



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 120 OF 2010

RE: ESTATE OF JOSIAH KIBISEM SANG (DECEASED)

JEROTICH TABARNO SANG.....PETITIONER

VERSUS

DAVID KIPKOSGEI BISEM.....1ST OBJECTOR

JOSEPH ARAP LETING.....2ND OBJECTOR

RULING

1. The application seeks revocation and annulment of the deeds which were obtained through a revoked grant, relating to parcels No. Nandi/Lessos 554, 236, 564 and 555.

2. That pending the determination of this application, an order do issue to restrain Nandi District Land Registrar from effecting any transaction in the mentioned parcels.

(c) That JEROTICH TABARNO SANG and JOSEPH T. ARAP LETING, the title holders in the aforementioned titles be ordered to deposit in court the respective titles touching on the said parcel

d) That the court makes such orders as are a fair mode of distribution to cater for all the dependants of the late JOSIAH KIBISEM SANG.

3. In the supporting affidavit sworn by **DAVID KIPKOSGEI BISEM**, it is deposed that the deceased (**JOSIAH**) had various properties which included parcel No. **NANDI/LESSOS/317** which was subdivided by the petitioner No. 554, 555 and 556 (as shown by copies of green cards showing the entries) and which subdivided plots are held by **JOSEPH A. LETING** and **JEROTICH TABARNO SANG**. The petitioner (Jerotich) is said to have transferred plot No. **NANDI/LESSOS/236** to herself courtesy of a revoked grant.

4. The applicant (who describes himself as a son of the deceased is aggrieved by the manner in which the estate was distributed as he was not given his due share, and the manner in which the transfer was effected from **TABARNO** to **LETING** is described as fraudulent.

The said **JOSEPH A. LETING** as alleged to have falsely presented himself to the Land Control Board as a son/beneficiary of the late **JOSIAH KIBISEM SANG** and obtained titles for the said parcel. The petitioner is accused of wrongfully benefitting from the assets of the estate to the exclusion of all the other beneficiaries.

5. In opposing the application the petitioner by a replying affidavit dated 9th February 2009 deposes that she is a true purchaser for value without notice and is thus protected under Section 28 of the Registered Land Act (**Cap 300**) Laws of Kenya.

She describes the application as mischievous saying that parcel no. Nandi/Lessos 554 is still available and registered in her name.

Further that **Nandi/Lessos/236** does not exist as part of it was sold to two people and have new numbers being 751, 752 & 753. It is her contention that the deceased owned parcel No. **Nandi/Songoliet/181** which the applicant registered in his name on 23.02.2000 that a grant that was illegally issued in **Succ. Cause No.2334 of 1997** (which cause file can't traced at the High Court Registry in Eldoret) was in Kapsabet. She suggests that the applicants appears to be withholding vital information from court and has not come to court with clean hands.

6. She confirmed obtaining grant in **Eld. SRMSUCC. Cause No. 39 of 1986** which was issued on **25.02.1987** and confirmed on **28.12.1988** – however the applicant successfully applied for revocation of the said grant which was allowed on **21.07.2008**. However at the time of that

revocation, he never disclosed that he had obtained a parallel grant which was issued in **Succ. Cause No.2334 of 1997**, nor has she made such disclosure to date. The applicant is accused of being on a spree of selling off the deceased's land, saying the applicant obtained a death certificate in respect of the deceased claiming that he wanted to process tea payment from the factory, yet all along he intended to apply for a rival grant with the respondent's knowledge.

7. It is further contended that the deceased had other properties namely Nandi/Lessos/235 and 237 which are still intact, and the following have already been sold off by various family members being:

- a) Centre plot No.4 near police station
- b) Centre plot No 4
- c) Eldoret plot
- d) Cheplaskei plot
- e) Centre plot No.6
- f) Tulinet Centre Plot
- g) Kamagron Terige Farm

8. It is also contended that all the properties had been distributed in accordance with the **WILL** left by the deceased, and the beneficiaries have since sold their respective portions.

9. The Respondent further explained that at the time of applying for grant, she was only aware of one parcel No. **Nandi/Lessos/317** where everyone got their rightful share, it is pointed out that the deceased had 3 homesteads and each dependant got their rightful share through the respective houses. The applicant is described as fraudster whom the court ought to deal with ruthlessly.

10. In a supplementary affidavit the applicant denies engaging in any fraudulent activities saying it is the respondent who used the grant she obtained ex-parte for parcel No. 317 to transfer or deal with other properties of the deceased, without amending the certificate of grant. He demands that the respondent gives an account how each of the three houses benefited from the grant issued to her. The applicant states that no property was transferred to one **KIPCHUMBA SANG**, so **KIPCHUMBA SANG** had no capacity to transfer or sell the same.

He admits filing a suit for the estate of **JOSIAH KIBISEM** but it was a relative who instructed her to file the cause.

He maintains that Respondent just wants the benefits to go to him and no one else.

The applicant admits to have entered into an agreement with one Hosea Kipchumba. Applicant was to take possession and own the ten acres of parcel No.554 where he now resides, and he gave Hosea 10 acres of **SONGOLIET** (which **HOSEA KIPCHUMBA**) later sold to a third party. This therefore leaves 12 acres for the petitioner. He insists that the petitioner is not being candid about the acreage of the entire estate and she ought to disclose the total acreage of the entire estate. Further that she should be ordered to deposit all the title deeds in her possession to the court if she is acting in good faith.

11. In a further affidavit dated 23.10.15 the applicant who describes himself as a son of the deceased deposes that the petitioner filed a Succession Cause No. 39 of 1986 in the Eldoret Principal Magistrate's Court in 1986 at a time when the law did not permit the filing of a succession cause in the magistrate's court in a station where there was a high court, and this rendered that cause invalid. That in fact Ibrahim (J) found on 21.07.2008 that the Principal Magistrate's court at Eldoret did not have jurisdiction to deal with the estate of the deceased. Further that there was material non-disclosure and the grant issued by the lower court was revoked.

He argues that consequently the estate has never been distributed, and the petitioner lacks power to deal with the estate for want of appropriate letters of administration. Therefore the transfer of 25 acres out of the estate to the interested party was illegal.

12. In the oral submissions, **MR MOMANYI** on behalf of the applicant argued that by the time the grant issued by the lower court was set aside, the IP had already obtained the 25 acres out of the deceased's property, hence the need for cancellation of the title, and the IP has sought to rely on an invalid agreement which existed between him and one **HOSEA KIPCHUMBA** who was not an administrator to the estate.

13. In response **MR OTIENO** on behalf of the respondent submitted that a grant was issued in 1986 by the subordinate court, and urged this court to take judicial notice that at the time, there was no High Court in Eldoret which was why the case was filed in the magistrate's court at Nandi.

It is also pointed out by Mr Otieno, that the applicant had also filed the Succession Cause in 1997 where he claimed to be the sole surviving beneficiary of the deceased and he listed the Songoliet property as the only one and he even sold it. Thereafter he filed Misc. Succession case No. 143 of 2004 in Eldoret, then he now files this application which counsel describes as incompetent.

14. Counsel argues that the deceased had already shared out his property to the three houses – which is why the petition did not mention the Songoliet property in her petitioner. Mr Otieno urges this court to be guided by Section **93(1)** of the Law of Succession, saying at the time

the parcel was sold the action by the petitioner was valid as it was done within her powers as an administrator then, and the issue of jurisdiction came later. Mr Otieno submits that Section 93 of the Law of Succession Act protects transfers made whether the grant was valid or not. That in any event, this court is functus officio as the same matter was dealt with by the Environment and Land Court.

It is contended that as between the interested party and petitioner, there was no collusion and a host of documents demonstrate that there were agreements between interested party and Hosea Kipchumba who was a brother of the applicant from the 2nd house.

That the agreement was entered into on the understanding that an account of Misc. Succ. Cause No. 317, Hosea had a future registerable interest and thereafter the parcel was subdivided to create the numbers now cited in this application. Counsel argues that the administrators of Hosea (he is now deceased) estate ought to have been enjoined in this application.

15. Mr OTIENO further submits that the annexures used by the applicant are the same documents which are missing at the Land Registry and it would appear that the agreement is perpetrating fraud and that at some point even the advocates entire file was missing.

16. Mrs ORINA on behalf of the interested party submits that her client was an innocent purchaser for value whose title can't be impeached by Rule 73 Probate and Administration Rule. The interested party purchased parcel No.554 and 555 and is protected by Section 143 (2) of the RLA (Cap 300) which was applicable at the time.

17. Counsel argues that it is not disputed that the transfers were signed by the administrator of the estate then, and the interested party had consideration flowing from him to the beneficiary, who had an expected intent in the estate, and at the time, there was nothing to prohibit the administrator from transferring the property to the interested party. Further that since no entry had been made in the register so as to alert the interested party that someone else had an intent on the parcel, there was nothing to prohibit the transaction.

18. The applicant is accused of being guilty of the very same acts he accuses the Respondent of, as he too filed petitions elsewhere and did not disclose all the properties nor did he include all the other beneficiaries.

19. The scenario playing here is the typical muscle flexing which rears its head in situations where there is more than one wife, and often each house wants to out – fox the other, that explains the multiple succession causes each party filed to the exclusion of the other. There is also the deliberate lack of full disclosure as regards all the properties of the deceased, as evidenced in the earlier grants which were both eventually revoked. Both parties display similar traits of mischief.

-Indeed there seems to be a quiet consensus that the deceased had shared out his property during his life time – that would explain;

a) The absence of the first house from this dispute,

b) The restraint each party seems to exercise when listing property which ought to form part of the deceased's estate,

c) The applicant's skirting around the status of the Songoliet property which he already disposed off, and whether the Respondent/Petitioner avoided in the list of the estate's assets.

It is also a common ground that all the grants earlier issued to the parties, including the one the petitioner filed in the subordinate court in 1986 were revoked.

The applicant has specifically targeted property which was subdivided, and part of the resultant subdivided parcels were transferred to the 3rd party courtesy of a sale transaction. It would also seem that the applicant is not very sure the extent of the deceased's assets, hence his prayer that the petitioner/respondent be directed to deposit the title deeds she has (which relate to the deceased's estate) in court. This is at its best a fishing trap – what criteria will the court adopt to confirm that the petitioner has deposited all the title documents which are in her possession? What about the parcels she first formerly had. To even deign to make such an order is simply making a mockery of common sense.

I decline to venture into that sort of scenario.

20. Certainly the grant which the petitioner obtained from the subordinate court in 1986 was revoked by orders issued by Ibrahim (J) on grounds of want of jurisdiction by the court which issued it and also fraudulent representation by the petitioner, yet long before that she had a valid and legal authority.” and thus dealt adversely with the assets which forms the subject of this cause, and a third party had purchased what the applicant now seeks to recover.

21. The petitioner did what was within her powers as a legal administrator of the estate at the time, yet the court subsequently found that she ought not to have been issued with the grant due to want of jurisdiction and fraud and this rendered the process a nullity. Can the court sanitize what was grounded under a cloud of fraud. Can it be argued that at the time of subdividing and selling the land there was nothing to prohibit the transfer to the interested party? Would the interested party find refuge under the principle of an innocent purchaser for value whose title should not be impeached.

Granted Rule 73 of the P & A Rule provides as follows:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Yet Section 93 (1) of the Law of succession provides as follows:

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after commencement of this Act.

22. To my mind this seals the tape on the circus being created by the applicant, and which must now come to a shrieking halt. I hold that this application is a wild goose chase and is devoid of merit. It is consequently dismissed with costs to the Respondents.

DELIVERED and DATED this 10th day of January 2019 at ELDORET

H. A. OMONDI

JUDGE