



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 59 OF 2004

IN THE MATTER OF THE ESTATE OF NZOKA MUSAVI-DECEASED

MARGARET KANINI MUTISYA aka MARGARET KANINI MUTUA.....APPLICANT

-VERSUS-

NELSON KIKUVI NZOKA.....1ST ADMINISTRATOR/RESPONDENT

LUIA MWIKALI MUOKI aka LUIA MUOKI.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. By Summons for Revocation of or Annulment of Grant dated 1st March, 2021, the Applicant herein seeks the following orders:

a) THAT this application be certified urgent and service thereof be dispensed with in the first instance.

b) THAT this honourable court do issue a preservative and protection order that the administrators/respondents whether by themselves or through their servants, agents and/or employees or any other person whomsoever claiming under them or through them and the deceased administrator Samuel Musyoki Nzoka be restrained from trespassing into, selling, transferring, re-transferring and/or otherwise intermeddling or interfering in any way with the subject property parcel of land number Kangundo/Matetani/33 or from doing any other prejudicial act pending the hearing and determination of this application.

c) THAT the rectified grant of letters of administration (letter 41) issued herein on 16/11/2012 and dated 11/3/2013 together with the rectified certificate of confirmation of grant also issued herein on 16/11/2012 be revoked and/or annulled and a fresh grant of letters of administration intestate (letter 41) be issued in the name of the applicant.

d) THAT the court do revoke, annul, nullify and/or cancel any and all registrations, sales, transfers, dispositions, charges, leases or any other transactions made by the administrations/respondents, deceased administrator Samuel Musyoki Nzoka or any other person whomsoever with regard to the subject parcel of land number Kangundo/Matetani/33 and the registration of the same be reverted to the name of the deceased Nzoka Musavi.

e) THAT the name of the applicant herein be hereby included in the petition list of liabilities over the entire parcel of land number Kangundo/Matetani/33 as awarded vide judgement and order in the Land Disputes Tribunal Kangundo Division dated 7/12/2004 in Land Disputes Tribunal Case number 14 of 2004 in favour of the applicant.

f) THAT costs of this application be borne by the administrators/respondents.

2. According to the applicant, she was awarded parcel of land No. **Kangundo/Matetani/33** (the suit property) vide judgement dated 7th December, 2004 by **Kangundo Land Disputes Tribunal Case No. 14 of 2003** wherein he was the plaintiff. Though there was an attempt by the 1st respondent and one Peter MunuveNzoka, deceased, to appeal out of time vide the then **Eastern Provincial Land Disputes Appeal Committee Case No. 14 of 2005** on or about 31st March, 2005, they never pursued the appeal which was never heard until the tribunals were disbanded.

3. According to the applicant, upon the death of her husband, **Bonface Mutua Mutuvi**, the respondents and their family sought to unlawfully deny her use of the suit land which attempts she resisted and instead sought the help of the local administration based on the said tribunal judgement and has continued utilising the suit property to date. However, in the months of June and July 2020, the respondents attempted to

interfere with her quiet possession thereof compelling her to seek legal advice from her advocates on record who sought to have the Kangundo Law Courts enter judgement and issue decree in terms of the aforesaid tribunal's judgement and order. However, by its ruling dated 2nd February, 2021, the said Court opined that the Applicant should first apply for revocation of grant herein.

4. The applicant averred that upon conducting an official search of the suit land she discovered that on or about 9th January, 2014, contrary to the said judgement, the respondents went ahead to have the suit land transferred from Nzoka Musavi's name and co-registered in their names and that of the late Samuel Musyoki Nzoka as administrators in trust vide this succession cause without her knowledge and clearly in a bid to unlawfully circumvent the aforesaid judgement which they are very much aware of. In her view, the said grant ought to be set aside to pave way for her to obtain an order and decree from the lower court so as to ultimately enjoy the fruits of her legally obtained judgement and to have the suit land finally registered in her name. It was her view based on legal advice that the aforesaid judgement is valid, legal and enforceable in law since the same was made way before 30th August, 2011 when the **Land Disputes Tribunals Act** was repealed by the **Environment and Land Court Act** and that the decision of the Land Dispute Tribunal Kangundo Division dated 7th December, 2004 in **Land Disputes Tribunal Case No. 14 of 2003** was not entered as judgement and a decree issued by the lower court in tandem with the judicial authority under Article 159 of the Constitution and the overriding objective & transitional provisions of the **Environment and Land Court Act** because the learned magistrate was of the view that the effect thereof would be to overturn the decision of this court which is superior to it hence the need to have the grant herein revoked which was what she was seeking.

5. In opposition to the application, the Petitioners Respondents relied on the following grounds:

1. The alleged sale transactions and/or cause of action are time barred.

2. This court lacks jurisdiction to hear and determine the applicant's alleged claim based on sale and use of land which is the sole jurisdiction of the Environment and Land Court under the Constitution.

3. The applicant's application ought to be struck out with costs.

6. On behalf of the applicant it was submitted, while reiterating the averments in support of the Summons set out hereinabove, that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making of a false statement and by the concealment from the court of material facts and the grant was obtained by means of an untrue allegation of fact essential in point of law. It was submitted that the existence of the decision of the Tribunal and the Applicant's interest in the suit property was not disclosed to this court hence concealing material facts and making a false statement and untrue allegation that the estate did not have any liabilities yet the 1st respondent and the late **Peter Munuve Nzoka** even sought to appeal against the Tribunal's decision.

7. In response to the Respondents' objections, the Applicant submitted that the same is based on a misconception of the law and the subject matter herein. In her view, the application herein is based on a conclusive judgement which is clearly a liability in the estate which was not declared herein by the respondents. This is an application for revocation or annulment of grant under the **Law of Succession Act** as quoted hereinabove and is clearly not time barred since she has not instituted a land matter herein.

8. On the second ground that this court lacks jurisdiction to hear the applicant's claim based on sale and use of land, it was reiterated that since the Applicant has not instituted a land matter, this court has jurisdiction to hear and determine her application brought under sections 45, 48, 49 and 76 of the **Law of Succession Act** and Rule 44 of the **Probate and Administration Rules** since the land matter was long determined vide the aforesaid tribunal judgement which was clearly an undisclosed liability herein.

9. The Court was therefore urged to allow the applicant's application as prayed and dismiss the respondent's notice of preliminary objection.

10. The Respondent, on the other hand submitted that Petitioners filed the petition for Grant of letters of Administration in their capacities as the deceased's widow and son respectively and that the Notice for the filing of the petition was published in the Kenya Gazette on 27th February, 2004 inviting objections to the petition to be made within 30 days from the date of publication. However, no objection was raised to the petition and the court proceeded to make the Grant of letters of Administration to the Petitioners which was subsequently rectified and confirmed on 16th November, 2012 and thereafter the subject land title No. Kangundo/Matetani/33 was transferred to the Administrators on 9th January, 2014. Regarding limitation, reliance was placed on section 7 of **The Limitation of Actions Act**.

11. According to the Respondent, the Applicant's claim is hinged on an alleged sale agreement that was made on 8th June, 1981, exactly 40 years ago while the decision which the applicant wants to enforce was delivered on the 7th December, 2004, exactly 17 years ago. It was therefore contended that the Applicant is time barred in filing the Application before the court.

12. On jurisdiction of the Land District Tribunal, reliance was placed on section 3(1) of the repealed **Land District Tribunal Act** and it was submitted that what is before the court is a decision of the Land District Tribunal that was delivered on 7th December, 2004 by which the land registrar was purportedly directed to change title Kangundo/Matetani from the name of Nzoka to that of Magaret Kanini Mutua. According to the Respondent, the **Land District Tribunal Act** was very clear with regards to the jurisdiction of the tribunal and since the same was limited to division and determination of boundaries, claim to occupy and work on land and trespass, the tribunal did not have jurisdiction to deal with ownership of land and the same was a preserve of the courts. Reliance was placed on **Bedan M. Chege vs. Julius Kabugu Ndungu [2018] eKLR**. According to the Respondent, what is before the court is a nullity and that the decision made is unenforceable as the same was made by a tribunal without jurisdiction. As this court is being used to sanitize an illegality, the same should be rejected.

13. It was the Respondents' view that the Applicant's claim ought to be filed before The Environment and Land Court which is clothed with jurisdiction to deal with land matters under section 13 of **The Environment and Land Court Act, 2011**.

14. It was therefore contended that the application is incompetent and same should be dismissed with costs to the Petitioners/Respondents.

Determination

15. I have considered the issues raised herein.

16. The Summons before me seeks revocation or annulment of a grant of representation. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

17. That section provides that a grant of representation may ***at any time*** be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned. The Respondents have invoked the provisions of section 7 of **The Limitation of Actions Act** which provides that:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

18. The said provision applies to situations where the claimant seeks to recover land at the end of the statutory limitation period. The matter before me is not, strictly speaking a land matter. It may well be that when the applicant eventually seeks to enforce the Tribunal matter, the limitation statute may be invoked. Before me, the allegation is that the Applicant has an interest in the suit property, an interest which the 1st Respondent was well aware of at the time he sought to confirm the grant but failed to disclose. This interest had been concretised in a judicial decision by a land tribunal. Accordingly, what the Applicant is seeking before me is not the recovery of land. Before me, she is not even seeking to enforce the decision of the Tribunal but is only seeking a determination as to whether her interest ought to have been disclosed so that its validity could be determined in light of the Tribunal decision. Accordingly, I find that the objection to the Summons based, as it is on **Limitation of Actions Act**, is misconceived.

19. On jurisdiction of the Land District Tribunal, the Respondents relied on section 3(1) of the repealed **Land District Tribunal Act** that provided that the tribunal shall have jurisdiction to;

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy and work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under Section 4.

20. According to the Respondent, the Tribunal had no jurisdiction to make the orders it did. With due respect, this Court is not being called upon to determine the legality or validity of the tribunal decision. That may be a matter to be argued before the Court called upon to enforce the Tribunal decision. As to whether or not the Respondents' objection will succeed in light of the un-denied allegation that the Respondents' attempt to reverse the decision of the Tribunal was not realised by the time the Tribunal was disbanded, is another matter. The question before me, however, is whether the Applicant's interest in the suit property as conferred on her by the said Tribunal ought to have been disclosed at the time of the confirmation of the grant.

21. According to section 3 of the **Law of Succession Act** "estate" means "the free property of a deceased person" while "free property" "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of a deceased is that property which the deceased was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated. Where there was a decision by a Tribunal terminating his interest in the property, that property cannot form part of the deceased's estate for the purposes of succession. As to whether the interest of the deceased in the suit property herein was terminated is not a matter for determination of this court since that is the subject of the proceedings before the Kangundo Court.

22. As regards the relevancy of the **Environment and Land Court Act** to these proceedings, as I have stated above, the proceedings before me, though revolves around the suit property, are not seeking a determination on ownership of the suit land. According that Act does not apply and this Court has the jurisdiction to determine this Summons.

23. In this case the allegation made by the Applicant that there was a decision made by the Land Disputes Tribunal that awarded the Applicant the suit property have not been challenged. Further, it has not been denied that there was an attempt to have that decision set aside but the said attempts came a cropper. Therefore, the 1st Respondent was well aware of the Tribunal proceedings in which the Applicant's interests in the suit land crystallised but did not disclose this fact. in **Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira**

“Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration Rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked. In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

24. Based on the foregoing, I find that the Applicant’s interest in the suit property ought to have been disclosed. The failure on the part of the Respondents to do so fell afoul of section 76 of the *Law of Succession Act*.

25. Accordingly, I find merit in the Summons for Revocation of or Annulment of Grant dated 1st March, 2021 and hereby revoke and annul the rectified grant of letters of administration issued herein on 16th November, 2012 and dated 11th March, 2013 together with the rectified certificate of confirmation of grant also issued herein on 16th November, 2012 in so far as they relate to land parcel no. Kangundo/Matetani/33. Accordingly, I direct that the registration of the same be reverted to the name of the deceased Nzoka Musavi. If and when Summons are taken out to confirm the Grant, the Applicant shall be served in order for her to protect her interest in the suit property.

26. There will be no order as to costs.

27. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF JANUARY, 2022.

G. V. ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Susan