



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 1053 OF 2011

IN THE MATTER OF THE ESTATE OF MWENGA KAVOI - DECEASED

PETER NGUI MWENGA.....PETITIONER

VERSUS

1. WILLY NYILA NDUNDA

2. MUIA MWENGA.....OBJECTORS

RULING

1. By the summons dated 15th November, 2012, the applicant sought confirmation of the grant issued to him on 29th May, 2012. The same was confirmed on 18th January, 2013. Subsequently, the 1st objector filed the summons dated 1st March, 2013 for revocation/annulment of the grant. The court upon considering the application for revocation, issued an order that there be stay in use of the grant with the effect that the Registrar of Lands Machakos be prohibited from registering any dealing in all that parcel of land Known as Mavoko Town Block 3/2422 pending full hearing of the application and that the letter of administration issued on the 29th May, 2012 and confirmed on the 18th January, 2013 be revoked and/or annulled. The 1st objector's case was that he purchased a portion of Plot No. 412 of Lukenya Ranch measuring 9 acres whose title is Mavoko Town Block 3/2422 and another plot Mavoko Town Block 3/179. That he was settled on Mavoko Town Block 3/3074 whose title is not included in the list of the deceased's assets.

2. The petitioner later filed a summons on 14th December, 2015 seeking to rectify the grant. He sought that the grant be rectified to include L.R. No. Mavoko Town Block 3/3074, L.R. No. Mavoko Town Block 3/179 and Sikia Plot No. 20 as part of the deceased's estate and be distributed as per the schedule annexed to the application.

3. On 24th February, 2016, the 2nd objector filed summons seeking revocation or annulment of the grant and further that title deeds and transfers effected by use of the said grant confirmed on 18th January, 2013 be recalled and cancelled. The 2nd objector lamented that he did not consent to the grant or renounce his rights prior to the issuance of the grant and that the deceased's estate was distributed to intermeddlers who are not beneficiaries of the estate. He stated that Land parcel No. Mavoko Town Block 3/179 was sold to Willy Nyila and not Massage Labs Africa Ltd as claimed by the petitioner.

4. In contention thereto, the petitioner vide his replying affidavit filed on 15th December, 2015 stated that at the time of applying for grant, only one property L.R. No. Mavoko Town Block 3/2422 was included in the petition against their wish. Upon confirmation of the grant, L.R. No. Mavoko Town Block 3/2422 was subdivided and totally distributed as per the schedule thereof. That there was no complaint until he filed that application for rectification to include some property that had been left out. He contended that the 1st objector did not buy such land from the deceased as claimed and that the attached documents are mere forgeries and meant to mislead the court. That the only land that he is aware of was sold by the deceased to the 1st objector and is a 4 acre portion from L.R. No. Mavoko Town Block 3/3074 where the 1st objector lives. That the objector must have seen the surveyors on the ground when the parcel L.R. No. 3/2422 was being surveyed and was fully aware since the succession cause was filed and that he did not object to the distribution. That had the 1st objector been included, he would have been given his 4 acre out of L.R. No. Mavoko Town Block 3/3074 and that the properties that were left out were L.R. No. Mavoko Town Block 3/3074 L.R. No. Mavoko Town Block 3/179 and Sikia Plot No. 20 which has no title.

5. In response to the 2nd objector's application, the petitioner contended that the 2nd objector was involved and executed all relevant documents. That he was present in court during the confirmation of the grant but did not raise objections. The petitioner expressed his suspicion that the 2nd objector has been promised some monies or favours by the 1st objector occasioning him to change his mind. He contended that the 2nd objector in fact swore a consent for rectification of grant and that he is the one who received the biggest portion of the estate in the distribution and should tell the court as much. The petitioner further contended that the 2nd objector was the one who accompanied the surveyors and land officials as the subdivision of the estate was done but did not raise any objections then.

6. In oral evidence, William Nyila Ndunda (Objector witness no. 1) stated that he bought 5 acres of plot no. 588 later referred to as Mavoko Town Block 3/179 vide letter of transfer dated 5th March, 1997. That he also bought plot no. 412 later referred to as Mavoko Town Block 3/3074. That he first bought 4 ½ acres. At the time of survey, it was found to be more than 4 acres and he had to pay additional money and took 6 acres.

7. The 2nd Objector's witness Kavoi Muia Mwenga stated that the 5 acres and another 6 acres had been sold to the 1st objector. That the 1st objector was the first to buy plots and other companies came later. On cross examination, he admitted to having signed the consent annexed to the petition to apply for grant. The deceased had other properties that were not included in the initial petition for letters of grant. That he was given 10 acres and never sold any portion of it. He later stated that he sold part of his land and his siblings came to court in 2013. He stated that he does not know how to read and admitted to signing the consent. He stated that the 1st objector resides on part of the 20 acre since the same had been sold by the deceased to the 1st objector. He admitted that the 1st objector approached him to assist him in the application for rectification of grant. On re-examination, he stated that some documents were prepared in his absence.

8. The Petitioner Peter Ngui Mwenga stated that the petition was consented to by all the deceased's beneficiaries and the 2nd objector signed the consent. That the deceased had 40 acres, 20 acres, 5 acres of land and 2 town plots. That only the 40 acres of land was included in the petition and was subdivided upon issuance of the grant. He made an application for rectification which was endorsed by the 2nd objector. That the 1st objector had bought 4 ½ acres from the deceased and resides on it but that the 2nd objector has no share on the 40 acre plot and that he has not seen any sale agreement to that effect. That he and the 2nd objector received 10 acres and part of the land had been sold. That the 2nd objector sold part of his land but that he did not sell the same to the 1st objector. That the deceased had not sold part of the 5 acre plot. He stated that there was intention to sell the 5 acres to a certain company and the 2nd objector had consented to that.

9. It was the objector's submissions that the petitioner did not dispute the sale agreement dated 15th February, 1983 and that of 5th July, 1987 thereby the 1st and 2nd objectors' evidence was not discredited. It was contended that if indeed the claim of forgery was genuine, the petitioner should have tendered such evidence and that failure to call a witness to prove such a fact was a pointer that such evidence would be prejudicial to the petitioner's case. **Nguku v. Republic [1985] eKLR** was cited to support that argument. It was argued that the 1st objector's evidence was corroborated by the 2nd objector's evidence. when he stated that the 1st objector bought 4 ½ acres and later 1 ½ acres when it emerged that the portion sold to him was bigger after measurements were done. That the 1st objector wholly purchased L.R. No. Mavoko Town Block 3/179. That the 1st objector was the first person to buy the land and that the petitioner did not rebut the said evidence. It was submitted that the petitioner was acting in bad faith to disadvantage the objectors. That the petitioner left out the properties the 1st objector had claims to. That despite the filing of the application for revocation dated 1st March, 2013, the petitioner still denied the 1st objector's claim until the year 2015. That had the petitioner not been pushed, he would have continued to perpetuate his illegalities with respect to the deceased's estate. It was submitted that the objectors have satisfied the standard of proof as was enunciated in **D.T. Dobie & Co. (K) Ltd v. Wanyonyi Wafula Chebukati [2014] eKLR**.

10. It was submitted that the petitioner's request for rectification of grant cannot be granted since there is no error spelled under Section 74 of the Law of Succession Act to be rectified.

11. On the other hand, the petitioner submitted that the 1st objector's prayer for injunction in respect of Title No. Mavoko Town Block 3/2422 was overtaken by events since the land was subdivided and new titles issued to different owners who were not enjoined in this suit. Section 93 of the Law of Successions Act was cited in this regard. The said section provides:

“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

The case of **Kennedy Opiche Olela v. William Ogida Ochuodho & another [2014] eKLR** and **Ireru Nyaga v. Karani Ngari & Another [2010] eKLR** were cited in that regard.

12. It was further submitted that the petitioner and the beneficiaries agreed to the proposal and each beneficiary gave his/her consent and had no objection to the 3 parcels of land being included. That in that regard, this court has the power to rectify the grant. In support of the said argument, the petitioner cited **Re Estate of Joseph Kiama Rumen (Deceased) [2010] e KLR**. It was argued that the powers of a succession court under section 47 of the Law of Succession Act are very wide and that under rule 73 of the Probate and Administration Rules, the court can under its inherent powers rectify the grant.

13. I have given due consideration to the dispositions by the parties herein. The 2nd objector admitted to signing the consent that resulted to the grant being issued and thereby agreed to its terms. Although he stated that he does not know how to read, he did not contend that he sold the portions that he bought. He also admitted to having been asked by the 1st objector to assist him and I find that he merely objected to the grant due to pressure.

14. On the other hand, the 1st objector's case that he purchased part of Mavoko Town Block 3/179 and 3/2422 was not rebutted by the petitioner, it is not clear therefore why even with the knowledge that the 1st objector had bought portions of the said lands, the petitioner went ahead to list them for distribution. Having not tendered any evidence in rebuttal to water down the 1st objector's claim, I find that the petitioner's argument has no merit. In the circumstances, I nullify the grant issued on 29th May, 2012 as the respective Applications by the

objectors are found to have merit and are allowed.

15. In effect, I make the following orders:

a) The grant issued on 29th May, 2012 is hereby annulled/revoked.

b) The Petitioner's Application dated 14th December, 2015 is hereby dismissed.

c) Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 19th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Kinyanjui - for the Petitioner

Musya for the Objectors

Josephine - Court Assistant