



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 566 OF 2008**

**IN THE MATTER OF THE ESTATE OF WESONGA NAMUNUNI (DECEASED)**

**ESTA ANYANGO OMONDI .....1<sup>ST</sup> PETITIONER/APPLICANT**

**ALI CHIKUNE WESONGA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**SULEIMAN NAMANUNI WANGA(Sued as the personal representative of**

**the Estate of the Deceased ALI SHABAN WESONGA)...1<sup>ST</sup> RESPONDENT**

**HAMISI WANYAMA.....2<sup>ND</sup> RESPONDENT**

**MICHAEL WASHIKA KHACHESO .....3<sup>RD</sup> RESPONDENT**

**JUMA JALIB .....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The petitioners herein have filed a notice of motion dated 10<sup>th</sup> December, 2015 seeking for orders for cancellation of sub-division numbers of land parcel South Wanga/Lureko/380 and for the registration of the said land to be reinstated to the name of the deceased Wesonga Namanuni to enable the petitioners register grant of letters of administration and certificate of confirmation of grant issued to them by this court. The application is premised on the grounds on the face of the application and supported by the affidavit of the 1<sup>st</sup> petitioner. The 1<sup>st</sup> petitioner states that this court has issued a grant of letters of administration confirming the stated land parcel in the petitioners' names. However that they have been unable to register the land in their names because the same has been fraudulently sub-divided and registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

2. The application was opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents but was supported by the 1<sup>st</sup> respondent. The 4<sup>th</sup> respondent was served but did not file a response.

3. The petitioners are respectively widow and son of the deceased in this succession cause. The 1<sup>st</sup> respondent is son to the late Shaban Wanga. He is being sued in a representative capacity. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are purchasers who bought parcels of subject land from the late Shaban Wanga. The matter proceeded by way of affidavit evidence.

4. It was the case for the petitioners that the deceased herein was the registered owner of land parcel No. South Wanga/Lureko/380. He died in 1967. The deceased had a brother by name Shaban Wanga. Shaban Wanga had his own parcel of land. That after the death of the deceased Shaban Wanga fraudulently registered land parcel 380 into his name. He subsequently divided the land into land parcels South Wanga/Lureko/763 and 764. He sold land parcel 764 to the 2<sup>nd</sup> respondent and remained with land parcel 763. He later on in 1983 subdivided land parcel 763 into land parcels South Wanga/Lureko/998 and 999. He sold 999 to the 3<sup>rd</sup> respondent. In 1984 he sold land parcel 998 to the 4<sup>th</sup> respondent. Shaban later died.

5. Meanwhile, the petitioners in the year 2008 filed this succession cause with the aim of distributing the deceased's land. On the 10<sup>th</sup> March, 2010 the court issued a grant of letters of administration to them. The court transmitted land parcel South Wanga/Lureko/380 to them. However they were unable to effect registration of the land as the title had ceased to exist upon sub-division. They eventually filed the instant application seeking for the orders stated above.

6. The 2<sup>nd</sup> respondent in his replying affidavit stated that he purchased land parcel South Wanga/Lureko/764 from Shaban Wanga in the year 1968. That Shaban Wanga posed as the owner of the land. In 1970 he was issued with a title deed to his land parcel. Later on he learnt from the petitioners that Shaban Wanga was a brother to the real owner of the land. He contends that he was an innocent purchaser for value. That he has been settled on the land since 1968. He produced a copy of the title deed as exhibit.

7. The 3<sup>rd</sup> respondent stated that he bought parcel No. 999 from Shaban Wanga in 1983. That he was issued with a title deed. That he has lived on the land for 33 years.

8. The 1<sup>st</sup> respondent stated in his affidavit that his father sold all the land that belonged to him and that of his brother, the deceased herein. That he is now a squatter on the land in issue. He supported the application by the petitioners.

9. The petitioners were represented by the firm of **Otinga Ochume & Co. Advocates** while the 2<sup>nd</sup> respondent was represented by **J. M. Migosi & Co. Advocates**. The 3<sup>rd</sup> respondent was represented by **Malalah & Co. Advocates**. The firm of J. M. Migosi & Co. Advocates did not make any submissions in the matter.

10. The advocates for the petitioners submitted that land parcel South Wanga/Lureko/380 was registered in the name of the deceased at the time of his death. That the property was therefore the free property of the deceased. That Shaban Wanga did not possess a grant of letters of administration when he sub-divided the land. That the dealings on the land by Shaban Wanga were therefore illegal. That the land should therefore go to the petitioners and the respondents can seek indemnity from the estate of Shaban Wanga.

11. The advocates for the 3<sup>rd</sup> respondent submitted that the 3<sup>rd</sup> respondent bought his parcel of land from Shaban Wanga in 1983 which was 13 years after the subdivision of the land in 1972. That the land was in the name of Shaban Wanga when he bought it. That the title to land parcel South Wanga/Lureko/380 was closed in 1972 upon sub-division of the land. That the 3<sup>rd</sup> respondent was an innocent purchaser for value. That Shaban Wanga passed good title to him. Counsel referred to the case of **Katende –Vs- Haridar & Company Limited (2008) 2 EA 173** on who an innocent purchaser for value is.

12. Counsel submitted that the title of the 3<sup>rd</sup> respondent is indefeasible by virtue of the provisions of section 26 of the Land Registration Act No. 3 of 2012 unless it can be proved that the 3<sup>rd</sup> respondent was involved in a fraud in respect to the acquisition of the land. That there was no such evidence. Counsel referred to the decisions in **Nairobi Permanent Markets Society & 11 Others –V- Salima Enterprises & 2 Others (1997) eKLR** where the Court of Appeal held that the respondent company as the registered proprietor of the suit land was the absolute and indefeasible owner of the land whose rights could not be interfered with unless there was evidence that they were a party to any fraud or misrepresentation of which there was none.

13. Counsel submitted that the case herein is a land matter that is disguised as a succession cause. That succession matters deals only in the properties already registered in the names of the deceased persons. That it is trite law that orders seeking cancellation of land title deeds can only be granted in a substantive suit and not in an interim basis in a notice of motion. That the application therefore ought to be dismissed.

14. I have considered the application, the objection thereto and the submissions filed by the advocates. The issues for determination are:-

(1) Whether a succession court has power to cancel title deeds.

(2) Whether the matter ought to have proceeded before this court or before the Environment and Land Court.

15. The answer to the first issue is in the affirmative. Section 45 of the Law of Succession Act Cap 160 Laws of Kenya makes it an offence for any person to intermeddle with the estate of a deceased person. Rule 73 of the Probate and Administration Rules gives a succession court inherent powers to issue such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In this case it is averred that Shaban Wanga did not have a grant of letters of administration when he sold and sub-divided the deceased's land. That his dealings with the estate of the deceased was illegal. I have no doubt that a succession court has power to cancel title deeds where it is shown that they were obtained in contravention of the provisions of the Law of Succession Act.

16. Article 162 (2) of the Constitution of Kenya 2010 and section 3 of the Environment and Land Court Act, 2012 confers jurisdiction to determine matters relating to the environment, use, occupation of and title to land to the Environment and Land Court. However our courts have recognized that in some matters relating to succession involving land both the High Court and the Environment and Land Court have concurrent jurisdiction. In such matters the test is as to which of the two courts is better suited to determine the dispute. In the case of **Munyasya Mulili & 3 Others –V- Sammy Muteti Mulili (2017) eKLR** Nyamweya J. held that:-

**“In Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru, Nairobi ELC suit NO. (2013) eKLR, which was relied upon by the Petitioners, I held that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.....**

**It is thus my finding that since the dispute herein is one between the personal representatives of the deceased and the survivors, beneficiaries and dependants of the deceased, it is a succession dispute to be determined solely within the framework of the Law of Succession Act.....”**

17. The issue was also elucidated by Musyoka J. in **re Estate of Alice Mumbua Mutua (Deceased) 2017 eKLR** where he held that:-

“..... what I can gauge from the papers placed before me is that it relates to a dispute between a buyer and a seller of land. It hinges on whether the buyer should have possession or occupation thereof. It is about title, for the buyer is no doubt asserting entitlement to the property having exchanged money with the sellers over the same. That would squarely place the matter within Article 162 (2) of the Constitution. In those circumstances, it would mean then that the High Court has no jurisdiction over the matter by virtue of Article 165 (5) of the Constitution.

It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules.

Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41 (3), which provides as follows –

‘where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ....’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio so far as the property in question is concerned*. *The primary mandate of the probate court is distribution of the estate and once an order is made distribution the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by the court are limited to what I have stated above.*”

18. A more practical approach was suggested by Gikonyo J. in the case of **Simon Kamundi -V- Tabitha Gatiria Maingi & 3 Others (2016) eKLR** where he held that:-

“The law on this subject is not clear. Some courts have held that a purchaser’s claim should be litigated separate from the succession cause, whilst others have said it should be within the succession cause. The decision of the Court of Appeal in the case of **Rubo Kipngetich Arap Cheruiyot –Vs- Peter Kiprop Rotich Civil Appeal No. 128 of 2008** also invites diverse interpretation; when it stated as follows:-

‘Claims by third parties to deceased persons’ properties although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits.’

...The Court of Appeal recognized these possibilities in the case of **Rubo Kipngetich Arap Cheruiyot –Vs- Peter Kiprop Rotich Civil Appeal No. 128 of 2008 (supra)**. Therefore, I take the view that there is no absolute prohibition of third party claims being litigated in a succession cause except this should be decided on case to case basis depending on the circumstances of each case..... rather than making a hard and fast rule that all claims by third parties must be litigated in separate proceedings. There are, however those clear claims which should be tried by the ELC Court.”

19. I am in agreement with the view expressed by the learned Judge in the latter case. It is for the court to determine whether the issues raised before it are issues that can be accommodated within the succession cause or there are other crucial issues that are better dealt with in a civil suit between the parties. In the instant case the 2<sup>nd</sup> respondent bought his parcel of land in 1968. He obtained title to the land in 1970 and has been in occupation since then. That is a generation away. The 3<sup>rd</sup> respondent bought his land in 1983. He had been in occupation of the land parcel and has title deed to the land. The person the respondents bought their parcels of land from is now deceased. The question is whether the respondents have any legal right in their parcels of land that they have occupied for a long time.

20. The petitioners brought this matter to court by way of notice of motion. It proceeded by way of affidavit evidence. No witnesses were called in the case. In my view the matters raised in the application were so weighty that they could not be left to affidavit evidence. It needs to be interrogated whether Shaban Wanga had a grant of letters of administration when he sub-divided and sold the land. It requires to be proved that the respondents were not innocent purchasers for value. There is still a question as to whether the respondents have any right to land that they have occupied for a generation. I do not think that these questions can be properly canvassed in a succession cause. It is my considered view that it is the Environment and Land Court that is best suited to hear the dispute herein. If the petitioners are successful in

that court then they can proceed with the succession cause. The parties are thereby advised to ventilate their dispute before the Environment and Land Court.

21. I am alive to the fact that this court has already confirmed a grant of letters of administration in the names of the petitioners. I have noted that when the petitioners applied for confirmation of grant they did not disclose to the court that the subject land had already been sub-divided and new titles issued, a fact which was definitely in their knowledge. There is no way that the court would have confirmed the grant if this information had been brought to its attention. The petitioners are to blame for not being candid in the matter.

22. Section 76 of the Law of Succession Act states as follows:-

**“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. ....**

**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.**

**.....”**

23. The fact that the subject land had been sub-divided and new titles issued when the application for confirmation was made was a material fact during confirmation of grant. The petitioners concealed this material fact from the court. This court has powers to revoke a grant that has been obtained through concealment of a material fact. It is my considered view that the grant should be revoked so as to enable fresh litigation over the land.

24. In the foregoing, the application by the petitioners dated 10<sup>th</sup> December, 2015 is dismissed. The court does hereby, by its own motion, revoke the grant of letters of administration issued to the petitioners on 10<sup>th</sup> March, 2010.

Orders accordingly. Each party to bear its own costs.

**Delivered, dated and signed at Kakamega this 5<sup>th</sup> day of June, 2020.**

**J. N. NJAGI**

**JUDGE**

Representation:

No appearance for Petitioners

No appearance for 2<sup>nd</sup> Respondent

By consent of Mr. Malalah through e-mail for 3<sup>rd</sup> Respondent

Petitioners - Absent

Respondents - Absent

Court Assistant - Polycap

30 days right of appeal.