



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 14 OF 2018**

**(Formerly Kisii High Court Succession Cause No. 127 of 2012)**

**IN THE MATTER OF THE ESTATE OF SIMON ROBI MAROA (DECEASED)**

**-between-**

**GRACE KEMUNTO ROBI.....OBJECTOR/APPLICANT**

**-versus-**

**1. ESTHER BOSIBORI MIYONGA**

**2. KEFA OKETCH MOINDE.....PETITIONERS/RESPONDENTS**

**RULING NO. 2**

1. This ruling is in respect of the Summons for Revocation of Grant dated 02/05/2018 (hereinafter referred to as '**the Summons**'). The Summons was filed by **Grace Kemunto Robi** (hereinafter referred to as '**Grace**') on 03/05/2018.

2. Grace was the wife of the deceased herein one **Simon Robi Maroa**. I will henceforth refer to Simon Robi Maroa as '**the deceased**'.

3. The Summons was based on 28 grounds. Those grounds appeared on the body of the Summons. There were however two main grounds in support of the Summons. The first one was that the true and legitimate beneficiaries of the deceased were not notified of the proceedings and as such they did not participate and were disinherited. The second ground was that another property registered in the name of the deceased was left out. That was **Bukira/Buhirimonono/1531**. The Summons was supported by an Affidavit sworn by Grace on 02/05/2018.

4. The Respondents opposed the Summons. They relied on the Replying Affidavit sworn by Kefa Oketch Moinde who is the 2<sup>nd</sup> Respondent herein. The Affidavit was evenly sworn and filed on 11/06/2018. I will refer to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as '**Esther**' and '**Kefa**' respectively.

5. It was contended in opposition to the Summons that Grace was fully made aware of the succession proceedings that led to the issuance of the Grant and subsequent confirmation. That, Grace took part in a Citation Cause in *Kisii High Court Succession Cause No. 591 of 2010* where she was ordered to petition for the representation of the grant in respect of the estate of the deceased in vain. The Respondents were thereafter granted leave to institute the proceedings.

6. The Respondents posited that even after the citation proceedings were allowed aforesaid they still complied with the law and placed appropriate notices in the Kenya Gazette and Grace was kept aware of the proceedings throughout. They vehemently denied the allegation that they dealt with the proceedings fraudulently and concealed material facts. They also denied any acts of misrepresentation.

7. On the confirmation proceedings and subsequent registration of the parcel of land known as **Bukira/Buhirimonono/2023** in the name of **Kefa**, the Respondents contended that the transaction was protected under **Section 93** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the LSA**'). The Respondents prayed that the Summons be dismissed accordingly.

8. Directions were taken and the Summons was disposed of by way of written submissions where both parties duly complied. Each party buttressed their positions and relied on several decisions.

9. I have carefully perused the Summons and the Replying Affidavit together with the submissions and the decisions referred thereto. I find two main issues for determination. The first one is whether the grant was obtained fraudulently, with concealment of material facts and with misrepresentations. The second is whether the confirmation proceedings were regular and if **Section 93** of the **LSA** aids the Respondents.

10. I will first deal with the manner in which the grant was issued.
11. From the record, the Respondents instituted citation proceedings *vide Kisii High Court Succession Cause No. 591 of 2010 Esther Bosibori Miyonga & Kefa Oketch Moinde (Citors) vs. Grace Kemunto Robi, Wilfred Simon & Sosytenno Mboya Simion (Citees)*. Both the Citors and the Citees were duly represented by Counsels. The Court (**Makhandia, J** (as he then was) recorded a consent by the parties that the Citees were to petition for the grant of representation of the estate of the deceased within 1 month and in default the Citors were at liberty to do so. The consent was recorded before Court on 08/04/2011 and a formal order was extracted on 14/04/2011.
12. It appeared that the Citees did not proceed in terms of the consent order. Consequently, the Citees (now Respondents) instituted *Kisii High Court Succession Cause No. 127 of 2012* in petitioning for the grant of representation. A Gazette Notice No. 3057 was carried out in the Kenya Gazette Vol. CXVII-No. 47 dated 29/04/2016 informing the general public of the Court's intention to issue a grant to the Respondents on lapse of 30 days and calling for any objection thereto.
13. There being no objection the Court issued the grant on 18/08/2016.
14. I have also perused Form P&A 5. It is the Affidavit in support of the Petition. The Respondents named the children of the deceased including those who were then dead. They also named Grace. They further named the second wife of the deceased one **Ann Simon** whom they indicated that she was then dead. The Respondents went further and disclosed that they were enjoined in the Petition by the leave of the Court.
15. Having carefully considered the manner in which the grant was issued I am not convinced that the issuance thereof was preceded by fraud, concealment of material facts or misrepresentations on the part of the Respondents. The Respondents fully complied with the law. They took out citation proceedings and conceded to accord the members of the family of the deceased the first opportunity to petition for the grant. The family members however did nothing despite then being represented by Counsel. The Respondents then petitioned and named the members of the deceased as beneficiaries. The Court further placed a notice in the Kenya Gazette and called for any objections. There were no objections for the period of 30 days.
16. The grant was rightly obtained. None of the grounds provided for in **Section 76 of the LSA** for the revocation or annulment of a grant were proved in this Cause. Therefore, the prayer for revocation and/or annulment of the Grant issued on 18/08/2016 fails.
17. The second issue is whether the confirmation proceedings were regular and if **Section 93 of the LSA** aids the Respondents. The grant was confirmed by the Court on 04/05/2017. A Certificate of Confirmation of the Grant was issued on the same day. The Certificate was rectified *vide* an application dated 06/06/2017 on 29/06/2017 and an Amended Certificate issued.
18. Whereas the Respondents contended that the transfer to Kefa is protected in law aforesaid, the starting point is how the confirmation proceedings were undertaken.
19. According to the record, **Mr. Nyambati** Counsel for the Respondents appeared in Court on 04/05/2017 and prosecuted the confirmation application dated 15/03/2017. The application was allowed as prayed. There was no indication on the record if the beneficiaries as disclosed in the Form P&A 5 attended Court. There was as well no evidence of service upon any of them. The record indicated that the beneficiaries were 14. Only two were represented.
20. A similar scenario occurred on 29/06/2017 when the Respondents prosecuted an application for rectification of the grant. It is imperative to note that the initial confirmation devolved the parcel of land known as **Bukira/Buhirimono/2023** to Esther to hold for herself and in trust for the other 11 beneficiaries who were Grace and 10 children of the deceased. The Amended Certificate devolved the property wholly and absolutely to Esther.
21. **Article 50 of the Constitution** provides for the *right to fair hearing* of disputes before Courts or tribunals or any other body. One of the tenets of the right to a fair hearing is that all parties in a dispute must be accorded an opportunity to present their cases. In this case the right to the beneficiaries to attend the confirmation and the rectification hearings on 04/05/2017 and 29/06/2017 respectively was flouted. There is no evidence that any of the beneficiaries was called upon to attend Court accordingly.
22. The argument by the Respondents that the transfer of **Bukira/Buhirimono/2023** to Kefa is protected by **Section 93 of the LSA** can only be interrogated if the confirmation proceedings were regular. Since the beneficiaries' cardinal right to be heard was contravened, then the fairest order in the circumstances is to revisit the confirmation proceedings. It is during the confirmation proceedings where the issue of **Section 93 of the LSA** will be considered in light of the jurisdiction of this Court.
23. From the foregone analysis this Court now makes the following final orders on the Summons for Revocation of Grant dated 02/05/2018:  
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  - (a) **The issuance of the Grant of Letters of Administration Intestate made to Esther Bosibori Miyonga and Kefa Oketch Moinde on 18/08/2016 was in accordance with the law.**
  - (b) **The confirmation proceedings undertaken on 04/05/2017 and the proceedings on the rectification of the grant on 29/06/2017 be and are hereby set-aside.**
  - (c) **The resultant Certificate of Confirmation dated 04/05/2017 and the resultant Amended Certificate of Confirmation dated 29/06/2017 be and are hereby revoked and/or annulled.**

**(d) The registration of the parcel of land known as Bukira/Buhirimonono/2023 to Kefa Oketch Moinde is hereby cancelled and the parcel of land shall revert to the name of Simion Robi Maroa, deceased.**

**(e) The Summons for Confirmation of Grant dated 15/03/2017 shall be heard afresh. To that end, the application shall be served upon all the beneficiaries appearing in Form P&A 5 within 14 days of this ruling.**

**(f) The Summons for Confirmation shall be fixed for directions on 11/03/2020.**

**(g) Since the Summons for Revocation has partly succeeded the Respondents shall bear one-half the costs thereof.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 7<sup>th</sup> day of February, 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Oguttu Mboya**, Counsel instructed by the firm of Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates for the Objector/Applicant.

**Mr. Nyambati**, Counsel instructed by the firm of Messrs. G. M. Nyambati & Company Advocates for the Petitioners/Respondents.

**Evelyne Nyauke** - Court Assistant