



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**SUCCESSION CAUSE NO. 326 OF 2012**

**IN THE MATTER OF THE ESTATE OF NORAH KEMUNTO NYAMWEYA (DECEASED)**

**- AND -**

**INNOCENT MORACHA WABUYELE.....PETITIONER**

**VERSUS**

**FRANCIS MANYANTA MARAGIA.....OBJECTOR**

**RULING**

(1) The summons for revocation or annulment of grant dated 22<sup>nd</sup> October 2012, were taken out by **Francis Manyanta Maragia** (herein, the objector/applicant) against **Innocent Moracha Wabuyele**, who is the petitioner herein and holder of the grant of letters of administration intestate respecting the estate of the late Norah Kemunto Nyamweya issued on the 8<sup>th</sup> October 2012.

In the petition for the grant, the petitioner listed himself and his four sisters namely Nancy Kemuma, Rose Kerubo, Genes Kemunto and Jude Ndinda as the beneficiaries of the estate. He is the only surviving son of the deceased while his sisters are the only surviving daughters even though they are all married women.

(2) The only asset listed in the petition was a portion of land described as Site & Service Plot No. 35 within the Kisii Municipality. Its stated value was Kshs. 300,000/=.

The petition was filed on 15<sup>th</sup> July 2012, and after the usual pre- requisites the impugned grant was issued on that 8<sup>th</sup> October 2012. Immediately thereafter, the present application dated 22<sup>nd</sup> October 2012 for revocation of grant was made by the objector on the basic ground that the grant was fraudulently issued to the petitioner since he was very much aware that the listed asset (i.e Plot No. 35 Kisii Municipality) had been sold to the objector by the deceased prior to her death.

(3) In his supporting affidavit dated 22<sup>nd</sup> October 2012, the objector alluded to the deceased having purchased a separate portion of land situated near Suneka Market on which the petitioner settled.

A further affidavit deponed by the objector dated 6<sup>th</sup> November 2012, indicates that the portion of land sold to him by the deceased on 13<sup>th</sup> February 1995, measured 27 x 80 ft. The relevant sale agreement is annexed to the affidavit and marked Exhibit "No. **FMM 1**". Also annexed are a copy of the building plan (Exhibit No. "**FMM 2**") and medical documents (Exhibit No. "**FMM 3**").

It is averred by the objector that the material estate property was put in his possession after the sale and he commenced development thereon by building a foundation for a storeyed building and erecting a fence but due to illness in the year 2001, he was unable to proceed with the proposed development.

(4) In a replying affidavit dated 29<sup>th</sup> November 2012, the petitioner denies all the allegations made by the objector and contended that the material plot belonged to the National Housing Corporation and was allocated to the deceased who started construction thereon in the year 1997 shortly prior to her demise. That, in the year 2006, the skeleton structure on the land was completed by the petitioner who thereafter rented the house to a third party in the year 2008. The photographs of the structure are marked as Exhibit No. **“IMW 1”**.

The petitioner further contended that the property has been in his possession and not that of the objector and that the fence thereon was erected before the deceased died.

The petitioner averred that there are no building materials belonging to the objector on the property and that he (objector) never purchased the property from the deceased.

(5) The application was heard by way of “viva-voce” evidence and both the objector and the petitioner gave their respective testimonies and called witnesses.

The supporting and replying affidavits of both parties and the written statements of their respective witnesses were adopted as their evidence for or against the application.

This court has given due consideration to the affidavits and the statements together with the rival submissions of both sides and all the documentary evidence produced herein and what clearly emerges as the bone of contention is whether the estate property belonged to the deceased and if so, whether she sold it to the objector prior to her death.

(6) If the property belonged to the deceased and was sold and transferred to the objector as alleged, it would follow that it was not available for distribution as part of the estate property and therefore its inclusion as an asset belonging to the deceased was not proper and amounted to misrepresentation and/or concealment of material facts which are factors capable of prevailing upon a court to revoke and/or annul a grant.

From the evidence, it is undisputed that the property belonged to the deceased as a beneficial owner having been allocated the same by National Housing Corporation (NHC) apparently through the defunct Kisii Municipal Council. If that ownership remained unchanged upto the time of the demise of the deceased, then the property was available for distribution as part of her estate. The objector’s contention is that the ownership changed when the property was sold to him by the deceased prior to her death. He therefore claims an interest in the property to the exclusion of the petitioner or any other beneficiary of the estate.

(7) Ownership of the property by the objector is a vital factor in the determination of this application and the burden to establish the same lay more with the objector. In that regard, it was incumbent upon the objector to prove the purchase and transfer of the property into his name prior to the demise of the deceased. It is subject to that proof that it may be said that the objector has an interest in the estate property and this should have been noted by the petitioner in his petition for the impugned grant.

As was clear from the evidence the property is currently in the possession of a third party but according to the petitioner the third party is merely renting the property from him. The objector however, alleges that the property was purchased by the third party from the petitioner.

(8) A Sale Agreement dated 13<sup>th</sup> February 1995 was exhibited herein by the objector (i.e Annexure marked “FMM 1”) to show that the deceased sold the suit property to him. The objector’s wife, **Agnes Moraa Obonyi (PW 2)**, and his then employee, **Joseph Osoro Oino (PW 3)**, testified and confirmed the property was indeed sold to the objector by the deceased.

Agnes, contended that she actually witnessed the agreement but conceded that her signature was not affixed thereon. Joseph, indicated that he witnessed a sum of Kshs. 15,000/= being paid to an advocate called Omwamba by a brother of the objector for the purchase of a plot. He stated that the transaction occurred on 7<sup>th</sup> June 1995, but it is clear that he did not identify the actual plot being purchased at the time. His evidence did not establish that it was the suit property which was the subject of the transaction.

**(9)** The Sale Agreement it would appear was made between the deceased and the objector and was witnessed by the advocate, Omwamba Abuki and one Samuel Omoke Getugi.

However, none of these two witnesses to the agreement was called to testify and confirm that the agreement was actually signed and executed in their presence by the deceased and the objector. Nonetheless, it is evident that the agreement was not substantially or at all disputed by the petitioner who stated in his evidence that he would not be surprised if the property was indeed sold to the objector by his late mother at the material time. He confirmed that the purchase price was Kshs. 95,000/= but could not tell whether the amount was fully paid or not. He said that the property actually measures 34 x 84 ft and not 27 x 80ft as reflected in the agreement.

**(10)** All the foregoing factors clearly show that most likely than not the deceased who was the beneficial owner of the suit property sold it to the objector in the year 1995 prior to her demise in the year 1998.

However, it would appear that the process of transferring the property into the name of the objector was not effected, completed or formalized thereby implying that there was a breach of the sale agreement by the deceased.

There is insufficient evidence that the objector took actual possession of the property immediately after the execution of the sale agreement. The building plans (annexture marked "FMM 2") did not suffice as evidence of actual possession, neither did the presence of any building materials at the scene.

**(11)** Even the receipt dated 7<sup>th</sup> June 1995 alleged to be the final payment receipt could not suffice to prove that the objector took actual possession of the suit property after purchasing it from the deceased.

The receipts and documents issued by the Municipal Council of Kisii which were exhibited herein by the objector are all issued in the name of the deceased thereby implying that despite the sale of the property to the objector, its transfer to him was never effected. This fact was indeed confirmed by the objector's wife (PW 2) in her testimony.

The consent sought from the Kisii Municipal Council for the transfer of the property dated 13<sup>th</sup> October 1994 is not evidence of actual transfer. In any event, the transfer could not be sought prior to the sale agreement which was made on 13<sup>th</sup> February 1995.

**(12)** In essence, the failure to have the property lawfully transferred to the objector on the strength of the Sale Agreement in respect thereof meant that it remained under the ownership and possession of the deceased and could be listed by the petitioner as part of the deceased's assets available for distribution to her heirs. It would therefore follow that there was no fraud and/or misrepresentation and/or concealment of material facts at the time the petitioner applied for and obtained the impugned grant of letters of administration.

The ultimate loser in the sale transaction involving the deceased and the objector was obviously the objector. His remedy would thus lie in damages for breach of contract and/or for specific performance against the petitioner in his capacity as the legal administrator of the estate of the deceased. The objector's attempt for a remedy by way of this succession cause was a misconception.

**(13)** In the upshot, the present application is wanting in merit and is hereby dismissed.

Each party shall bear their own costs of the application.

[Read and signed this 15<sup>th</sup> day of June 2017].

**J. R. Karanjah**

**Judge**