



In re Estate of Alfred Mukabana Eshinali (Deceased) (Succession Cause 596 of 2014) [2023] KEHC 20032 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 596 OF 2014
SC CHIRCHIR, J
JULY 6, 2023**

BETWEEN

WILSON MAKARI MUKABANA PETITIONER

AND

FRANCIS OBONGITA CHUNGE OBJECTOR

RULING

1. Before this court is the summons dated November 15, 2021 seeking for revocation or annulment of the grant issued in this cause. The summons is supported by the affidavit of the Applicant and or the ground appearing on the face of the Application.

The Applicant's case

2. The Applicant depones that he is the only son and beneficiary of the estate of Alfred Mukabana Eshinali (Deceased). At the same time however, he says that he is the son of one John Ostialo Change, now deceased
3. He states that that the petitioner and his family had sold 0.5 acres out of the land parcel No East Wanga/ Isango/1979 being one of the Estate properties to his late father, at a price of Kshs 30,000. He has attached an agreement in the presence of a number of people including the Respondent herein.
4. That his father died before the transfer could be done. That when the petitioner applied for letters of administration he concealed the Estate's liability to his late father with respect to the 0.5 acres.
5. The Applicant further argues that in the circumstances, the grant was obtained through fraud misinformation, false statements and concealment of material facts.



The Respondent's case

6. The Application is opposed through the affidavit of the petitioner. He depones that the deceased owned land parcel Nos E Wangala/Isongo/1979, 1980 and 1981. That there was no sale of any property that took place after the deceased's demise. That the Kshs 30,000 was an advance towards funeral arrangement of the deceased and that in any event the Kshs 30,000 has since been refunded.
7. The petitioner further states that the applicant lacks the legal capacity to bring this suit on behalf of his late father.
8. The summons was canvassed by way of written submissions.

Applicant's Submissions

9. The Applicant in his submission reiterate that the deceased's family sold 0.5 acres from the deceased's property known as East/Wanga/Isongo/1979. The said portion was given to him by his late father, John Otsialo Chungu as a gift. He thereafter proceeded to use the subject portion with the full knowledge of petitioner.
10. That the petitioner failed to recognize the Estate's liability to his late father and instead included other persons as liabilities.
11. The applicants contend that it is dishonest of the petitioner to state that the Kshs 30,000 was for funeral expenses even in the face of a signed sale agreement. He further states that the purported refund agreement is a fabrication as none of the family members, who were involved in initial sale agreement appended their signatures in the later agreement.

Respondent's Submissions

12. It is the respondent submissions that the grant is not eligible for revocation as the distribution of the estate has been completed. It is further submitted that the applicant lacks the locus standi to bring the application as he is a heir to the deceased. It is also submitted that claim ought to have been filed before the Environment and Land Court as the applicant is not a creditor to the estate.
13. The respondent further contends that the applicant has no authority to lodge such a claim on behalf of his father's estate as he has no grant of representation to his said Estate.

Determination

14. I have considered the application, the annexures thereto, the reply and the rival submissions of the parties.
15. The following issues arises for determination:
 - a). Whether there was a sale of the deceased's land
 - b). Whether the said sale if any was a liability to the estate
 - c). Whether such sale was valid in law
 - d). Whether the applicant has locus standi to bring this claim



Whether there was a sale of the Deceased's Land

16. Attached to the applicant's affidavit is what one may describe as an agreement to sell a portion of the land by among others the petitioner herein. It was clearly a transaction between the deceased's family members and the Applicant's father one John Otsialo Chunge. The agreement involved a sale of ½ acre portion out of the parcel of land parcel No E Wanga/Isiongo/1979. Although there is no Title deed or certificate of search to show who owned the land at the time of sale, it is common ground that the land belonged to the deceased herein.
17. Attached to, the respondent's replying affidavit, is another document in which some people representing themselves as the family of John Otsialo Chunge is acknowledging the refund of the Kshs 30,000 on account of the fact that the earlier sale has aborted. The document was signed by 5 individuals on behalf of John's family. Thus, despite the respondent's denial, the 2 documents indeed confirm that a portion of land parcel No E Wanga/Isiongo/1979 was sold to the Applicant's father.

Was the sale a liability to the Deceased's Estate?

18. The deceased died on January 22, 1996 while the purported sale took place on March 17, 1998. A Liability to an estate is a liability that was incurred or entered into prior to a deceased's person's demise. Any transaction thereafter is not a liability to the Estate. It is therefore a misconception to allude that a sale which took place after the demise of the deceased, was a liability to the deceased's Estate.

Whether such sale was valid in law in any event

19. As Pointed out earlier, the deceased died on January 22, 1996 and sale took place on March 17, 1998. The grant was issued on December 1, 2014, and confirmed on April 1, 2016. Section 79 of the *Law Of Succession Act* vests the property of the deceased on the personal Representative once appointment has been done. However as at March 17, 1998 there was no representative that had been appointed Thus as at the time of sale on March 17, 1998, the property of the deceased had not vested on anyone. The purported sellers had no capacity to enter into any transactions affecting the Estate. What they were simply doing was intermeddling in the estate, an act which is criminalized under section 45 of the Act. Illegal transactions are unenforceable in law, in any event.
20. Even if the respondent had obtained a grant of letters of Administration at the time, under section 82(b) (ii) of the Act, he still could not sell the land in the absence of confirmation of the grant, save under an order of the court.
21. The Applicant herein has no claim therefore against the Estate, as his father was never a creditor to the Deceased's Estate. His claim is against the persons who purported to sell him the land, and he should pursue them as individuals.

Whether the Applicant has the locus standi to bring this claim

22. The suit property was sold to the applicant's father. He is therefore seeking to enforce a transaction on behalf of his late father's estate. However, he has not demonstrated that he has the Locus Standi to prosecute the claim on behalf of his father's estate. There is no proof of any representation to his father's Estate giving him authority to litigate on behalf of the said Estate.
23. Finally, to the extent that the Applicant's claim does not lie against the Estate such a claim will not be determined in these proceedings or by this court. His remedy lies elsewhere.
24. In conclusion the application has no merit. The same is dismissed with no orders as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 6TH DAY OF JULY,
2023**

S. CHIRCHIR

JUDGE

In the presence of:

Eric- Court Assistant

Mr. Mandia for the Respondent

No appearance by the Applicant.

