



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 767 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE MUCHOKI GATHUTHI (DECEASED)

MATHERI ISAAC NGURU.....APPLICANT

VERSUS

CHARLES GATHUTHI MUCHOKI

RICHARD MURAGE MUCHOKI.....RESPONDENTS

RULING

1. The estate relates to the late **Muchoki Gathuthi (DECEASED)** who died on the 5th September, 1995;
2. The Grant in dispute was issued on the 2/05/2016 to the respondents herein one Charles Gathuthi Muchoki (**'Charles'**) and Richard Murage Muchoki (**'Richard'**) as joint administrators; and the same was confirmed on the 7/02/2017;
3. The applicant filed the application on the 17/06/2017 under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Probate & Administration Rules stating that he was a creditor of the estate of the deceased; that the respondents were his nephews as well as being sons of the deceased; in the application he claims that the respondents had obtained the Grant to the deceased's estate without informing him; and he sought the following order:
 - (a) The Grant of Letters of Administration issued to CHARLES GATHUTHI MUCHOKI and RICHARD MURAGE MUCHOKI on the 2.05.2016 and confirmed on the 7.02.2017 be revoked and/or annulled on the grounds that the proceedings to obtain the grant were defective in substance, that the grant was made fraudulently by the making of false statement and by the concealment from the court of something material to the court and particularly that the applicant is a creditor of the estate.
4. The application was supported by an affidavit made by the applicant and evidence adduced at the hearing hereof; directions were given on the that the matter proceeds by way of oral evidence; at the close of the hearing the parties were directed to file and exchange written submissions; hereunder is a summary of the parties claims;

APPLICANT'S CASE

5. The applicant's evidence was that he was the brother in law to the deceased the late **Muchoki Gathuthi ('deceased')** who died on the 5th September, 1995; the deceased was the registered owner of the parcel of land known as Mweiga/Block 4/Mwireri/112 (**'subject property'**) and in 1993 which was during the deceased's life time he had sold the subject property to the applicant for the sum of KShs.35,000/-; the full purchase price was paid and the deceased had sought the consent of the Kiambu West Land Control Board Application form for the Land Board's consent is dated the 18/06/1993 (**'PEXh.1'**); both the deceased's wife (now deceased) and his eldest daughter named Beatrice Waruguru were in attendance at the board meeting; the consent was obtained vide Letter of Consent to Transfer is dated the 29/06/1993 (**'PEXh.2'**);
6. The respondents and the deceased's other children were all aware of this transaction as the monies were utilized in payment of school fees; and the deceased had put him in possession and to date he lived and cultivated the land;
7. The deceased was not able to effect and finalize the transfer during his lifetime as the subject property had a loan but he had agreed to effect the transfer once the title was discharged; unfortunately, the deceased passed away before finalization of the Transfer; thereafter the respondents secretly filed the instant succession cause with full knowledge of the creditor's claim but failed to disclose this fact to the court; the respondents never informed him nor did they involve him before the succession cause was filed; that it was the Bank that notified the applicant that the Title had been discharged and that the respondents had called in claiming the Title Documents and were pursuing the Discharge of Charge; that he later discovered that the beneficiary of the subject property was the respondent known as **'Richard'** to whom it

had been distributed to;

8. To support his claim the applicant called two (2) witnesses Mary Wachuka Murage(**PW2**) and Joseph Muriithi Ndungu (**PW3**); the witness **PW2** relied on the witness statement she had recorded on the 4/07/2018; her evidence was that she was the wife to the applicant, the deceased was her brother and the respondents were her nephews; and that she was the bridge between the applicant and the respondents;

9. She stated that she was aware that the subject property had been charged to the bank and that the beneficiary of loan was the applicant through a company known as Eversure Company Ltd; as for Joseph Muriithi Ndungu (**PW3**)his evidence was that he was a neighbor; and was always aware that the applicant was the one who had purchased the land from Muchoki and that the purchase price was Kshs.20,000/-; he stated that he was never told that Muchoki had not finalized the Transfer of the land; he confirmed that the applicant was the one utilizing the subject property;

10. The applicant urged this court to find that the administrators had concealed the creditor's interest from the court in a calculated scheme to disinherit him from his lawful entitlement to the estate of the deceased;

11. In the circumstances the grant having been obtained through concealment of the creditor's interest in the deceased's estate it was the applicants prayer that the Grant and the Certificate of Confirmation issued to the respondents be annulled or revoked;

PETITIONERS'/RESPONDENTS' CASE

12. Although the summons for revocation of the grant is based on fraud by making a false statement and concealment the applicant did not tender any evidence to prove the same; the applicant claims to have bought Title No.Mweiga Block 4/Mwireri/112 but he is not sure when he did so; he only stated that it was around 1991/1992;

13. There was no evidence in writing of the sale that allegedly took place in 1992; even if there was such evidence why didn't the applicant enforce the contract when the deceased was still alive?; the deceased died in 2010, over 15 years after the alleged sale; the Charge is dated 4/08/1992 and was discharged in 2017; that the Charge was registered on 4/08/1992 whereas an application for consent to Transfer was made on 18/06/1993 and the Consent was granted on 29/06/1993; that a Land Control Board's consent cannot be granted if the land has inhibitions; making the Consent suspect;that the respondents came to learn of the alleged sale and the consent in 2017 when the instant application was filed;

14. There is no evidence adduced that the proceeds of the said sale were ever used by the deceased to educate his children; there is also no evidence of repayment by the applicant of the alleged loan secured by the subject property; the applicant and his wife only brought the application to frustrate the respondents who had lost both their parents;

15. The respondents prayed for the dismissal of the application.

ISSUES FOR DETERMINATION

16. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether there was a valid agreement made between the applicant and the deceased;

(ii) Whether there was concealment from the court of something material to the case; whether to revoke the Grant and the Confirmed Grant;

ANALYSIS

Whether there was a valid agreement made between the applicant and the deceased;

17. The application is for the revocation of the grant issued to the respondents on the grounds that when the Grant was obtained there was concealment of the applicant's creditor's interest from the court in a calculated scheme to disinherit him from his lawful entitlement to the estate of the deceased; the applicant contends that the subject property had been sold to him by the father of the respondents;

18. The evidence of **PW2** was that she was the aunt to the respondents and upon the demise of their father she was the bridge between the applicant and the respondent and that she tried to intervene to have the matter resolved but to no avail; her evidence corroborated that of the applicantsin that the respondents were at all material times aware of the applicant's interest in the deceased's estate;

19. All the applicant herein needs to prove on a balance of probability is that the documents produced as exhibits impliedly acknowledge that there was an offer and acceptance and that the deal had been concluded;

20. The applicable law is Section 3(3) of the Law of Contract Act which envisages that any contract entered into touching on land must be in writing; the format is of no consequence provided the parties and the subject matter are all identifiable and there be a clear demonstration of their intentions; the consideration should also be indicated;

21. **On parties, subject matter, offer and consideration;** the applicant produced two documents into court one being the Application for Consent from the Land Control Board dated the 18/06/1993 which was marked as '**PEXh.1**'; and the Letter of Consent issued on the

29/06/1993 and this was marked as **'PEXh.2'**;

22. This court has had occasion to peruse the documents and notes that the exhibit **'PEXh.1'** contains the names and addresses of the applicant and the deceased; the deceased is described therein as the registered holder of the interest in the subject property and the name of the purchaser therein is that of the applicant; the description of the subject property is identifiable and the nature of the transaction is stated as a **'Transfer by way of Sale'**;

23. The intentions of the deceased and the applicant were reduced onto **'PEXh.1'**; it is noted that it was duly executed by the deceased and the applicant; and the appending of their respective signatures thereon shows that the deceased and the applicant were **'ad idem'** on the terms of the agreement for the sale of the subject property; inclusive of the consideration which is stated thereon as being Kshs.35,000/-;

24. These documents are found to clearly establish the deceased's intentions;

25. **On acceptance**; the deceased is said to have attended the Land Control Board and obtained the Consent to Transfer for the subject property; the applicant stated that he had also attended the Land Control Board and this evidence is corroborated by the documentary evidence in the form of the Application for Consent to Transfer (**'PEXh.2'**) and the subsequent Letter of Consent to Transfer that was issued; the attendance at the Board and the issuance and exchange of the Letter of Consent to Transfer demonstrates that there was an acceptance of the offer that had been made by the deceased;

26. **On delivery**; the applicant's evidence was that he utilized the subject property to secure a loan from Kenya Commercial Bank in the sum of Kshs.15,000/- and that the deceased was the guarantor to the said facility; that he was also placed in possession by the deceased and had been tilling and utilizing the land;

27. This court is satisfied that the action of execution of **'PEXh.1'** by the applicant and his attendance at the Land Board signified acceptance; and that being in possession of the subject matter confirms that there was actual delivery of the subject matter by the deceased to the beneficiary;

28. The upshot is that from the evidence adduced this court is satisfied that there was a valid agreement for sale between the deceased and the applicant over Parcel No. Mweiga/Block 4/ Mwireri/112;

Whether there was concealment from the court of something material to the case; whether to revoke the Grant and the Confirmed Grant;

29. The provisions of Section 76(b) of the Law of Succession 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) ...

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;"

30. The original intentions of the deceased and the applicant were reduced onto **'PEXh.1'** and that the issuance and exchange of the Letter of Consent to Transfer demonstrates that the agreement was concluded;

31. There was also evidence adduced that the applicant utilized the subject property to secure a loan from Kenya Commercial Bank in the sum of Kshs.15,000/- and that the deceased was the guarantor to the said facility;

32. The 1st respondent confirmed that he conducted a search at the Lands Office and he was issued with a Certificate of Official Search dated the 8/07/2014; it is not in dispute that the respondents had petitioned for the Grant of Letters of Administration which they filed on the 5/10/2015;

33. A cursory perusal by this court of the form P&A 5 reflects that it was also dated 5/10/2015 and was filed by the respondents and it indicates at the Liabilities Section that the deceased had no liabilities;

34. It therefore follows that the respondents who were in possession of the Certificate of Official Search which was obtained prior to the filing of the petition deliberately failed to disclose this material information to the court;

35. The applicant, his wife and the respondents are relatives and there was corroborated evidence on the interventions made which demonstrate that the respondents were at all times made aware of the applicant's interest in the deceased's estate;

36. Again upon perusal by this court of the form P&A 5 it does not reflect the name of the applicant as a creditor/purchaser at the Liabilities Section; the section this court reiterates that it indicates the deceased had no liabilities;

37. For these foregoing reasons this court is satisfied that the respondents obtained the Grant by the making of untrue allegations of fact and refrained from disclosing material facts to the court; and it is found that there was also concealment of pertinent facts;

FINDINGS

38. In the light of the forgoing this court makes the following findings;

(i) The Grant and the Confirmation of Grant are found to have been obtained in a manner that renders both defective as both were obtained by the making of an untrue allegations of fact; and it is found that there was also concealment of pertinent facts;

DETERMINATION

39. The application for Revocation of the Grant and the Certificate of Confirmation Grant is found to have merit and it is hereby allowed;

40. The Grant dated 2/05/2016 shall be retained in the names of the respondents but the Certificate of Confirmation of Grant dated the 7/02/2017 is hereby revoked;

41. Any title issued to Charles Gathuthi Muchoki and Richard Murage Muchoki touching on Parcel No. Mweiga/Block 4/ Mwireri/112 is hereby cancelled and the property to revert back to the estate of the deceased;

42. The Parcel No. Mweiga/Block 4/ Mwireri/112 shall be and is hereby distributed to the applicant; and a fresh Certificate of Confirmation be issued accordingly;

43. Distribution of the other properties remain unaffected;

44. Parties at liberty to apply for further directions;

45. The respondents shall bear costs of this application.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of March, 2020.

HON. A. MSHILA

JUDGE