



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Iringo Mugaine (Deceased) (Succession Cause
20 of 2020) [2023] KEHC 25784 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 20 OF 2020
EM MURIITHI, J
NOVEMBER 28, 2023**

BETWEEN

FRANCIS MATHIU APPLICANT

AND

FRANCIS MIRITI IRINGO RESPONDENT

RULING

1. This succession cause relates to the estate of the late Iringo Mugaine (deceased) who died intestate on 5th July, 1991.
2. Before this Court is the Applicant's summons application dated 25th August, 2018 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the honourable court be pleased to issue an order of inhibition inhibiting any dealings with land parcel number Abothuguchi/Lower Kiiija/454 either by way of subdivision, sale, lease, charge or otherwise pending the hearing and determination of this cause.
 - iv. That the honourable court be pleased to annul/revoke the certificate of confirmation of a grant dated 25th February, 2015 issued to Francis Miriti Iringo.
 - v. That the costs of this application be borne by the Respondent.
3. The application is supported by the affidavit sworn by the Applicant on the same 25th August, 2018 and further premised on the following grounds, inter alia:
 - i. 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.



- ii. That the Respondent filed this succession cause secretly without informing the Applicant.
- iii. That the Applicant has been insufficiently provided for in the distribution of the estate.
4. In his affidavit in support of the Application, the Applicant deposed that the deceased left him in occupation of seven (7) acres which he has been utilizing from 1974 and which he claims to be entitled to.
5. The Respondent opposed the application vide his Replying Affidavit which he swore on 22nd September, 2020. He deposed that the Applicant lacked locus to petition for revocation or annulment of the grant as he is not a member of the estate of the deceased. That at the time of the demise of the deceased, the Applicant never raised any issue of joint ownership of any property between him and the deceased.
6. According to the Respondent, the deceased had told him that the Applicant intended to buy one (1) acre of the portion of land registered as Abothuguchi/Lower Kijja/454 which measures 17.75 acres and not 20 acres as alleged by the Applicant. That the Applicant failed to complete payment for the one (1) acre and he requested the deceased to complete the payment and pay for the cost of processing the title and that the Applicant would reimburse the deceased. That the deceased consequently took possession of the one (1) acre he was entitled to but never bothered to follow up with the process of acquiring the title to the said land. Further, that the Applicant remained in occupation and use of the said one (1) acre even after the demise of the deceased but has since stopped cultivating the said portion.
7. The Respondent thus maintained that the Applicant was only in occupation and use of one (1) acre of the suit land and not seven (7) acres as the Applicant alleges. The Respondent thus prayed for the present application to be dismissed.
8. At the hearing of the application the Applicant (PW1) adopted his witness statement dated 14th January, 2021 as his evidence in chief as well as his supporting affidavit to the application for grant dated 6th July, 2020.
9. On cross examination, he reiterated that claim that he had not be sufficiently provided for from the estate of the deceased. He averred that he bought land from the deceased in 1974 and to date, the land has never been transferred to him. That acknowledged that he did not have an agreement but stated that he bought the land at a total consideration of Kshs. 2,100/=, the same being Kshs. 300/= per acre. Further, he was not related to the deceased. He maintained that he bought the land from the deceased and lived there for seventeen (17) years prior to the demise of the deceased.
10. PW2 was MMBui M'Ichunge who also adopted his witness statement dated 14th October, 2021 as his evidence in chief. On cross examination, it was his testimony that he lived about three (3) kilometers to Kariburi where the deceased stayed. He stated that he was not a neighbour to the deceased but they had been friends for a long time and a friend to his family.
11. According to PW2, the deceased called him and told him that he was buying a parcel of land but he was unable to pay the full amount. He stated that the deceased started by buying seven (7) Acres for Kshs. 2,100/= as each acre was going for Kshs. 300/=. That he told the deceased that he could not help him raise the money as he was paying fees for his children. That having failed to raise the money, the deceased told PW2 that he had sold the land to another man called Mathiu. According to PW2, the deceased never introduced him to the said Mr. Mathiu but he later met the said Mr. Mathiu while passing by. PW2 corroborated PW1's testimony that the deceased sold land to Mr. Mathiu in 1974. According to him, in those days, people used to make oral agreements and pay for the land.



12. PW3 was Joseph Kaburu M’Murugi. He also adopted his witness statement dated 14th October, 2021 as his evidence in chief. On cross examination, he testified that the Applicant herein and the deceased were his neighbours. That he was not when he bought the land but that he heard that they had bought the land from one Mr. Mutungu and the same was sub-divided by a surveyor. Further, that the Applicant started cultivating the land but stopped around five (5) years before the date PW3 was testifying, that is, 25th October, 2021.
13. On the other hand, the Respondent testified as the sole witness in opposition of the application for revocation of grant. He stated that he was the son of the deceased and adopted his Replying Affidavit sworn on 22nd September, 2020 as his evidence. He stated that he knew the Applicant as his home was about 1 ½ kilometers from their home. He however stated that he did not Mr. Mburi (PW2) as he had never seen him in their family.
14. According to the Respondent, the total acreage of the land in question is 17 and ¾ acres. He testified that he had no records of sale of the land. That the deceased sent him to the Applicant to pay money for the one (1) acre he wanted to sell to him but that the Applicant never came. It is the Respondent’s case that the Applicant only started using the one (1) acre of land after the death of the deceased. Further, that the estate of deceased was shared among the beneficiaries after taking out the one (1) acre that the Applicant was cultivating.
15. I have considered the Application for revocation of grant, the testimonies of the witnesses as well as the submissions by the parties. The main issue that arises for determination by this Court is whether the grant issued to and confirmed to the respondent should be revoked.

Analysis

16. The law on revocation of a grant is provided for under Section 76 of the Act and rule 44 of the *Probate and Administration Rules*. Section 76 of the Act provides as follows:

“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 court of something material to the case.
 - c. that the grant was obtained by means of an untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
 - d. ...
 - e. ...”
17. For the court to order revocation of grant, a party must prove that:
 - a. Proceedings to obtain the grant were defective in substance;
 - b. The grant was obtained fraudulently by the making of a false statement or concealment from court of something material to the case;
 - c. That the grant was obtained by means of untrue allegations.



18. In this case, it is not in dispute that the deceased sold a portion of his land to the Applicant. What is in dispute is the size of land that the Applicant is entitled to from the estate of the deceased.
19. The Applicant claims that he bought seven (7) acres from the deceased but that the deceased died before he formally transferred the same to him. On the other hand, the Respondent that the deceased only sold one (1) acre to the Applicant which portion is what he distributed to him out of the estate.
20. The Applicant claims to have an interest in the seven (7) acres from the estate by virtue of being a purchaser for value. That he purchased the land in 1974 and until the deceased's death in 1991, and even to date, that portion of land that he alleges to have purchased has never been transferred to him. Further, that he had no agreement or evidence to show that he had purchased the land from the deceased.
21. On the allegation of fraud, the first principle is that the same must be specifically pleaded and proved. In *R.G Patel -V-Lalji Makanji* [1957] EA 314, the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
22. The next principle is that the burden of proof of an allegation of fraud is on the person alleging. In *Christopher Ndaru Kagina -V- Esther Mbandi Kagina & Another* [2016] eKLR the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”
23. The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In *Central Bank of Kenya Limited -V- Trust bank Limited & 4 Others* [1996] eKLR, the court rendered itself as follows:

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”
24. It is trite that he who alleges must prove. In *Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another* (2013) eKLR where the appellant therein unsuccessfully sought protection under section 93 of the *Law of Succession Act*, the Court of Appeal sitting in Nyeri stated:-

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser.”
25. In this case, the burden of proof was on the Applicant to prove that he was a bona fide purchaser of a total of seven (7) acres from the estate. However, there was no evidence to support the Applicant's claim that he actually bought land from the deceased or that the Respondent obtained the grant fraudulently. Further, the Applicant did not tender any explanation as to which steps he took, if any,



to have the land he bought transferred to him. This was seventeen (17) years from the time he claims to have bought the land until the death of the deceased.

26. Looking at the evidence before this Court in relation to the instant matter, the court finds that the Applicant failed to discharge the burden of proof that he is entitled to the portion of land he claims to have bought from the deceased.

Conclusion

27. Accordingly, for the reasons set out above, the Court finds that the Summons for Revocation of Grant dated 25th August, 2018 is devoid of merit and it is dismissed.

28. There shall be no orders as to costs.

Order accordingly

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

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