



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 5 OF 2006

IN THE ESTATE OF:

EKISA MAITO ELOKOT.....DECEASED

BETWEEN

DAVID ALEKUTU EKISA.....OBJECTOR

AND

MICHAEL OKEDI

DAVID ONYANGO OMUSE.....PETITIONERS

RULING

1. **David Alekutu Ekisa**, the objector herein filed an application for revocation of the grant herein under section 76 of the Law of Succession Act, Cap. 160 and Rule and 44 of the Probate and Administration Rules. It is premised on the following grounds:

- a) The proceedings to obtain the grant were defective in substance.
- b) The grant was obtained fraudulently by making false statements and by concealment of material facts relevant to the same.
- c) The cause was filed and finalized in circumstances not disclosed to the objector.
- d) The objector is the son to the deceased and ranks in priority to the interested persons and is at par with his absentee brother who is the petitioner herein.
- e) That the 2nd petitioner/respondent is not a member of the deceased's family in order to have petitioned for the grant as shown herein.

2. The application was opposed.

3. I have perused the affidavits of both parties and the record. The following facts have emerged:

- a) That David Onyango the second petitioner/respondent herein bought a parcel of land from the 1st petitioner and the objector herein and not from Ekisa Maito Elokot, the deceased herein.
- b) That the deceased herein died on 15th February 1995.
- c) That when the two sold portions of land none of them had been granted letters of administration in respect of the deceased's estate.

I therefore find that 1st petitioner and the objector had no capacity to deal with the estate of the deceased and could not therefore pass any title to the second respondent. He can only pursue his claim with the seller and not from the estate of the deceased.

4. On revocation and annulment of a grant, section 76 of the Law of Succession Act provides:

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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

The grant herein issued and confirmed is revoked. The objector and Michael Okedi are appointed co-administrators of their father's estate.

5. In an application by way of Notice of motion under order 45 Rule 1 of the Civil Procedure Rules dated 6th June 2018, the 2nd petitioner/applicant was seeking for the following orders:

a) That this matter be certified urgent and service of the same be dispensed with in the first instance.(Spent)

b) That there be a stay of execution of the orders of this court made on 23/05/2018 and all other consequential orders arising therefrom pending hearing and determination of this application inter-partes.

c) That there be stay of execution of the orders of this court make on 23/05/2018 and all other consequential orders arising therefrom pending the hearing and determination of this suit.

d) That this court's proceedings and orders of 23/05/2018 be set aside, varied and or reviewed.

e) That leave be granted to the applicant/ petitioner to file his response/replying affidavit to the respondents' application for revocation dated 28th December, 2015 and subsequently this matter be listed for inter-partes hearing.

6. The application was premised on the following grounds:

a) That the proceedings of 23/05/2018 were done ex-parte.

b) That on 23/05/2018, the applicant was present in court but his advocate was absent.

c) That the applicant had instructed the firm of **J.B. Otsiula & Associates Advocates** to file response and represent him in this matter as he is a layman.

d) That Mr. Otsiula advocate failed to file response and witness statements.

e) That Mr. Kweyu advocate who was in court on 23/05/2018 holding brief for the applicant's advocate did not have the lawyers file and could not handle the matter adequately.

f) That the mistakes of an advocate should not be visited on an innocent client.

g) That the applicant can compensate the respondents by way of costs for the proceedings of 23/05/2018 if he is given a chance to be heard.

h) That the applicant has a good defence/reply to the application for revocation.

i) That the issues between the estate of the deceased and the applicant were settled on 04/03/2008, upon hearing all the parties in this case.

- j) That the applicant bought the land measuring 1 ¼ Acres from the respondents herein on 09/08/2001 at Kshs.32, 500/= which he paid in full.
- k) That on 01/12/2008, the applicant obtained title to the suit land which was land parcel number **BUKHAYO/KISOKO/5813**.
- l) That in 2004, the applicant sold his land to **Tejveer Singh Raj** at Kshs.200, 000/= and was paid in full and the land transferred to the said **Tejveer Singh Raj** on 20/01/2014.
- m) That the respondent herein misled the court by averring that they were unaware of this suit when they were present and took part in the proceedings that allowed the applicant to file this succession cause in 30 days with effect from 31/10/2005.
- n) That the proceedings of this court vide **Busia HCC Misc. Succ.Appl.No.148 of 2004** dated 31/10/2005 bears witness that both the respondents took part in this proceedings and it is false for them to claim otherwise.
- o) That it is not true that this succession cause was filed fraudulently as alleged by the respondents or at all.
- p) That the applicant never needed consent of the respondents to file this succession cause as he had been authorized by court to file the same and the presence of the 1st petitioner was only for purposes of good faith.
- q) That the respondents were in court and had been aware of this cause all along and even on 02/07/2007, when the assistant chief one **Denis Nyekenye Ouma** appeared in court they were present.
- r) That the allegations made about two law firms of **Balongo Advocates** and **Samba Advocates** are very serious allegations which need to be interrogated.
- s) That the applicant never took part in the confirmation of 15/07/2014 as he had already received his title on 01/12/2008.
- t) That it is wrong for the respondents and their brothers to drag the applicant into their family fight.
- u) That the applicant's claim on the land for 1 ¼ acres is settled by court orders of this court and the lower court.
- v) That the respondents gave evidence that was not true before this court.
- w) That locking the applicant out of this proceeding is condemning him unheard and has caused the applicant undue prejudice and injustice.
- x) That the orders of 23/05/2018 have the effect of cancelling title number **BUKHAYO/KISOKO/5813** which is registered in the name of Tejveer Singh Raj who was never given a hearing before his title was cancelled.
- y) That canceling the number **BUKHAYO/KISOKO/5813** will expose the applicant to liability from the current registered owner.
- z) That had the court been seized of all the facts herein, there is a possibility that it could have declined to grant the orders made on 23/05/2018.

7. This application was rendered impotent by the reasons I have explained in paragraphs 3 and 4 above. I also want to observe that an advocate is an agent of an instructing party. When he fails to conduct the case professionally, the instructing party cannot be seen to hide behind the trite saying that mistakes of an advocate ought not to be visited on the party. Parties have a duty to shop for a competent advocate and in cases where an advocate displays incompetence, an affected party has a right to seek legal redress.

8. The Notice of motion dated 6th June 2018 is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 13th day of June, 2019

KIARIE WAWERU KIARIE

JUDGE