



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 201 OF 2011

IN THE MATTER OF THE ESTATE OF SALOME BOSIBORI NYABUYA (DECEASED)

AND

IN THE MATTER OF EAST KITUTU/ BOTABORI II/1664

AND

IN THE MATTER OF KEROKA SRMCC SUCCESSION CAUSE N. 5 OF 2007

BETWEEN

DUKE ONYARI NYABUYA.....OBJECTOR/ APPLICANT

AND

JOSEPH ASUMA NYABUYA...PETITIONER / RESPONDENT

RULING

1. The objector, **Duke Onyari Nyabuya**, filed summons for revocation of the grant issued to the petitioner, **Joseph Asuma Nyabuya**, in **Keroka SRMC Succession Cause No. 05 of 2007**. The deceased, **Salome Bosibori Nyabuya** died intestate on 17th January 1992 and was the registered proprietor of land parcel number **East Kitutu/Botabori II/ 1664** which is the crux of the dispute between the parties herein.

2. The objector swore an affidavit on 9th May, 2011 in support of the summons. In it he averred that his father had been a polygamous man with three wives including his mother, the deceased. The objector's father had given his two brothers property and the suit land was intended to be divided between him and the petitioner. Instead, the petitioner who was a step son of the deceased commenced succession proceedings without involving him or obtaining his consent and proceeded to have the suit land registered in his name as the absolute owner before the grant was confirmed. The objector also deposed that the suit property was worth more than Kshs. 1,000,000/= and the Senior Resident Magistrate's Court at Keroka lacked jurisdiction to grant the letters of administration.

3. In response the petitioner in his affidavit sworn on 10th June 2011, averred that the land had been allocated to him by Rigoma land disputes' tribunal and their father had never been opposed to that allocation. He averred that the objector lived on the plot allocated to his mother by their father like his brothers and consequently the suit land belonged to him solely. The petitioner refuted the objector's assertion that the suit land was worth more than Kshs. 1,000,000/= and deposed that he had adhered to the law in conducting the succession proceedings. He denied concealing any facts as had been alleged by the objector and urged the court to dismiss the application.

4. Directions were taken to have the matter proceed by way of oral evidence. Okwany J. took the evidence of four witnesses who testified the objector's case. The petitioner testified and called one more witness who testified before me.

5. Duke Onyari Nyabuya (PW 1) told the court that his father, PW 2 had 3 wives. The deceased who was his mother was his father's third wife. She had 9 children including 6 daughters and 3 sons and was the proprietor of the suit property. He testified that his father, PW 2 had given his two brothers land parcel number East Kitutu/Botabori II/ 1662 and had intended that parcel 1664 be shared between his last born sons. According to him, the petitioner had agreed with his last born brother to swap their portions. He and the petitioner had been living on their portions on the suit property which was well demarcated. PW1 objected to the chief's letter dated 1st October 2007 which stated that the petitioner was the sole beneficiary of the suit property. He urged the court to let him occupy his portion of the land where the deceased had been buried.

6. Livingstone Nyabuya Orina (PW 2) testified that he had married three wives including the deceased and the objector was his son from the 3rd house while the petitioner was his son from the 1st house. He testified that he had given each of his wives a portion of land and the

petitioner was cultivating on the land he had given to his mother, the deceased. He however admitted on cross examination that the Land Disputes Tribunal had resolved that the suit property be transferred to the petitioner.

7. Eference Nyabuya (PW 3) a son from the 1st house, stated that their father, PW 2 had subdivided his land among his sons and the suit property was supposed to be divided between the petitioner and the objector. The petitioner lived on his portion with his family and the objector had a house and some tea bushes on his side. The deceased had also been buried on the objector's side. PW 3 was surprised by the petitioner's action of grabbing the entire land and urged the court to have the suit land shared between the petitioner and the objector.

8. Kennedy Minda Nyabuya (PW 4) who was also a son of PW 2 from the 2nd house, reiterated that their father had given the suit property to the objector and the petitioner. Each of them was supposed to occupy their portion of the land which was demarcated but the petitioner's house had been demolished leaving him landless.

9. Joseph Asuma Nyabuya (DW 1) agreed that their father, had given each of his sons a piece of land. He testified that he got the suit property from their father and had been living thereon since 1980. He had planted tea and built a homestead on the land. He told the court that the objector had his own share in East Kitutu/Botabori II/ 1665 and he was therefore opposed to him getting a share out of the suit property. He testified that his father had registered the land in the name of the deceased as he was away but when he retired their father showed him the suit property and had agreed that the land would be transferred to him. He testified that he had applied for grant with his father's consent. He had also filed a land dispute at the tribunal and from the evidence given before the tribunal and the tribunal's decision the land belonged to him.

10. During cross examination, the petitioner conceded that he had not involved his father or the petitioner in the succession proceedings. He stated that his father had subdivided the original parcel 1083 into several parcels of land including parcel 1662, 1664 and 1665 which he had divided among his sons from all three houses. He denied having a portion in parcel 1662 and stated that there had been no agreement for him to swap a parcel of land with his brother George for the suit property. He admitted that the objector had been initially lived on the suit property before his house had been demolished and moved to parcel 1665. He also admitted that he was not the deceased son but insisted that their father had given him the suit property solely in 1980 before the objector was born.

11. Stanley Makana Orina (DW 2) testified that he was present when the suit property was given to the petitioner in 1980 by his brother PW 2. The petitioner had built a home and had cultivated tea and maize thereon. The tea bushes on the land had been planted by the petitioner and PW 2 and they cut across the entire land. He testified that the objector had been given his own portion of land and his claim against the petitioner was therefore unmerited. DW 2 admitted that he was not aware whether PW 2 had given the deceased the suit property but stated that when she died she had been buried on the land. He testified that the objector resided on parcel 1665 and had never lived on parcel 1664.

12. The parties filed their written submissions in support of their rival positions. Counsel for the objector, in his written submissions, urged the court to revoke the grant issued to the objector and issue a new one in the objector's name. He submitted that the petitioner had not sought the consent of his late father Livingstone Nyabuya or the biological sons of the deceased prior to filing the petition. Counsel also noted that the petitioner had failed to disclose that he was the step-son to the deceased. He had gone ahead and used the unconfirmed grant to have himself registered as the sole proprietor of the land and had then proceeded to kick the objector out of the suit property. Counsel urged the court to use its discretionary power to cancel that title and disregard the proceedings before Rigoma Land Disputes Tribunal as the tribunal lacked capacity to determine the issue of ownership of land or determine matters relating to the estate of the deceased.

13. Counsel for the respondent dismissed the petitioner's contention that the magistrate's court had lacked jurisdiction to hear the matter, stating that the petitioner had not substantiated his claim that the land was worth Kshs. 1,000,000/=. He submitted that the proceedings and the decision in land case number 2 of 2007 before Rigoma land disputes tribunal proved that the petitioner was the rightful owner of the suit land as his late father PW 2 had admitted in those proceedings that the land belonged to the petitioner solely. It was submitted that the objector had been allocated his own parcel of land and therefore had no claim to the suit property.

14. The objector herein seeks to revoke the grant issued to the petitioner on two grounds. The first ground is the lack of jurisdiction by the magistrate's court to issue a grant in the estate of the deceased, which he contends is worth more than Kshs. 100,000/=. **Section 48** of the **Law of Succession Act** donates powers to the magistrate's courts to issue orders relating to estates whose gross value does not exceed Kshs. 100,000/=. The onus to prove that the value of the suit property exceeded Kshs. 100,000 fell upon the objector but he has not adduced evidence to prove this assertions. He therefore failed to discharge his burden of proof and I reject the argument that the magistrate's court lacked the requisite jurisdiction to issue a grant in the estate of the deceased.

15. The petitioner also objected to the issuance of the grant to the petitioner based on **section 76** of the Act which provides as follows;

76. 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;

16. The petitioner argues that his father PW2 gave him the suit property in 1980 and it had only been registered in the name of the deceased as he was away at the time of registration. The petitioner relied on proceedings before the land dispute tribunal in case number 2 of 2007 which he had initiated to compel PW 2 to transfer the suit property to him.

17. From the tribunal's record, which has been availed to this court, it would appear that PW 2 agreed with the petitioner's stance. He told the tribunal that the suit property belonged to the petitioner but he had been away for a long time and he had decided to process the title in the name of the deceased. The tribunal resolved that the parcel of land belonged to the petitioner and advised the petitioner and PW 2 to cancel the title in the deceased name and have the parcel transferred in accordance with their verdict.

18. The parties discussed in great length the passing of title from the deceased husband, PW 2 to the deceased and also expended considerable energies discussing how PW 2 had distributed his properties among his three houses. However the subject of this case is land parcel number **East Kitutu/Botabori II/ 1664** and it is an uncontested fact that the deceased was the registered owner of that parcel of land.

19. At the time the tribunal made its award on 12th March 2007, the deceased had died and the property was still registered in her name. The deceased died after the commencement of the Law of Succession Act and her property was therefore subject to division in accordance with the Act. The Act gives the High Court and the Magistrate's court the jurisdiction to deal with matters relating to the distribution of estates thus the tribunal could not purport to determine issues raised with respect to the deceased's property.

20. **Section 66** provides the order of priority for issuance of a grant where the deceased died intestate as follow;

66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

21. In this case, the deceased was survived by her spouse, PW 2. She was also survived by her son, the objector who ranked higher in the order of priority to the petitioner. **Rule 26(1) and (2)** of the **Probate and Administration Rules** provides;

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

22. In his application for grant, the petitioner listed the survivors of the estate of the deceased as Okero Nyabuya, Peter Nyabuya, Moi Nyabuya and Livingstone Nyabuya Orina. He however failed to seek the consent or a renunciation of the objector, PW 2 or any of the beneficiaries listed in form P & A 5 before making his application for grant. (see *In re Estate of George Muriithi Gitahi (Deceased) Succession Cause No. 20 of 2018 [2019] eKLR; Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another Succession Cause No. 124 of 1999 [2013] eKLR and In re Estate of Wahome Mwenje Ngonoro Deceased Succession Cause No. 196 of 2005 [2016] eKLR*)

23. The petitioner ought to have sought the renunciation, or written consent of all persons entitled in equality or priority of him. He was also required to apply for confirmation of grant prior to the distribution of the property in accordance with Section 71 of the Act which he failed to do.

24. I therefore find that the application for grant in Keroka SRMC Succession Cause No. 05 of 2007 was defective for want of compliance with Section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules. For these reasons, I make the following final orders:

a. The grant of Letters of Administration granted to the petitioner on **19th November 2009** in **Keroka SRMC Succession Cause No. 5 of 2007** is hereby **revoked**.

b. A fresh grant shall issue in the names of the Petitioner **Joseph Asuma Nyabuya** and the Objector **Duke Onyari Nyabuya** as administrators of the estate of the deceased.

c. The administrators shall apply for confirmation of the grant within 30 days from the date of this Ruling.

d. The title in respect of land parcel number **East Kitutu/Botabori II/ 1664** transferred to the name of the petitioner is hereby revoked and shall revert to the name of the deceased.

e. As this is a family matter there shall be no orders as to costs.

Dated and signed on 3rd day of May 2019.

R.E. OUGO

JUDGE

Signed and delivered at Kisii on the 7th day of May 2019

D.S MAJANJA

JUDGE