



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE NO. 403 OF 2014
(Formerly Migori SPM Succession Cause No. 35 of 2014)

IN THE MATTER OF THE ESTATE OF

PITALIS OJIWA KACHANDO (Deceased)

BETWEEN

TOBIAS ONGONDO SORO APPLICANT

AND

THOMAS OTIENO OJIWAPETITIONER/RESPONDENT

RULING

1. The matter before me concerns an application for the revocation of the grant issued on 15th July 2014 and confirmed on 7th April 2015 in respect of the estate of Pitalis Ojiwa Kachando (deceased). The deceased's only property was a parcel of land; **SUNA EAST/KAKRAO/711**.
2. In his summons dated 16th April 2015, the applicant claims he purchased 14 acres of land from the deceased in the year 1985 and has lived on the property since then and has constructed a permanent house thereon. He avers that when the respondent applied for confirmation of the grant of letters of administration, he did not disclose that the applicant was entitled to 14 acres from the deceased's estate.
3. I heard the application by *viva voce* evidence and submissions by counsel and the only issue for determination is whether the applicant is entitled to 14 acres of the property. The respondent does not dispute that the applicant is entitled to part of the land. The fact that the applicant was an interested party in the succession proceedings is confirmed by the letter written by the Chief of Suna Otacho Location dated 17th 2013 which identifies the applicant. In the affidavit in support of the application for confirmation of the grant he deponed that the applicant purchased 2.4Ha (6 acres) from the deceased.
4. The dispute revolves around an agreement which the applicant produced in evidence and which shows that he purchased 14 acres from the deceased in 1985. PW 2, John Ologi Odongo, testified that he was the person who recorded the agreement in presence of the deceased and the applicant. He stated that the agreement was executed by both parties; the deceased affixed his thumbprint and the purchased executed his signature. He stated that the deceased retained the original copy while the applicant retained the duplicate which is a carbon copy.
5. Although the applicant raised several objections regarding the authenticity of the agreement, I accept

and believe the testimony of PW 2 who was present when the agreement was executed. There is no reason for him to lie. Likewise PW 3, Julius Atzira Ougo, was a credible witness. He testified that he was one of the persons deputed by then chief to assist in ascertaining and delineating the property the deceased had sold to the applicant. He confirmed that 14 acres had been sold to the applicant.

6. As to whether the purchase price was paid, I find that the same was paid by 27th March 1985 as confirmed by PW 2 who recorded on the agreement that the purchase price had been paid. If the full price had not been paid it is inconceivable that the deceased, who passed away in 1998, would not have made a demand upon a defaulting purchaser who had lived as his for 14 years. Further, the deceased would have told his son, the respondent, that the applicant owed some money.

7. It is true that the applicant is not a direct beneficiary of the estate within the meaning of **section 29** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** but the agreement which formed the basis of his occupation states that he was entitled to 14 acres. The part of the agreement that clearly sets out the acreage is not altered in any way and it is corroborated by the testimony of PW 2 and PW 3.

8. After the parties signed the agreement PW 3 testified that they proceeded to affix boundaries by planting sisal. What is clear to me is that there is a dispute as to the exact measurements of the land delineated by the deceased and occupied by the applicant. PW 3 testified that when the measurements were done, they were done by the elders without the benefit of surveyors.

9. The respondent denies the existence of the agreement but in light of the agreement which I hold is genuine and the testimony of PW 2 and PW 3, I reject his contentions.

10. This court is entitled to revoke the confirmed grant under **section 76** of the **Law of Succession Act**. As I stated elsewhere, the respondent's admits that the deceased had disposed of part of the land to among others, the applicant. Had the respondent been served with the application for confirmation, he would have appeared before the court and staked his claim to part of the deceased's estate. I consequently revoke the certificate of confirmation issued on 7th of April 2015.

11. It was apparent during the proceedings that there had a back and forth over the boundary and the parties have involved the civic authorities including the Forest Department and the police to advance their respective causes. Both parties alluded to institution of criminal proceedings against one another. I am not unmindful of the fact that if this matter is not resolved conclusively it may lead to further court proceedings and breaches of the peace.

12. Based on my findings, I now make the following orders;

- a. I revoke the certificate of confirmation issued on 7th of April 2015.
- b. The District Surveyor Migori and the Chief, Suna Otacho Location shall proceed to the property known as **SUNA EAST/KAKRAO/711** and identify the boundaries of the portion thereof occupied by **Tobias Ongondo Soro** and delineated by, inter alia, sisal plants and also the area occupied by the other purchasers namely; **Alloys Obiero, Fleria Akumu** and **Policarp Odera**.
- c. The report shall be filed in this court in or before 10th August 2015 when this matter will be mentioned for further orders and directions.

DATED and DELIVERED at MIGORI this 16th day of July 2015.

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company Advocates for the applicant.

Mr Oguttu-Mboya instructed by Oguttu-Mboya and Company Advocates for the respondent.