



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1750 OF 2008

IN THE MATTER OF THE ESTATE OF SAMUEL THUOKAMUYU– (DECEASED)

CHARITY WAMUGO THUO.....APPLICANT

VERSUS

GRACE NJERITHUO.....1ST ADMINISTRATRIX

EDWARD KIRUMBAKAMUYU.....2ND ADMINISTRATOR

RULING

1. The deceased Samuel ThuoKamuyu died intestate on 12th march 2005. He left a widow Grace NjeriThuo (1st administratrix) and two daughters Charity Wamugo Thuo (the applicant) and Faith Mweru Thuo. Land parcel Dagoretti/Waithaka/322 measuring 11 acres, was registered in his name. On 28th July 2008 Grace Njeru Thuo, Charity WamugoThuo and Faith Mweru Thuo petitioned for the grant of letters of administration intestate. The grant was issued to them on 18th November 2008.
2. When the three applied to have the grant confirmed, the brothers of the deceased protested. They were Edward KirumbaKamuyu (2nd administrator) and David GitauKamuyu. Their case was that the parcel of land belonged to their late father Thomas KamuyuThuo. Their late father had three families (house s). The deceased, the two brothers and others were fromthe house of MinehWaitheraKamuyu. She was the third wife. The late Thomas KamuyuThuosettled her house on the parcel in question and got it registered in the name of the deceased (who was the eldest child and son) to hold in trust for the members of the house. Edward KirumbaKamuyu and DavidGitauKamuyu challenged the position held by Grace NjeriThuo and her daughters that the parcel belonged to the deceased and could only be shared among the three of them.
3. The dispute over this parcel of land had been heard and determined in **High Court Succession Cause No. 730 of 1995 Inthe Matter of the Estate of Thomas KamuyuThuo**. It involved all his beneficiaries including the house of MinehWaitherakamuyu. The court found that this parcel belonged to the deceased, he had settled the house of MinehWaitheraKamuyu on it, and that he had got the deceased to be registered in respect of the parcel to hold it in trust for himself and all the members of the house. The deceased participated in those proceedings and was represented by counsel. The decision was rendered by Justice K . H . Rawal (as she then was) on 21st November 2008.
4. The protest by Edward KirumbaKamuyu and David GitauKamuyu to the application by Grace NjeriThuo and her two daughters (including the applicant) was heard by Justice W. Musyoka who delivered his ruling on 23rd October 2015. He relied onthe findings by JusticeK.H. Rawal in **HC Succession Cause No. 73 of 1995** and found that the parcel belonged not to the deceased alone, but to all members of the third house of his late father Thomas KamuyuThuo. It was on that basis that he ordered the grant issued to Grace NjeriThuo, Charity WamugoThuo and Faith Mweru Thuo be revoked and that a fresh joint grant be issued in the names of Grace NjeriThuo and Edward KirumbaKamuyu. He asked that the two new administrators do file application to confirm the grant.
5. On 3rdFebruary 2016 Edward KirumbaKamuyu (2nd administrator) filed an application to confirm the grant. The application was heard and ruling delivered on 11th May 2018. The court distributed the parcel equally among 7 children of the third house of the late Thomas KamuyuThuo (the house of MinehWaitheraKamuyu) who included the deceased. The deceased's share was to be held by Grace NjeriThuo (the 1st administratrix).
6. The applicant filed the present application on 23rd July 2019 seeking under **section 76 of theLaw of Succession Act (Cap 160)**, to cancel and nullify the grant that was issued to her mother and Edward Kirumba Kamuyu on 23rd October 2015 and confirmed on 11th May 2018 as

rectified on 16th July 2018. The substantial complaint by the applicant was that Dagoretti/Waithaka/322 was registered in the name of the deceased (her father) as the absolute owner; that he was not registered as a trustee; and therefore the 2nd administrator and his siblings had no claim to the parcel. Quite unfortunately, the issue whether parcel Dagoretti/Waithaka/322 was the absolute property of the deceased or he was registered to hold in trust of himself and his siblings was heard and determined by Justice K . H . Rawal in **High Court Succession Cause No. 730 of 1995**. The decision was not reviewed or appealed against. It binds this court. It is *res judicata* under **section 7** of the **Civil Procedure Act** which provides that:-

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The parties herein, including the applicant, are bound by this decision. The matter has finally been litigated, and public interest dictates that there should be closure to the dispute (**The Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others, Nairobi Court of Appeal No. 105 of 2017 [2017]eKLR**).

7. The issue whether or not the deceased participated in the proceedings leading to the decision in **HC Succession Cause No. 730 of 1995** cannot be raised now in this subsequent matter.

8. In the affidavit in support of the present application, the applicant stated that she did not know how her name was removed from being an administrator and –

“my lawyer then representing us Mr Charles Muriithi did not inform me that there was an application for revocation of Grant.”

However, from the ruling of 23rd October 2015 it is clear that she swore an affidavit on 29th July 2010 in answer to the protest that the 2nd administrator and his brother had filed to their application seeking the confirmation of the grant that had been issued to them. In her affidavit, she had asserted that the parcel was not held in trust by the deceased for the protesters as alleged, but that it belonged to him absolutely. The court found that the deceased held the parcel in trust, revoked the grant issued to the deceased widow and her two daughters, the applicant included. It appointed her mother and the deceased's brother (the protester) as co-administrators.

9. On the evidence, I find that no fraud, non-disclosure of material facts, defect or untrue allegation of essential fact has been proved against the issuance of the grant to the joint administrators. Under **section 76** of the **Act**, the application cannot be granted.

10. Lastly, it was submitted on behalf of the applicant that neither Justice K.H. Rawal nor Justice W. Musyoka, both as High Court judges, had jurisdiction under **Article 162(2)(b)** of the Constitution and **section 13** of the Environment and Land Court Act to hear and determine a claim over title to land, occupation to land and matters relating to trust over land; that the jurisdiction belonged to the Environment and Land Court. The answer is that this court cannot sit in judgment over decisions of courts of concurrent jurisdiction, and therefore the less I say about the matter the better.

11. In conclusion, I find no merit in the application by the applicant and dismiss it with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020

A.O. MUCHELULE

JUDGE