



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**SUCCESSION CAUSE NO. 7 OF 1996**

**IN THE MATTER OF THE ESTATE OF TARATIO OIGO SIKO (DECEASED)**

**BETWEEN**

**WILFRED KEGONYE BABU.....APPLICANT**

**AND**

**ANNA NYABONYI OIGO ..... PETITIONER/RESPONDENT**

**RULING**

1. This matter concerns the estate of Taratio Oigo Siko (“the deceased”) of Nyansiongo, Gesima, who died intestate on 18<sup>th</sup> December 1992. The petition for grant of letters of administration for his estate were taken out by his wife, Anna Nyabonyi Oigo (“Anna”). A grant of representation was issued to her on 8<sup>th</sup> August 1996 and confirmed on 29<sup>th</sup> April 1998. After confirmation of the grant, Anna inherited the deceased’s only property, NYANSIONGO SETTLEMENT SCHEME/459 (“Plot 459”).

2. What is before me for consideration is the summons for annulment of grant dated 25<sup>th</sup> April 2013 filed by Wilfred Kegoye Babu (“Wilfred”) seeking to **annul the grant issued to Anna on the ground that Plot 459 was not part of the deceased’s estate and that Anna obtained the grant by making false statements and concealing material facts. The summons for revocation was supported by the affidavit of Wilfred sworn on 25<sup>th</sup> April 2013.**

3. **In opposition to the application, Anna filed a replying affidavit sworn on 5<sup>th</sup> June 2014. It is common ground that Anna was the wife of the deceased while Wilfred was the son of Babu Siko (“Babu”), a brother of the deceased. Babu died on 12<sup>th</sup> January 2012.**

4. **On 25<sup>th</sup> April 2016, Okwany J., directed that the matter be disposed of by oral testimony. She heard the testimony of Wilfred (PW 1) and Anna (DW 1). Following her transfer, I took the testimony of Robert Nyaaga Chore (DW 2) and Justus Onchari Keana (DW 2), nephew and cousin to the deceased and Babu respectively.**

5. **Wilfred deponed that at the time of his death the deceased had filed a suit against the Anna namely; *Kisii HCCC No. 35 of 2011 (Babu Siko v Anna Nyabonyi Oigo)*. Following Babu’s death, Wilfred obtain grant of letters of administration ad litem dated 18<sup>th</sup> May 2012 in *Kisii High Court Succession Cause No. 116 of 2012* and was substituted as the plaintiff in that case. He later discovered that Anna had obtained a grant of letters of administration and included Plot 459 as part of the deceased’s estate. He contended that the transfer of the plot of the deceased was irregular and illegal in so far as Anna was purporting to execute an order given on 19<sup>th</sup> March 1981 in *Kisii SRMCC No. 12 of 1980*. He further added that at the time the grant for letters of administration was issued, that is on 8<sup>th</sup> August 1996, Plot 459 was registered in the name of Babu’s name was not part of the deceased’s estate.**

6. Wilfred testified Plot 459 was originally part of NYANSIONGO SETTLEMENT SCHEME/73 (“Plot 73”) which was registered in Babu’s name in 1986. In 1991, Babu subdivided the land into two parcels; Plots 318 and 319. He retained the former plot and transferred the latter to Daniel Onkagi. Wilfred further testified that in 1993, Plot 318 was sub-divided without Babu’s consent into Plots 458, 459 and 460. The plots all remained in Babu’s name until 2002 when the Plot 459 was registered the deceased’s name. Wilfred contended that the “transfer” from the deceased to the Petitioner in 30<sup>th</sup> July 2002 was not possible or otherwise legal as the deceased died in 1992.

7. Anna denied concealing any fact or fraudulently obtaining the grant. She testified that the deceased and Babu bought Plot 73. She recalled that she went to live on the land in 1970 when she married the deceased. She testified that the deceased sued Babu and was awarded 5 acres. She told the court that as a result of *Kisii SRMCC No. 12 of 1980*, the deceased became the legal owner of Plot 459 following the decree from the court.

8. DW 2 testified that the deceased and Babu had purchased Plot 73. He confirmed that both families reside on the land and that Anna has constructed permanent structures and had cultivated tea. He told the court that the following a court case Plot 73 was divided with the deceased getting 5 acres and Babu retaining 10 acres. DW 3 also confirmed that Babu and the deceased purchased Plot 73.

9. From the evidence, both parties agree that at some point there was a case between Babu and the deceased regarding Plot 73 which led to the subdivision. Although the pleadings of that case were not produced by either party, the nature and content of that case being **Kisii SRMCC No. 12 of 1980** are readily apparent from the plaint filed by Babu in **Kisii HCCC No. 35 of 2011**. **The contents of the plaint which were verified by Babu state as follows:**

[3] *That the defendant's husband, TARATIO OIGO SIKO (now deceased) instituted civil case No. 12 of 1980 in the Senior Resident Magistrate at Kisii praying inter alia:-*

*(a) A declaration that parcels No. 73 NYASIONGO SETTLEMENT SHCEME belongs and is owned by the plaintiff and defendant jointly in equal shares.*

*(b) A further order that the defendant is the registered allottee of Parcel No. 73 NYANSIONGO SETTLEMENT SCHEME in trust for himself and the plaintiff.*

[4] *The suit came up for hearing on the 14<sup>th</sup> day of October, 1980 before the Honourable Senior Resident Magistrate Kisii and the same was referred to arbitration.*

[5] *The Arbitrators award was delivered on 10<sup>th</sup> March, 1981 and was adopted as an order of the court.*

[6] *That on 19<sup>th</sup> March ,1981 the court decreed this: inter alia:-*

*(a) That the defendant holds Plot No. 73 Nyansiongo Settlement Scheme in trust for himself and the plaintiff in the undivided share of 2/3 in his favour and 1/3 in favour of the plaintiff.*

*(b) That the defendant is hereby ordered, subject to clearance of any outstanding loans to sign the settlement Fund Trustees transfer forms, transferring 5 acres of the whole Plot No. 73 Nyansiongo Scheme to the plaintiff in accordance with the earlier directions of the clan elders. [Emphasis mine]*

10. In **Kisii HCCC No. 35 of 2011**, Babu contested the decree issued by the subordinate court and sought several reliefs as follows:

*(a) A declaration that the proceedings, judgment and decrees and all consequential order and acts arising out of Civil Case No. 12 of 1980 in the Senior Resident Magistrates Court in Kisii are irregular, unlawful and therefore null and void.*

*(b) A declaration that the execution process of the judgment and decree in Kisii SRMCC No. 12 of 1980 between the plaintiff and the late TARATIO OIGO SIKO is null and void.*

*(c) That the registration of the defendant for title No. NYANSIONGO SETTLEMENT SCHEME/459 be declared null and void hence the defendants name as the registered proprietor of NYANSIONGO SETTLEMENT SCHEME/459 be cancelled and the Register be rectified accordingly.*

*(d) An eviction order do issue and the defendant himself, or her agents be permanently restrained from interfering in any manner whatsoever or howsoever with Land Title No. NYANSIONGO SETTLEMENT SCHEME/459.*

11. As can be seen from the extract of the pleading I have set out above, the purport of **Kisii HCCC No. 35 of 2011** is to annul the proceedings in **Kisii SRMCC No. 12 of 1980** which gave the deceased part of Plot 73. As regards the status of Plot 73, the extract from the Land Register, the Green Card, shows that Babu was the registered owner until 1991. It was sub-divided and a new title issued for Plot. 318 in favour of Babu. The said land was further subdivided into Plots 458,459 & 460.

12. Having considered the evidence, I find that Babu acquired an interest in Plot 73 following a court decree issued in **Kisii SRMCC No. 12 of 1980**. The decree issued in 1981 declared a trust in favour of deceased and at no point was the Babu discharged from the terms of the trust. Babu held the property as a trustee with certain obligation placed upon him as trustee, that is, to transfer part of the property to the deceased. Despite the suit land being registered in the name of Babu, 5 acres of the suit land formed part of the deceased's estate. And it is the fact that the land belongs to the deceased and forms part of his estate that Babu and now Wilfred seeks to annul in **Kisii HCCC No.35 of 2011**.

13. The substantive issue before this court is whether I should revoke the grant issued to Anna. Under **section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**, the Court may annul or revoke grant of representation on, amongst others, the following grounds:

**76 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;***

14. I am called to determine whether ***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. The duty of this court is to distribute the estate of the deceased to the rightful beneficiaries hence the parties are required to make full disclosures to the court of all material facts pertaining to the estate property.***

15. Anna applied for the grant of letters of administration on the basis of the final determination of ***Kisii SRMCC No. 12 of 1980*** declaring a trust in favour of the deceased. Though the deceased was not the registered proprietor up until 2002, for all intents and purpose Plot 459 belonged to the deceased at the time of his death. Anna's claim was supported by DW 2 and DW 3 who confirmed that the deceased and his family had resided on the land. The land register indicated that the executive officer executed a transfer which was registered against the title in 2002.

16. I therefore find and hold that Wilfred failed to prove that Anna filed these proceedings by concealing material facts or failing to disclose material facts. She relied on the deceased's entitlement supported by the court order which had declared that part of Plot 73 was held in trust for the deceased. Even if the green card showed that the deceased was not the registered owner of the property at the time the grant was confirmed, the property belonged to the deceased by virtue of the trust created and therefore formed part of his estate.

17. I would further add that since the decree in ***Kisii SRMCC No. 12 of 1980*** is contested in ***Kisii HCCC No. 35 of 2011***, I have exercised great circumspection in commenting on other aspects of the evidence which will form a basis for determination of that case. Suffice to state that allowing the summons dated 25<sup>th</sup> April 2013 would amount to setting aside the orders issued in ***Kisii SRMCC No. 12 of 1980***. This kind of collateral challenge amounts to an abuse of the court process and cannot be permitted. At the end of the day, the Wilfred will have the opportunity to pursue his suit to determine whether the Anne is entitled to Plot 459.

18. For the reasons I have set out the summons for annulment of grant dated 25<sup>th</sup> April 2013 is therefore dismissed with costs to the petitioner.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of February 2019.**

**D. S. MAJANJA**

**JUDGE**

Mr Gichana instructed by Bosire Gichana and Company Advocates for the applicant.

Mr Momanyi instructed by Momanyi Aunga and Company Advocates for the petitioner.