



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 144 OF 2013

BETWEEN

SHIKUKU MASON SITERA.....1<sup>ST</sup> APPELLANT

EVERLYNE NAKHUNGU JUMA.....2<sup>ND</sup> APPELLANT

AND

BEN KUMBUTI WASILWA.....RESPONDENT

*(Being an appeal from the ruling and orders of the High Court of Kenya at Eldoret (Ngenye, J.) delivered on 28<sup>th</sup> March, 2013*

in

**Succession Cause No. 59 of 2011)**

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**JUDGMENT OF THE COURT**

1. This judgment is in respect of a ruling delivered by Ngenye Macharia, J. on 28<sup>th</sup> March, 2013 wherein the learned judge revoked a grant of representation that had been confirmed on 9<sup>th</sup> September, 2012 on grounds of concealment of material facts.
2. The background to the said ruling is that on 22<sup>nd</sup> March, 2012 **Ben Kumbuti Wasilwa**, the respondent herein, filed an application for revocation of a grant of representation to the estate of the late **Wilson Wachenda Mason**, also known as **Wachenda Mason** (the deceased), that was issued to **Shikuku Mason Sitela** (the 1<sup>st</sup> appellant), on the ground that the grant had been obtained by concealment from the court of matters material to the case.
3. In his affidavit in support of the summons for revocation of the grant, the respondent stated that the deceased sold to him his parcel of land known as Kakamega/Chekalini/238 and transferred the title to him. That notwithstanding the 1<sup>st</sup> appellant had included the said parcel of land among the list of assets of the deceased as shown in the certificate of confirmation of the grant.
- 4 The respondent believed that in so doing the appellant intended to defraud him of the said parcel of land, as he had already been issued with a certificate of confirmation of grant and listed his brother, **Jotham Juma Masoni**, as the beneficiary of the said property.
5. The respondent further deponed that during his lifetime, the deceased had exchanged his parcel of land number Kakamega/Chekalini/238 with the respondent's Plot No. 485 Surungai. The deceased's parcel of land had been charged to the Settlement Fund Trustees from whom the respondent had secured a loan. The objector repaid the loan and the said parcel of land was transferred into his name by the Settlement Fund Trustees.
6. The initial exchange was on a gentleman's agreement but the transaction was formalized on 24<sup>th</sup> December, 1986. In the latter agreement, the deceased instructed the respondent to transfer Plot No. 485 Surungai directly to one Joel Kakai who had purchased it from the deceased.
7. Subsequently the suit land, that is, Kakamega/Chekalini/238, was subdivided into three parcels of land namely, Kakamega/Chekalini/2582 (registered in the name of the 1<sup>st</sup> respondent), Kakamega/Chekalini/2583 and Kakamega/Chekalini/2584.

8. The petition for letters of administration of the deceased's estate was filed in March 2011 when the ownership of the suit land was in the hands of third parties. Prior to the filing of the petition, the Lugari District Land Adjudication and Settlement Officer had written to the Registrar of the High Court, Eldoret, a letter dated 3<sup>rd</sup> March, 2010 stating that parcel no. Kakamega/Chekalini/238 had been transferred to the respondent. It was therefore clear that the petitioner had concealed that fact from the court. On that basis the learned judge revoked the grant.
9. Being aggrieved by that decision the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant faulted the learned judge for revoking the confirmed grant without considering the fact that the grant also included other properties registered in the deceased's name, thereby leaving the deceased's estate unadministered.
10. Further, the appellant faulted the learned judge for failing to make a finding on his offer to transfer Plot No. 485 to the deceased's estate; for failing to consider the history between the applicant and the deceased in the succession cause; and for basing her decision on legal technicalities.
11. When the appeal came up for hearing, **Mr. Luchivya**, learned counsel for the appellants, relied on his written submissions that had been filed on 16<sup>th</sup> June, 2016. On the other hand, **Mr. Omolo**, learned counsel for the respondent made oral submissions in opposition to the appeal.
12. The appellant's counsel argued most of the grounds of appeal in an omnibus manner. He submitted that in the petition for letters of administration and other documents in support thereof, land parcel no. Kakamega/Chekalini/238 had been listed as one of the assets of the deceased. He cited the letter dated 3<sup>rd</sup> March, 2010 from the Lugari Land Adjudication and Settlement Officer which showed that the deceased was the first allottee of the suit land but he transferred the same to the respondent on 14<sup>th</sup> August, 1979.
13. Counsel further submitted that the Green Card showed that the suit land was held in trust by the Settlement Fund Trustees on behalf of the deceased and that the deceased was in occupation of the land until his death on 18<sup>th</sup> January, 1988. In his view, the land had not been transferred to the respondent as at 18<sup>th</sup> January, 1988 when the deceased passed on. He added that the suit land was transferred to the respondent on 11<sup>th</sup> January, 2000.
14. The appellant's counsel further submitted that the confirmed grant also listed another parcel of land, Kakamega/Surungai/25. By revoking the grant the learned judge caused that parcel of land, which was not in dispute, to remain unadministered and thus open it to wastage and intermeddling.
15. Counsel discounted the respondent's contention that there had been a lawful exchange of properties between him and the deceased. He urged the court to allow the appeal.
16. On his part, **Mr. Omolo** for the respondent submitted that there was sufficient evidence that the appellant deliberately failed to disclose that the suit land did not form part of the deceased's estate. As at the date of filing the petition, the title in respect of the suit land was not in existence as the original parcel of land had been subdivided in 2006. He referred to the Green Card which revealed that the title in respect of the suit land was closed on 3<sup>rd</sup> March, 2006 following the subdivision. He urged the court to dismiss the appeal.
17. The main issue for determination in this appeal is whether as at 1<sup>st</sup> March, 2011 when the 1<sup>st</sup> appellant filed the petition for letters of administration of the deceased's estate the suit land formed part of the estate of the deceased as stated in the petition, and if not, whether that was sufficient reason for revocation of the confirmed grant.
18. We must point out that what was before the court was not a substantive suit for determination of ownership of the suit land. On 26<sup>th</sup> March, 2012 the appellant had filed a suit against the respondent and one Gladys Chilikona Tawayi, where the appellant sought, *inter alia*, an order for rectification of the register by cancellation of the titles in respect of Kakamega/Chekalini/2582, 2583 and 2584, arguing that the deceased was the lawful owner of the original parcel of land that is Kakamega/Chekalini/238, that had been subdivided to give rise to the impugned titles. The suit was defended and it was still pending before the Court when the application for revocation of the grant was argued.
19. Suffice it that in reaching her decision, the learned judge took into consideration documents that were available before the court which showed that long before the petition for letters of administration was filed land parcel no. Kakamega/Chekalini/238 had been subdivided and the title closed as hereinabove stated. The Green Card showed that the first registered proprietor of the land was the Settlement Fund Trustees; that the land was transferred to the respondent on 11<sup>th</sup> January, 2000 and a title deed issued; that on the same date a caution was registered in favour of the appellant, who was claiming beneficial interest; that on 1<sup>st</sup> December, 2005 the caution was removed vide a court order issued in Miscellaneous Application No. 87 of 2005 by the Chief Magistrate's court at Kakamega; and that on 3<sup>rd</sup> March, 2006 the title was closed as subdivisions Nos. 2582 – 2584 were registered.
20. From the above, it is clear to us that in filing the petition for grant of letters of administration of the deceased's estate, the suit property did not form part of the deceased's estate and the 1<sup>st</sup> appellant was well aware of that fact. That is why he subsequently filed Civil Suit No. 111 of 2011 before the High Court of Kenya at Kakamega.
21. In the circumstances, the learned judge was right in finding that the appellant had obtained the grant fraudulently, having concealed material facts. Consequently, this appeal is without merit. It is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of July, 2017.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**