REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 648 OF 2010

IN THE MATTER OF THE ESTATE OF OTINA NJER (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION

INTESTATE BY RISPER OTUOMA OTINA (APPLICANT)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT TO RISPER OTUOMA OTINA BY MESHACK OTIENO OTINA AND CALEB ONYANGO OTIENO (OBJECTORS)

MESHACK OTIENO OTINA.....1ST APPLICANT/OBJECTOR

CALEB ONYANGO OTINA.....2ND APPLICANT/OBJECTOR

VERSUS

RISPER OTUOMA OTINA.....1ST PETITIONER/RESPONDENT

EDWIN NDALO WADORE.....2ND RESPONDENT

RULING

The deceased in this case died on 25th July 1992 and left a widow (the 1st Respondent) and seven children among them the applicant in this case. The deceased died intestate. On 21st October 2010 the 1st Respondent petitioned for letters of administration intestate naming herself and the 2nd Respondent as the only survivors of the deceased. Upon confirmation from the Principal Registrar that there was no other petition the petition was duly gazetted and there being no objection a grant was subsequently issued to the 1st Respondent.

The record shows that on 26th April 2012 an application to confirm the grant was made. That application was heard on 19th April 2013. Thereafter on 29th April 2013 a certificate of confirmation was issued and the only asset of the estate **LR KISUMU/BAR/1705** (whole) was devolved to the 2nd Respondent. The 1st Respondent obtained registration of the asset in his name and allegedly threatened to evict the sons of the 1st Respondent who upon doing a search discovered that the 2nd Respondent was now the registered owner of the entire parcel of land. It is for that reason that on 27th April 2015 the applicants who are sons

of the 1st Respondent and the deceased brought these summons for the revocation of the grant. The gist of the application is that the grant was obtained through fraud, forgery, misrepresentation and non-disclosure of material facts first because the 1st Respondent did not include the names of her children in the petition and secondly because by bequeathing the whole of **LR KISUMU/BAR/1705** to the 2nd Respondent the children of the deceased were disinherited.

The Court heard the summons by way of oral evidence. It has also painstakingly gone through the record and found as follows:- First, that the deceased is survived by a widow (the 1st Respondent) and seven children among them the two applicants. Secondly, that **KISUMU/BAR/1705** is the only asset of the deceased's estate. Thirdly that the 1st Respondent and the 2nd Respondent did in fact enter into a sale agreement concerning that asset. It is also clear from the record that when the grant was confirmed the asset was devolved to the 2nd Respondent and is now registered in his name. Be that as it may, it is my finding that not only were the proceedings giving rise to the grant issued to the 1st Respondent defective but that the same was obtained fraudulently. The 1st Respondent's petition was premised on a letter dated 14th October 2010 from her area Chief. That letter does not mention the names of the children of the deceased. It instead lists the 2nd Respondent as a beneficiary of the estate. That letter sharply contradicts another letter written by the same Chief on 27th April 2015 which gives the real names of the children of the 1st Respondent and the deceased in this case. The 1st Respondent is an old illiterate woman who may not have known the contents of the letter dated 14th October 2010. However I did note that her affidavit in support of the petition (Form P & A5) also misrepresented the survivors of the deceased as it does not include her own children. This is in breach of rule 7(1)(e)(i) that requires that in cases of total intestacy as is the case here the Petitioner gives the names, addresses, marital state and description of all surviving spouses and children of the deceased. Being the widow of the deceased and hence in a higher degree of preference the rules (see rule 26(1) of the Probate & Administration Rules) do not require her to give notice of her petition to her children. Nevertheless Rule 40(8) requires that in the case of confirmation there must be consent of all persons who may be beneficially entitled. In this case there was no such consent from the children of the deceased who clearly are the persons "beneficially entitled to participate in the estate". Instead the 2nd Respondent who falsely misrepresented himself as a survivor of the deceased is the one who gave the consent – see Form 38. Moreover whereas the confirmed grant of letters of administration devolved the asset of the estate to the 2nd Respondent there is an attempt to perpetuate the fraud in the manner in which the registration at the Land's Office was done. The Land Registry Record (green card) which was produced as exhibit 3 shows that the land was on 31st July 2013 first transmitted to the 1st Respondent and then transferred to the 2nd Respondent on the same day. This was perhaps to defeat the principle of the law that holds that one can only pass an interest in land if they have it. The Respondents and the applicants are in agreement that the 1st Respondent and the 2nd Respondent entered into an agreement of sale in respect of this land long before she petitioned for letters of administration. This means therefore that she entered into the agreement even before she acquired an interest in the land and secondly this despite the provisions of Section 82 of the Law of Succession Act which prohibits the sale of immovable property before confirmation of the grant. Moreover whereas the sale agreement and the acknowledgements signed thereafter purport to have been for portions of land measuring 50 meters x 52 meters and 80 meters x 42 meters the 2nd

Respondent ended up getting the entire parcel of land which according to the copy of records and the certificate of search filed here is 1.7 hectares.

In the sale agreement for the first parcel of 50 meters x 52 meters the 1st Respondent acknowledges receipt of Kshs.150,000/= and the acknowledgements of receipt for the second portion measuring 80 meters x 42 meters shows Kshs.130,000/= was paid in instalments of Kshs.40,000/=, 33,000/= and 57,000/=. There is absolutely no evidence that the 2nd Respondent paid a sum of 850,000/= to the 1st Respondent.

I find merit in the summons for revocation but as the letters of administration were rightfully issued to the 1st Respondent and so as to save the parties time and costs what shall be revoked is the certificate of confirmation of grant. The title deed issued to the 2nd Respondent shall also be cancelled and there shall be confirmation of the grant after three months. In order to do justice to both sides this Court directs that the interest of the 2nd Respondent may be considered either by giving him the two plots for which he paid

280,000/= to the 1st Respondent or by refunding his money. He shall however bear the costs of this application. It is so ordered.

Signed, dated and delivered at Kisumu this 9th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Applicants/Objectors

N/A for the Petitioners/Respondents

C/A: Serah Sidera