



In re Estate of Mutuota s/o Mwai alias Mutuota Mugo (Deceased) (Succession Cause 34 of 1994) [2023] KEHC 25803 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 34 OF 1994
FN MUCHEMI, J
NOVEMBER 29, 2023
IN THE MATTER OF THE ESTATE OF MUTUOTA S/
O MWAI ALIAS MUTUOTA MUGO (DECEASED)**

BETWEEN

WILSON GATARIO MWANGI APPLICANT

AND

JOHN MUTURI WCHIRA 1ST RESPONDENT

NJOGU WACHIRA 2ND RESPONDENT

PERPETUAL GATHONI WAITUIKA 3RD RESPONDENT

TITUS THUO MURITHI 4TH RESPONDENT

RULING

Brief Facts

1. The application for determination dated November 21, 2019 is brought under section 76 (a), (b) & (c) of the *Law of Succession Act* and rule 44(1) of the *Probate & Administration Rules*. It seeks for orders of revocation of grant issued on April 30, 2018 and confirmed on June 12, 2018.
2. The respondents opposed the application by filing replying affidavits dated January 22, 2020.

The Applicant's Case

3. The applicant states that he is a *bona fide* purchaser for value having purchased 1.5 acres of LR No. Gikondi/Karindi/260 *vide* sale agreement dated March 7, 1998 from the 1st & 2nd respondents. He further states that he purchased the said land at a consideration of Two Hundred Thousand Shillings (Kshs. 200,000/-) which is pending a balance of only Thirty Thousand Shillings as the final instalment payable upon transfer.



4. Pursuant to the said sale, the applicant contends that he has extensively developed the suit property until recently when the 4th respondent began destroying his crops and cutting down his mature trees. As a result, the applicant reported the matter to the Mukurweini police and the 4th respondent informed them that he was a bona fide purchaser for value and produced a title deed of the said parcel of land. The applicant argues that he purchased the said parcel of land even before the 4th respondent came on board. The applicant further argues that the 1st and 2nd respondents agreed and assured him that they would transfer the said land upon attending the land control board for on sub-division.
5. The applicant contends that the grant ought to be revoked as it stands, there is non-disclosure of material facts as the schedule of distribution ought to have captured two purchasers instead of one, the 4th respondent.
6. The applicant states that he placed a caution on the said parcel of land as he was apprehensive that the 1st and 2nd respondents would sell the remainder of the land however the said caution was withdrawn without his consent.

The 1st Respondent's Case

7. The 1st respondent states that the estate had no liability by the time the deceased died. It is argued that the agreement was allegedly entered into in 1998 before any administrators were appointed by the court. The 1st respondent further states that he is ready and willing to refund to the applicant any amount of money he owes him. Further, the 1st respondent states that the applicant is not in occupation of the land and nowhere in the agreement is he allowed to take occupation.
8. The 1st respondent contends that after they were appointed administrators of the estate, they sold the land to the 4th respondent who has obtained a valid title. Thus, the 1st respondent states that no prohibitory orders ought to be issued to the applicant to restrain the 4th respondent from dealing with the land as the applicant has no claim against him.

The 3rd Respondent's Case

9. The 3rd respondent states that she substituted her late husband who was the objector in these proceedings. She further states that her husband did not sell any part of the land as the estate of the deceased had not yet been distributed. The 3rd respondent further states that she did not purport to sell the said parcel of land to the applicant but sold it to the 4th respondent after they were appointed administrators. The 3rd respondent states that they passed good title to the 4th respondent because the land was transmitted to them through the normal process.

The 4th Respondent's Case

10. The 4th respondent states that he is a *bona fide* purchaser for value as he approached the administrators of the estate of the deceased owner of the said parcel of land and they entered into a sale agreement. On November 2, 2018, he states that he obtained a title deed and took occupation of the land which was vacant and did not have any developments. The 4th respondent states that he developed the same by planting trees, maize, nappier grass and arrow roots.
11. The 4th respondent argues that the applicant was not in occupation when he took him to the police and moreover, he produced a title deed to prove ownership. The 4th respondent further argues that the applicant can claim for his money without seeking for revocation of the grant.



The Applicant's Submissions.

12. The applicant relies on the case of *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR and submits that he is a *bona fide* purchaser of value and he is willing to let leave the grant undisturbed provided that the respondents reimburse him Kshs. 549,000/- being the amount in possession by the estate beneficiaries from the year 2003 with an interest of 14% per annum.

The Respondents' Submissions.

13. The respondents submit that by virtue of section 76 of the *Law of Succession Act*, the applicant is not an interested party and therefore has no *locus* to institute the revocation proceedings. Furthermore, the respondents argue that the applicant knowingly purchased the said parcel of land from them yet they had no right to sell it to him.
14. The respondents argue that since the applicant has sought to claim a refund instead of revoking the grant, he ought to claim a refund of his money from those he gave but through other processes as this is a probate court. Such monies can only be claimed as a civil debt which ought not to attract any interest. The respondents further argue that they are not to blame for the fact that the sale of land agreement is unenforceable as it was void ab initio. The respondents thus state that the applicant ought to withdraw the summons for revocation of grant and proceed to file suit in the appropriate court to recover his money.

The Law

Whether The Applicant Has Presented Sufficient Evidence To Warrant Revocation Or Annulment Of The Grant.

15. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It 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 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

The grant has become useless and inoperative through subsequent circumstances.

16. The deceased died on September 18, 1959. He was the registered owner of LR No. Gikondi/Karindi/260 measuring 3 acres. This court found that the deceased had no children and ordered that the said parcel of land be shared equally between Timothy Mwai Wachira and Waituika Mugo on 9th January 2003 and a certificate of confirmation of grant was issued. Both Wachira and Mugo died on October 11, 2008 and September 12, 2004 respectively, before they could execute the grant. Timothy Mwai Wachira was substituted by the 1st respondent whereas Waituika Mugo was substituted by the 3rd respondent and the two respondents obtained limited grants on January 9, 2008 and June 30, 2014 for purpose of substitution. The 1st and 3rd respondents were thereafter appointed administrators of the estate on April 30, 2018 and the grant confirmed on June 12, 2018.
17. I have perused the court record and noted that there is a sale agreement between the applicant on one hand and Timothy Mwai Wachira, the 1st and 2nd respondents on the other hand dated March 7, 1998 for sale of 1.5 acres of the suit property. Further there is an acknowledgment of receipt of Kshs. 70,000/- paid by the applicant to Timothy Mwai and the 1st & 2nd respondents in respect of the suit property. It is evident that the applicant as the purchaser and the 1st & 2nd respondents as vendeors entered into a sale agreement for 1.5 acres of the said land. Although the parties indicated in their agreement that the said parcel of land was under succession process, the court had not yet appointed any administrators in the estate. It is evident that at the material time, the 1st, 2nd respondents and the initial petitioner did not have any capacity to sell the land before the succession proceedings were concluded. However, the acknowledgment of the proceeds of the sale were signed after the court confirmed the grant on 9th January 2003.
18. Section 82 of the Law of Succession Act defines the duties and powers of administrators and personal representatives. The provisions of section 82 (b) iii) provides:-

“ no immovable property shall be sold before confirmation of the grant.”

Section 45 of the Act prohibits inter meddling with the property of the deceased. It provides:-

“ 45 (1) 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.”
19. The law is clear that the respondents had no capacity or authority to sell the deceased’s property or any part thereof before the grant was confirmed. Surprisingly, the respondents were in such a hurry to dispose of the deceased’s property even before the land was bequeathed to them. The applicant on the other hand contravened the law by entering and taking possession of the land before the grant was confirmed. He entered into an agreement with the respondents on 07/03/1998 before the letters of administration were issued. The grant was to be confirmed twenty years later specifically on 12/06/2018. The act of the applicant amounts to intermeddling with property of the deceased which is an offence punishable with “a fine not exceeding KShs.10,000 or to a term of imprisonment not exceeding one (1) year, or to both such fine or imprisonment.”



20. The applicant having intermeddled with the property of the deceased does not expect a remedy in these proceedings. Indeed, no such remedy exists under the *Law of Succession Act* for the applicant. However, the applicant has other legal avenues of recovering his debt which he ought to pursue.
21. The grant of letters of administration and the confirmation thereof were done by the court according to the law and based on the facts presented to the said court. The applicant has not established any of the grounds for revocation of grant as spelt out under S.76 of the Act. It is also noted that the applicant is a purchaser and not a blood relative of the deceased or in any degree of consanguinity so as to entitle him to be appointed an administrator even if this grant was to be revoked.
22. Consequently, I find no merit in this application for revocation of grant dated 21/11/2019 and it is hereby dismissed.
23. Each party shall meet their own costs.
24. It is hereby so ordered.

DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF NOVEMBER 2023

F. MUCHEMI

JUDGE

