



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION NO. 91 OF 2011

IN THE ESTATE OF:-

OPAMO WANGIRA MASAKHWE.....DECEASED

BETWEEN

JACOB BABU OKUMU.....APPLICANT

AND

FREDRICK TUSKER OPAMO.....RESPONDENT

RULING

1. **JACOB BABU OKUMU**, the applicant herein filed an application dated 24th February 2017 for revocation and annulment of the grant issued herein under section 76 (a) (b) and (c) of the Law of Succession Act, Cap. 160 and Rules 44 of the Probate and Administration Rules. It is premised on the following grounds:

- a) That the grant was obtained fraudulently by making a false statement or by concealment of material facts.
- b) That the grant failed to recognize the existence of other beneficiaries.
- c) That the grant failed to appreciate that the estate was owned by three brothers, who are all deceased.
- d) That the grant subdivided the estate afresh yet the same was distributed in 1990.

2. The second application is dated 13th March 2017 is seeking to stop all the survey work by the respondent. It is brought under section 3A and section 63(e) of the Civil Procedure Act, order 40 Rules 1(a), 4(2), 10(1) and Order 51 of the Civil Procedure Rules. The application is premised on grounds:

- a) That the applicant has commenced survey works to give effect to the grant issued on 5th October 2016.
- b) That the applicant has filed an application for the revocation of the grant.

3. Both applications were opposed by **FREDRICK TUSKER OPAMO**, the petitioner/respondent on the following grounds:

- a) That the succession cause is in respect of his father's estate.
- b) That he has provided for all the beneficiaries.
- c) That the applications were brought out of ignorance of the existing facts.

4. The application dated 13th March 2017 is seeking to stop all the survey work by the respondent. It is brought under section 3A and section 63(e) of the Civil Procedure Act, order 40 Rules 1(a), 4(2), 10(1) and Order 51 of the Civil Procedure Rules. Judge Ruth Nekoye Sitati while addressing these sections and Rules in a Probate and Administration cause of **PRISCILLA VUGUTSA KAMALIKI V MARY**

RUNYANYI OCHIENG [2016] eKLR said the following:

The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.

I concur with this finding of the learned judge. The effect therefore is to render the application dated 13th March 2017 incompetent for want of form. The same is dismissed with no orders as to costs.

5. I have perused the affidavits of both parties in respect of the application dated 24th February 2017. The following facts have emerged:

- a) That the letter by the senior assistant chief, Budalang'i sub location, Mr. William Barasa dated 6th January 2011, introduced the respondent as the sole heir to the estate of **Opamo Masakhwe**.
- b) That the respondent in form P. & A. 5 indicted that he was the sole heir of his father's estate.
- c) A copy of search certificate in respect of land parcel number **BUNYALA/BULEMIA/149** as at 7th October 2010 was registered in the names of **Okumu Masakhwe** and **Opamo Masakhwe** each entitled to half a share of the said parcel of land.
- d) That there are other claimants to the estate who have contended that they have been left out.

6. From the foregoing observations, I make a finding that the respondent herein obtained the grant herein without full and true disclosure of facts.

7. Section 76 of the Law of succession provides inter alia as follows:

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;

8. Rule 44 (1) of Probate and Administration Rules provides for the form of the application.

9. In the interest of justice, I make the following orders:

- a) That the grant issued herein be and is hereby revoked.
- b) That the same be substituted with an order of grant to **FREDRICK TUSKER OPAMO** and **JACOB BABU OKUMU** as joint administrators.
- c) For avoidance of doubts, **JACOB BABU OKUMU** is made a joint administrator so as to safe guard the interests of his father's half share in land parcel number **BUNYALA/BULEMIA/149**.
- d) That the joint administrators ought to move the court for confirmation of the grant within 6 months of this ruling failure to do so, this grant will automatically stand revoked.
- e) Each party to bear own costs.

DELIVERED and SIGNED at BUSIA this 8th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE