



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Kamaku & 4 others (Civil Appeal E054 of 2021)
[2024] KEHC 16412 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E054 OF 2021
RM MWONGO, J
JULY 31, 2024**

BETWEEN

BEN KINYUA WAWERU APPELLANT

AND

BENJAMIN MUGO KAMAKU 1ST RESPONDENT

ELIUD MUGOH 2ND RESPONDENT

MARGARET WANJIRU MAINA 3RD RESPONDENT

MARGARET WANGWERE KARUE 4TH RESPONDENT

JOHN JOSHA MUGO 5TH RESPONDENT

*(Being an appeal against the Ruling of Hon. A.K. Itbuku, Chief Magistrate in
Kerugoya CM Succ. Cause No. 283 of 2018 delivered on 30th November 2024)*

JUDGMENT

1. The appellant had purchased parcel No. Ngariama/Ngiriambu/6190 -6791 which were two of four sub-divisions of title Ngariama/Ngiriambu/214 belonging to the deceased. The sub-divisions and sale had, according to the appellant been made pursuant to a confirmed grant.
2. In a ruling in the lower court delivered on 29.9.2020 the court revoked the grant issued to Margaret Wanjiku Maina, joint administrators were appointed and inhibitions placed on Ngariama/Ngiriambu/6190 -6791.
3. In a subsequent ruling on 30.11.2021 the trial court determined that if the appellant was a bona fide purchaser, he would have an opportunity to prove his claim in the confirmation proceedings. this was notwithstanding the fact that the applicant had not been given notice of the revocation of the grant.
4. Aggrieved by the letter and ruling the appellant filled this appeal on the following grounds:



1. That the learned trial Magistrate erred in law and in fact in holding that a holder of title deeds issued pursuant to succession process would suffer no prejudice if the grant is cancelled and titles revoked; without affording him a hearing; an inalienable right.
2. That the learned trial Magistrate erred in law and in fact in failing to note that the appellant herein having obtained title through court process, the said titles could only be revoked pursuant court orders where he is offered a chance to be heard; thereby occasioning an injustice.
3. That the learned trial Magistrate erred in law and in fact in clearly belittling the right to be heard by indicating that the same can be held in abeyance, withheld or postponed to a later date; which in law amounts to abrogation of rights of a litigant and title holder that the court has no jurisdiction to make; thereby occasioning injustice to the appellant.

Background to the Appeal

5. . The background to the appeal is well summarised with the appellant's submissions as follows. The petition being Kerugoya Succession Cause No.283 of 2018 was filed over the estate of J. Kamaku (deceased) who passed on in the year 1966.The deceased was at the time of his death the registered proprietor of land parcel known as Ngariama/Ngiriambu/214.
6. The petition was presented by the 3rd respondent who was appointed administratrix over the estate when letters of administration were issued on 31.12.2018. Summons for confirmation of grant were filed dated 12.6.2019 and subsequently confirmed on 2.7.2019.
7. Following the confirmation of grant the land parcel Ngariama/Ngiriambu/214 was subdivided resulting into parcels Ngariama/Ngiriambu/6790-6794. The appellant was registered as proprietor of parcels 6790-6791 and title deeds issued over the said parcels while the others were registered in the names of the 3rd-5th respondents.
8. On 9.7.2020 the 1st and 2nd respondents filed summons for revocation of grant confirmed on 2.7.2019. The summons was heard and determined. On 22.9.2020 the trial court delivered its ruling which revoked the grant, and appointed the 1st, 2nd and 3rd respondents and administrators over the estate. Simultaneously, orders of inhibition over the derivative titles were issued and an order was made for fresh summons for confirmation to be filed.
9. The 1st and 2nd respondents filed summons for confirmation of grant dated 28.12.2020 to which the 3rd -5th respondents filed an affidavit of protest on the mode of distribution. Before, the same could be heard the appellant found out of the orders for revocation had been made without his knowledge or opportunity to be heard and application dated 15.6.2021 was filed for determination by the court on grounds that the revocation was done without granting him an opportunity to be heard yet he was a person directly affected by the adverse orders.
10. This application was heard where parties filed their submissions and after consideration by the trial court it proceeded to deliver the ruling on 30.11.2021 and dismissed the application as it found the same unmerited. That is the ruling subject of this appeal.

Appellant's Submissions

11. The appellant submit that the trial magistrate erred in revoking and cancelling the titles without affording him a chance to be heard. He submits that at the inception of the cause he had a meeting with the respondents intending to purchase land from the estate. This was a fact acknowledged by the respondents who went ahead to transfer the titles to him after confirmation of grant. The appellant



- had followed all requisite procedures before acquiring title to the properties and proceeding to develop them.
12. According to the appellant, however, the ruling delivered on 22.9.2020 directed inter alia the revocation of the appellant's titles. These orders irreparably and negatively affected and continue to affect the rights to ownership of the appellant's property which the appellant has proceeded to develop.
 13. The appellant contended that the petitioners never informed him of any protest lodged in the succession cause and he therefore did not get an opportunity to be joined to these proceedings to explain his interests. It was for the same reason that he was unable to make his application promptly.
 14. It is the appellant's case that his titles to the suit properties were revoked without him being afforded an opportunity of being heard. The right to a hearing is fundamental right that cannot be taken away. That the decision to revoke his titles was bound to and clearly adversely affected his interests in the suit properties cannot be denied.
 15. The appellant cited the case of *Simon Kamundi v Tabitha Gatiria Maingi & 3 Others* [2016] eKLR Gikonyo J opined that:

“...that, a purchaser of the property of the estate from a person to whom representation has been granted should, of necessity, be a party in the cause where revocation is sought and transfers of estate property to him is being questioned. A decision on revocation application will invariably be a matter of direct concern to a purchaser of a property of the estate from a person to whom representation has been granted.”
 16. The appellant further submits that a person against whom adverse orders are made but who has not been afforded an opportunity of being heard is entitled to apply for the review of the decision, hence the appeal.
 17. The necessity to afford parties the right to be heard before adverse decisions are made against them was emphasized by the Court of Appeal in the case of *J M K vs M W M & Another* [2015] eKLR in the following words:

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”
 18. The respondents chose to keep silent and did not inform the trial court of the existence of the appellant or even inform the court that transmission had since been done to the appellant. The trial court did not also probe further to ascertain the true position of the derivatives of the titles thereto.
 19. The appellant acquired title over the suit land in the year 2019 and the 1st and 2nd respondents only filed summons for revocation of grant in July 2020. In addition to this, in the summons for revocation of grant, the objector never joined nor applied during the proceeding for leave to join the appellant. He merely mentioned that the said original suit land had been subdivided and mentioned the resultant parcels but did not provide the annexures. The petitioner also did not inform the court of the appellant who had subsequently purchased the property.
 20. With respect to grounds 2 and 3 of the appeal, the appellant submits that the process of his obtaining the titles deeds for the property was pursuant to a valid court process. Thus, the same could only be revoked through a court order where he had been granted an opportunity to be heard and if his right to



be heard could be postponed to a later date. He reiterates his submissions in the lower court and state that the appellant was prejudiced and the trial court went ahead to cause an injustice to the appellant.

Respondent Submissions

21. As to whether the appeal is merited the respondent submits that for an appeal of this nature to succeed it ought to be brought in good faith and by the beneficiaries of the estate of the deceased who were the primary parties in the trial court.
22. The appellant filed an application in the trial court seeking to be enjoined as an interested party but the same was dismissed for lack of merit and it is based on the dismissed application that the appellant is basing his grounds for appeal. Additionally, it is worth noting that the Appellant is not a beneficiary of the estate of the deceased but has a proprietary claim against a parcel of land that originated from the now revoked grant.
23. In establishing who the dependants and beneficiaries of a deceased person are guidance is given by Section 29 of the Law Succession Act Cap 160 Laws of Kenya provides that: Part, "dependant" means-
 - (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.
24. In the view of the foregoing, it is clear that the Appellant is neither a dependent nor beneficiary of the estate of the deceased and he is a mere intermeddler who ought to be treated as such.
25. Further it is submitted that Section 45 (1) (a) of the Law of Succession Act states that:

“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.”
26. In addition, the 1st and 2nd Respondents having been appointed by the trial court as joint administrators on how to deal with the Appellant are well guided by Section 45(2)(b) of the Law of Succession Act which states that;

“(2) Any person who contravenes the provisions of this section shall-
 - b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
27. The appellant necessitated the acquiring of the now revoked grant by ensuring that the petitioner left out all the bona fide beneficiaries to the estate. He also went ahead and facilitated the subdivision of the land parcel known as Ngariama/Ngiriambu/214 which he got a substantial portion.



28. Finally, the respondent relied on the case of *Re Estate of M'Ngarithi M'Miriti* [2017] eKLR on the question of intermeddling.

Issue for Determination

29. The sole issue is whether the appellant was entitled to be heard on the trial court prior to the revocation, hence the ruling should be set aside.

Analysis and Determination

30. The 1st and 2nd respondents filed summons for confirmation of grant dated 28.12.2020 to which the 3rd -5th respondents filed an affidavit of protest on the mode of distribution. Before, the same could be heard the appellant found out of the orders for revocation had been made without his knowledge having any opportunity to be heard. He filed an application dated 15.6.2021 for determination by the court on grounds that the revocation was done without granting him an opportunity to be heard yet he was a person directly affected by the adverse orders.
31. This application was heard and parties filed their submissions. After consideration by the trial court, it proceeded to deliver the ruling on 30.11.2021 and dismissed the application as it found the same unmerited.
32. The appellant argues that the ruling delivered on 22.9.2020, inter alia, revoked the appellant's titles. That the said orders irreparably and negatively affected and continue to affect the rights to ownership of the appellant's property wherein the appellant has proceeded to develop. The appellant was registered as proprietor of parcels Nos. 6790-6791 and title deeds issued over the said parcels.
33. I have perused the appellants application dated 15.6.2024. It sought, inter alia, to stay further proceedings in the matter, and set aside the orders issued in the ruling of the trial court on 22nd September 2020.
34. The said ruling of 22nd September 2020 was revoked, the grant and inhibition ordered to be registered on parcel Number Ngariama/Ngiriambu/6790 -6794, which includes the two properties purchased by the Appellant.
- In the present appeal the appellant has submitted that his titles were revoked and cancelled without his being given an opportunity to be heard.
35. Clearly, that is an inaccurate representation. Whilst is true that the appellant had not been heard in the revocation, the court clearly found that the grant was obtained through concealment. That is the reason why the trial court, correctly in my view, instantly revoked the grant.
36. However, contrary to the allegations and submissions of the appellant the appellants title was not revoked. Instead, the trial court's order was:
- “ 3. That as necessary order an inhibition shall be registered on the Land Parcel Nos Ngariama/Ngiriambu/6790,6791,6792 and 6793 until the succession cause is heard and determined.”
37. Thus, no revocation of the appellant's title has occurred.
38. I am in full agreement with the Judge in that case. The position espoused there will apply to the appellant in this case as he will be fully heard, and no prejudice will befall him.



39. In the result, the appeal is dismissed, and the ruling of the trial court is confirmed. Let the appellant participate in the confirmation proceedings where he entitled to fully ventilate his case in the trial court.
40. The lower court file is hereby returned.

Orders accordingly.

DATED AT KERUGOYA THIS 31ST DAY OF JULY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Wanjira holding brief for Karweru for Appellant
2. Kamau holding brief for Murigu for Respondents
3. Court Assistant, Murage

