



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO.421 OF 2008**  
**IN THE MATTER OF THE ESTATE OF**  
**JOSEPHAT SHIMENGA ANGULUSHI.....DECEASED**  
**BETWEEN**  
**FRANCIS SHIMENGA**  
**FAUSTUS J. ANGATIA.....PETITIONERS/RESPONDENTS**  
**EMMANUEL S. MULINDI**  
**AND**  
**JOSEPHAT DESSLIS MWOREH....OBJECTOR/APPLICANT**  
**J U D G M E N T**

**Introduction**

1. The Objector herein JOSEPHAT DELLIS MWOREH filed Summons for the revocation of Grant of letters of Administration issued to FRANCIS ISUTSA SHIMENGA, FAUSTUS JAMHURI ANGATIA and EMMANUEL SHIKHUYU MULINDI the Administrators of the estate of the deceased herein JOSEPH SHIMENGA ANGALUSHI, who died on the 3<sup>rd</sup> day of September 1987. The grant was issued on the 27<sup>th</sup> October 2009. The applicant wants the grant revoked on grounds that the same was obtained fraudulently by making of false statements and the concealment from the Court of material facts therein which are relevant to the case.

2. His application is supported by the affidavit dated 08/12/2009 wherein he depones that the said grant of letters of administration intestate issued to the Petitioners was obtained fraudulently by the making of false statement and the concealment from the Court of material facts therein relevant to the case.

**The Affidavits**

3. In his affidavit the applicant explains how the deceased had married four (4) wives whom he settled on different parcels of land and further enumerates the names of the persons who survived the deceased. He

claims that he first began making use of L.R. No.IDAKHO/SHISESO/1273 (hereinafter referred to as “the suit land”) during the lifetime of the deceased and at a certain point the deceased sold to him the said parcel. He further claims that the deceased’s surviving wife ROSA INGASIANI knew about the sale and had initiated steps to have the same transferred to him but she unfortunately passed on. He maintains that he has been in use and occupation of the suitland for approximately twenty six (26) years both during and after the death of the deceased and his wife ROSA INGASIANI. He claims that since the deceased had catered for all his survivors, none of the petitioners or beneficiaries as listed in the affidavit can lay any claim to the suitland. He contends that the Petitioners and beneficiaries herein never attempted to petition for letters of administration intestate for the deceased’s estate since they were aware that the suitland rightfully belonged to ROSA INGASIANI. He also claims that the Petitioners are in violation of Rule 26(1) of the Probate and Administration rules because they did not inform the deceased’s two daughters of the succession proceedings.

4. The application is opposed vide the joint replying affidavit dated 22/05/2012. In the joint affidavit the petitioners state that the deceased herein who is their paternal grandfather had three wives and that the allegation by the Objector that ROSA INGASIANI was a wife of the deceased is not true. They have also explained who ROSA INGASIANI was and where she was buried. They maintain that at no time did the said ROSA INGASIANI and MARY SHIMENGA lay claim on the deceased’s estate and that it is therefore a lie for the Objector to allege that ROSA INGASIANI had been allocated L.R. No. Idakho/Shiseso/1273 the suitland herein. They also refute the allegations by the Objector that the deceased sold to him the suitland herein and that he (objector) has been using the suitland for over twenty six (26) years as they have exclusive use and occupation of the suitland. Petitioners contend that a perfect stranger and/or alleged buyer has no capacity to seek for revocation of a grant of letters of administration intestate.

5. This Court gave directions that the matter be heard by way of oral evidence where the objector was the plaintiff and the petitioners the defendants.

### **Plaintiffs Case**

6. JOSEPHAT MWOREH who testified as PW1 told the Court that the deceased whom he knew and who was a neighbour leased to him part of the suitland. He produced searches for the parcels of land owned by the deceased being PExhibit 1 – 4 and pointed out the registered owners. He claimed that none of the petitioners have resided on the suitland part of which, measuring 2.5 acres he purchased from ROSA INGASIANI as shown in the PExhibit 5 and for which he paid kshs.150,000/=. He adds that ROSA was the 4<sup>th</sup> wife of the deceased and that she died in 2008. He wants to be given the 2 ½ acres.

7. On cross examination the Objector states that he started leasing the suitland from the deceased in 1983 but he did not have the lease agreement. He maintains that his claim is that he bought part of the suitland as shown in the sale agreement PEx 5 and according to the sale agreement no family member of the deceased except ROSA appears in the agreement. He adds that he did not engage the deceased’s family after the death of ROSA.

8. PW2 SOLOMON MUHEI MARENKA a brother to ROSA SHIMENGA told the Court that his sister was married to JOSEPH SHIMENGA (deceased) and the two lived together at Shesere sub location. He said he witnessed the sale agreement between ROSA and the Objector.

9. On cross-examination PW2 told the Court that Shimenga’s family totally rejected ROSA and that ROSA was buried by her son Musonye at Mukulusu. He explained that there was no dowry agreement between ROSA’s and SHIMENGA’s families.

10. PW3 ALPHONCE SEREBWA told the Court that ROSA wanted to lease the suitland to him between 2001 – 2004. He claims to have cultivated the suitland for one year before ROSA told him that she had sold the suitland. He said he witnessed the sale

11. On cross examination PW3 claimed that he knew that ROSA was the owner of the suitland which he

rented during the period 2001 – 2004. He reiterated that ROSA told her that someone wanted to buy the land from her and that he was refunded his money by PW1.

### **Defence Case**

12. During the hearing of the defence case, FORSTUS JAMUHURI A SHIMENGU, DW1 told the Court that the deceased herein was his paternal grandfather and the owner of the suitland being Idakho/Shiseso/1273 which is still registered in the deceased name. He re-affirmed that the deceased had three (3) wives and that he had no relation with the plaintiff. He denied that the deceased sold part of the suitland to the plaintiff (PW1). He also rejected the sale agreements PExh 5 and added that ROSA was not his grandfather's wife but a friend and that between them they got a child named Mary who has since died.

13. He confirmed that ROSA was buried on the land of Alex Muyunga her husband. He also stated that apart from PEx 5 the defendants did not adduce any other evidence showing purchase of the suitland herein and further that there was no single member of the deceased's family among the witnesses of the alleged sale agreement. He also testified that as at 24/05/2004 ROSA INGASIANI had not been appointed administrators of the deceased's estate and therefore she had no powers to deal with the deceased's estate. He denied the allegation that the objector/plaintiff was currently using the suitland. He averred that the deceased's family is the one using the suitland.

14. On cross examination, DW1 reiterated his earlier testimony and added that none of her grandmothers was buried on the suitland. He also stated that the reason why the deceased's did not take out succession proceedings earlier was because they had not met over the issues. He added that the objector once used the suitland after chasing away his sister who had leased the property from the deceased's family. He also maintained that between 1987 and 2008 nobody was living on the suitland. At the close of the defence case, parties filed and exchanged written submissions which the Court has had opportunity of going through.

### **Issues for Determination**

15. The only one issue for determination is whether the grant of letters of administration issues to the defendants/petitioners on the 27<sup>th</sup> of October 2009 was obtained fraudulently by the making of a false statement and the concealment from the Court of material facts therein, and therefore liable to revocation and/or annulment.

16. The plaintiff on one hand claims to have bought part of the suitland from deceased herein and on the other hand from ROSA who he claims was the 4<sup>th</sup> wife of the deceased. PW1 has shown Pexh 5 being the sale agreement executed between ROSA and himself but no other member of the deceased's family has witnessed it. The issue of ROSA being a wife to the deceased is supported by both PW2 and PW3.

17. DW1 has rebutted the testimonies of the plaintiff and plaintiffs witnesses he maintains that the deceased's family did not know anything about the sale of suitland and have distanced themselves from the alleged sale agreement. DW1 also maintained that ROSA was not the wife but only a friend of the deceased and that they had a child between them. This Court notes also that the plaintiff (PW1) claims to have used the suitland for 26 years which also has been denied by the Defence (DW1). The allegation by the plaintiff is not supported by independent evidence.

18. Even if ROSA was the wife of the deceased did she have the right to sell the deceased's property without letters of administration? Section 79 of the Law of Succession Act vests the property of the deceased in the personal representatives for avoidance of doubt, the said Section states as follows:

**“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant and subject to any limitation imposed in the grant all the property of the deceased shall vest in his personal representatives.”**

The effect of Section 79 is that personal representative steps into the shoes of the deceased so far as his property is concerned.

19. The sale agreement herein is dated 24/05/2004. There is nothing to show that by the said date ROSA had obtained letters of administration to give her the authority to act as the personal representative of the deceased's property. She was therefore wrong to enter into the said agreement with the plaintiff in regard to the suit property. Section 45(1) & (2) of the Law of Succession Act defines ROSA as an intermeddler with the deceased property and liable to prosecution. Even without going into any further details the transaction between the plaintiff and ROSA was illegal in as much as the property of the deceased herein was concerned. This Court therefore finds that the plaintiff has not shown that he is a rightful beneficiary to the deceased's estate as the sale agreement he entered into with ROSA was illegal. The plaintiff has not proved fraud on the part of the petitioners nor has he proved that the petitioners concealed any material facts from the Court. There is therefore no reason to warrant revocation of the grant. In my considered view, the plaintiff can seek recourse for adverse possession if he so wishes since he maintains that he has used the Suitland herein for over twenty (20) years.

20. In the premises, I find that the application for revocation of grant of Letters of Administration intestate dated 13/11/2009 lacks merit and is hereby dismissed for the above stated reasons with costs to the petitioners/defendants.

21. Orders accordingly.

Judgment delivered, dated and signed in open Court this 2nd day of December 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Didi for Kundu (present) for Objector/Applicant

Mr. Wafula (absent) for Petitioners/Respondents

Mr. Lagat - Court Assistant