



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO.48 OF 2017
FORMERLY NAIROBI SUCC. CAUSE 853 OF 1998
IN THE MATTER OF THE ESTATE OF BERNARD MUTIE MUNYAKA (DECEASED)
MACKENZIE SILA MUTISO.....APPLICANT
VERSUS
TERESIA WAMBURA MUTIE.....RESPONDENT

RULING

1. The ruling relates to the application dated 9.1.2017 filed on 17.1.2017 for revocation of grant that was issued to the respondent. The subject grant was issued on 30.6.1998 and confirmed on 6.6.2012. The applicant claimed that the land **Machakos/ Kiandani/245** was transferred by the respondent to herself and yet he had purchased the same in 1978 from the deceased. A copy of the title deed in respect of Machakos/ Kiandani/243 was attached. The applicant claims purchasers' interest in respect of the suit property and sought that the letters of administration issued to the respondent be revoked.

2. The application was opposed by a preliminary objection that was addressed vide the ruling dated 2.7.2019. The application was opposed vide a replying affidavit deposed by the respondent on 22.10.2018 wherein she admitted the sale transaction and averred that the applicant went ahead to fence the entire plot rather than the 100 by 260 feet that was sold to him and which is the subject of ELC 22 of 2014. She averred that she had no issue with transferring the 100 by 260 plot to the applicant and attached a copy of subdivision application that was marked TWM 6.

3. The court directed that the application be canvassed vide written submissions. There are no submissions on record by the Applicant. Learned counsel for the respondent vide submissions dated 5.11.2019 placed reliance on the case of **In the matter of the Estate of Mbai Wainaina (Deceased) (2015) eKLR** and submitted that the applicant should seek recourse in the Environment and Land Court. Counsel submitted that the process leading to the issuance of the grant on 6th June, 2012 has been substantial towards finalizing the cause and therefore the application herein is meant to delay the same and ought not to be granted.

4. The issue I have to determine is whether the application has merit.

5. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated **In Re Estate of G K K (Deceased) [2017] eKLR** that:

“The primary function of a probate court is distribution of the estate of a dead person.”

6. A perusal of the pleadings indicates that the court had confirmed the grant and in this regard became functus officio and the task of administration left to the administrators. **In Re Estate of Ernest Kerry Komo (Deceased) (2016) eKLR** it was observed that once the grant was confirmed, the court became functus officio and that the property ceased to be estate property as the same vested in the administrators.

7. It is evident that the claim by the applicant is that of a purchaser and is based on a purchase agreement with the deceased. Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** stated that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the

claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

8. The cause of action was instituted in the Environment and Land Court which recognized the applicant’s right to 100 by 260 feet in the suit land. Is this reason enough to revoke the grant? The Respondent has not disputed the applicant’s claim to a portion measuring 100 by 260 feet in the deceased’s land parcel Machakos/Kiandani/245. Already the matter is being handled by the ELC court at Machakos vide ELC number 22 of 2014. In the circumstances I find it would not be proper to revoke the grant yet the applicant’s grievances are now being addressed by the appropriate court.

9. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

Revocation or annulment of grant or 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.;

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.;

10. Applying the test of law in section 76 of the Law of Succession Act, the applicant alleges that he purchased part of the suit land and that the respondent has not controverted this. In addition, the respondent has demonstrated steps that she took towards the realization of the interest of the applicant and because the same will cater for the interest of the applicant, revocation of grant shall serve no useful purpose. The court is satisfied that the suit in the ELC court also addressed the concerns of the applicant and finds that the applicant could approach the ELC court to execute on the findings of the court. I am satisfied that the respondent did not conceal any material fact from the court as she has admitted that she is ready to give the applicant the portion he had purchased from the deceased and which arrangement has been presented before the ELC court. In fact a determination has already been made by the ELC court vide a judgement dated 10/12/2019 where the applicant’s portion comprising 100 by 260 feet from the suit land. It is thus clear that the applicant’s interests has been taken care of. That being the position I find the present application appears to be a tit for tat aimed at settling scores with the respondent. All what the applicant has to do is to enforce the judgement of the ELC court. The wider interests of justice and in consideration of the provisions of the **Constitution** and the **Law of Succession Act** it is appropriate to decline the applicant’s application as all his interests have been taken care of in the ELC case which has since been determined. It is instructive to note that the Respondent herein has admitted before the ELC court that she is ready to give the applicant a portion measuring 100 by 260 feet out of the suit land and hence the applicant should be patient over the same. It seems to me that the applicant having been challenged in the ELC case as he had attempted to take the whole land is now out to harass the respondent just for the sake of it. Rule 73 of the Probate and Administration Rules gives this court wide discretion to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. One such order suitable to this court at this juncture is to decline the applicant’s request. The applicant should just proceed to execute the decree emanating from the ELC case.

11. In the result the applicant’s application dated 9th January 2017 lacks merit. The same is dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 23rd day of January, 2020.

D. K. Kemei

Judge