



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT MISC. SUCCESSION CAUSE NO. 21 OF 2020

FREDRICK KIVALA NZUKI.....APPLICANT

VERSUS

JOSEPHINE KATHATHI MULI.....RESPONDENT

RULING

1. By summons for revocation of grant dated 23rd July, 2020, Josephine Kathathi Muli, the applicant herein is seeking the following substantive reliefs: -

- a) That the grant of letters of administration and certificate of confirmation issued to Fredrick Kivala Nzuki be revoked.
- b) That the transfer of land Parcel No. Kyanguithya/Misewani/1295 made to Emily Nzuki Fredrick (deceased) and subsequently to Fredrick Kivale Nzuki be declared unlawful and void.
- c) That the Applicant Josephine Kathathi Muli be declared the beneficiary of Land Parcel No. Kyanguithya/Misewani/1295.
- d) That Kitui County Land Registrar be directed and ordered to register Land Parcel No. Kyanguithya/Misewani/1295 into the name of Applicant-Josephine Kathathi Muli.
- e) Costs of this application.

2. The Applicant has despite not specifically stating which grant or succession proceedings she wants this court to nullify listed the following grounds as the basis for the reliefs she is seeking in this court. They are: -

- (i) That the proceedings to obtain the grant were defective in substance. She claims that the Respondent abused the whole process to fraudulently and illegally obtain title to Land Parcel No. Kyanguithya/Misewani/1295 (herein after to be referred to as the disputed Parcel for ease of reference) through what she terms as back door and fraud.
- (ii) That the Respondent used the succession proceedings to sanitize what she terms fraudulent and illegal acquisition of disputed parcel.
- (iii) That the grant was obtained fraudulently by making of a false representation and concealment of a material fact and she claims that the material fact is that there was no sale agreement between the late Adson Muli Nguthu (deceased) and the Respondent or his deceased wife Emily Nzuki Fredrick.
- (iv) That the Respondent further concealed the fact that there he was not in an active occupation of the parcel in dispute.
- (v) That the Respondent proceeded to file a suit to evict the Applicant vide Kitui Civil Suit No. 307 of 2015 which suit she claims, made her aware of what had taken place.

3. The applicant further avers that, while the grant was issued on 11th February, 2014, it was confirmed on 6th May, 2015 which according to her was outside one-year limitation period. She faults the Respondent for allegedly stage managing the entire succession process behind her back. She claims that, the Respondent also appropriated to himself huge chunks of the estate without considering other adult children of the deceased who were beneficiaries to the estate.

4. In her supporting affidavit, sworn on 23rd July, 2020, the Applicant claims that, the Respondent is alleging to have purchased the disputed Parcel from her late husband. She insists that there was no sale agreement to support the transaction.

5. She faults the Respondent for conducting the succession proceedings discretely and in secrecy in order to deprive her of her late husband estate. She claims that her late husband was bona fide owner of the disputed parcel. She insists that the Respondent filed Succession Cause to defeat her beneficial interests over the disputed parcel. She claims that documents in relation to the disputed parcel were falsified to defeat her claim adding that she has been in active occupation of the said parcel for more than 20 years.

6. The Applicant further claims that the transaction between her late husband and the deceased's wife was not sanctioned by the Land Control Board and faults the Applicant for seeking to evict her upon getting the parcel through transmission. He accuses the Respondent for using his influence as a former Mayor to perpetuate fraud and an illegality. She sees the filing of the Civil Suit in Kitui Civil Suit No. 307 of 2015 by the Respondent as a further evidence of some mischief.

7. In her written submissions through Counsel dated 9/11/2020 submits that the Certificates of Registration of the title (commonly referred to as the green card) indicates that there was fraud pointing out that the title deed to the parcel in dispute was issued on 19/11/1989 but the entry of the Respondent's wife as the registered owner was allegedly backdated to 19/11/1987 which in her view, shows some irregularity and an illegality.

8. She further contends that, the Respondent has contradicted himself as on one hand he says he purchased the disputed parcel from the applicant's late husband while on the other, he states that his late wife purchased it. She further states that the Respondent filed a Civil Suit seeking *inter alia* to declare the owner because he knew that he was not the legal owner.

9. In her written submissions through her Learned Counsel Sethna Atonga & Company Advocates, the Applicant submits that, she has met the threshold stipulated under **Section 76 of Law of Succession Act** to have the grant set aside. She contends that the Respondent offended **Section 76 (b) and (C) of the Act** at the time of applying for the grant and submits the grant should be revoked as it was revoked in the case of:-

Monica Adhiambo –vs- Maurice Odera Koko [2016]eKLR and Ibrahim –vs- Hassan & Charles Kimenyi Macharia (2019) eKLR.

10. She contends that the Respondents purchase of the disputed parcel breached **Section 3 (3) of the Law of Contract** which stipulates no suit can be brought upon a contract unless the same is in writing and that interests over the disputed parcel did not pass to the Respondent for want of written agreement. She further submits that as a purchaser the Respondent cannot seek protection under **Section 93 of Law of Succession Act** because he has not proved that he is a bona fide purchaser. In this regard, she relies on the case of **Musa Nyaribari Gekonde & 2 Others –Versus- Peter Miyianda & Another (2015) eKLR.**

11. The Applicant further submits that, the sale is void for lack of Land Control Board consent as required **under Section 6 and 8 of the Land Control Act** and relies on the decision of **Willy Kimtai Kitilit –Versus- Michael Kibet (2018)eKLR.**

12. The applicant asserts that under **Article 43 of the Constitution of Kenya 2010**, nobody shall be deprived of ownership and enjoyment of his/her legitimate right to property including land and that the Respondent is trying to deny her that right.

13. She claims that, the Respondent deliberately failed to disclose to court that the disputed parcel was part of an estate of a deceased person and that he should have disclosed that the same belonged to the estate of Adson Muli (deceased). She urges this court to revoke the grant and relies on the decision of the **re Estate of Ngore Ndinwa (2019) eKLR.** She further relies on the decision of **re Estate of Kakua Kioko (deceased) (2018)ekLR** where she submits that the court found a sale agreement to be illegal and directed an estate of deceased person to revert back to the name of the deceased person.

14. Fredrick Kivala Nzuki, the Respondent herein has opposed this application through a replying affidavit sworn on 24th July, 2020 and written submission dated 28th October, 2020 made through Counsel. He avers that, the parcel in dispute was registered in the name of his late wife Emily Nzuki Fredrick. He says he is the appointed administrator of her estate and that the Applicant was not a beneficiary to her estate. According to him, her late wife got the parcel in dispute from the original owner, one Adson Muli Nguthu (deceased) in 1987. He claims that the Applicant is a stranger to the estate of her late wife and that he was the sole beneficiary to her estate.

15. The Respondent denies that the issuance of the grant was defective in any way, and denies that he that he obtained the grant fraudulently or through concealment. According to him, he proceeded diligently with the administration of the estate and distribution after obtaining the grant.

16. The Respondent avers that, the Applicant is not privy to the contract of sale between her deceased husband and his late wife. He insists that he has already filed a Civil Suit vide Kitui Environment and Land Court No. 307 of 2016 where issues of ownership will be canvassed.

17. He claims that, the issues raised by the Applicant in her affidavit will be canvassed through the land case at the Environment and Land Court. He denies that the parcel in dispute ever formed part of the estate of the late Adson Muli Nguthu and points out that the estate of the late Adson Muli Nguthu comprised that property known as Kyanguithya/Misewani/1009.

18. The Respondent further claims that he sued the Applicant for eviction because he was illegally occupying his late wife's property. He testified that his late wife lawfully bought the parcel in dispute and the Applicant has no interests in it.

19. In his written submissions, the Respondent insists that the Applicant is a stranger to the estate of his late wife and that she was not entitled to be notified of the Succession Cause. He points out that when the Applicant applied for grant in respect to the estate of the late

Adson Muli Nguthu, she did not include the parcel in dispute.

20. The Respondent opines that this Application is an abuse of court process because in his view, the question of ownership of the disputed parcel will be fully determined in the Environment and Land Court. He asserts that, the Applicant has failed to make up a case for revocation of grant and prays for costs.

21. This court has considered both the Applicant's and the

The Respondent's respective cases. The Application before me is an application brought by way of summons for revocation of grant under **Section 76 of Law of Succession Act**. From the onset, this court has noted that the Applicant has not specifically stated the grant which she is seeking to revoke. Her application is silent on which Succession Cause her Application is based on and this Court has had to glean from the written submissions and the affidavits filed to really know the succession proceedings being impugned in this application. This court has noted that the grant being challenged here relates to Kitui Chief Magistrate's Court Succession Cause No. 167 of 2013 which relates to the Estate of Emily Nzuki Fredrick who died on 20th February, 2002. The Respondent was appointed the Administrator in that cause on 11th February, 2014, and the grant was confirmed on 6th May, 2015 and through a certification of confirmation dated 23rd April, 2015 the Respondent was vested with all the listed assets of the estate of the late Emily Kivala Nzuki inclusive of the parcel in dispute.

22. The Applicant was required to state clearly, the grant she is seeking to revoke, as in when the grant was issued and confirmed and through which succession proceedings. This court notwithstanding that defect or omission has decided to look at the substance of the reliefs sought and determined the same on merit rather than on technicality due to the dictates of **Article 159(d) of the Constitution**.

23. The main issue for determination in this matter, is whether the Applicant has established any of the grounds listed under **Section 76 of the Law of Succession Act** to warrant this court to revoke the grant issued to the Respondent on 11th February, 2014 vide Kitui Chief Magistrate's Court Succession Cause No. 167 of 2013.

24. There is no doubt or contest that the Applicant is not a dependant of the late Emily Kivala Nzuki within the meaning of **Section 29 of Law of Succession Act**. Her claim to the Estate of the late Emily Kivala Nzuki is not based on her dependency but rather on a cause of action against the ownership of the parcel in dispute by the deceased.

According to the Applicant, the parcel in dispute did not legally form part of the Estate of the late Emily Kivala Nzuki in whose proceedings this application is based, but rather the parcel in dispute according to her, forms part of the estate her late husband, the late Adson Muli Nguthu. The Respondent in my considered view posed a legitimate question which went unanswered. The question was if the Applicant knew or believed that the property in dispute formed part of the estate of her late husband, then why did she not include the property as the part of the estate of her late husband in the succession cause she filed as the Administratrix of the estate of her late husband?

In my view, if the parcel in dispute legally belonged to the late Applicant's husband, Adson Muli Nguthu (deceased), the property should have formed part of his estate and if it is true that the Applicant occupies the said parcel, she could not have failed to include it in the listed assets of the deceased in the succession proceedings in order to lawfully administer the same and have it distributed in accordance with the law. Her failure to include the property in the list of assets belonging to her late husband in my view indicates that she did not consider it as an asset forming the estate.

25. I have also considered the gist of the Applicant's case and find it to be beyond the scope of a probate court. In my considered view, the **Law of Succession Act** does not apply to her claims and the reliefs sought in this application. **The Law of Succession Act** is limited to intestate and testamentary succession and the administration of estates of deceased persons. The provisions of Section 1 of the Act is clear about this. The applicant as I have observed, is not claiming inheritary rights over the estate of late Emily Nzuki Fredrick. She is a stranger to her estate and cannot in law question for example why the husband of the late Emily Nzuki, the Respondent herein, was vested with all the assets of the estate. It is only the children of the late Emily Nzuki or any other dependant who can lawfully question or challenge the mode of distribution of the estate proposed by the administrator and adopted by the court.

26. The Applicant's claim in my view challenges the manner in which the parcel in dispute changed hands from the late Adson Muli Nguthu in 1987, to the late Emily Nzuki Fredrick. She alleges that the transaction was fraudulent and that the transaction was not sanctioned by the Land Control Board.

27. The above claims are her basis in asking this court to declare the transfer a nullity in view of **Section 6 of land Control Act** and direct that the true owner should be Applicant by virtue of operation of law. I am however, not persuaded that I have the requisite jurisdiction sitting as a probate court to make such finding albeit the legitimate legal concerns expressed by the Applicant regarding the ownership and occupation of the parcel in dispute.

28. The architectural design of **Law of Succession Act (Cap 160)** as I have observed above, is not made to solve disputes on ownership of land, particularly where the dispute is based in a chose in a chose in action. In my view, the Applicant herein may have a chose in action against the ownership of the disputed parcel but the right forum for such disputes is the **Environment and Land Act Article 162(2)(b) of the Constitution of Kenya and Section 13(1)(2) of the Environment and land Court Act, 2011**.

29. That forum (Environment and Land Court) in my view, is seized with the requisite jurisdiction to determine all issues raised by the Applicant herein, in relation to ownership of the parcel in dispute. Issues of fraud, and whether transaction leading to the transfer of the parcel in dispute from one deceased to the other can properly be determined in the Environment and Land Court.

30. It is only after the Environment and Land Court renders itself on the question of ownership, can this court be moved on the question of administration of the estate if the question of administration remain unresolved.

The reliefs sought under *paragraphs (vi), (vii) and (viii)* can only be canvassed in the Environment and Land Court.

31. This Court has been notified that indeed there is a pending matter at Environment and Land Court which is Kitui Chief Magistrate's Court Environment and Land Court Case No.307 of 2016. That is the right forum to ventilate the issues raised here. This court finds that the Applicant is well aware of the existence of case at Environment and Land Court but despite that, lodged this application raising the same issues now pending in the Environment and Land Court. That in my view, is an abuse of court process.

32. This court, has considered the authorities cited by the Applicant and I find the same irrelevant to the issues at hand in this application. In the case of **re Estate of Ngore Ndinwa (2019) eKLR**, the court for example, the question before the court among other issues was whether the Respondent's purchaser's interests were protected under **Section 93 of Law of Succession Act** and the court found that Respondents claim were unethical, illegal and prejudicial to the interest of the right beneficiaries. The Respondent had bought part of the estate from an administrator of the estate before the grant was confirmed. In this matter, the Respondent is not seeking protection under Section 93 of the Law of Succession Act.

He is only saying that the issues at hand are before another forum, which is the Environment and Land Court. In this matter, the transaction over the parcel in dispute occurred between 2 deceased persons in their life time and property the changed hands in 1987 way before the impugned succession proceedings were filed in 2013. The provision of **Section 93 of Law of Succession Act** does not therefore apply.

In Musa Nyaribari Gekore & 2 Others –Versus- Peter Miyianda & Another (2015) eKLR, the Court of Appeal sitting in Kisumu was dealing with an issue of concealment and whether a party who had benefited from concealment can then resort to **Section 93 of the Law of Succession Act** for protection to whatever he had gotten. In my considered view, that case is different from the present scenario because the Respondent is not seeking protection from **Section 93 of the Law of Succession Act**. He says the property lawfully belonged to his late wife and being the Administrator of her estate, he lawfully obtained the property through transmission. The Applicant here is not challenging transmission per se, she is challenging the legality of the transfer between her late husband to the Respondent's late wife. The two processes (transmission and transfer) are distinguishable and different and that is why, I find that the best forum to canvas the legality of the transfer is the Environment and Land Court.

33. In the end and for the foretasted reasons, this court finds that the amended summons for revocation of grant dated 23rd July, 2020 is not merited. Before I sign off, this court wishes to mention the fact that the summons for revocation of grant as framed does not comply with the **Provisions of Rule 59(1) and (5), of Probate and Administration Rules** besides the defect I have noted above but for clarity purposes, that is not the reason why this application has failed. It has failed on merit as observed and much less for want of form. The Applicant shall pay costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF MARCH, 2021.

HON. JUSTICE R. K. LIMO

JUDGE