In re Estate of Nahashon Ojode Gwambo (Deceased) (Succession Cause 595 of 2009) [2024] KEHC 6720 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE 595 OF 2009

MS SHARIFF, J

MAY 31, 2024

BETWEEN

ELIZABETH OKELLO ..... 1ST OBJECTOR

THOMAS MBOYA OCHINGA ..... 2ND OBJECTOR

JOHN OTUOMA ACHENGE ..... 3RD OBJECTOR

AND

BENTA ADOYO OJODE ..... RESPONDENT

RULING

1. Vide an application dated 22nd February 2021 the Objectors/Applicants seek revocation of the grant issued to Benta Adoyo Ojode (the Respondent) on 22nd of January 2010 and confirmed on 26th June 2014. Contemporaneously they seek conservatory orders allowing them access to Kisumu/Nyalenda "A"/1121 (the suit property) for rent collection and prohibiting alienation, subdivision and sale of the property.

2. The Application is premised on the grounds that there was material non-disclosure of the beneficiaries. Additionally, that the suit property belonged to the deceased's great grandfather hence it was family land. Moreover, the Applicants aver that they have built rental units on the property which they are likely to be disinherited.

3. Benta Odoyo (the Respondent) through a Replying Affidavit dated 30th June 2021 depones that the suit property was registered to her husband Nashon Ojode Gwambo (deceased). She stresses that the current petition is with regard to Nashon Gwambo and not Esau Gwambo the said great grandfather. For this reason, she avers that it is only the deceased's wife, sons and daughters who are entitled to his property and not the entire lineage of Esau Gwambo.

4. Either way, the Respondent contends that the Applicants have not provided evidence of material non-disclosure, rent collection or expenses incurred in construction of the houses. She equally affirms that the Applicants have no locus to seek revocation as they are not beneficiaries to the deceased's estate.

5. On 27th of March 2023 when the matter came up for mention it was agreed by both parties that the matter proceeds by viva voce evidence. Four witnesses testified on behalf of the Applicants while none appeared on behalf of the Respondent.

Objectors/ Applicant's Case

6. OW1 Elizabeth Okelo narrated how the suit property came to be in the deceased's name. She stated that the land initially belonged to Esau Gwambo who transferred it to the deceased (his son) to hold in trust for the rest of the family. She specified that Esau Gwambo had two wives Victoria Gwambo and Margaret Awino, with the former bringing forth four issues amongst them being the deceased and one Joseph Ochinga.

7. OW1's further testimony is that Joseph Ochinga the deceased's brother sired eight children, one amongst them being Martin Okello Ochinga her husband. She stressed that in 1988 Joseph Ochinga Gwambo apportioned some part of the suit property to her husband who constructed some rental units thereon. She avers that she has since been collecting rent from those houses till recently when the Respondent sought to stop her.

8. OW2 Thomas Mboya Ochinga testified that he was the son to Joseph Ochinga Gwambo. He reiterated that the land belonged to Esau Gwambo who transferred it to the deceased to hold in trust for the rest of the family. He restated that both the 1st and 3rd Objectors had rental property on their portions of the suit property. He affirmed that the larger family of Esau Gwambo was entitled to the property and that the Respondent had discreetly acquired ownership through non-disclosure of facts.

9. OW3 Pilister Oyugi Okumu testified that as a daughter to Joseph Ochinga Gwambo she lived with her Grandfather Esau Gwambo at the suit property for over 10 years. She averred that when her grandparents died, they were buried on the suit property. She recounted that before his death Joseph Ochinga gave some land to Sarah her sister on which she constructed some rental houses. She avers that after Sarah's demise her husband John Otuoma the 3rd Objector took over management of the rental units.

10. OW4 Zakayo Oluoch Kisera on his part relayed that he witnessed the burial of Esau Gwambo, Victoria Adhiambo, Margaret Awino and Nashon Ojode on the suit property.

Applicants'/Objectors' Submissions

11. In their submissions dated 20th December 2023 the Objectors submit that the only issues for the court's consideration is whether the grant issued to the Respondent should be revoked and whether they should be included in the redistribution of the estate.

12. They submit that there is uncontroverted evidence of the suit property being ancestral land. This they assert is evinced by the burial of Esau Gwambo and his two wives on the land. They urge this court to consider the court's ruling in Kisumu ELC case No 14 of 2020 where the court doubted the absolute ownership of the suit property by the Respondent.

13. They equally submit that the Respondent's failure to disclose their presence amounted to concealment of material facts warranting revocation of the grant. They rely on section 76 of the *Succession Act* and the case of *Peter Owino Anino v John Oriedo Anino* [2021]eKLR where the court reiterated the importance

of full disclosure in succession matters. Further reliance was placed in the case of *Estate of Tabitha Waitherera Kamau (deceased)*[2019] eKLR where the court revoked a grant due to non-disclosure of the objector's interest in the estate.

Analysis and Determination

14. The instant application seeks revocation of the grant issued on the 22nd of January 2010 and confirmed on 26th June 2014.

15. The legal provision governing revocation of grant is section 76, the Law of Succession Act which provides;

> " 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 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.

16. The Objectors assert that the land belonged to their great-grandfather Esau Gwambo. The common thread from their witnesses testimonies is that the deceased was holding the plot in trust for them. On her part the Respondent affirms that it is not Esau Gwambo's estate that is the subject of these proceedings but that of Nahashon Ojode Gwambo. It is her further assertion that the Objectors are not beneficiaries of the estate of Nahashon Ojode hence they lack locus to file objection proceedings.

17. The point of contention as gleaned from the record herein is the ownership of Kisumu/Nyalenda "A"/1121. It is not in dispute that the plot was initially owned by the deceased Nahashon Ojode Gwambo. It is also not in dispute that the Respondent is Nahashon's wife and took over ownership of the land upon his demise through transmission.

18. The Objectors seem to challenge the initial ownership of the plot by Nahashon Ojode. They assert that he was holding the plot in trust for the larger family and that there was an agreement to that effect. They equally state that Justice Ombwayo's ruling in Kisumu ELC No 14 of 2020 alludes to the land being ancestral land.

19. I have studiously gone through the said ruling; the judge indeed acknowledges the Respondent as the registered owner. He equally acknowledges the Objectors as having some sort of claim over the property that could succeed in court.

20. The above notwithstanding it is trite law that disputes regarding title to land is the exclusive preserve of the Environment and Land Court by dint of the provisions of article 162 (2) (b) of the *Constitution* of Kenya 2010 and section 13 (2) (a) of the *Environment and Land Court Act* No 19 of 2011.

21. The Objectors have not provided any proof of existence of a trust. They have also not provided any evidence of a resolution to have the deceased registered as the proprietor of the land. Nothing barred them from moving the Environment and Land Court if at all they had misgivings as to the ownership of the suit property. This court agrees with the respondent that the estate under consideration is that of Nahashon Ojode Gwambo and not of Esau Gwambo.

22. In any case the Objectors herein do not fall under the purview of dependants as envisaged by section 29 of the *Law of Succession Act*. The section provides as follows:

> " 29. Meaning of dependant

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death

b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

23. There is no evidence that the objectors were being maintained by the deceased prior to his death so as to fit the bill in section 29 above.

24. The authority of the *Re Estate of Tabitha Waitherera* (*supra*) cited by the objectors is distinguishable from the circumstances herein as the objector in that suit held the property in common with the deceased.

25. Premised upon the foregoing reasons this court finds that there is no ground to warrant the revocation of the grant issued to the Respondent.

26. The application is found to be without merit and is dismissed.

27. Each party to bear their own costs.

DELIVERED, DATED, SIGNED AT KISUMU THIS 31ST DAY OF MAY 2024.

MWANAISHA. S. SHARIFF

JUDGE