



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 529 OF 2008**

**IN THE MATTER OF THE ESTATE OF SHONGO OMEDO (DECEASED)**

**BETWEEN**

**STEPHEN KIMOI KEBENEI.....PETITIONER/RESPONDENT**

**AND**

**RUTH CHUMBA.....1ST OBJECTOR/APPLICANT**

**ALICE CHEPKOSGEL.....2ND OBJECTOR/APPLICANT**

**JUDGEMENT**

**Introduction**

1. **SHIONGO OMEDO** (deceased) died sometimes on 22<sup>nd</sup> June, 1973. Deceased's estate comprised of Land Parcel No. **NANDI/KANGORO/499**. Letters of administration were issued in Petitioner's favour on 22<sup>nd</sup> December, 2008. The grant was confirmed on 2<sup>nd</sup> October, 2009 in the following terms:

- Julius Kiprono Atugah (purchaser) 5 acres
- Kipsongok Arap Tendei (purchaser) 1 acre
- Stephen Kimoi Kebenei and Alice Chumo jointly to share the remainder of Land

**Application**

2. The application before the court is dated 20.6.10 and is a summons for revocation of the grant of letters of administration made under section 76 Rule 4 of the Law of Succession Act (Chapter 160 of the Laws of Kenya). The applicants seek the following orders:

***1. The Honourable Court be pleased to revoke/annul the grant of letters of administration intestate and subsequently confirmed grant issued to Stephen Kimoi and Alice Jesang Chumo***

***2. Pending the hearing and final determination of this application, there be a stay of Kapsabet Principal Magistrate's Court Civil Case No. 134 of 2010 between Stephen Kimoi Kebenei v Alice Jepkosgei and Ruth Chumba***

***3. Costs of this application be provided for***

3. The application is based on the grounds among others that the grant was obtained fraudulently and by concealment of material facts including failure to provide for all beneficiaries of the estate.

4. The application is supported by 1st applicant's affidavit sworn on 20.6.11. She avers that the petitioner is not deceased's son. She further faults the petitioner for not disclosing to court that their parents had bought 2 acres of deceased's land and had lived on it until their demise and further that applicants had continued to use and occupy the said 2 acres and were therefore entitled to the same during the distribution of deceased's estate.

5. In his replying affidavit, petitioner maintains that he is son of the deceased whose siblings were Alice Chepngetich (deceased) and John Kibitok Arap Siongo. He went further to state that the rightful beneficiaries of deceased's estate were himself and Alice Chumo the widow of his only brother Joash Kiptanui Chumo. He additionally averred that applicants had not annexed any sale agreement to demonstrate their

interest over deceased's estate and urged the court to dismiss the objection.

**Objector/Applicant's Case**

6. In her evidence, 1st applicant reiterated what is contained in her supporting affidavit as stated hereinabove. She told court that their father Joel Arusei bought 2 acres of deceased's land from the deceased and lived on it with their mother until their death. It was further her evidence that the 2nd applicant was still living on the said 2 acres until she was evicted by the petitioner who also destroyed their house. It was the eviction that prompted the applicants to find out the cause of the eviction and it was then that they became aware that petitioner had obtained a grant in which they were not provided for. She faulted petitioner for not notifying them of the filing of this succession cause and for not making a provision in their favor thereby disinherited them. 2nd applicant gave evidence similar to that of the 1st applicant and stated that she was evicted 5 years ago from the 2 acres of deceased's estate she occupied. PW3 Cosmas Kiptum Rotich, assistant chief Chepsirai sub-location in Nandi County stated that the dispute between petitioner and objectors was deliberated by elders who resolved that objectors were entitled to 2 acres of deceased's estate. PW4 Francis Matei stated that his aunt who was deceased's wife had informed him that applicants' father had bought 2 acres of deceased's land on which applicants lived with their parents until their death. He stated that he was aware that petitioner had sold 5 acres of deceased's land to Julius Kiprono Atuga and one acre to Kipsongok Arap Tendei and had shared out the remainder with his late brother's wife, Alice Chumo.

**Petitioner/Respondent's Case**

7. The petitioner stated that Land Parcel No. **NANDI/ KANGORO/499** belonged to his deceased father and that his siblings were Alice Chepnetich (deceased) and John Kibitok Arap Siongo. He denied knowledge that applicants' father had bought 2 acres of land from the deceased. Although he denied that applicants had lived on deceased's land, he conceded that he had filed **Kapsabet Principal Magistrate's Court Civil Case No. 134 of 2010 between Stephen KimoiKebenei v Alice Jepkosgei and Ruth Chumba** seeking to evict the objectors from deceased's land. He additionally conceded that deceased's land had been subdivided and separate title deeds issued to Julius Kiprono Atugah (purchaser) 5 acres; Kipsongok Arap Tendei (purchaser) 1 acre and 5.64 acres each to himself and Alice Chumo.

**Analysis and Determination**

8. I have considered the evidence on record and the submissions by learned counsels. The issues that arise for determination are:

*a. Whether applicants are beneficiary interested in the estate of the deceased.*

*b. Whether the Grant of Letters of Administration of the estate of the deceased was obtained by concealment of material facts.*

**a. Whether applicants are beneficiary interested in the estate of the deceased.**

9. On the question whether the applicants are beneficially interested in the estate of the deceased and whether they have the legal standing to apply for revocation of the grant of the letters of administration, Section 76 of the Law of Succession Act empowers this court to revoke or annul a grant ***“on the application of any interested party or of its own motion”***. The expression ***“any interested party”*** is wide enough to cover a person who claims to have purchased an asset of the estate.”

10. The relevant part of 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.....”***

11. The expression ***“any interested party”*** as used in that provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in my view have a bearing on the question of who may be an ‘interested party’ for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act.

12. I therefore find that applicants have the locus standi to present the application for revocation of the grant. Applicants' interest as daughters of a purchaser of the property of the deceased qualifies them as ‘interested parties’ with standing to challenge the grant.

**b. Whether the Grant of Letters of Administration of the estate of the deceased was obtained by concealment of material facts.**

13. Section 76 of the Law of Succession Act provides 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) .....***

***(b) That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case***

(c) .....

(d) .....

(e).....

14. It is not in dispute that petitioner petitioned for letters of administration in respect of intestate estate of the deceased. Under the confirmed grant, the heirs of the estate were identified Julius Kiprono Atugah (purchaser); Kipsongok Arap Tendei (purchaser); Petitioner and Alice Chumo (son and daughter in law respectively).

15. It is also not in dispute that upon confirmation of the grant, the property was transmitted to, and registered in the name of Julius Kiprono Atugah (purchaser), 5 acres; Kipsongok Arap Tendei (purchaser), 1 acre and 5.64 acres each to petitioner and Alice Chumo.

16. In **Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR**, the Court of Appeal stated that

***“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser.....”***

17. Whereas applicants do not have any document to prove that their late father had bought 2 acres of land from the deceased, the fact of their occupation of part of deceased’s land is not disputed. The petitioner’s allegation that applicants have never been in occupation of part of deceased’s land cannot be factual in view of the fact that he even filed ***Kapsabet Principal Magistrate’s Court Civil Case No. 134 of 2010*** seeking to evict them from deceased’s land. And whereas there is no evidence that petitioner obtained the eviction orders, there is evidence that he went ahead and evicted the 2nd applicant who was still living on part of deceased’s land.

18. Occupation by the applicants of part of deceased’s land is corroborated by PW3 and PW4 and has been explained to have arisen from a sale agreement between their father and deceased during their lifetime, thenon-availability of the written sale agreement notwithstanding. The petitioner has not explained that applicants occupied deceased’s land on any other ground other than for the reason explained by the applicants and their witnesses.

19. From the foregoing; I am satisfied from the facts in this case that applicants are persons beneficially interested in the estate of the deceased. I am also satisfied that the grant was obtained by concealment of material facts and non-disclosure of applicants’ interest and on the basis of an untrue allegation that all persons beneficially entitled to the estate had been ascertained and determined. I find and hold that applicants were lawful heirs by way of purchase, by their late father, of 2 acres of deceased’s’ land.

20. Having said that, I find that there is overwhelming evidence to support the objectors’ case for revocation of the grant of administration intestate obtained by the petitioner.

21. Finally, I have considered the effect of the revocation on the other 2 purchasers, i.e Julius Kiprono Atugah and Kipsongok Arap Tendei. In ***Kisii High Court Succession Cause No.35 of 2012 Peter Miyenda & another –vs- Musa Nyaribari Gekone & 2 others*** (unreported), the court held that the object of Section 93 of the Law of Succession Act was to shield an innocent purchaser for value of a deceased’s estate whether such purchase was before or after commencement of the Act.

22. There is no evidence that the sale by the petitioner of 5 and 1 acres respectively to Julius Kiprono Atugah and Kipsongok Arap Tendei was fraudulent. Under Section 93 of the Law of Succession Act, the revocation or variation of the grant herein will therefore not invalidate the transfer by petitioner to Julius Kiprono Atugah and Kipsongok Arap Tendei.

23. The result of the foregoing is that objection succeeds and I proceed to make order as follows: -

***i. The confirmed grant issued to Stephen Kimoi Kebenei is hereby revoked***

***ii. This revocation does not invalidate the transfer by petitioner of 5 acres and 1 acre respectively to Julius Kiprono Atugah and Kipsongok Arap Tendei***

***iii. Titles for land parcels NANDI/KONGORO/691 and NANDI/KONGORO/692 are hereby revoked and it is hereby ordered as follows:***

***a. I (one) acre of Titles for land parcel NANDI/KONGORO/691 be transferred to the 1st applicant and a title deed thereof be issued for the same while Alice Chumo shall be issued with title deed for the remainder of 4.64 acres***

***b. I (one) acre of Titles for land parcel NANDI/KONGORO/693 be transferred to the 2nd applicant and a title deed thereof be issued for the same while petitioner shall be issued with title for the remainder of 4.64 acres***

***iv. The petitioner is hereby ordered to pay costs of this objection to the applicants/objectors***

**DATED, DELIVERED AND SIGNED THIS 19TH DAY OF JULY 2018**

**T. W. CHERERE**

**JUDGE**

**READ IN OPEN COURT IN THE PRESENCE OF-**

**Court Assistant** - Felix

**Petitioner/Respondent** - N/A

**For Petitioner/Respondent** - N/A

**Objectors/Applicants** - N/A

**For Objectors/Applicants** - N/A