the deceased, he must demonstrate through an application brought under section 26 of the Act that he or she was dependent on the grandparent immediately before his death. The application before this court is not contemplated by section 26 of the Act.
20. Be that as it may, a grant has been obtained by the petitioner which enabled her to transfer one of the parcels of the estate. It is not in dispute at the time of death, the parcel so transferred was registered in the deceased's name and there had been no formal proceedings to obtain letters of administration.
21. Section 51(2) of the Act gives information that must be given by an applicant for grant of letters of administration. The section mandates that information such as information as to the relationship the applicant has with the deceased. According to P & A 80 filed herewith, the petitioner described herself as the deceased's daughter in law.
22. According to the affidavit in support of the petition, the petitioner disclosed that the deceased had only one parcel of land and that she is the only survivor. This information is of course not true since as according to the evidence on record, the deceased had six children some of whom are deceased.
23. Hand in hand with this is a requirement under Rule 26 of the *Probate and Administration Rules* which states that:
 - 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
 - 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
24. From the onset, the petitioner and the 1st objector are both daughters in law to the deceased. Ordinarily, the petitioner ought to have obtained the 1st objector as person of equal priority with her.
25. This being the case, I find that the petitioner proceeded without informing and or seeking the objector's consent and this alone renders the entire process leading to the issue of the grant unprocedural and liable for revocation. Even if the other parcel No. 337 had been shared by some of the sons of the deceased, it was proper for the petitioner to involve all the family members of the deceased and then indicate in the schedule of distribution the assets already allocated and thereafter leave out the one acre on plot No.358 which had been earmarked for her husband Amona Jembe Simiyu and then proceed to claim the same. Once she did that then any member of the family would have gotten an opportunity to raise objections if any. That was not done by the Petitioner. It seems the petitioner just went to court with only one mission namely to get the one-acre parcel on plot No 358 yet the process of succession required that all the family members to be involved. That strategy by the petitioner was her Achilles Heel and a blot in the whole process. That being the position, the summons for revocation of grant has merit. However, revoking the grant in my view will be drawback in the conclusion of this old matter. It is noted from the record that the court did on February 7, 2019 appoint the petitioner and Isaac



Kituyi Makari as joint administrators. It is my view that it is fair to decline the revocation of grant since this court has already brought on board a second administrator. The two should now proceed with the remaining task. I am inclined to interfere with the certificate of co confirmation of grant by having it cancelled so that the administrators will go back to the drawing board and come up with a fresh distribution. As the title has changed hands, it is proper that the same be revoked and it reverts back in the name of the deceased pending distribution.

26. In view of the foregoing observations, I find the objector's application dated May 15, 2018 has merit. The same is allowed in the following terms:
- a. A fresh grant be and is hereby issued to Jane Simiyu and Isaac Kituyi Makari forthwith.
 - b. The certificate of confirmation of grant issued to Jane Simiyu on May 21, 2012 be and is hereby cancelled.
 - c. The registration of parcel number Bokoli/Chwele/358 in the name of Jane Simiyu be and is hereby revoked and/or cancelled and the same to revert in the name of the deceased David Makari and to await distribution.
 - d. The administrators are directed to file a fresh summons for confirmation within thirty (30) days from the date of this ruling.
 - e. Matter is fixed for mention on the 18/10/2023 to confirm compliance and for further directions.
 - f. As the matter involves family members, there will be no order as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 21ST DAY OF JULY 2023.

D KEMEI,

JUDGE.

In the presence of:

Wati for Petitioner

Genta N Sitati 1st Objector

David M Sitati 2nd Objector

No appearance Wanyonyi for 3rd Objector

Kizito Court Assistant

