



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Application 8 of 2012**

**IN THE MATTER OF THE ESTATE OF SAID RAJAB (DECEASED)**

**BETWEEN**

**SALEH KIBET SAID ..... 1<sup>ST</sup> PETITIONER/RESPONDENT**

**ISAACK MELLY ..... 2<sup>ND</sup> PETITIONER/RESPONDENT**

**VERSUS**

**IDDI KIPKORIR SAID ..... OBJECTOR/APPLICANT**

**RULING**

The Summons for Revocation of Grant dated 28th February, 2012 is brought under S. 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It is brought on grounds that:-

1. The proceedings to obtain the grant were defective in substance and/or are non existent.
2. The grant was obtained fraudulently by the making of a false statement and/or by he concealment from the court of something material to the case.
3. The grant appears to have been issued in a civil sit without any formal application for the same.
4. The grant appears to have been issued for a limited purpose but has been grossly abused by the Petitioners.

It is supported by the affidavit of the objector/Applicant Iddi Kipkorir Said sworn on 28th February, 2012. The Supporting Affidavit basically reiterates the grounds on which the application is brought. Additionally it is deposed that some of the beneficiaries of the deceased are already dead and it is not known who has benefited from their share and that the Petitioners have defrauded the estated by selling one parcel of land, namely **L.R. NO. 1181/63 KAPSABET TOWN** to one **CORNELLY SEREM** for a sum of Ksh. 6,000,000/=, although a transfer has not yet been effected.

The application is opposed vide two Replying Affidavits sworn by the Petitioners respectively on 12th October, 2012. They depone that the deceased's estate was distributed vide Eldoret Kadhi's Civil Case No. 3 of 1993 in which proceedings the Objector actively participated. That the Objector did not raise any objection as to their appointment as Petitioners and Administrators of the deceased's estate.

They depone that the sale of L.R. No. 1181/63 Kapsabet Township was suctioned by the Kadhi who signed the sale agreement and issued a Certificate of Sale. That out of the Kshs. 6,000,000/= being proceeds of the sale, the Objector received a sum of Ksh. 550,089/=. That upon the sale, a certificate of lease was issued in the name of the Purchaser, Cornelly Serem. That as such, the Objector's application is overtaken by events, and in any event he is estopped from challenged a grant which he benefited directly from and which he participated in its issuance.

When parties came for directions before me, I gave orders that the application can be disposed of by way of affidavits. The matter was to be canvassed on 17th December, 2012. Come the 17th December, 2012 counsel for the respective parties opted, in addition to file written submissions. It was noted that only the Petitioners' counsel had by that morning filed the written submissions. The Objector's counsel was to thereafter file his and both counsel were to return to court on 25th February, 2013 to highlight the submissions. On 25th February, 2013, counsel for the Objector, Mr. Otieno informed the court that he too had filed his written submissions. Although I did not see the filed submissions, I was of the impression that possibly Mr. Otieno would hand them over to court later. As I write this ruling, I have not yet been furnished with any written submissions filed on behalf of the Objector. However, the lack of the same does not in any way affect the outcome of the ruling as the affidavits in support of and opposition to the application suffice in enabling me arrive at an informed decision. Having said so, I take the following view.

A Limited Grant of Administration was issued on 20th January, 2009 to the Petitioners herein vide Eldoret Kadhi Court Civil Case No. 3 of 1993. The same was **“limited to purposes only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted”**.

The parties in the Eldoret Kadhi Court Civil Case No. 3 of 1993 are Saleh Kibet Said, Ali Said Rajab and Zuhura Aziz as Plaintiffs and Yusuf Said as the Defendant. The first two Plaintiffs are the parties named as Petitioners and the Defendant as the Objector herein. The orders prayed by the Plaintiffs against the Defendant therein were as follows:-

- (a) *The Defendant be stopped from collecting rents, interfering with the tenants and or in any way over plot No. 63 Kapsabet Township.*
- (b) *An Order be made that a Bank account be opened for the operation of Plot No. 63 Kapsabet Township.*
- (c) *An Order that Funds be provided for the maintenance of Plot No. 63 Kapsabet Township.*
- (d) *Costs of this suit.*

The subject land in the civil case is also the subject land to these proceedings. The same was sold to Cornelly Serem vide a sale agreement dated 11th January, 2010 in proceedings in the Kadhi Court Civil Case No. 3 of 1993. The agreement is annexed to the supporting affidavit of the Objector and marked 'IKS3'.

In the same proceedings, the Kadhi issued a Certificate of Sale which is annexed to the 2nd Petitioner's Replying Affidavit as 'SKS1'. A Schedule of Distribution Order in accordance with the Islamic Law is attached to the Replying Affidavit as 'SKS2'. In it, the Objector is named as the 4th beneficiary. The schedule confirms that the Objector attested to the sale agreement. Under Table B of the Schedule, it is shown that he received a net of Ksh. 550,089/=.

Further, annexures 'SKS4' and 'SKS5' are an attestation that the ownership of the land has transmitted into that of the Purchaser, Cornelly Serem.

This chronology of events does show that, although the Limited Grant was issued in the Khadhi's Court Civil Suit No. 3 of 1993, nothing was done or transacted without the knowledge of the Objector. The

subject matter of the suit being L.R. No. 1181/63 Kapsabet Township has been fully distributed. I am of the view that that suit ought not to subsist anyway. Interestingly none of the parties informed the court on the position of the suit.

Indeed as per the schedule of Distribution, the Objector was one of the beneficiaries of the proceeds of the sale. He cannot therefore come to court firstly, to seek orders which cannot be effected and secondly, challenge a grant from which he himself benefited. Surprisingly, he even suctioned the sale of the land. He is thus coming to court without clean hands and is definitely acting malafide.

The fact is that any objection to the sale ought to have been made before the Kadhi. But I doubt that the Objector would have done so having himself suctioned the sale and thereafter benefited from the proceeds of the sale.

Section 76 of the Law of Succession Act clearly sets the grounds under which a grant can be revoked, which are:-

- (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 has ordered or allowed; 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.**

The Objector has not been able to demonstrate acts of fraud committed by the Petitioners for the very reasons I have given. He has also not demonstrated that the Limited Grant was issued to them through concealment of material information. Consequent whereof, I find this not a suitable case under which a grant can be revoked.

**“He who alleges must prove”**. This threshold has not been met by the Objector as was held by court in the **RE ESTATE OF WAITHERU KIHORO (DECEASED) 2009 e KLR**. **“In any event it is a cardinal principle of our justice system that whoever alleges must prove the allegation”**.

And **JULIUS MACHABE MAROMBO -VS AUGUSTINE WANJALA MAROMBO (2011) e KLR** the court observed that, **in the absence of fraud, mistake or misrepresentation, the Objector cannot sustain an application for revocation of Grant**.

In the result, this application is dismissed with costs to the Respondents.

**DATED and DELIVERED at ELDORET this 2nd day of May 2013.**

**G. W. NGENYE - MACHARIA**  
**JUDGE**

**In the presence of:**

..... for the Objector/Applicant

..... for the Petitioners/Respondents