



IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 198 OF 1999
IN THE MATTER OF THE ESTATE OF
AGER NYASEME ABUOR (DECEASED)

BETWEEN

JOAN LUDIA SAKA 1ST
APPLICANT

WILKISTER SAKA 2ND
APPLICANT

DENIS OCHIENG SAKA 3RD
APPLICANT

AND

GETRUDE PAMELA ATIENO..... 1ST
RESPONDENT/PETITIONER

HABAKUK ONYANGO ABOGNO 2ND
RESPONDENT

JACOB THOMAS MBOYA ONYANGO 3RD
RESPONDENT

RULING

1. The deceased Ager Nyaseme Abuor of East Gem, Ramula died on 31st December 1978. His daughter, Pamela Getrude Otieno (“Pamela”), the 1st respondent herein, applied for the grant of letters of administration for his estate. The grant issued to her was confirmed on 14th June 1999. His only property, EAST GEM/RAMULA/206 (“Plot 206”) was given to her absolutely.

2. What is before the court is the summons for revocation for the grant dated 6th November 2014. It has been brought by Joan Ludia Saka (“Joan”), Wilkista Saka (“Wilkista”) and Denis Ochieng (“Denis”). Joan is the wife of Percival Saka Abuor (“Saka”), the deceased’s second son, while Wilkista and Denis are their children. The deceased first born son is John Okore Ager (“Okore”). Saka is dead while Okore is still alive. The main ground for the application is that the petitioner failed to disclose material facts bearing upon the application for the grant of letters of administration. I heard *viva-voce* testimony from the parties.

3. The applicants' claim is that they were entitled to Plot 206 which Pamela had acquired without disclosing to the family that she had taken out these proceedings. They accused her of fraudulently taking out letters of administration and effectively disinheriting them by selling the entire land to Archbishop Habakuk Onyango Abogno ("Habakuk") and his son, Thomas Mboya Onyango, the 2nd and 3rd respondent respectively. They denied that Pamela had the consent of her brothers to take out letters of administration or to transfer the land to herself. They refuted the claim by Pamela that the deceased had given her Plot 206 after giving Okore and Saka their own land during his lifetime.

4. Pamela was emphatic that before her father died, he owned several pieces of land which he distributed to his two sons and bequeathed her Plot 206. He gave Okore a piece of land in Muhoroni where him and his family moved and now reside. Saka was given an adjoining piece of land, EAST GEM/RAMULA/143 ("Plot 143") where he settled and constructed his house. She accused the applicant and her family of moving to Plot 206 on Saka's death to lay claim to her land. Pamela further testified that when she applied for letters of administration, Saka, Okore and her mother in law were still alive and they did not raise any objection to the process.

5. Habakuk testified that although he knew the family of the deceased, he was approached by Pamela to purchase Plot 206. After satisfying himself that Pamela had obtained a valid title to the property and after conducting due diligence to confirm that she was indeed the registered owner, he proceeded to purchase it with his son.

6. The issue for consideration is whether I should revoke the grant issued to Pamela and if so, the effect of such revocation on the title obtained by Habakuk.

7. When Pamela filed the petition (Form P & A 5), she did not state in what capacity she made the application. However, in her affidavit sworn on 2nd March 1990, she disclosed that the deceased was survived by three children. She stated that the deceased died on 31st December 1998 (although I believe this is a mistake) and had left behind Plot 206. She deponed that Okore and his family had settled on family land at Muhoroni. Saka, she deponed, was a person of unsound mind. The petition was not accompanied by a letter from the local chief. After the grant was issued, Pamela applied for confirmation before the expiry of 6 months because she intended to obtain a loan to assist her proceed for medical treatment.

8. I find and hold that Pamela failed to disclose material facts for several reasons. She did not state either in the petition or application for confirmation that the deceased had given land to his sons prior to his death. Even though she mentioned that Okore had been given land in her founding affidavit, she did not disclose the particulars of the land. She did not disclose that Saka had been given Plot 143. The non-disclosure was compounded by her claim that Saka was insane yet from the testimony given by the applicants and accepted by her, Saka was employed and was working in Nairobi before his retirement and that he was married with 7 children. All these facts negate Pamela's contention that she was bequeathed that land before she died. In any case in her founding affidavit she stated that, "*the deceased before his demise left the title deed [to Plot 206] in my hands as the care taker.*" [Emphasis mine]

9. It is the duty of a petitioner who comes before the court seeking letters of administration to disclose all material facts that have a bearing on the administration and ultimately distribution of the estate. It is not good enough for the petition to state that certain beneficiaries knew what she was doing. It is also worth noting that Pamela did not obtain any consent from her mother in law and brothers when she lodged these proceedings contrary to **Rule 26** of the **Probate & Administration Rules** which states: -

26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require

10. Under **Section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**, the Court may, on its own motion or on application of a party, revoke a grant where there are sufficient grounds to do so including non-disclosure or concealment of material facts or because the procedure leading to issuance of the grant was defective. The facts I have outlined meet the test for revocation.

11. I now turn to the issue of Plot 206 sold to Habakuk. He bought the land in 2009, 10 years after Pamela had received the title on 1999 after the grant was confirmed in her favour. The search he relied upon was issued on 1st December 2009 and it confirmed that Pamela was the registered owner. He became the registered owner on 19th February 2012 and the title deed was issued on 19th March 2012. On this basis, I am satisfied that Habakuk and his son were bona fide purchasers of the land. Under **section 93** of the **Law of Succession Act**, such a title is indefeasible and cannot be set aside. The section states as follows;

93 (1) A transfer of any interest in immovable or moveable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act. [Emphasis is mine]

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

12. In order to buttress her claim to the land, Pamela relied on a civil case, **Maseno Principal Magistrate's Court Civil Case No. 209 of 2010 (Pamela Getrude Otieno v Joan Saka)**, where she sued Joan and obtained a decree on 31st May 2011 ordering the said Joan to vacate Plot 206. In my view, Pamela's action of filing suit was intended to consummate her act of non-disclosure and it cannot stand in the way of my finding that she failed to disclose material facts.

13. This findings I have made do not leave the applicants without a remedy. **Section 94** of the **Law of Succession Act** imposes on a personal representative the duty to account in the event of loss or damage to the estate. It states;

94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies such an asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

Accordingly, Pamela is called upon to account for the proceeds of sale of Plot 206 to Habakuk.

14. Since removal of the applicants from Plot 206 is no imminent, I would hope that the applicants' accept the Archbishop's magnanimous offer to give them part of the land they occupy.

15. My final orders are that I hereby allow the summons for revocation dated 6th November 2014 on the following terms;

- a. I direct the Pamela Getrude Otieno to account for the proceeds of sale of **EAST GEM/RAMULA/206** within 30 days from the date hereof.
- b. The matter will be mentioned on 15th December 2016 for further directions/orders.
- c. There shall be no order as to costs.

DATED and DELIVERED at KISUMU this 7th day of November 2016.

D. S. MAJANJA

JUDGE

Applicants in person.

Mr Anyul instructed by D.O.E. Anul and Company Advocates the 1st respondent.

Mr Anyumba instructed by Odhiambo Ouma and Company Advocates for the 2nd and 3rd respondents.