



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION 231 OF 2011

**IN THE MATTER OF THE ESTATE OF ATIKA MISIA.....
DECEASED**

AND

**IN THE MATTER OF PETITION FOR GRANT OF LETTERS OF ADMINISTRATION
INTESTATE**

BETWEEN

SAMWEL BONUKE THROUGH POWER OF

ATTORNEY AILEEN BONUKE.....OBJECTOR/RESPONDENT

AND

WILSON MISIA ATIKA.....PETITIONER/RESPONDENT

JUDGMENT

1. ATIKA MISIA, (hereinafter “the deceased”), died on 4th October, 1996. Grant of Letters of Administration was made to his son WILSON MISIA ATIKA, the Petitioner herein on 23rd April, 2012 which grant was subsequently confirmed and a certificate of confirmation of grant issued by this court on 19th April, 2016.

2. On 1st August 2016, the Objector herein Samuel Bonuke, through the power of attorney donated to Aileen Bonuke, filed summons for revocation of grant under **Section 47 and 76 of the Law of Succession Act (hereinafter “the Act”)** and **Rules 44, 59 and 73 of the Probate and Administration Rules**, in which he sought the following prayers:

1. Spent.

2. THAT pending the hearing and determination of this Application there be an interim order of injunction restraining the petitioner/Respondent either by himself, his agents, servants, employees or any other person acting through him in any way whatsoever form alienating, transferring, disposing and or appropriating any property belonging to the estate of the Deceased ATIKA MISIA and particularly parcel of Land known as Nyaribari cache/Keumbu/1550.

3. THAT Honourable court be pleased to revoke a grant of letters of Administration issued to

the Petitioner/Respondent, WILSON MISIA ATIKA, dated on the 19th day of April, 2016 and confirmed on the 14th day of April 2016, in this succession cause.

4. THAT the mode of distribution of the Deceased's (ATIKA MISIA) Estate herein (NYARIBARI CHACHE/KEUMBU/1550) be revoked/cancelled by this Honourable court, in any event.

5. THAT upon the grant of the foregoing herein above, the letters of Administration in respect of the estate of the Deceased ATIKA MISIA be issued afresh to the objector and the petitioner herein respectively.

6. THAT costs of this application be provided for by the Respondent/Petitioner.

3. The application is supported by the applicant's affidavit sworn on 29th July 2016 in which he states that his father SAMUEL BONUKE is a beneficiary of the estate of the deceased by virtue of the fact that he purchased a portion of the deceased's parcel of land known as **LR. NO. NYARIBARI CHACHE/KEUMBU/1550** (hereinafter "the suit land") from the deceased way back in 1966 whereupon the deceased filled the mutation forms and obtained consent of the land Control Board in a bid to transfer the purchased portion to the applicant but that the intended transfer did not materialize as the deceased died before completing the transfer process. The applicant attached copies of the mutation forms and consent of transfer as annexure "**AB -3**" to his supporting affidavit. The applicant also attached a copy of the land sale agreement as annexure "**AB-2**" to his affidavit.

4. He further states that he had on several occasions implored the petitioner to file a succession cause to no avail thereby prompting him to initiate citation proceedings before Kisii Chief Magistrate's Court being citation cause No. 136 of 2016 only for the petitioner to file a response to the citation stating that he had already obtained a grant to the estate of the deceased which had also been distributed thereby leaving the applicant with no choice but to initiate the instant objection proceedings to revoke the grant as he had been left out of the distribution of the deceased's estate. It is the Objector's case that the petitioner has all along been aware of his interest in the suit land part of which he (applicant) has utilized for more than 12 years. The Objector contends that the petitioner concealed the fact that he was a purchaser of the deceased's estate thereby necessitating the filing of the instant application for revocation of grant.

5. The petitioner opposed the application though his replying affidavit sworn on 25th August 2016, in which he denies the allegation that the objector purchased a portion of the suit land from the deceased as there were no minutes of the Land Control Board to prove that consent was given for the transaction. The Petitioner further states that there was no proof of sale of the land as the alleged seller was deceased and that the objector's claim was time barred.

6. When the application came up before me for hearing on 3rd October 2016, the parties agreed to canvass it by way of written submissions.

7. Upon considering the pleadings herein and the parties respective written submission, I note that the main issue that presents itself for determination is whether the applicant has established sufficient grounds to warrant the revocation of the grant issued to the petitioner.

8. The power of the court to revoke/annul grant of Letter of Administration intestate is provided for under **Section 76 of the Act** in the following terms:

"76. Revocation or annulment of grant

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 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 inoperative through subsequent circumstances.”

9. In the case of **Matheka & Another vs Matheka [2005] IKLR 456**, the Court of Appeal laid down the principles guiding the revocation of grant as follows:

a) A grant may be revoked either by application by a interested party or on the court's own motion.

b) Even when the revocation of grant is upon court's motion there must be evidence that the proceedings to obtain grant were defective in substance or that grant was obtained fraudulently by making of a false statement or by the concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with Administration of the estate.

c) It must be shown to court that the person to whom the grant has been issued has failed to produce to court such inventory or account of Administration as may be required.

10. In the instant case, I find that the applicant/objector has established that his father Samuel Bonuke, purchased a portion of the suit land in 1966 as seen in the sale agreement made on 10th April 1996 attached to the applicant's affidavit as annexure “**AB2**”. As shown in the Objector's annexure “**AB-4**”, he went out of his way to initiate citation proceedings in a bid to persue his interest in the deceased's estate only to realize much later that the petitioner had to already initiated this succession cause which had at the time been concluded after the issuance of the Certificate Confirmation of grant.

11. The objector also demonstrated that the deceased had, prior to his death, obtained a Land Control Board consent to subdivide and transfer part of the suit land to him. Copies of the Letters of consent dated 3rd December 1993 were attached as annextures to the applicant's affidavit. I am satisfied that the purchaser's claim has been established and I find that the proceedings to obtain the grant were therefore defective by virtue of the fact that the petitioner concealed the interest of the purchaser of the suit land from the court which interest was a material issue to the estate.

12. Having found that the petitioner concealed something material to the case, it is my finding that the

instant application is merited and I therefore allow it in the following terms:

- a) **Grant of Letters of Administration issued to the petitioner on 23rd April 2012 and confirmed on 19th April 2016 is hereby revoked and a fresh grant is hereby issued in the joint names of the petitioner and the objector herein.**
- b) **The suit land shall in the circumstances revert back to the name of the deceased.**
- c) **The new administrators are at liberty to apply for confirmation of the grant in which case, the objectors interest in the suit land will be factored in the distribution of the estate.**
- d) **An order of inhibition do issue to inhibit any transactions on the suit land pending the fresh confirmation of grant.**
- e) **Each part shall bear his own costs.**

Dated, signed and delivered in open court this 14th day of February, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner
- Mr. Okemwa for the Objector
- Omwoyo: Court Clerk