



KTL.NO.67/2016

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 212 OF 2015

IN THE MATTER OF THE ESTATE OF SYOKAU NZAMBILI KAANGO (DECEASED)

JOSHUA MALITI MATU.....APPLICANT

VERSUS

JUSTUS MWANGANGI NZAMBILI.....RESPONDENT

R U L I N G

1. By an application dated the 27th day of **April, 2015**, the Applicant seeks orders as follows:
 - That the court may be pleased to call for the court file at Chief Magistrates Court Kitui in **Probate and Administration Cause No. 3 of 2012** Estate of **Syokau Nzambili Kaango** deceased for purposes of these proceedings.
 - That the Honourable Court may be pleased to make an order to preserve the Estate and to prohibit the Administrator/Respondent or any third party from disposing or transferring to himself or to any third party or in any other manner dealing with **Plot No. 024/H/PDP/29/96/15** in the confirmed grant pending the hearing and determination of these summons.
 - That the court be pleased to issue an order restraining and/or prohibiting the Chief Land Registrar, from registering any dealings with regard to **Plot No. 024/H/PDP/29/96/15** pending the hearing and determination of these summons.
 - That the grant of letters of administration intestate made to the Respondent on **23rd March, 2012** and confirmed on **21st November, 2012** by the Chief Magistrate Kitui in **Probate and Administration Cause Number 3 of 2012** be revoked and/or annulled.
 - That the costs of these summons be awarded to the Applicant.
2. The application is premised on grounds that the grant was obtained fraudulently by concealment from court of something material in respect of the Estate. In distributing the Estate of the deceased, the Administrator/Respondent completely left out the Applicant as a creditor to the Estate who was denied his lawful share of the Estate, **Plot No. 024/H/PDP/29/96/15** which he purchased from the deceased during his life time.
3. The Applicant swore an affidavit in support of the application where he deposed that the deceased died on **8th day of January, 2009** having sold **Plot No. 024/H/PDP/29/96/15** to him during his life time by a sale agreement dated **10th August, 2004**. He executed transfer documents with the Municipal Council of Kitui in favour of the Applicant. The Applicant paid the outstanding rents and rates amounting to **Kshs. 86,242/=** and the transfer fees in the sum of **Kshs. 1,890/=**. Subsequently he prepared a building plan that was approved for which he paid.

4. Further, he averred that he has fully developed the plot. He was not served with any citation and that the respondent did not faithfully administer the Estate of the deceased having left him out of the sharing formula.
5. In a response thereto the Respondent filed a replying affidavit where he deponed that the transfer in respect of the plot was not valid as it was not signed by the deceased. It was not approved by the Municipal Council of Kitui, the area councilor did not sign the transfer form as the minutes of the meeting held by the council, copy of the transferor's ID Number in the transfer form is not **Syokau Kaango's** or his late mother's, all requirements of a valid transfer were not met.
6. Further, that the signature on the agreement is not for the deceased. The transfer form was paid for in **2009** after the demise of the deceased. A case, **RMCC 259 OF 2014** is pending in respect of the subject suit property. The land rates were paid after the death of the deceased. The subject property forms part of the Estate of the deceased. That he was not aware of the sale therefore the grant was not obtained fraudulently. Having forged the documents the Applicant is not a creditor to the Estate of the deceased.
7. The application was canvassed by way of written submissions which I have taken into consideration.
8. It is not in dispute that **Plot No. 024/H/PDP/29/96/15** situate in **Kitui town** forms part of the Estate of the deceased. At the stage of confirmation of the grant the Respondent herein was the only beneficiary of the Estate of the deceased. According to the schedule of distribution the person eligible to the share was the Respondent. Indeed it was distributed to him.
9. To grant or not the application sought this court must consider the provisions of **Section 76** of the **Law of Succession Act** which states:

“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.”

10. The Applicant avers that the Respondent obtained the grant fraudulently by concealment of something material from court. He deliberately left out the Applicant a creditor to the Estate and went ahead to deny him of his lawful share.
11. The Applicant has demonstrated by way of affidavit evidence the fact of having purchased a residential **Plot No. H** measuring **0.11 Ha** at **Kshs. 500,000/=** on the **10th of August, 2004** from the deceased. The deceased having passed on in **January, 2009**, this was during her life time. Subsequently an application to transfer form was duly filled and signed but the signature on both

- the sale agreement and transfer form stated to be for the deceased is however disputed by the Respondent who argues that it is forged. Consequently he instituted a suit in the Civil Court in **October, 2014** seeking injunctive orders to issue against the Applicant from erecting structures on **Plot No. H** in **Kitui** from **January, 2009**. A suit that is strongly opposed by the Applicant who claims ownership of the same. Further he has pleaded fraud on the part of the Respondent for failure to disclose that he is a Creditor to the Estate in respect of the plot.
12. The Succession Cause in respect of the deceased was filed and gazetted in **January, 2012**. The grant was issued on the **23rd March, 2012**. **Plot H** was included as an asset forming the Estate of the deceased. The property (**Plot No. 024/H/PDP/29/96/15**) is to be transmitted to the Respondent following the confirmation of the grant.
 13. It is averred that there was no fraud in obtaining of the grant as the Respondent was not aware of any sale. It is however pleaded in the Civil Suit that the Applicant started erecting structures on the land in **January, 2009** hence interfering with the Respondent's possession. Although the action of the Applicant was illegal according to the Respondent he did not report the matter to the Police until 2014.
 14. Having believed that the property formed part of the Estate of the deceased and the Applicant had taken possession of it, he should have sought orders to preserve it and/or notified the Applicant of his intention to obtain representation in respect of the Estate of the deceased regarding the land he was in occupation of.
 15. At the point of taking out letters of administration intestate, **three years** after the Applicant had embarked on construction. The construction was at an advanced stage therefore this was a fact that should not have been concealed. The applicant should have been given an opportunity of being heard prior to distribution of the plot in dispute.
 16. As correctly submitted, the trial court did not have jurisdiction to hear the matter as the value of the Estate exceeded **Kshs. 100,000/=** (see **Section 48 of the Law of Succession Act**). Having conferred upon itself jurisdiction which did not exist by hearing the matter the proceedings were defective. The proceedings were a nullity in law. In the premises it calls for annulment.
 17. From the foregoing I make orders as follows:
 - i. *The grant of letters of administration intestate issued to the Respondent on the 23rd March, 2012 and confirmed on 21st November, 2012 in Chief Magistrate Kitui, P & A Cause No. 3 of 2012 be and is hereby annulled.*
 - ii. *The Respondent herein who must be given preference to administer the Estate of the deceased pursuant to the provisions of Section 66 of the Law of Succession Act should petition for fresh letters of administration in a court that has jurisdiction to determine the cause.*
 - iii. *Costs of the application shall be borne by the Respondent.*
 18. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of February, 2016.

L. N. MUTENDE

JUDGE