



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 21 OF 1987

IN THE MATTER OF THE ESTATE OF SAUL MAGWINGWI SONGWA (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION AND/OR ANNULMENT OF GRANT

BETWEEN

PATRICK BARASA MAKWINGWI.....1ST APPLICANT

ARMSTRONG S. SONGWA.....2ND APPLICANT

AND

GEORGE WAKHUNGU SONGWA.....RESPONDENT

RULING

[1] Before the Court for determination in this ruling is the Summons for Revocation of Grant dated **18 October 2019**. It is expressed to be brought by the two applicants, **Patrick Barasa Makwingwi** and **Armstrong Simiyu Songwa**, under **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, and **Rules 44, 45 and 49** of the **Probate and Administration Rules** for the following orders:

[a] Spent;

[b] Spent;

[c] That the Court be pleased to make an order for the transfer of this cause to the High Court at Bungoma for hearing and disposal;

[d] That the Grant of Letters of Administration Intestate issued to the Petitioner herein on **4 February 1994** and confirmed on **31 January 2017** be revoked or annulled;

[e] That the applicants herein be made legal administrators or co-administrators of the estate of the deceased;

[f] That costs be provided for.

[2] The application was predicated on the grounds that the petitioner obtained the grant without full disclosure of the entire estate of the deceased, and especially some **Kshs. 3,500,000/=** that he received in respect of estate land that was compulsorily acquired by the Government. It was also alleged that the petitioner went ahead to unilaterally transfer the whole parcel of land measuring over 40 acres into his name and then proceeded to sell off commercial plots without any reference to the other beneficiaries, who have been to hardship and prejudice as the petitioner continues to fritter away the estate. They averred that it is in the interest of justice that the inheritance of the vulnerable beneficiaries be protected, especially because some of them are currently facing the threat of being evicted from portions of the estate land that they are currently occupying.

[3] The application was supported by the affidavit sworn by the 2nd applicant, **Armstrong Simiyu Songwa**, annexed thereto, sworn on **18 October 2019**. He averred therein that he is one of the sons of the deceased; and that the deceased died on **28 July 1987** and left behind a piece of land measuring 17.26 Ha, known as **KIMILILI/KAMUKUYWA/875**; which property is the subject of this Succession Cause. He further averred that the petitioner brought this cause and was issued with a Grant of Letters of Administration Intestate on **4 February 1994**.

His complaint however was that the petitioner did so without a full disclosure of all the material facts in respect of the estate of the deceased. The 2nd applicant averred, for instance, that the petitioner omitted the names of some of the deceased's daughters as well as the grandchildren of the deceased whose parents had since died.

[4] The 2nd plaintiff also took issue with the fact that the petitioner failed to account for funds received from the Government for part of the deceased's land that was compulsorily acquired vide Gazette Notice No. 3876 dated **4 September 1992** and Gazette Notice No. 4631 dated **23 December 1992**, for which a total of **Kshs. 3,500,000/=** was paid to the estate through the law firm of **Kiarie and Co. Advocates**. He was particularly concerned that the petitioner has transmitted the entire suit property into his name and has gone ahead and filed a lawsuit to evict or stop some of the beneficiaries from accessing the land, being **Kimilili ELC No. 34 of 2019**. In support of his assertions the 2nd applicant has annexed copies of the title confirming that the petitioner is now the registered proprietor of the suit land and the plaint filed in the Kimilili case.

[5] The court record shows that, although the application was duly served on the petitioner, he opted not to file a response thereto. The Affidavit of Service sworn by **Charles Alumasa** and filed herein on **4 March 2020** also shows that a Hearing Notice was also served on counsel for the petitioner. Neither the petitioner nor his counsel attended court for the hearing on **4 March 2020**. Accordingly, the averments set out in the Supporting Affidavit are entirely uncontroverted; and therefore the issue for determination is whether that evidence satisfies the requirements of **Section 76** of the **Law of Succession Act**, which stipulates that:

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 assist 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.

[6] There is no dispute that the deceased herein, **Saul Makwingwi Songwa**, died on **28 July 1982** and left behind four widows and several sons and daughters. All indications are that the beneficiaries were in agreement that this cause be filed by the petitioner with a view of his appointment as the sole administrator of the deceased's estate, which comprised of only one asset, LR No. **KIMILILI/KAMUKUYWA/975**, measuring about 52 acres. The record further shows that Grant of Letters of Administration Intestate was issued to the petitioner on **4 February 1994**. The Grant was thereafter confirmed and a Certificate of Confirmation issued on **13 March 2017**.

[7] That Certificate of Confirmation has, appended to it, a schedule showing the respective portions each of the 20 beneficiaries would receive as well as what was set aside for the Government of Kenya, the Commissioner of Land and others who appear under the list of purchasers. The list of beneficiaries includes females; and although it is not stated therein who the daughters were, the number of females on the list is almost the same as the male. The conclusion that I draw therefore is that the deceased's daughters were taken into account in the proposed division. It is noteworthy that while alleging that some of the daughters were not taken into consideration in the proposed distribution, the applicants did not furnish the particulars of any such ones. In the same vein, the applicants failed to demonstrate that, other than L.R. **KIMILILI/KAMUKUYWA/875**, the deceased owned any other assets, which the petitioner left out when he applied for grant. Thus, it cannot be said that the proceedings to obtain the grant were defective in substance; or that the grant was obtained by the petitioner fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or even that that the grant was obtained by means of an untrue allegation.

[8] It is however evident that, having obtained the Certificate of Confirmation of Grant, the petitioner caused the entire suit property to be transferred into his own name, instead of causing the same to be transmitted to the beneficiaries in accordance with the schedule aforementioned. The applicants annexed to their Supporting Affidavit a Certificate of Search dated **13 April 2017** and it gives the name of the petitioner as the registered proprietor; though it does also show that he was thus registered in his capacity as the administrator of the estate of the deceased. Under the circumstances, nothing stops him from selling portions of the estate; and therefore the applicants' apprehensions about the dissipation of the estate are not far-fetched. It is also noteworthy too that the applicants' allegations of highhandedness on the part of the petitioner are not only unrefuted, but have been buttressed by the documents exhibited by the applicant's

which show that he has filed a suit for eviction against one of the beneficiaries of the deceased.

[9] More importantly, there is absolutely no justification why the petitioner has not, thus far, concluded the distribution exercise. The deceased died on **28 July 1982** and he was issued with grant on **4 February 1994**. There is no excuse as to why the petitioner had to wait until **2017** to apply for confirmation of the grant, yet **Section 71(1)** of the **Law of Succession Act** provides that:

“After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

[10] There is, likewise, no justification why the petitioner has, since **13 March 2017** when the grant was confirmed, failed to conclude the administration; yet under **Section 83(g)** of the **Law of Succession Act**, the period envisaged for this exercise is only 6 months. It is manifest therefore that the petitioner has failed to diligently proceed and finalize the administration of the estate; and to produce to the court, within the time prescribed, any inventory or account of administration assist required by the provisions of paragraphs (e) and (g) of **Section 83** of the **Law of Succession Act**. In addition thereto, the petitioner has also been accused of failing to account to the beneficiaries and to the Court in connection with his responsibilities as an administrator, which accusation is entirely uncontroverted.

[11] It is for the foregoing reasons that I find sufficient cause for revoking the Grant of Letters of Administration Intestate issued herein to the petitioner. Accordingly, it is hereby ordered that:

[a] the Grant of Letters of Administration Intestate issued herein to the Petitioner, **George Wakhungu Songwa**, be and is hereby revoked; and that a fresh grant be issued forthwith in the name of the petitioner, jointly with the two applicants, **Patrick Barasa Makwingwi** and **Armstrong Simiyu Songwa**.

[b] The three administrators should move with speed to present a fresh application for confirmation with a view of concluding the distribution of the deceased's estate so as to bring to a close this longstanding cause. The costs of the application shall be in the cause.

[c] This Succession Cause be and is hereby transferred to the High Court Registry at Bungoma to expedite its processing to conclusion.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY 2020

OLGA SEWE

JUDGE