



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CASE NO. 410 OF 2004

OKUMU WAMBUNDO WAYSABINADECEASED

AND

BASHIRI EKESA OKUMU.....PETITIONER

AND

PROTUS OFUOR MALALA.....OBJECTOR

AND

WANYANGU LIVINGSTONE ONJALA.....INTERESTED PARTY.

J U D G M E N T

1. The objector herein has filed summons for revocation of grant dated 3rd June, 2014 seeking that the grant of letters of administration intestate issued to the petitioner herein by this court on the 21/3/2013 be revoked on the grounds that the interested party herein fraudulently misrepresented to the honourable court that he was entitled to 2 acres of land from the estate of the deceased when infact he had knowledge that the 2 acres belonged to the objector.

2. The application is supported by the affidavit of the objector in which he states that he is in occupation and use of 2 acres of the estate of the deceased namely plot No. North Wanga/ Namamali/665 which the deceased herein had sold to one **Lawrence Mubatsi Kundu**. That Lawrence then sold the land to the interested party herein, **Wanyangu Livingstone Onjala**. However that neighbours and the larger clan of the deceased were against the interested party taking up possession of the said portion of land due to serious historical differences as a result of which the interested party was refunded his purchase price through his mother and the objector bought the land from **Lawrence Mubatsi Kundu**. He took over physical possession of the said land and has established his homestead thereon. That later be learnt that the estate of the deceased had been distributed and the interested party issued with a title deed. That it is criminal for the interest party to get a refund of his money and at the same time obtain title to the two acres of the land. That a cursory comparison of the signature of the petitioner when filing the petition and that attributed to him on the summons for confirmation of the grant intestate shows that they were not made by the same person thereby suggesting that forgery could have taken place given that neither the petitioner nor the interested party attended court during the confirmation proceedings. The objector attached some receipts indicating that the interested party did receive some money from Lawrence through his mother.

3. The application was opposed by the petitioner and the interested party through their respective affidavits. The **petitioner** deponed in his affidavit that he is a son to the deceased herein. That the objector did not buy any land from him nor from his father and he does not recognize his dealings with third parties. That he agreed to the sale made to the interested party herein, **Wanyangu Livingstone Onjala**, hence the confirmation to him of the 2 acres to which he has his title. That there was no forgery or impropriety during the confirmation proceedings. That the allegation by the objector to that effect is misplaced. The petitioner urged the court to dismiss the objection as it lacks legal basis.

4. The interested party, Wanyangu livingstone Onjala, on his part deponed that he bought 2 acres of land title No. **North Wanga/Namamali/665** from Lawrence Mubatsi Kundu who had bought it from the deceased herein. That the petitioner had agreed to the said sale to him. That a succession cause was carried out and his 2 acres given to him. He now holds title to his 2 acres. That he is aware that Lawrence Mubatsi Kundu purported to sell the said 2 acres to the objector after the sale to him. That it is not true that the local community was averse to the sale to him or that there was any agreement for refund of his purchase price. That he had given Kshs. 90,000/= to the said Lawrence for facilitation of succession proceedings which he failed to do and has been refunding through his mother. That he personally attended the succession proceedings herein and there was neither fraud nor impropriety involved. That the summons for revocation thereby lacks legal basis and should be dismissed.

Submissions

5. The advocates for the objector, **K.N Wesutsa & Co. Advocates**, submitted that the objector has through the filed receipts shown that the interested party was refunded his purchase price after which the objector bought the land from Lawrence Mubatsi Kundu. That the identity of the widow of the deceased was not disclosed in the succession proceedings. That there was no consent of the widow filed to prove that she gave consent to the grant being made to the petitioner. That neither did the widow give consent to the distribution of the estate. That this is sufficient ground to have the grant revoked. That though the interested party states that he and the petitioner attended the confirmation proceedings on the 27/2/2013, the court record shows that only the advocate for the petitioner, Mr. Nyikuli, was present.

6. The advocates further submitted that the interested party has confirmed refund of Kshs. 90,000/- by Lawrence though he says that it was money given to initiate succession proceedings. That it has not been proved that the Kshs. 90,000/= was payment to conduct succession proceedings. That the annexure by the objector shows that the refunds were in connection with purchase of plot No. 665.

7. Further that Lawrence is a creditor of the estate to the extent of 2 acres purchased from the deceased. Thus the petitioner lacked the authority to alienate the 2 acres to the interested party who had the remedy of lodging a regular suit should he feel aggrieved at not getting the two acres.

8. The advocates for the petitioner and the interested party **Nyikuli, Shifwoka & Co. Advocates**, on their part submitted that as both the objector and the interested party claimed to have purchased the land from Lawrence Mubatsi Kundu, they had competing interest in the piece of land. That the interested party's interest was acknowledged and recognized by the petitioner. The petitioner carried out succession proceedings and conferred title to the interested party. That the sole reason for the summons for revocation of the grant is because the petitioner preferred the interested party over the objector.

9. The advocates further submitted that the summons do not establish a single ground that would bring it under the ambit of section 76 of the Law of Succession Act. That there is no evidence of fraud. Both the petitioner and the interested party have sworn affidavits that they attended the proceedings. That the issue about the widow was not raised in the summons and only cropped up in the submissions by the advocates for the objector. That the alleged widow can bring up her own claim if at all it exists.

10. The advocates submitted that the succession court is not the proper forum for the dispute before the court. That the objector's claim should be directed at Lawrence Mubatsi Kundu and no one else. That the objector should have moved to the land court to pursue his claim once the petitioner declined to recognize his interest in the land of the deceased. Therefore that the summons for revocation of grant are misconceived and should be dismissed. The advocates relied on the decision of Mwita J in **Kakamega High Court Successions cause No. 64 of 2014** in a case where the petitioner did not recognize the protestor as one who had beneficial interest on the deceased's land and the learned judge held that:

“The moment the personal representative refuses to recognize the purchaser's beneficial interest in the estate that issue is taken outside the purview of a succession cause and becomes a claim within the meaning of Article 162(2) (b) of the constitution and section 13 of the Environment and Land Court Act.”

Analysis and Determination:

11. The objector is seeking for revocation of grant. Section 76 of the Law of Succession Act provides 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.

e.

12. The advocates for the objector submitted that the grant was defective in that the identity of the widow to the deceased was not disclosed in the application for grant of letters of administration and that she did not give the requisite consent. However this issue only came up in the submissions by the advocate for the objector and was not part of the objector's application for nullification of the grant. The widow herself has not complained that she was left out in the distribution. That ground cannot thereby form the basis of revocation of the grant.

13. The objector insinuates that there could have been forgery in the confirmation proceedings as the court record does not indicate that the petitioner and the interested party were present in court during confirmation proceedings. The petitioner and the interested party have sworn affidavits to the effect that they were in court on the day the grant was confirmed though the court record does not indicate so. Be that as it may, the record indicates that both the petitioner and the interested party have signed consent on distribution form – form 37. The probate and Administration Rules do not make it a mandatory requirement for the presence of the parties where consent has been signed. The objector has not established any fraud on the part of the petitioner in the manner the grant was applied for and confirmed.

14. The petitioner recognized the interested party as the lawful owner of the 2 acres of land sold by his father to Lawrence Mubatsi Kundu.

The issue as to who between the objector and the interested party is the lawful owner of the 2 acres of land is a dispute that involves the objector, the interested party and Lawrence Mubatsi Kundu. The petitioner has divested himself from the dispute by transferring the land to the interested party. The objector did not buy any land from the petitioner or the estate of the petitioner's father. If there was any refund of the money by Lawrence Mubatsi Kundu to the interested party the petitioner was not involved and therefore the issue is between the said Lawrence and the interested party. If Lawrence sold the same land to the objector that is an issue between them. The petitioner has completed his duty of an administrator by transferring the land to the interested party. I therefore agree with the submission by the advocate for the petitioner that if the objector was aggrieved by the transfer of the land to the interested party he should have moved to the Environment and Land Court to ventilate his claim there. The duty of a succession court ended with the transfer of the land to the interested party unless there were grounds for revocation of the grant under the provisions of section 76 of the Law of Succession Act. The objector has not established any ground under the said section that warrants the revocation of the grant.

15. In the foregoing, the application for revocation of grant lacks merit and is dismissed with costs to the petitioner and the interested party.

Delivered, dated and signed in open court at Kakamega this 28TH day of March 2019.

J.NJAGI

JUDGE

In the presence of:

Mr. Nyikundi.....for petitioner and interested party

Miss, Oduor.....for objector

Parties

Petitioner.....absent

Objector.....absent

Court assistantGeorge