



REPUBLIC OF KENYA



KENYA LAW
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**Omufwoko v Osabwa & 4 others (Succession Cause 15 of 2023)
[2024] KEHC 638 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 15 OF 2023
JN KAMAU, J
JANUARY 31, 2024**

BETWEEN

WILSON MUKUNA OMUFWOKO APPLICANT

AND

JACKSON AYIEKO OSABWA 1ST RESPONDENT

ZEBEDEE DANSON OSABWA 2ND RESPONDENT

RUTH ESITOKO OYA 3RD RESPONDENT

VELMA ECHALEKA KOLI 4TH RESPONDENT

THE COUNTY LAND REGISTRAR, VIHIGA 5TH RESPONDENT

JUDGMENT

1. On 28th November 2023, this court dismissed the Applicant’s Notice of Motion application dated 4th March 2023 and filed on 7th March 2023 in which he had sought that the responses that had been filed by the 6th, 7th, 8th, 9th and 10th Advocates (now struck out from the proceedings herein) be expunged from the court record for having been filed and/or commissioned by persons who were not qualified to act as advocates. It then directed that it would deliver its Judgment in respect of the Applicant’s undated Petition that was filed on 22nd September 2022 on 31st January 2024.
2. In response to the Petition herein, on 4th October 2022, the firm of M/S Osabwa Sandys & Co Advocates filed Grounds of Opposition and Replying Affidavits by the Respondents and one Enos Okola Ottichilo. They were all dated 3rd October 2022.
3. The Respondents’ assertion was that Earnest Omuchanji Om’mbwaro (hereinafter referred to as “the deceased”) was the 3rd and 4th Respondents’ father and that they sold LR No East Bunyore/Ebunagwe/1248 (hereinafter referred to as “the subject property”) that was registered in his name to the 1st Respondent herein after doing (sic) succession proceedings.



4. The Applicant swore a Further Affidavit on 13th October 2022. The same was filed on even date.
5. He dismissed the Replying Affidavits as containing falsehoods. He averred that the 3rd and 4th Respondents did not rebut his evidence that he started tilling the subject land in 2002. His assertion was that they had no right to sell land to a stranger before they initiated the succession proceedings which was in contravention of Section 76 of the Law of Succession.
6. This court had considered the other averments in his said Further Affidavit when it heard and determined his aforesaid Notice of Motion application dated 4th March 2023 and filed on 7th March 2023. There was therefore no need to re-state the same herein.
7. The Applicant's undated Written Submissions were filed on 6th February 2023 while those of the Respondents were dated 24th October 2022 and filed on 2nd November 2022. The Judgment herein is based on the said Written Submissions that all parties relied upon in their entirety.

Legal Analysis

8. A perusal of the undated Petition herein showed that the Applicant herein had sought the following orders:-
 - a. That the purported sale agreement between the 2nd Respondent herein on the one part and the 3rd and 4th Respondents on the other part pertaining to LR East Bunyore/Ebunagwe/1248 amounted to intermeddling and was therefore null and void.
 - b. That the grant of letters of administration intestate in Succession Cause No 117 of 2018 was obtained illegally and was therefore null and void and the same be revoked.
 - c. That the certificate of confirmation of grant issued to the 3rd and 4th Respondents be cancelled.
 - d. That the County Land Registrar in charge of Vihiga County be ordered to cancel the title deed issued to Jackson Ayieko Osabwa in respect of LR East Bunyore/Ebunagwe/1248.
 - e. That the County Land Registrar in Vihiga County be ordered to register the Petitioner herein as the proprietor of all that parcel of land known as LR East Bunyore/Ebunagwe/1248.
9. Notably, Section 49 (1) of the Law of Succession Act Cap 160 (Laws of Kenya) provides as follows:-

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
10. Further, Section 76 of the Law of Succession Act states that:-

“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
 - a. that the grant has become useless and inoperative through subsequent circumstances.”
11. Asati J therefore acted correctly when she downed her tools and transferred this matter from the Environment and Land Court (ELC) where it had initially been filed to this court. Indeed, it was only the High Court that could deal with succession matters by virtue of Article 162(2) of the Constitution of Kenya, 2010 that provides as follows:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- a. employment and labour relations; and
- b. the environment and the use and occupation of, and title to, land.”
 - 1. This file was therefore registered in the Probate and Administration Registry of the High Court of Kenya at Vihiga and assigned serial number Succession Cause No 15 of 2013.
 - 2. However, bearing in mind the nature of the orders that the Petitioner had sought in this Succession Cause, it was evident that the same could not be addressed in this Succession Cause.
 - 3. The correct procedure for a person who wished to have a grant of letters of administration intestate and/ or certificate of confirmation of grant annulled and/or revoked could only do so under the provisions of Section 76 of the Law of Succession in the cause in which the said grant of letters of administration intestate and/or certificate of confirmation of grant was issued.
 - 4. In this case, the Applicant herein ought to have sought his redress in Vihiga SPMC Succession Cause No 117 of 2021. It was also in that Succession Cause that the issues of intermeddling of the deceased’s estate could have been dealt with.
 - 5. The Applicant herein was a layman. He was also being assisted by one Zakayo Henry Angoiya, a layman, who had a Power of Attorney, a copy which bore the Land Registrar’s registration number “268” and signature.
 - 6. Notably, the procedure that the Applicant had invoke to revoke the said Grant of Letters of Administration Intestate and Certificate of Confirmation of Grant that were issued on 19th



July 2021 and 24th March 2022 respectively went to the root of his case. It was not a procedural technicality that could be cured by Article 159(2)(d) of the *Constitution* of Kenya that mandates courts to administer justice without undue regard to procedural technicalities.

7. It was evident that considering the merits or otherwise of revoking and/or annulling the Grant of Letters of Administration Intestate and/or Certificate of Confirmation of Grant that were issued on 19th July 2021 and 24th March 2022 respectively in this Succession Cause was not only likely to occasion the Applicant herein great injustice but that it would also be highly un-procedural and/or irregular. If it proceeded herein, it would have adopted a procedure unknown to law to deal with the reliefs that the Applicant herein had sought.
8. This court therefore found it prudent not to consider the Written Submissions that had been filed by the parties herein on the issue of revocation and/or annulment of the aforesaid Grant of Letters of Administration Intestate and/or the aforesaid Certificate of Confirmation of Grant that were issued on 19th July 2021 and 24th March 2022 respectively so that the issues could be ventilated in the proper file and forum and on merit.

Disposition

20. For the foregoing reasons, the upshot of this court's decision was that the undated Applicant's Petition that was filed on 22nd September 2022 was not merited and the same be and is hereby dismissed. The Applicant will bear the 1st, 2nd, 3rd and 4th Respondents' costs of this Petition.
21. The Applicant be and is at liberty to file the application for revocation and annulment of the Grant of Letters of Administration Intestate that was issued on 19th July 2021 and/or the Certificate of Confirmation of Grant that was issued on 24th March 2022 in the proper manner and format for consideration.
22. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JANUARY 2024

J. KAMAU

JUDGE

