



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. SUCCESSION CAUSE NO. 21 OF 2013

TABITHA CIORUI KAMUCERE.....1ST APPLICANT

KANINI KAMUCERE.....2ND APPLICANT

VERSUS

NKM.....1ST RESPONDENT

WM.....2ND RESPONDENT

WILFRED MBIRINGITU NJIRU.....3RD RESPONDENT

JUDGMENT

1. The applicants have filed an application dated 13/12/2016 seeking the following;

- i. Revocation of the grant of letters of administration issued to Wilfred Mbiringitu Njiru vide Kerugoya SRMCC Succession Cause No. 71 of 1977.
- ii. Rectification of land register in respect of Mutira/ Kirimunge/1589 -1592 being subdivision of Mutira/ Kirimunge/ 84 and the land to revert back to the estate of the deceased.

2. The background on this matter is that it relates to the estate of Kamucere Rubari Ileri (deceased) who died intestate on 21-7-1995. The applicants who are the wives of the deceased filed Kerugoya Senior Resident Magistrate's Court Succession Cause No. 152/ 1997 and were issued with a grant of letters of administration which was confirmed on 6-10-2000. The estate of the deceased which was comprised in Land Parcel No. Mutira/ Kathare/ 112 was distributed equally to all his beneficiaries. Before the deceased died he was the registered proprietor of Land parcel No. Mutira/ Kirimunge/84 which was inadvertently omitted when the grant was confirmed. This matter was filed in the High court at Embu as Misc. Application No. 76. of 2009. The applicant had filed summons for revocation of grant dated 3-8-2009 which had not been heard and determined. However, on 20-11-2014 the applicant was ordered to file proper summons for revocation of grant. The applicant filed this application

APPLICANT'S CASE

That they are wives of the deceased and applied for letters of administration vide **Kerugoya SRMCC Succession Cause No. 152 of 1997** which was confirmed on 06-10-2000. However, the suit property **Mutira/ Kirimunge/ 84** was inadvertently omitted. That they obtained certified copy of register of the suit property and discovered that **Kerugoya SRMCC Succession Cause No. 71 of 1977** was illegally commenced before the deceased death on 21-07-1995. That the petitioner therein Wilfred Mbiringitu Njiru did not have capacity to petition as he does not rank before her in line with **Section 29 of the Law of Succession Act**. Subsequently Wilfred Mbiringitu Njiru transmitted the suit property to Nicasio Kabue Muthaiga and Wachira Muthaiga on 25/04/1986.

That Kerugoya **SRMCC Succession Cause No. 71 of 1977** is irretrievably lost despite efforts to trace it.

RESPONDENT'S CASE.

In response they stated that the 1st and 2nd respondents were registered as proprietor of the suit property on 08/04/1981 though they were minors whereas the 3rd respondent was the guardian. That upon attaining age of majority, they were registered on

25-04-1986.

That the applicant is a trespasser and they have no blood relationship. That she lodged a caution on the property but which they removed vide **Kerugoya RMCC No. 218 of 2004**. They subdivided the land and sold portions thereof to 3rd parties who are not parties to the suit herein. That the applicant was charged vide **Kerugoya Criminal Case No. 121 of 2013** with offence of forcible entry.

In **Kerugoya RMCC No. 218 of 2004** the parties were the 1st and 2nd respondents and the applicant herein. The court in its judgment on 02/03/2009 held that the registration of deceased as proprietor of the land was cancelled and the 1st and 2nd respondents were put in the register on 04/08/2001. The applicant herein has never appealed against the said judgment.

3. When the matter came up for directions, the parties agreed to proceed by way of written submissions and the Court to rely on the affidavits of the parties.

4. For the applicant, Submissions were filed by Simiyu Opondo Kiranga. He submits that he wishes to expound the facts, and the law to demonstrate that the summons aforesaid is meritorious and should be allowed. He submits that the issue for determinations are;

a. Whether the Applicants have satisfied the conditions set under **Section 76 of Law of Succession Act Cap 160 Laws of Kenya** to have the grant revoked or annulled?

b. Whether Title Nos: **Mutira/ Kirimunge/ 1589 -1592** the same being resultant parcels emanating from sub-division of the original being Title No. **Mutira/ Kirimunge/ 84** should be cancelled and the land reverted back to the Estate of the deceased for proper distribution?

5. He further submits that it is not in dispute the wives are the legal custodian of the deceased of Kamucere Rubani Ireri who passed away on **21 July 1995**. That the deceased was the registered proprietor of **Mutira / Kirimunge/84**. That the 1st respondent fraudulently and while the deceased was still alive and unwell petitioned the court vide **Kerugoya Senior Resident Succession Cause No. 71 of 1977** and obtained a grant of letters of administration and confirmation of grant to the estate of the deceased.

6. That the respondent proceeded to fraudulently transmit parcel number **Mutira/ Kirimunge/84** on 8th April, 1981 to himself and the 2nd and 3rd Respondents. That it is indicated in the register that he was appointed guardian of 1st and 2nd respondents. He further submits that all this fraudulent acts happened while the deceased was still alive and without the knowledge of the applicants.

7. That the applicants' applied for grants of letters of administration jointly to the estate of the deceased vide Kerugoya SRM magistrate court **Succession cause no. 152 of 1987** which was confirmed on 6th of October, 2000. That it is after the grant was confirmed that the applicant realized that they had omitted one of the deceased properties namely **Mutira/ Kirimunge/84** that they applied for an official search and were shocked to discover it was long sub-divided by the respondent into four portions namely **Mutira/ Kirimunge/ 1589 -1592** and all but one parcel sold to known 3rd parties. That the applicant's placed a caveat on 11th August, 1997 but was removed under unclear circumstances effectively allowing the respondents to fraudulently subdivide the property into four portions.

8. He submits that the law on revocation of grant is under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. He has referred this court to the case of; **SUSAN WANGITHI MUCHUNGU and SIX OTHERS - VERSUS - JAMES THURUI MUCHUNGU & Another (2016) eKLR** where the court found that there was a strong case of concealment and false representation against the respondent, as the respondent had in the letters of administrations falsely indicated that he was a sole son of the deceased and there were no other dependents and revoked the grant. That the respondent was guilty of concealment and representation. The court in the case cancelled the title deed issued to 3rd parties and nullified the transactions.

9. In conclusion he has submitted it is crystal clear from the facts of this case that the respondent obtained the grants fraudulently. The respondent fraudulently filed documents in Kerugoya SRM Magistrate court Succession cause no. 71 of 1977 and obtained the grants of letters of administration and confirmation of grants. That the respondent lied to the court that the deceased was dead and while indeed he was alive and enjoying robust health at the time.

10. That the respondent filed this case in respect of the deceased **18** years before his death. This could only mean that the respondent forged the death certificate, permit for burial, letter from chief among other documents.

11. The respondents' are not related to the deceased in any way and therefore they could not have had capacity to file succession cause in respect of the deceased in any event.

12. He submits that the grant issued at the behest of the respondent ought to be nullified and the title number **Mutira/ Kirimunge/84** revert to the name of the deceased for purposes of proper administration of the estate as provided by the law.

13. For the respondents it is submitted that on the 29th of September, 1959 Title No. Mutira/ Kirimunge/84 was registered in the name of Muthiaga Kavute (deceased) who is the father of the 1st and 2nd respondents. That after the death of the late Muthiaga Kavute, Wilfred Mbiringitu Njiru on behalf of the 1st and 2nd respondent filed Succession No. 71 of 1977 in

Kerugoya and the Court ordered that a process of arbitration after it emerged that Kamucere Rubari had fraudulently transferred title number Mutira/ Kirumunge/84 to himself. That the arbitration process made an award that the title Mutira/ Kirumunge/84 to revert back to Muthaiga Kavute (deceased) and that the beneficiaries herein do proceed with the Succession process.

14. The aforesaid succession number 71 of 1997 was in respect to Muthaiga Kavute not Kamuchere Rubari who was still alive. The court ordered that the respondents share the estate equally and Wilfred Mbirigitu was appointed as a guardian, and in 1986 the 1st and 2nd respondents got registered as the owners of Mutira/ Kirumunge/84 after attaining the age of majority.

15. On 11th August, 1987 the applicant herein, lodged a caution on the title **Mutira/ kirumunge/84** and the respondents filed **SRM Civil Case 218 of 2004** seeking removal of the caution. Thereafter, the court ordered the caution to be removed, the respondents then sub-divided the property and sold the portions to 3rd parties.

16. It is submitted that no appeal was preferred in respect of the arbitration award and the same has never been set aside or reviewed. The respondents got the suit property after the conclusion of the aforesaid Succession cause. After the sub-division of the land the portions were transferred to 3rd parties who were not parties to this suit. The 3rd parties are protected **Under Section 93 (1) of The law of Succession Act.**

17. The respondents pray that the summons for revocation of grant dated 13th December, 2015 be dismissed with costs.

ANALYSIS AND DETERMINATION.

I have considered the evidence tendered by the parties in their affidavits I have also considered the submissions.

The issues which arises for determination is;-

REVOCAION OF GRANT

The law on revocation of grant is anchored under **Section 76 of the Laws of Succession Act Cap 160 of the Laws of Kenya,** which provides;

“(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.”

18. The circumstances which can lead to the revocation of grant are that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of a false statement or by concealing of something material to the case or that the grant was obtained by means of untrue allegations of facts essential to a point of law.

19. The proceeding in the Kerugoya Succession cause number 71 of 1977 has not been traced. However, from the register the following information is available. The nature of the claim was an application for certificate of succession in respect for Mutira/ Kirumunge/84 by the then defendant who was Kithaiga Kabute the remarks are that by consent Parcel No. Mutira/ Kirumunge/84 shall be registered in the name of Kamuchere Rubari / Identity/ K/EBA/2290. Thereafter, the certificate for succession was granted to Kabute Muthaiga ½ an acre, Wachira Muthaiga ½ an acre.

20. It seems after the deceased Kamuchere Rubari was registered, a Succession was filed in the estate of Muthaiga Kavute who was the original owner of Mutira/ Kirumunge/84. There followed some arbitration proceedings which were done under Succession cause no. 71 of 1977 which seem to have been arbitration by order of the court, in this case the District Magistrate court Kerugoya. As can be seen by annexure marked NKM 6 attached to the affidavit of Nicasio Kavute Muthaiga sworn on 10th May, 2019. This arbitration proceeding were before the Assistant Chief Kathare Sub-location and have been certified as true copy of the original by the District Magistrate Kerugoya.

21. In the proceedings Wilfred Mbirigitu Njiru testified that the late Muthaiga Kavute was married and had two (2) sons who were then small boys and stated that the land should be given to the two sons of the late Muthaiga Kavute. In the same proceedings Kamuchere Rubari opposed and said that the late Muthaiga Kavute had sold his land to him, and he said that when Muthaiga Kavute died they had not gone to the land board for approval. He admitted that he claimed for the death certificate of the late Muthaiga Kavute and then he got title deed in the way of inheritance instead of the way of buying.

22. The decision of the arbitration committee was that the two sons of the late Kithaiga Kabute will be the right and true heirs of title number Mutira/ Kirumunge/84 and the complainant (Kamuchere Rubari) may claim his money and properties. This proceedings were held on 16th February, 1981. This proceedings are backed by what is in the register of Succession matters which I have referred to above.

23. The two sons were subsequently registered as proprietors on 8th April, 1981 and they were minors and Wilfred Mbirungitu was appointed guardian. They were later registered as proprietors on 28th of April, 1986 and issued with Land certificate.

24. The applicants lodged a caution (caveat) on the Title deed of the respondents. The respondents filed Civil case 218 of 2004 in the Senior Resident Magistrate's court at Kerugoya. See annexure marked NKM 2 A.

25. The applicants participated in the proceedings. On perusal of the proceedings the applicants were aware of the arbitration proceedings before the Chief and in particular Tabitha Ciorui admitted that her husband was a party in those proceedings. The Judgment of the trial court was that the caution lodged on the land was without basis and the same was ordered to be removed forthwith. This judgment in this Civil case is still valid as the applicants did not appeal against the decision of the trial magistrate. The copy of green card produced by the respondent shows that Kamuchere Rubari was registered through Succession and yet the applicants are asserting that they acquired the land through purchase.

26. In view of the facts which I have analyzed above I find that the respondents were registered through the due process. The applicants have not discharged the burden to prove that the grant was obtained fraudulently.

The applicant have not brought this application within the ambit of **Section 76 of the Law of Succession Act**.

Kamuchere Rubari was not related to the deceased Kithaiga Kabute and could therefore not acquire his land through Succession. Indeed in the Arbitration proceeding he admitted that the agreement he entered with the Kithaiga Kavute had not gone through approval by the land board and that he acquired the land by way of inheritance instead by the way of buying.

Kamuchere Rubari did not acquire the land genuinely in the circumstances. The title he had acquired was not clean and the arbitration committee found that he had not acquired the land and his remedy was in recovery of his purchase price and ordered the land to revert back to Kithaiga Kabute.

27. The respondents have deponed that the land was sub-divided and has changed hands and it is in the hands of third parties. The resultant sub-divisions are; -

i. Mutira/ Kirumunge/ 1589 - David Maaabu Rukinye

ii. Mutira/ Kirumunge/ 1591 - Josephat Murimi Njeru

iii. Mutira/Kirumunge/ 1592 - Charles Mwangi Murage

The only portion which is in the names of the respondents is Mutira/ Kirumunge/1590 - Nicasio Kabute Muthaiga and Ephantus Wachira.

The third parties who are purchasers are protected under Section 93 (1) (2) of The Law of Succession Act which provides:

“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

In the case of; **STEPHEN MWANGI -VERSUS- JOYCE WANJIRU WAMTHUA and Another (2007) eKLR** it was stated that I must however

“emphasize that the gist of Section 93 of the Law of succession act is to protect purchaser for value of the property arising out of the Succession proceedings whatever the outcome is purchase and title to the suit property cannot be impugned and disturbed at all.”

28. The third parties bought the parcels of land from the respondents after the grant was confirmed. They are bonafide purchasers for value and are protected by **Section 93** and even if the grant were to be revoked the right to their properties cannot be disturbed.

29. The applicants were seeking a prayer for rectification of grant so that Mutira/ Kirumunge/1589 - 1592 being sub-division of Mutira/ Kirumunge/84 to revert back to estate of the deceased.

30. The law on rectification of grant is under **Section 74 of the Law of Succession Act** which provides that errors in names and descriptions and in setting out the time and place of the deceased death for the purpose of a limited grant may be rectified by the court.

Under Rule 42 (1) of the Probate and Administration Rules it is provided

“where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act, rectification of an error in the grant as to the names or descriptions or any person or theme or as to the time or place of the death of the deceased, or in the case of a limited grant the purpose for which the grant was made, we shall apply by summons.”

31. It is clear from this provisions that it is errors that may be rectified by the court where they relate to names, descriptions or setting out of time or place of deceased death. The power of the court to order rectification is limited to those restrictions.

The rectification cannot be ordered where it would substantially alter the grant.

32. A succession court will not normally order rectification of a land register but may in some situations where the grant was obtained fraudulently and is ordered to be revoked, may order cancellation of the resultant title deeds. In this case, the applicants have not proved any of the grounds under Section 76 of the Law of Succession Act to warrant the court to order revocation of grant.

In conclusion I find that;

- i. The summons for revocation of grant is without merit and is dismissed.
- ii. Each party will bear its own costs.

Dated and Signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE