



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO.103 OF 2009**

**IN THE MATTER OF THE HENRY MICAH OMINO (DECEASED)**

**BETWEEN**

**JOAB OUMA.....OBJECTOR/APPLICANT**

**AND**

**JOSEPHAT KOLA OMINO.....1<sup>ST</sup> RESPONDENT/ADMINISTRATOR**

**LINDA ATIENO OMINO .....2<sup>ND</sup> RESPONDENT/ADMINISTRATOR**

**PHILISTER OLILO OMINO .....3<sup>RD</sup> RESPONDENT/ADMINISTRATOR**

**ELIZABETH OMONDI OMINO .....4<sup>TH</sup> RESPONDENT/ADMINISTRATOR**

**JUDGMENT**

1. The estate **Henry Micah Omino (Deceased)** was settled by this court by a certificate of confirmation of grant dated 31<sup>ST</sup> October, 2018.

**Application**

2. By summons dated 24<sup>th</sup> June, 2019 filed on 25<sup>th</sup> June, 2019, the Objector/Applicant prayed for orders **THAT**:

**1) The Grant of Letters of Administration to the Administrators/Respondents be revoked and annulled**

**2) That the Administrators/Respondents refund Kshs. 725,000/- to the Applicant being the money paid for purchase of a portion of property known as KIBOS MIWANI CENTRAL 6096/2(IR 1597/3) which formed part of the deceased's estate**

**3) Costs of the application**

3. The application is premised upon the grounds on the face of the application, Objector/Applicant's affidavit and the submissions filed on behalf of the applicant. Briefly, the Objector/Applicant's has argued that:

**a. The grant herein was confirmed without his knowledge**

**b. He bought a portion of KIBOS MIWANI CENTRAL 6096/2(IR 1597/3) (the suit land) from the deceased vide agreement dated 07<sup>th</sup> February, 2003 and had paid him Kshs. 725,000/- of the total price of Kshs. 4,275,000/-.**

**c. The Respondents/Administrators concealed the fact of the sale to court**

4. The Respondents/Administrators opposed the application and filed a replying affidavit sworn by the 1<sup>ST</sup> Respondent/Administrator. The averments by the 1<sup>ST</sup> Respondent/Administrator sums up their stand point on this application. These averments include **THAT**:

**a. They were unaware of the said sale agreement**

**b. That the sale agreement herein is unenforceable for lack of consent from the Lessor, the Government of the Republic of Kenya**

**c. The completion date was 90 days and deceased died 5 years thereafter**

**d. There is no evidence that Kshs. 725,000/- was paid to the deceased**

#### **DETERMINATION**

5. Details have emerged that there was an agreement between the Objector/Applicant and the deceased for the sale of portion of the suit land. Accordingly, at the very least, the Objector/Applicant could be treated as a creditor, thus, an interested party for purposes of section 76 of the Law of Succession Act. Therefore, he is within his right to apply for revocation of grant as he has done.

#### **Revocation or annulment of grant**

6. I now turn to the substantive issues before me. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

**Revocation or annulment of grant 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 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**

**iv. that the grant has become useless and inoperative through subsequent circumstances.**

7. After hearing the arguments of the parties, I should determine, whether: -

**(a) 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**

**(c) 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**

8. Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties.

9. Of relevance in these proceedings is whether such material facts were deliberately concealed from this court during confirmation of the grant when it made a decision on distribution of the estate.

10. Accordingly, by virtues of the law, and having considered the facts of this case, I find that the Applicant has not satisfied the court that:

**(a) 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**

**(c) 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**

11. From the foregoing, I find that the Objector/Applicant has not demonstrated that the Respondents/Administrators sought to deliberately defraud him and the application for revocation must therefore fail.

12. The foregoing notwithstanding, I wish to state that where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions.

12. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased.

13. The parties herein have raised weighty issues concerning validity of the sale agreement and the part payment made to the deceased and refund thereof, which issues ought to go for trial.

14. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters.

### **Findings and Orders**

15. The analysis above leads me to the conclusion that:

**1) The dispute on the sale of a portion of KIBOS MIWANI CENTRAL 6096/2(IR 1597/3) as claimed by the Objector/Applicant and refund of Kshs. 725,000/- in respect thereof cannot be conveniently determined in these proceedings.**

**2) The Objector/Applicant has not satisfied section 76 of the Law of Succession Act.**

**3) In the upshot, the Objector/Applicant has not made a case for the success of his application dated 24<sup>th</sup> June, 2019 filed on 25<sup>th</sup> June, 2019 and it is dismissed**

**4) Costs of the application shall be paid by the Objector/Applicant**

**DELIVERED AND SIGNED AT KISUMU THIS 13<sup>th</sup> DAY OF February 2020**

**T. W. CHERERE**

**JUDGE**

**READ IN OPEN COURT IN THE PRESENCE OF-**

**Court Assistants - Amondi/Okodoi**

**For Objector/Applicant - N/A**

**For Respondents/Administrators - Mr. Otieno**