



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE 290 OF 2000
IN THE MATTER OF THE ESTATE OF FRANCIS
OBAGA MATOYA ALIAS OTWORI (DECEASED)
BEATRICE MATOYA.....APPLICANT
(Co-administrator of Estate of Walter
Otwori Matoya(Deceased)
VERSUS
HENRY MATOYA MANYANGE.....RESPONDENT
(Administrator of Estate of Francis Obaga
Matoya alias OtworI (Deceased)

JUDGMENT

INTRODUCTION

1. The respondent herein Henry Matoya Manyange filed this succession cause seeking grant of Letters of Administration Intestate in respect to the estate of Francis Obaya Matoya (hereinafter also known as "the deceased"). Grant of letters of administration were issued to the respondent and subsequently, a certificate of confirmation of grant was issued by this court on 2nd May 2002. Later, summons for revocation of grant of the respondents confirmed grant were brought by one Walter OtworI Matoya (who is now deceased.) After the death of Walter Matoya his daughter Beatrice Matoya, the applicant herein, brought fresh summons for revocation of grant.

THE PLEADINGS

2. The applicant filed summons for revocation of grant on 7th December 2012 in which she sought the following prayers:

1. **A declaration be issued in the first instance that confirmation of grant dated 2nd May 2002 was fraudulently achieved and therefore that the succession cause herein is an abuse of court process, through a fraudulent misrepresentation of persons, documents and claims that cannot be verified legally and therefore be revoked and/annulled forthwith.**

2. An order by the Honourable court in the first instance to the District Land Registrar Kisii as direction to rectify their records on the fraudulent Green Card of KISII TOWN/BLOCK111/1409 (hereinafter also known as suit property) that inadvertently omitted the name of initial principal partner of KISII VEGETABLE AND FRUIT SUPPLIES STORES (hereinafter also known as Kisii Vegetables & Fruits Supplies Store)- WALTER OTWORI MATOYA as condition for releasing a valid and current lease for the suit premises whose lease stands expired since 1st May 2000.

3. An order by the Honourable court granting and bestowing authority to the administrators of the principal partner of the suit premises (Walter Otworu Matoya - Deceased) to manage the property, rent out and collect rent for securing and meeting the lessor/lessee financial obligations and; for Eleven Years (11) utilize the balance of the rents and space in a manner aimed at compensating themselves their share which the holders of the fraudulent green card / confirmation of grant herein have used to converted their share unless the claimable amounts can be paid upfront after computation.

4. Costs and interests be borne by the rents from the suit premises.

3. The application was supported by the applicant's affidavit in which she states that she is the co-administrator of the estate of Walter Otworu Matoya (now deceased). She further depones that her deceased father was a principal partner of the Kisii Vegetables & Fruits Supplies Store, the allottee of the suit property together with his two brothers, the deceased herein and one Zacharia Obiri Matoya . She further depones that she is a bona fide beneficiary of a 1/3 share of the suit property as the same was secured by allotment and developed through money loaned to the partnership of the Kisii Vegetables & Fruits Supplies Store . She further contends that to the best of her knowledge, no legally valid form of letters of administration have been taken out in favour of the deceased estate and Zacharia Obiri Matoya alias Matieka Obiri Matoya. It is thus the applicants contention that partners who are all now deceased were each entitled to a share of the Kisii Vegetables & Fruits Supplies Store.

4. She further contends that the confirmation of grant obtained in favour of the deceased estate was fraudulently acquired and has led to the dispossession of the beneficiaries of Walter Otworu Matoya of their share of the suit property. It is thus the applicant's contention that the only remedy for the applicant is for this court to bestow authority on the applicant as administrator of Walter Matoya's estate to draw rents from the suit property as the only justifiable means of mitigating the great loss occasioned to the estate of Walter Matoya. The applicant has also contends that it is important that this honourable court issues an order directing the office of the Commissioner of Lands to rectify their records on the green card of the suit premises which she contends inadvertently omitted the name of the initial principal partner of the Kisii Vegetables & Fruits Supplies Store, Walter Otworu Matoya, for the sake of releasing a valid and current lease for the suit premises whose lease stands expired since 1st May 2002.

5. The respondent opposed the application through a replying affidavit dated 21st January 2013 in which he denied the allegations made by the applicant and deponed that the suit property which forms part of the deceased estate was initially owned and registered in the joint names of deceased a herein and one Zacharia Matoya (who is also deceased) as tenants in common in equal shares. He attached a copy of certificate of lease and a certificate of official search marked as "KNI" and "KN2" respectively.

6. He further depones that upon the death of the two brothers, the suit property was left in the hands of their next of kin and hence he was nominated by both families to petition for grant of letters of administration to the said estate. He thus denies that the applicant is a beneficiary to the estate of the deceased or had any interest in the suit property as alleged by the applicant.

7. He further depones that all the beneficiaries of the deceased estate are well known and specified in the letter of the area chief that was filed together with the petition. A copy of the chief's letter was filed and marked as "KN3". He further contends that the involvement of Walter Matoya together with the deceased and Zacharia Matoya in the registration of the business name, the Kisii Vegetables & Fruits Supplies Stores, was not connected to ownership of the suit property nor did it confer any ownership rights interest

on the suit property to the late Walter Otworu Matoya since the said Kisii Vegetables & Fruits Supplies Store was conducting its business was on a different plot away from the suit property as indicated in the certificate of registration of the Kisii Vegetables & Fruits Supplies Store marked as annexure “**BBM-3**” in the objectors supporting affidavit.

8. He further states that the applicant has been making fraudulent attempts to alter and apply for extension of the lease over the suit property in her favour and this prompted him and other co-beneficiaries of the estate to lodge complaints with the Commissioner of Lands. He attached a copy of the said complaint letter which as annexure “**KN4**” to the replying affidavit. It is thus the respondents case that the summons for revocation of grant herein are misconceived, unmerited and legally incompetent for want of compliance with provisions of section 76 of the Law Succession Act. He thus urged this court to disallow the applicants summons for revocation of grant with costs.

ORAL EVIDENCE.

9. After the close of pleadings the matter proceeded to hearing before Sitati J. and later before me. PW1, the applicant herein, testified that she was a co-administrator to the estate of Walter Otworu Matoya, who died on 24th April, 2007. She produced a copy of the death certificate and a copy of deceased identification card as exhibits which were marked as Pexhibit 1 and 2. She also produced grant of letters of administration issued to her on 7th December 2008 as Pexh.3. She stated that her case is that the deceased Walter (who was also her father) and Francis Obaya Matoya (the deceased herein) were brothers. She produced a copy of deceased death certificate as Pexh.4. She further stated that the suit premises were allotted to the Kisii Vegetables & Fruits Supplies Store in which her father Walter was the physical patron. The said Kisii Vegetables & Fruits Supplies Store was registered under registration number 23943. She produced a certified copy of the certificate as Pexh. 5. She added that on 28th October, 1967 the Kisii Vegetables & Fruits Supplies Store was given allotment of plot number Z1 section 2 Kisii Township which she marked as PMF1-6. That on the basis of PMF1-6 a receipt being D537142 dated 4th September, 1969 was issued in respect of deposit for plot Z1 Section 2 Kisii Township. She produced a receipt of the same as Pexh 7. She contended that that plot is now the suit property and on the strength of that allotment, her father the late Walter Otworu Matoya secured a loan with Industrial Development Corporation to develop the property and at that time she contended that his brothers Francis Matoya (the deceased) and Zacharia Matoya witnessed the loan agreement with ICDC dated 11th August, 1970. She produced the loan agreement as Pexh 8.

10. She further stated that after securing the loan, her father he fell extremely ill after which things took a different turn in respect to the joint business and that on 14/7/1969, the department of lands in Nairobi wrote to the Kisii Vegetables & Fruits Supplies Store informing them of a new land registration number. She produced a copy of the letter as Pexh. 9. That in response to Pexh. 9 the Kisii Vegetables & Fruits Supplies Store wrote a letter dated 4th September, 1968 confirming their registration. She produced the said letter as Pexh. 10.

11. She also contended that as soon as her father(Walter Matoya) brought his brothers on board the deceased herein and Zacharia Matoya, his brothers started disinheriting him from the partnership. She produced a letter dated 9th October, 1969 showing that her uncle's founded the partnership. The same was produced as P exh 11. She further produced another letter dated 24th January, 1970 from her uncle's advocates which was to the effect stated that there were three partners to the partnership. A copy of the said letter was marked as Pmf1-12. She further referred to a letter dated 17/02/1970 through of which the ministry of lands acknowledged the letter dated 24/01/1970. A copy of the said letter from the Ministry of lands was marked as Pmf1-13.

12. She denied the respondent's contention that her father did not have any interest in the suit premises and contended that her father gave his brothers 2/3 of the Kisii Vegetables & Fruits Supplies Store and kept 1/3 of the Kisii Vegetables & Fruits Supplies Store for himself. In reference to the advertisement appearing on the Daily Nation dated 10/05/2010 in which certain properties were advertised and owners were asked to show up, she stated that she responded to the said advertisement and started the process of

extending the lease which had expired in 2000. She further contended that the council was satisfied with the documents that had presented and she produced the said documents as Pexh. 14 (a) to (g.) It was her case that her father Walter Otworu Matoya had a stake in the suit property.

13. On cross examination she was shown a copy of the certificate of lease in reference to the suit property in the names of Francis and Zacharia Matoya and she confirmed that her father's name was not on the lease certificate.

14. PW2 was James Manyange the son of Zacharia Obiri Matoya. He testified that his father Zacharia (deceased) had two brothers namely Francis Obaga who died in 2000 and Walter who died in 2007. He stated that the three brothers started a business partnership which he could not recall.

15. On cross examination he stated that during Walter's lifetime, he never complained about his brothers taking his plot and that he only heard of the said complain after Walter died.

16. When the above matter came before me for hearing on 11th February 2016, the applicant produced certified documents from the county government which had been marked for identification before Sitati J. as Mr. Nyasimi counsel for the respondent had no objection to the production but applied to further cross examine the applicant.

17. On further cross examination, in reference to exhibit P 6 the applicant stated that the plot no. was Z I section II Kisii Township allotment letter is not available in the lands office and that is why the government asked the allottees to avail the documents. This marked the close of the prosecution's case.

18. DW1 was the respondent herein Henry Matoya Mangange. He testified that he filed the petition for grant of letters of administration in this case with the consent of all the beneficiaries after obtaining a letter from the area Chief allowing him to bring the petition. He further stated that the consent from the beneficiaries is dated 10th November 2000 and that the beneficiaries who consented to the same were:

- **Esther Nyanchama Obaga Widow**
- **Edward Mochama Matoya Son**
- **Harun Mageka Matoya Son**
- **Joseph Obaga Matoya Son**

19. He produced the consent as D exh.1 and the Chief's letter as Dexh.2. He stated that the deceased Francis Obaga Matoya was his father who died on 30th April 2000. He produced the deceased death certificate as exhibit D exh.3. He further stated that the suit property and Central Kitutu/Daraja Mbili/ 507 belong to the deceased. He corroborated the applicant's evidence that the applicant's father, Walter Matoya, was the deceased's brother and hence the applicant is his cousin. He further stated that the family members of Walter were not entitled to inherit the suit property. He produced a certificate of search in respect to the suit property issued on 14th January 2005 showing its proprietors as:

- **Zacharia Matoya**
- **Francis Matoya**

Both as tenants in common in equal shares.

20. He further stated that his father was Francis Matoya while Zacharia Matoya was an elder brother to his father who is also deceased. He added that the suit property measures 50 by 100ft and in the instant succession cause he is only interested in his father's share of the suit premises. He further produced a lease certificate issued on 13th September 1973 as Dexh. 4 and stated that the said lease was to run for 33

years and had thus expired and he had applied for the renewal of the lease. He confirmed that the lease was granted to his father and uncle Zacharia Matoya.

21. He further stated that Walter Matoya, the applicant's father never claimed the lease from his father or Zacharia during their life time and that Walter and his family only started claiming the suit property after the death of his father and Zacharia. In reference to Pexh.6 the letter of allotment, he stated that the same was sent to the fruit business's postal address P.O.Box151 as it was their family business. He also produced a certificate of registration of the business and clarified that the plot where the vegetables and fruit business was carried out was not the same as the suit property but was on a different Plot No. Z1. Section 2 Kisii Township.

22. He further stated that his father was known as Francis Obaga Matoya alias Otwori and clarified that Otwori is a family name. Lastly, he prayed that the applicant's objection be dismissed with costs.

23. On cross examination the defendant revealed that the Kisii Vegetables & Fruits Suppliers (the suit business) was owned by Walter Otwori Matoya, Matieka Obiri Matoya and Francis Matoya.

24. This marked the close of the defence case. Parties were then directed to file written submissions.

DETERMINATION

25. After considering the applicant's summons for revocation of grant, the respondent's replying affidavit, the oral evidence and the written submissions filed by the respective parties, I note that the following issues present themselves for determination in this case:

- 1. Whether the applicant has established sufficient grounds to warrant the revocation of grant issued to the respondent?**
- 2. Whether this court has jurisdiction to order for rectification of the Land Register?**

26. With regard to the first issue, the power of this court to revoke/annul grant of letters of administration intestate is provided for under **section 76 of the Law of Succession Act (Cap 160) laws of Kenya** which stipulates as follows:

“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.”

27. In the case of **Matheka & another v Matheka [2005] 1KLR 456** the Court of Appeal laid down the guiding principles on revocation of grants and 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 wee 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.

28. In the instant case, I am of the humble view that the applicant has not established any ground within the ambit of section 76 of the Law of Succession Act to warrant this court to revoke the grant issued to the respondent. I say so for the following reasons:

29. Firstly, from the oral evidence adduced in court, the applicant is the beneficiary of the estate of her late father, Walter Matoya. The respondent on the other hand is the beneficiary of the estate of the deceased herein, Francis Matoya. The respondent applied and obtained grant in respect of his father's estate with the consent of all the beneficiaries in that estate. The relationship between the applicant and the respondent is that of paternal cousins as their fathers were brothers. Under section 66 of the Law of succession Act the order of preference to persons who should be given grant in favour of a deceased estate is: surviving spouse or spouses, the children of the deceased if the surviving spouse is dead, the public trustee or creditors. The applicant is not a beneficiary of the estate of Francis Matoya but a beneficiary to the estate of Walter Matoya. Furthermore, the certificate of official search exhibited before this court clearly shows that the suit property is not registered in the name of Walter Matoya (the applicants father) or the name of Kisii Vegetables & Fruits Supplies Store but in the name of the respondent's father(Francis Matoya and Zacharia Matoya.)

30. Secondly, the applicant and her deceased father are claiming part ownership of the suit property Kisii Municipality/Block111/140. In my humble view, such a claim is not a basis for revocation of a grant as stipulated under section 76 of the Law of Succession Act.

31. With regard to the jurisdiction of this court to grant the applicants prayer that her father Walter Matoya was a part owner of the suit property, as I have already observed in this judgment, the applicant and her deceased father claimed ownership of the suit premises . The claim is not within the jurisdiction of this succession court but within the jurisdiction of the Environmental and Land Court. The jurisdiction of the Environment and Land Court is conferred by in Article 162(2) (b) of the Constitution which stipulates that the court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition section 13 of the Environment and Land Court Act expounds on the jurisdiction of the land court as follows:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or

any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

32. The dispute herein involves a parcel of land and the specific prayers sought by the applicant are rectification of the register of the suit property to include the name of Walter Matoya (the deceased) and an order allowing the representatives of Walter to take rents from the suit property. These prayers, to my mind, are orders relating to the use, occupation and title to land which fall within the jurisdiction of the Environment and Land Court.

33. Having found that the applicant has not presented any evidence before this court in accordance with section 76 to warrant the revocation of grant of letter of administration intestate issued to the respondent and having found that this court lacks jurisdiction to issue orders relating to the use title and occupation of land, the order that commends itself to me is the order to dismiss the applicant's summons for revocation of grant dated 7th December 2012. Since the parties involved in this dispute are relatives, I direct that each party bears his/her own costs.

34. It is so ordered.

Dated, signed and delivered in open court this 7th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Nyasimi for the Petitioner
- Objector in person for the Objector
- Omwoyo: court clerk