



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNCOMA

P & A CAUSE NUMBER 45 OF 1998

IN THE MATTER OF THE ESTATE OF MWASAME CHEMIATI LUVISIA (DECEASED)

FREDRICK WEKESA MWANJA.....ADMINISTRATOR/PETITIONER

VERSUS

DAINA MUKASA.....1ST OBJECTOR/APPLICANT

PHILIP MUCHAI.....2ND OBJECTOR/APPLICANT

R U L I N G

The deceased Mwasame Chemiati Luvisia died on 27th November, 1978. He left widow Birita Mwasame and sons Joram Sita Mwasame, Philip Muchai Mwasame, Moses Barasa Mwasame and Josi Wasike Mwasame. He has land parcel No. Kakamega/Lwandeti/1291 measuring 4.8 hectares. In May 1980 Berita Mwasame sold the entire parcel of land Kakamega /Lwandeti/1291 to Fredrick Wekesa Mwanja the petitioner.

It would appear that the widow and children of deceased were reluctant to apply for letters of administration to enable them transfer the purchased land to the purchaser Fredrick Wekesa Mwanja. To compel them take letters of administrations, the purchaser Fredrick Wekesa filed citation to accept or refuse letters of administration intestate in Bungoma chief Magistrate's Court P & A 47 of 198 requiring them to apply for grant in default the petitioner will seek leave for grant to be issued to him in his capacity as a creditor of the estate under Section 66 (d) of the law of Succession Act. The citees did not file response or act. Leave was granted on 27th September, 1995 by A O Muchelule, Senior Principle Magistrate (as he then was).

The Petitioner then filed this succession Cause No. 45 of 1998 and on 14th May, 2001 the petitioner was issued with grant of letters of administration intestate to the estate of Mwasame Chemiati Luvisia. He applied for confirmation of the grant which was issued on 28th June, 2002 and certificate of confirmation issued showing as follows:

Schedule

Name: Description of Properties/Share of Heirs

Fredrick Wekesa Ndivisi/Muchi/1443 4.8 Hectares

From the date of confirmation this cause embarked on history of its kind. It has been handled by 14 judges, Mbitio J (2001), Osiemo J (2002), Ringera J (2002), Sergon J (2004), Ombija J (2006), Wanjiru Karanja J (2007), Muchemi J (2010), Onyanicha J (2011), Muchelule J (2012), Gikonyo J (2013), Mabeya J (2014), Omondi J (2015 and Aroni J (2016).

On the 22.32004 the Applicants filed this Summons for revocation/annulment of the grant seeking for the following orders:

- (a) That the letters of administration issued to Fredrick Wekesa made on 14th May 2001 and confirmed on 28th June 2002 be revoked or annulled.**
- (b) That the letters of administration in respect of Mwasame Chemiati Luvisia be made to the applicants herein.**

The application is supported by the affidavit of Philip Muchai the 2nd Applicant. He stated that the petitioner without knowledge of the

applicants proceeded to take out letters of administration in respect of deceased estate. He deponed that without knowledge of deceased family petitioner proceeded and obtained the land title deed in respect of Kakamega/Lwandeti/Kabras/1291. He deponed that the respondent now wants to evict deceased entire family from subject land.

By Consent this application was to be canvassed by viva voce evidence. Both parties filed written witness statement and gave evidence.

OW2 Philip Muchai Mwasame testified that he is son of deceased Mwasame Chemiati who died in 1978. He testified that they were staying on Land parcel N.Kabras 1291 and the deceased had two wives Berita and Dinah. He testified that deceased had sons and three daughters and they were never involved in the sale of the land. He testified that they went to Butali Tribunal that ordered they share deceased land and that he 1st saw exh.1 the sale agreement in court in the year 1999. He testified that the agreement shows Baraza selling to Fredrick. He stated that he did not know about the sale.

OW2 Moses Barasa testified that he does not know Fredrick Wekesa. He stated that Diana Mukasa is his step mother. He testified that he stays on parcel number 1291 and his father was Mwasame Chemiati. He testified that his mother was Basula Nasambu and she died but it was alleged she sold land to Fredrick but he did not know about the sale. He testified that he did not sign any agreement. He testified that Fredrick came with people who forced him to sign the agreement.

OW3 Jessi Wasike Masame testified that he is son of the late Masame Chemiati, he testified that he wished to adopt his statement recorded on 1.5. 2014. on cross examination he stated that his step mother was Berit and he does not know if it is her mother who sold the land. He stated that his mother died in 2006 and was buried in her sisters land at Tongareni and he was not around when Berita died and he does not know where she was buried.

The Petitioner/Respondent filed his witness Statement and gave evidence. He testified he got registered as a buyer of subject land from Berita Mwasame and her 3 sons, Joran, Philip and Moses.

He testified that he bought the land through J.M. Wafula Advocates on 22.5.1980 and paid for the land and he paid balance of Kshs.500/= to Berita and sons in presence of chief and the estate was cited. He testified that they did not take out letters of administration.

He testified in exh.5A,B,C,D that all of them appended signatures confirming the money they took from him and bought land elsewhere. He testified that Berita and Joran were not buried in the said land. He testified that it is not true that in 1980 wife of the deceased had no power to sell the land.

On cross examination he stated that it is Berita who sold him the land and he filed for succession.

PW2 Moses Wamoja Musee testified that he is a retired chief and that he recorded his statement dated 3.5.12 and he adopted it as evidence in chief. He testified that in 1982 Fredrick visited him and he owed the applicants a balance of Kshs.500/= and he wrote to them and on 28.4.1982 they came to him and received the balance and they acknowledged the same.

After the Hearing, Counsel for both parties filed their respective written submissions. Mr. Sichangi for the applicant submitted that the Petitioner/Respondent relied on an agreement of sale which was a forgery and the applicants have categorically denied entering into any sale agreement.

He submitted that during the proceedings the respondent was told to ensure the applicants fingerprints are compared with those in his sale agreement but he did not pursue that approach.

He submitted that proceedings of citation that were produced by petitioner were initiated during the lifetime of BERITA MWASAME and when they were served they engaged the firm of J.OKELLO & COMPANY ADVOCATES who filed a notice of objection on behalf of 1st widow and the sons objecting to granting of letters to the petitioner.

He submitted that she lacked capacity to sell or pass good title that the sellers as alleged by the respondent had no letters of administration and they had no authority to deal with the estate of the deceased relying on authority in **BUNGOMA I-ICC SUCCESSION CAUSE No.481 Of 2012. Timona Kiberenge Sikolia and Johnson Kamau Versus Kennedy Makokha Kiberenge and 2 Others.**

Mr. Onyando for the Petitioner/Respondent submitted that the petitioner bought the suit land and 2nd Applicant was a witness to the sale agreement which was exhibit FWM-I

He submitted that the 2nd applicant together with entire family after the sale moved to Trans-Nzoia. He submitted that the petitioner purchased the suit land in 1980 before the coming into force of Law of Succession

Act and applicable law then was customary law, therefore, the mother to

the 2nd objector and brother was within the customs to sell the land to the petitioner.

Having judiciously analyzed the Pleadings, the evidence on the record and the submissions of the advocates of the respective parties; I find that the main issue that arises for determination is whether the Objector's application meets the requirements for revocation of a grant as set out in Section 76 of 'the Law of Succession Act. Before delving into whether the Objector / Applicant has demonstrated the grant should be revoked, I will first address the issue of who between the Objector and Respondent had the right to apply for letters of administration.

Section 66 of the Law of Succession Act, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in Section 66(a)-(d) which provides: -

"66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) Surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- (c) The Public Trustee; and**
- (d) Creditors"**

The Petitioner herein filed the application to be appointed as an administrator of the estate of the deceased as a creditor of the estate.

The petitioner's contention is that when he applied for leave to be allowed to take out letters of administration, he cited the entire family to accept or refuse letters of administration and they filed notice of refusal of grant through their advocate M/S J.O. Okello & Co. Advocates but never took a step of taking up the letters of administration therefore they were aware of the process.

That being settled, I must now address whether in the circumstances, the grant issued to and confirmed to the Respondent ought to be revoked. The law on revocation of grants is Section 76 of the Law of Succession Act which provides:

Section 76: 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 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 order or allow; 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.**

An examination of the pleadings and submissions reveal that the

Objector's bone of contention is that the grant obtained by the Respondent was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Specifically, the Objectors cited the exclusion of them from participating in Bungoma Succession Cause 45 of 1998 as proof of the material non-disclosure. The Objector further alleged that the Respondent had failed to obtain the relevant consents from the dependants of the deceased which draws the inference that the proceedings to obtain the grant were defective in substance.

This is an application by the objectors seeking revocation of the grant issued to the petition on 28th June, 2002. The application is brought under Section 76 of the Law of Succession Act. Section 76 empowers the court to revoke or annul a grant issued either on its own motion or application on the following grounds: -

- a) Where there is deficiency in proceedings to obtain grant.
- b) Fraud or concealment of material particulars by petitioner.

- c) False allegations.
- d) Failure to carry out the administration of the estate diligently.
- e) Where the grant has become inoperative or useless due to subsequent circumstances.

The appellant should, therefore prove any one or all the grounds to the required standard for in civil cases for the court to revoke the grant.

The first ground of the applicant/objective is that the grant was obtained unprocedurally and effective in substance. In his supporting affidavit the application deponed that the petitioner without that knowledge cited the estate of the deceased in Bungoma CMCC 47 of 1994 and proceeded to take out letters of administration in Bungoma Succession No. 45 of 1998.

From the record, the petitioner filed application to court and a citation was issued by the District Registrar in May, 1994 stating:

"Republic of Kenya

In the Senior Principal Magistrate Court at Bungoma

Succession Cause No. 47 of 1004

In the matter of the estate of Mwasame Chemiati Luvisia (Deceased)

Citation to accept or refuse letters of Administration Intestate

To:

- 1. Berita Mwasame**
- 2. Joram Soita Mwasame**
- 3. Philip Muchai Mwasame 4 Moses Barasa Mwasame**
- 5. Josi Waside Mwasame**

PO Box 381

WEBUYE

WHEREAS it appears by the affidavit of Fredrick Wekesa Mwanja of P O Box 285, Bungoma, sworn on the..., day of May, 1994, that the above named Mwasame Chemiati Luvisi of Natete Luandeti Location died on the 27' November, 1978 intestate leaving you he said Berita Mwasame, Ioran Sita Mwasame, Philip Muchai Mwasame, Moses Barasa Mwasame and Jasi Wasike Mwasame his widow and sons as persons entitled to share in his estate.

AND WHEREAS it further appears by the said affidavit that the said Fredrick Wekesa Mwanja lays claim to the deceased's estate by virtue of the matters depend to in the said affidavit

Now this is to direct that you, the said Berita Mwasame, Joran Sita Mwasame, Philip Muchai Mwasame, Moses Barasa Mwasame and Jasi Wasike Mwasame do within fifteen days after service hereon on you (inclusive of the date of service) cause an appearance to be entered for you in the Senior Principal Magistrate's Court registry and accept or refuse letters of administration of all the estate which by law devolved to and vests in the persona/ representative of the deceased or show cause why the same should not be granted to the said FREDRICK WEKESA MWANJA.

AND TAKE NOTICE THAT in default of your so appearing and accepting and extracting letters of administration of the said estate to the said FREDRICK WEKESA WANJAU your absence notwithstanding.

Dated at Bungoma this day of May, 1994

DISTRICT REGISTRAR "

Upon being served with the citation the citees responded on 3rd June, 1994 by filing notice of refusal stating:

"To District Registrar

Senior Principal Magistrate's Court

Bungoma

TAKE NOTICE that BERITA MWASAME (widow), PHILIP MUCHAI MWASAME, MOSES BARASA MWASAME and JOSI WASIKE MWASAME (sons) of the deceased care of J Okello & co. Advocates, P O Box 1281, KAKAMEGA being heirs and beneficiaries of the deceased's estate hereby give Notice of Refusal of the granting of letters of administration intestate to FREDRICK WEKESA MWANJA and hereby also give notice of intention to accept and extract letters of administration.

Dated at Kakamega this 3rd day of June, 1994

J OKELLO & co. ADVOCATES FOR THE BENEFICIARIES"

The beneficiary did not take any action to file succession cause. Upon application the petitioner was granted leave to file Succession on 7th September, 1995 by A. O. Muchelule Senior Principal Magistrate. Upon obtaining that leave the petition filed this petition in Bungoma High Court Succession No. 45 of 1998. He applied for grant which was issued on 14th May, 2001 by Mbitio J and subsequently confirmed on 28th June, 2002 by Ringera J.

The process of citation is governed by the provision of part VI of the probate and Administration Rules, Section 22 of the probate and administration rules provide: -

1. "A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

2. Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the last survivor of such executors or of any beneficiary under the will.

3. A citation in Form 35 calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiration of three months from the death of the deceased: Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.

4. A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself.

5. If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may—

a. in the case of a citation under sub rule (1), petition the court (if he has not already done so) for a grant to himself;

b. in the case of a citation under sub rule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;

c. in the case of a citation under sub rule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application.

(6) An application under subrule (5) shall be supported by an affidavit showing that the citation was duly served and that the person cited has not entered an appearance.

(7) If the person cited has entered an appearance but has not within 30 days after his appearance applied for a grant under subrule (4), or has failed to prosecute his application with reasonable diligence, the citor may—

a. in the case of a citation under subrule (1), petition the court for a grant to himself;

b. in the case of a citation under subrule (2), apply by summons to the court for an order striking out the appearance and for the endorsement on the grant of such a note as is mentioned in paragraph (b) of subrule (5);

c. in the case of a citation under subrule (3), apply by summons to the court for an order requiring the person cited to take a grant within a specified time or petition the court for a grant to himself or to some other person specified in the petition, and the application shall in each case be served on the person cited."

The Petitioner followed these steps in his application for grant and in particular Section 22(7) of the probate and administration rules. The grant issued under those directions was, therefore, proper and proceedings leading to the same were not defective in procedure or substance.

The second ground is whether the grant was obtained fraudulently by making a false statement or concealment of something material to the case. Mr. Sichaingi for the objector/applicant submitted that the basis of objection is that the petitioner alleged to have bought land parcel No. Kabras/Lusendet/1291 from the widow of the deceased. The Petitioner tendered a land sale agreement for the sale. The objectors who were sons of the deceased denied entering into or their mother Berita entering into the said agreement and that the document and signatures of objectors relied on were forgery and false. The said Berita Mwasame the widow of the deceased is the one who sold the property and signed the agreement. In effect the objectors are contending that the documents adduced in court in furtherance of the grant were a forgery and therefore, fraudulent.

Dealing on the issue of forgery, the court in RE-estate of Samuel Ngugi Mbugua (Deceased) (2017) eKLR stated:

"Rules of construction should be regarded as a dictionary by which all parties including the court are bound, but the court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning. In other words, whether or not the testator has been in his own dictionary. "

In the matter of the estate of late Sospeter Kimani Waithaka Succession Cause 341 of 1998 the Court held:

"The Will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them "

The applicant/objector did not lead any evidence to show that the agreement tendered in court was a forgery or that he did not sign the agreement together with his mother as alleged by the Petitioner. In short he did not lead any evidence to show that the signature or thumbprint in the agreement is not his. The law places a burden on him to prove that particular fact which he wants the court to believe, The only evidence in court in that respect is his denial that the signature is his. That is not enough. It is upon him to show that it is a forgery. Having not proved in this court that the agreement annexed by the petitioner is a forgery; he has failed to prove that the petitioner obtained the grant fraudulently or by false statement.

The other grounds for revocation (c) and (d) under Section 76 do not concern this application.

Counsel for the parties in their submission urged the court to make a finding the issue of the validity or otherwise of the sale of land by Berita and his sons. I decline the invitation to make a determination on the same as that was neither pleaded and even if it were pleaded, is not a matter for determination by this court. The prayers sought before the court were specific in the application dated 22nd March, 2004 which I hereby reproduce.

"Let all parties concerned attend the judge in chambers on 14th October, 2004 at 9.00 0'clock in the fore noon thereafter on the hearing of applicants DIANAH MUKASA and PHILIP MUCHAI Beneficiaries of the estate of the above named Mwanase Chemiati Luvisia for an order that:

a. That grant for letter of administration to Fredrick Wekesa made on 14th May, 2001 and confirmed on 28/7 June, 2002 be revoked or annulled.

b. The letters of administration in respect of Mwasame Chemiati Luvisia be made to the applicant's herein.

Which application is grounded upon the annexed affidavit of DIANAH MUKASA and PHILIP MUCHAI and on the following grounds.

a. That the proceedings to obtain grant were defective in substance.

b. That the grant was obtained fraudulently by making 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 untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorant or in law to justify the grant notwithstanding that the allegation was made in ignorant or in advert.

d. That was issued irregularly as there existed no conflict between the deceased and the administrator. '

None of the grounds stated in the application have been proved.

In the result, after considering the application, evidence and submissions, I find no merit in the application for revocation by the Objector/applicant dated 22nd March, 2004 and hereby dismiss it with costs.

Dated, signed and delivered at Bungoma this 2nd day of February, 2021.

S N RIECHI

JUDGE