



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 47 OF 2011

IN THE MATTER OF THE ESTATE OF SABASTIANO MOCHI MASAE (DECEASED)

JOSEPH KIMUTAI KIMETTO.....OBJECTOR/APPLICANT

VERSUS

RICHARD KIPNGETICH KIMETTO)

JOHN KIPKEMOI KIMETTO).....PETITIONERS/RESPONDENTS

RULING

1. Before me is a Summons for Revocation of Confirmed Grant of Letters of Administration dated 23rd July 2015 filed by Ms Motanya & Company Advocates on behalf of the objector/applicant Joseph Kimutai Kimetto.
2. The Summons does not state the section of the law under which it was filed. It is based on the grounds that the proceedings to obtain the grant were defective in substance, and that the grant was obtained fraudulently by concealment from the court something of material in the case.
3. The application was filed with a supporting affidavit sworn by the applicant Joseph Kimutai Kimetto on 23rd July 2015 in which it was deponed that the deceased Sabastiano Mochi Masae died on 1st July 2005, and that the petitioners failed to obtain consent of all persons entitled to the grant, and also failed to furnish the court with a full inventory of assets and liabilities. In particular the liability that the applicant had bought from the deceased two (2) acres of land – in Kericho/Boito/173 in 1975 and lived thereon since then was not disclosed. (I note that the applicant did not annex any document of the purported sale of the land.)
4. The application was opposed through a replying affidavit sworn by Richard Kipngetich Kimetto one of the two petitioners on 3rd November 2015 in which it was deponed that it was not true that the administrators (petitioners) did not obtain the consent of all persons entitled to the grant and that it was also not true that they failed to furnish the court with a full inventory of the assets and liabilities of the deceased. It was also deponed that the applicant did not buy 2 acres from Kericho/Boito/173 from the deceased, nor had he been in occupation since 1975 as alleged.
5. Parties' counsel by consent filed written submissions to the application and adopted the same without highlighting in court.
6. In his submissions, Mr. Motanya for the applicant stated that the petitioners ignored the fact that the applicant had bought 0.8 acres in Kericho/Boito/173 in 1975 at Kshs.4,400/- and immediately applied for consent from the Land Control Board, and such consent was obtained. The petitioners however, frustrated the applicant and denied him peaceful possession and occupation of the suit land and uprooted his trees and destroyed boundaries.
7. Counsel further submitted that the applicant as a peaceful citizen involved village elders who decided in his favour, but the petitioners were adamant in not allowing him to enjoy his rights. Counsel concluded by stating that the applicant had been in continuous occupation of the land for more than 12 years and as such under the doctrine of adverse possession, the land belonged to him.
8. The petitioners' counsel M/s Chelule & Company Advocates started by giving a summary of the claims of the applicant in the application and the response of the petitioners. Counsel then proceeded to submit that the applicant had failed to prove any of the allegations made against the petitioners. Counsel relied on the requirement for proof or establishment of facts, and burden of proof under section 107 and 109 respectively of the Evidence Act (Cap.80).
9. This is an application for revocation or annulment of Grant of Letters of Administration. Under section 76 of the Law of Succession Act (cap.160) this court has jurisdiction to revoke or annul any Grant of Letters of Administration whether or not the same has been confirmed. The section 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;

(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 may 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 in operative through subsequent circumstances.”

10. The applicant has come to this court claiming to be a buyer of two acres of land from the deceased, and claiming that the petitioners ignored his interest in proceeding with obtaining the grant of representation of letters of administration and confirmation of the same. Under section 107 and 109 of the Evidence Act (cap.80) the burden was on him to present the facts and also to prove his claim in this court.

11. Starting with the technical point of adverse possession raised by Mr. Motanya for the applicant, there was no pleading in the application for conferment of title to the applicant based on adverse possession, and even if there was such a plea, same would have to go to another court, as the succession court does not have the mandate to determine matters to do with title to land.

12. With regard to the claim that the applicant had bought the 2 acres from the deceased, and obtained consent from the Land Control Board, there is no evidence or pleading in the application that would support these allegations. All the allegations and purported documents relied upon were filed in counsel's submissions. In my view, counsel's submissions are meant to support and amplify the pleadings and documents filed therein, and not to create new pleadings or introduce new documents not filed by the litigant. Besides, both in pleadings and even submissions of counsel the applicant has not stated whether he was aware of the succession proceedings and why he did not file his objections therein.

13. From counsel's arguments, infact if true, it appears that he knew then that he was being excluded, and the question is why he did not file his objection then. In any event, the issue as to whether indeed he purchased the 2 acres of land, and whether he has been in occupation cannot be determined in the Succession Court. The succession court can only act appropriately on an order made by the competent court with regard to title and ownership or entitlement to land outside inheritance rights.

14. I find no merits in the application for revocation or annulment of grant of Letters of Administration herein. The same is dismissed with costs to the petitioners/respondents.

Dated and delivered at Kericho this 9th December 2019.

George Dulu

JUDGE