



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 593 OF 1999**

**IN THE MATTER OF THE ESTATE OF JACKSON KALO KATESI, DECEASED**

**RULING**

1. The applicant herein filed an application dated 13<sup>th</sup> July 2016, under the provisions of Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 44 and 73 of the Probate and Administration Rules, seeking for an order that the court be pleased to order cancellation of subdivision Kabras/Bushu/1431 and to restore it back to its original form.

2. The main ground of the application is that the respondents had subdivided the parcel of land in two equal portions in their names and yet there were pending objection proceedings in the matter. It is the applicant's position that the respondents had since taken possession and use of the land now registered in their names to exclusion of the other beneficiaries. There is annexed a copy of the green card in respect of the property. The same states that, the said land was subdivided into two equal portions on 3<sup>rd</sup> September 2015.

3. The 1<sup>st</sup> respondent responded to the application by way of a further affidavit. He states that he was not aware of the objection proceedings as he was yet to be served. He confirms that the estate had been subdivided into two after confirmation of the grant made to him and the 2<sup>nd</sup> respondent. He alleges that the 2<sup>nd</sup> respondent had since taken possession of the estate and was using it to the exclusion of the other beneficiaries. The same was reiterated in his statement.

He states that the 2<sup>nd</sup> respondent was not competent to administer the property and that the objector was best suited to administer it. The 2<sup>nd</sup> respondent in his submissions, denied the allegations that he was mismanaging the estate. He stated that the dispute in court was still pending and thus the application that sought final orders could not be allowed. He further stated that the applicant had not demonstrated any danger of him wasting the land thus the orders sought cannot be granted.

4. The grant herein was confirmed on 20<sup>th</sup> February 2012. The same distributed the estate between the respondents in equal shares.

5. Jurisdiction of this court to grant the orders sought in the instant application was adduced in *Munyasya Mulili & 3 Others vs. Sammy Muteti Mulili* [2017] eKLR, where the court stated that -

*'As regards this Court's jurisdiction as a succession court to revoke title, this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides as follows:*

*"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient (Emphasis mine)*

*Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice."*

*Rule 73 of the Probate and Administration Rules 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."*

*As to whether there are grounds for the Court to exercise these powers in relation to revocation of the 2nd Petitioners title to the disputed properties and any other third party's titles arising therefrom, the law that applies as to the disposition of a deceased's person property is section 55 of the Law of Succession Act which provides as follows with regard to disposition of capital assets of a deceased person's estate:*

*“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.*

*(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”*

*This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased’s properties before confirmation of grant whether by way registration of title, or sale is thus liable to revocation pursuant to the powers granted to this Court by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.’*

6. Section 47 of The Law of Succession Act, Cap 160, Laws of Kenya, provides that,

*‘The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.’*

7. It therefore follows that this court has jurisdiction to cancel a title. In the instant application the applicant seeks to have the titles issued to the respondents revoked on the basis that the respondents might dispose of the land to the detriment of the other beneficiaries. I note that the subdivision came into effect pursuant to confirmation of the grant on 20<sup>th</sup> February 2012. The applicant has filed an application for Revocation of the grant dated the 23<sup>rd</sup> July 2015 and the same is still pending determination before this court.

8. The issues raised in this application depend on the fact that the applicant seeks to restore the estate of the deceased for the benefit of the other beneficiaries not included in the grant by the respondents herein. For this court to determine whether the titles were properly obtained it would have to be satisfy itself as to whether the grant was properly confirmed, which could only be established upon hearing the application for revocation. Further, the court cannot issue orders in vain. The determination of the application for revocation will consequently affect the titles

9. In *Re Estate of Siameto Ole Munguti (Deceased)* [2015] eKLR court held that

*‘I must also add that once the grant was revoked, neither the applicant nor anybody else could proceed as if there still existed a valid grant; the nullification of the grant had the domino effect of nullifying any action taken, in this case the subdivision and transfer of the deceased’s estate, on the strength of the nullified grant. Strictly speaking, the application for cancellation of the titles that were derived from the deceased’s original estate need not have been made in order for those titles to be cancelled. If it was to be made, the order that was consequently made would have been only necessary for avoidance of doubt on the net effect of the order nullifying the grant and, if the land registrar needed any direction, to direct him on the specific action to take; otherwise the revocation of grant was, in itself sufficient.’*

10. If I were to grant the prayers sought in the instant application, the effect would be to render inoperative the grant of 20<sup>th</sup> February 2012. Such a determination would lock out the respondents from defending their cause and justifying their entitlement as per the grant. Further, the applicant claims that the 2<sup>nd</sup> respondent intends to dispose of the land. I should be noted that the applicant in his submissions herein relied on the provisions of section 80 of Land Registration Act, which stipulate that –

*‘Rectification by order of Court.*

*80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.’*

11. Apart from stating that the respondents are likely to sell the land, the applicant has not adduced any other information in support of his application. The applicant has not sufficiently proved his cause to warrant the orders sought. The issues raised herein can be adduced in the pending application for revocation of grant filed by the applicant herein. The application dated 13<sup>th</sup> July 2016 is accordingly dismissed.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June 2019**

**W MUSYOKA**

**JUDGE**