



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. SUCC. CAUSE NO. 49 OF 2019

(FORMERLY SPM CHUKA SUCC. CAUSE NO. 2 OF 2011)

IN THE MATTER OF THE ESTATE OF FESTUS NKUNE KWARIA (DECEASED)

JENESIA KARIMI MBACIRU.....APPLICANT

VERSUS

ADIEL NYAGA NKUNE.....1ST RESPONDENT

DAVIS NJAGI FESTUS.....2ND RESPONDENT

JACKSON GITONGA FESTUS.....3RD RESPONDENT

TIMOTHY MBAKA NKUNE.....4TH RESPONDENT

BERNARD MURITHI FESTUS.....5TH RESPONDENT

DUNSTAN KINYUA NKUNE.....6TH RESPONDENT

ESTHER KAGENDO.....7TH RESPONDENT

BRIAN MURITHI HUMPHREY.....1ST INTERESTED PARTY

JOHN MATE NTHIGAL.....2ND INTERESTED PARTY

RULING

1. This matter relates to the estate of **NKUNE KWARIA** who died on 8th April 1993 in Meru but domiciled in Karingani/Mugwe. The surviving widow Edith Gakinga Festus petitioned for letters of administration of his estate vide **Chuka Principal Magistrate's Court Succession Cause No. 2 of 2011**. The only asset left behind by the deceased was that property known as Karingani/Mugirirwa/379.

2. The Petitioner was granted letters of administration on 1st April 2011 and the same was confirmed on 7th February 2012 in terms of the following mode of distribution.

A. Karingani/Mugirirwa/379

- (i) Edith Gakinga Festus - 0.2 ha
- (ii) David Njagi Festus - 0.21 ha
- (iii) Andiel Nyaga Nkune - 0.28 ha

- (iv) Edith Gakinga Festus - 0.24 ha
- (v) Jackson Gitonga Festus - 0.27 ha
- (vi) Timothy Mbaka Nkune - 0.28 ha
- (vii) Bernard Murithi Festus - 0.22 ha
- (viii) Dunstan Kinyua Nkune - 0.21 ha
- (ix) Jenesia Karimi Njeru - 0.14 ha

3. Jenesia Karimi Njeru, has now taken out Summons for Revocation of Grant dated 1st November 2019 seeking for the following reliefs namely:-

(i) Spent

(ii) That pending the hearing and determination of this application, the Respondents, their agents or anyone be restrained from evicting the Applicant from her permanent place of abode at Gitwaka village in Mugwe Location.

(iii) That the grant of letters of administration intestate issued to Edith Gakinga Festus (now deceased) on 9th August 2011 and confirmed on 7th February 2012 be revoked.

(iv) That all registration effected on L.R. Karingani/Mugirirwa/379 pursuant to the said confirmation of grant be reversed and the property do revert to the deceased's name.

4. The Applicant has listed the following grounds to support her application. These are:-

a. That the Senior Principal Magistrate's Court at Chuka lacked jurisdiction to hear and determine Succession Cause No. 2 of 2011 as the net worth of the estate was over Kshs.10 million.

b. That the cause was filed secretly, fraudulently and without the knowledge of the Applicant.

c. That the Applicant is the wife of Eustace NjeruNkune (deceased) who was a son of a deceased herein.

d. That the Applicant's signature was forged in the undated consent to the mode of distribution to the Summons for Confirmation of Grant presented to the trial court.

e. That all the beneficiaries were allocated a share of the estate but the Applicant was given a very small portion compared to the others.

f. That the Respondent took advantage of the fact that the Applicant's husband had passed on and gave out a portion she has been living for over 30 years to someone else.

5. The Applicant has supported the above grounds with a Supporting Affidavit sworn on 1st November 2019 where she has reiterated the above grounds adding that on receiving a notice to vacate her home on 15th October 2019 she came to this court seeking for the revocation of grant.

6. In her written submissions through Muthomi Gitari & Co. Advocate, the Applicant has insisted that the lower court in Chuka lacked Pecuniary jurisdiction. She points out that the whole estate measured approximately 6 acres of prime agricultural land situate 2 Km from Chuka Town. She contends that the declared value of Kshs.200,000/- was way below the actual value adding that even the declared value of Kshs.200,000/- was still above the then pecuniary jurisdiction of the lower court. She relies on the decision in the case of **Mwai Kabara -vs- Edith Waruguru Mwaniki & Another [2015] eKLR** where the High Court revoked a grant for the same reason that the magistrate entertained a matter that was beyond his statutory jurisdiction. She further relies on a decision of Court of Appeal in the case of **Florence Nandwa & Another -vs- John Alemba Kojwa** (Court of Appeal No. 300 of 1998) where the court held that if the holder of a grant dies, the grant becomes useless and inoperative and should be revoked. In the same breath she further relies on the decision of **Julia Mutune M'Mboroki -vs- John Mugambi M'Mboroki & 3 others [2016] eKLR**

7. The Applicant further submits that she has adduced evidence showing that she was short changed during the distribution and that her signature was forged. She asserts substantive justice demands that all beneficiaries be given equitable share of the estate.

8. She avers that there is no limitation of time for commencing proceedings to revoke a grant and has relied on the case of **Miriam Mbure Abdalla & 9 others -vs- Sophia Salim Gathiaka & Another [2004] eKLR**

9. The named Respondents have opposed this application through a Replying Affidavit sworn on their behalf by Timothy Mbaka Nkune, the 4th Respondent. The Respondent contend that this application discloses no reasonable cause of action because it is based on untrue allegations. They opine that the Applicant took part in succession proceedings in **Chuka Principal Magistrate's Court Succ. No. 2 of 2011** and accepted a parcel given to her which was Karingani/Mugirirwa/2848 where she has been issued with a title deed.
10. The Respondents deny being administrators of the estate of the deceased herein and that with demise of the administratrix on 20th September 2017 no one can be held accountable for any alleged fraud because the same if at all abated on her death.
11. The Respondents claim that no prove of the valuation of the estate has been tendered to show that the lower court lacked pecuniary jurisdiction. They have also faulted the applicant for laches claiming that the applicant waited until the administratrix died and after fully administering the estate. They claim that they are not the administrators of the estate of Edith Gakinga Festus- (appointed administratrix).
12. The Respondent have averred that the Applicant lacks the capacity to bring this application as she has no letters of administration of the estate of her husband.
13. The Respondents contend that they are beneficiaries of the estate and are not in a position to respond to the allegations of fraud made by the Applicant.
14. The Respondent aver that due to passage of time the estate has passed through many hands including 3rd parties and it would not be possible to reverse the transactions. They cite a purchaser named Brian Murithi who has built a school on the land and in their view revocation of grant would do more harm than good.
15. They submit that the provisions of **Section 76 of Laws of Succession Act** does not envisage a suit against a deceased administrator. They contend that the applicant herself is guilty of non-disclosure by failure to disclose that she holds parcel No.2848 and a title deed to the same.
16. The Respondents aver that it is the Applicant who has not shown what role the Respondents played in the issuance of the grant and its confirmation. They submit that allowing this application would create absurd legal results adding that the complaints raised by the Applicant have abated by events namely the death of the administratrix. They claim that none of the Respondents named is a personal representative of the deceased administratrix and therefore to them the Applicant has no cause of action against them. They rely on the Court of Appeal case of ;
- (i) **Troustic Union International & Another -vs- Jane Mbeyu & Another (Nbi Court of Appeal No.145 of 1990)** in their contention that they have wrongly been sued as no legal reasons have been given to show why they have been dragged to this court. In their view this application to that extent is an abuse of court process.
17. It is their contend that the Applicant had filed a similar application vide **Chuka Chief Magistrate's Court Misc. Succ. Cause No. 34 of 2019** and that the same was struck out by the subordinate Court for disclosing no reasonable cause of action. They claim that this application is frivolous and vexatious because they find themselves in an embarrassing situation because they cannot speak for the late Edith Gakinga Festus as they lack capacity to do so and were not privy to her action when she was alive. It is their contention that this application is not justiciable in law.
18. The Respondents submit that on the question of lack of jurisdiction by the lower court, the issue cannot be entertained because the Applicant herself lacks capacity to bring up the issue and besides that she has not tendered any expert opinion in form of a valuation report. They submit that the issue of monetary jurisdiction is a technical matter and has urged this court to be driven by substantial justice as opposed to the technicalities. They claim that the issue of valuation of the estate can only be answered by a personal representative of the late Edith (administratrix).
19. The Respondents claim that the Applicant has selectively presented facts and concealed a material fact which is the fact that she is a title holder of L.R. Karingani/Mugirirwa/2848. According to the Respondents, this Application has been brought in bad faith and that the applicant is dishonest by misrepresenting facts.
20. Its Respondent's submission that this Application is bad in law because the Applicant failed to take out letters of administration first before suing on behalf of the estate of her of Njeru (her late husband). They urge this court to consider doing substantial justice by disallowing this application.
21. There are two interested parties in this application who were admitted to these proceedings on 4th December 2019. The two are Brain Murithi Humphrey and John Mate Nthiga. They both swore separate affidavit on 2nd December 2019 claiming that they purchased some parcels resulting from subdivisions of the estate after the confirmation of the grant.
22. The 1st Interested Parties, Brian Muriithi, bought land parcels Karingani/Mugirirwa/3048, 3342 and 3341 from the 5th respondent, Bernard Murithi, who was a direct beneficiary to the estate. Their sale agreement is dated 5th August 2014. At the time, the land was already registered to the 5th respondent as parcel Karingani/Mugirirwa/3049. The sale agreement was fully performed and title deeds were issued in favour of the 1st IP. The 1st Interested Party claims protection under **section 93 of the Law of Succession Act** and requests that if the court is inclined to revoke the grant, then his interest in the parcels he purchased should not be affected.
23. The 2nd Interested Party, John Mate Nthigai, bought land parcel Karingani/Mugirirwa/3305 from the 1st respondent Adiel Nyaga Nkune who was a direct beneficiary to the estate. Their sale agreement is dated 27th May 2014. The sale was fully performed and title deed issued

to the 2nd Interested Party. He also seeks protection under **section 93** of the **Law of Succession Act** and requests that if the court is inclined to revoke the grant, then his interest in the parcels he purchased should not be affected.

24. The Interested Parties filed their separate submissions on 20/3/2020 and the documents are similar almost verbatim perhaps due to the fact that they are represented by one counsel I.C Mugo & Co. Advocate.. They first raise the issue of jurisdiction and submit that the applicant has not attached any documentary evidence that the value of the estate was beyond the jurisdiction of the lower court. They also submitted that they came into the picture after confirmation of grant and were innocent purchasers for value on a willing -seller- willing buyer basis having bought their respective lands from the beneficiaries who already held title deeds by that time. They both submit that they conducted due diligence and found no encumbrances on the properties before entering into the transaction and that they followed all procedures including going to Land Control Board for consent and payment of full consideration. They therefore seek protection under section 93 of the Law of Succession Act as was done by the courts in Chuka HC Succession 55 of 2015 and Kisii HC Succession Case 62 of 2009 where the court protected the interest of purchasers on revocation of grant. They claim that their transactions were on a willing seller willing buyer basis and that they obtained good titles for valuable consideration.

Analysis and determination:

25. The Applicant has moved this court for revocation of grant issued to the late Edith Gakinga Festus on 1st April 2011 and confirmed on 7th February 2011 under **Section 76** of Law of **Succession Act**. Section 76 Law of Succession Act specifies instances when a court either on an application of an Interested Party or on its own motion can revoke a grant whether confirmed or not. It states as follows:-

76. 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) 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

26. The Applicant has cited three grounds in this application namely:-

a. Concealment of material facts

b. Lack of jurisdiction

c. Fraudulent acts.

The cited grounds fall within the grounds under **Section 76** and if any of the grounds is proved to the required standard, it is sufficient to nullify a grant. The big question is whether the Applicant has proven any of the grounds stated above.

Lack of jurisdiction

27. The jurisdiction of the Subordinates Court in succession matters was limited to Kshs.100,000/- by the provisions of the then **Section 48** which section was amended in 2015 by Act No.26 of 2015. The cause in this matter was filed in the lower court in 2011 which means that the same was filed before the amendment in 2015 by Act No.26 of 2015 came into effect. The said amendment greatly enhanced monetary jurisdiction of the Magistrates Courts to be in tandem with **Section 7(1)** of the Magistrates' Courts Act, 2015.

28. The Respondents herein and the Interested Parties have faulted the Applicant for not tendering expert evidence or any evidence at all showing that the estate in question was worth more than 100,000/-. I have however looked at the documents filed by the late administratrix and in particular P & A 5 and the estimated value of the estate given therein is Kshs.200,000/- which obviously on the face of it shows that the value of the estate went beyond jurisdiction of the Principal Magistrate's Court at Chuka.

29. In my considered view given that jurisdiction of a court is everything, I would have not gone deep into this matter but the Respondents have raised fundamental legal issues that cannot be disregarded.

30. The Respondents have strongly submitted through Mutani Advocate (who I must say when the great and useful lengths to debunk the Applicant's contention on jurisdiction) that the issue of the value of the subject matter has been raised belatedly long after the full administration of an estate whose administratrix has passed on. The Respondents further claim that they have no *locus* to answer to any acts of omission or commission of the administratrix because they have not taken out letters of administration in respect of the late Edith Gakinya Festus (deceased administratrix). This contention in my view is given validity by dint of **Section 82 (a) Law of Succession Act** which states as follows:-

"Personal representatives shall, subject only to any limitation imposed by their grant have the following;

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law survive the deceased or arise out of his death for his estate....."

31. In the light of the above provision, I am persuaded that the allegations made against the administration of the estate of Nkune Kwaria could only be answered by the appointed administratrix or in her absence (due to her demise) by her appointed personal representative(s). Any party or person cannot in law be called to account unless nexus is established, to the required standard in law, between the acts of omission or commission of the deceased administrator and any other person or beneficiary. The Applicant has failed to establish the culpability of the Respondents herein or indeed the Interested Parties in respect to allegation of fraud, misrepresentation or failing to file the matter in a proper court.

32. Thirdly and more significantly is the issue raised by the Respondents that the Applicant herself lacks *locus standi* to commence or lodge this application for revocation of grant. The Applicant herein is a daughter in law to the late Nkune Kwaria (deceased) having been married to a late Eustace Njeru Nkune who was a son of the deceased (Nkune Kwaria). The question posed is whether the Applicant in her own right could qualify to be considered as a "*child*" or a "*dependant*" of the deceased in that court. I have looked at the definition of a "*child*" under **Section 3 (2) Laws of Succession Act** and the meaning of "*dependant*" under **Section 29** of the **Law of Succession Act** and a daughter in-law does not fall into any of those definitions given by the two relevant provisions. The Applicant in this application in my view made a fatal omission in her representation to the trial court and this court and that is to state whether or not she got children with her deceased husband (Njeru Nkune) because that would then mean that her children under **Section 29(b)** of **Law of Succession Act** would qualify to be dependants and hence validate a claim of an equitable share in the estate of the grandfather (Nkune Kwaria deceased).

33. The Applicant also has not stated that the deceased took her as his own child and provided or catered for her materially prior to his demise to qualify stake her claim on the estate under **Section 29(b)** as a "*dependant*".

34. The Applicant has simply stated in her application that she was married to Eustace Njeru Nkune (deceased) who was a son of Nkune Kwaria (deceased herein) and the same is not denied. However, the Applicant failed to take out letters of administration for the estate of her husband to give her the legal standing (Section 82 Law of Succession Act) to make her claim on behalf of the estate of the late Eustace Njeru Nkune. That failure in my considered view is fatal to her pursuit in this application. She has failed to inform this court whether the late Eustace Njeru had children with her and for which she was granted a parcel to hold in trust for the benefit of those children or lay legal basis upon which she can properly and validly challenge grant issued vide **Chuka Principal Magistrate's Court Succession Cause No. 2 of 2011.8**

35. In the absence of any legal basis to present her stake on behalf of either her late husband or her child/children, the Applicant claim based on evidence presented before me is based on her own personal capacity as a dependant because she has not denied that she is not a legal representative of her husband's estate. As I have observed, that claim is simply not tenable in law. In **Isaya Masira Momanyi -vs- Daniel Omwoyo & Another 2017**, the court made the following observations which I find relevant.

"With respect I do not agree that failure to obtain a grant of letters of administration to a deceased estate to enable one to acquire capacity to file a suit on behalf of the deceased estate would be a mere procedural technicality. The law is express that a deceased estate can only be represented by a person who is duly authorized to do so."

The above position similarly obtains in the case of **Re Estate of Malai Alias Lili (deceased) [2017] eKLR** where the court held as follows:-

"30. Section 82(a) of the Law of Succession Act provides that;

"Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate"

31. In interpreting the above provision of law, the Honourable Court in the case of ALEXANDER MUTUNGA WATHOME -VS- PETER LAVU TUMBO & ANOTHER [2015] ECLR (MACHAKOS SUCCESSION CAUSE NO. 80 OF 2011) noted that;

"In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person."

36. In the light of the above decisions and the cited express provisions of the law, this court finds that the Applicant lack legal capacity to make a claim over the estate of the late Nkune Kwaria or to challenge the manner in which the late administratrix went about the administration of the estate.

Concealment and misrepresentation of acts

37. The Applicant has faulted the administratrix for concealment of material facts and forging her signature. She has also claimed that she was unaware of the succession cause in the subordinate court. However as I have found out above, the allegations made are attributed to the late administratrix-Edith Gakinya Festus. The Applicant is guilty of laches because the administratrix finished the administration of the estate after giving each beneficiary their share including the Applicant herein. The Applicant has now come to court after the demise of the administratrix stating that she was unaware of the happenings in the succession cause at the lower court. But I am not persuaded by that plea. The Applicant got her title to her share which L.R Karingani/Mugiririwa/2848 and from the evidence presented by Timothy Mbaka Nkune (4th Respondent) in his affidavit sworn on 8th November 2019, which is an official search shows that the title deed was issued on 2nd March 2016. It is common knowledge that the process of obtaining a title is quite elaborate because one must present his/her documents like ID, Passport size photographs, Pin Certificate and go to Land Control Board. The Applicant certainly cannot state that she was not involved yet evidence to the contrary is glaring. She has not denied that she collected her title or state that the title deed was processed without her involvement.

38. I also find that her claims that her signature was forged by the administratrix or any other person in suspect because she has not demonstrated that she reported the matter to the CID for investigation and possibly an action to be taken.

39. This court has considered both the plea by the Applicant and the Respondent to invoke the inherent power of this court and do substantial justice rather than basing my decision on a technicality. This is an interesting scenario given that both parties would want to use the provisions of **Article 159(d)** of the Constitution of Kenya both as a shield and sword. The Applicant contends that this court should disregard the provisions of **Section 82 of Law of Succession Act and use Article 159(d)** to revoke the grant to ensure that all beneficiaries get an equal share. She urges me to go by the decision in ***Ibrahim -vs- Hassan & Charles Kimenyi Macharia [2019] eKLR*** and note that **"the objective of court is to uphold substantive justice"**.

40. On the other hand, the Respondents have pleaded that this court must not look at the question of jurisdiction under the repeated Section 48 because of passage of time which has seen this application overtaken by events and that this court should invoke Article 159(d) and do substantial justice given that part of the estate has been regularly sold to 3rd parties who have carried out development. They also state that the Applicant is technically in a class house and should not be throwing stones (jurisdiction) on them.

41. I have considered this matter at length and note that it is true that **Article 159(2)** in essence is invoking the jurisdiction of a court of Equity and one of principles of equity is that a party approaching it must do so with clean hands. This court has also applied equitable jurisdiction as provided under **Article 159(2)b** in order to balance the scale of justice carefully. There is no dispute that the administratrix in this matter finished the administration of the estate prior to her demise.

42. This court finds that the applicant for no good reason delayed her action and though **Section 76 Law of Succession Act** has no time limit, it is apparent that the Applicant's action is belated apart from the fact that I have found it wanting in law for the reasons I have highlighted above. There is no dispute that a large part of the estate has already changed hands and as the Interested Party submit, **Section 93** shields their interests because the transactions were done after the confirmation of grant and their acquisition is not tainted with any illegality or fraud. The Applicant has not faulted any of the Interested Party in any way and I find that they are innocent purchasers for value who acquired their interest without any notice that there were any encumbrances to the shares they bought.

By the time this application was brought on 1st November 2019, the administration of the estate of the late Festus Nkune Kwaria had been completed and all the beneficiaries had been given title deeds to their respective shares. The Applicant has not approached this court with clean hands because she has not been candid enough. She has not disclosed the fact that she was given 0.14 ha and has a title deed to that effect. She claims that her share was smaller compared to other beneficiaries who got 0.2 ha, but I find that she at least got an equitable share particularly given that in law she did not qualify to be given share equivalent to the other beneficiaries who are all children of the deceased. As I have said, she is a daughter in law to the deceased and a daughter in law as I have observed must lay basis by demonstrating *locus* to claim on behalf of a deceased spouse.

43. This court finds that the Applicant in her application is guilty of laches and has not persuaded this court about the reasons for the delay in making this application. I also find that given that the administratrix is now deceased and died after fully administering the estate, the Applicant's allegations of fraud, misrepresentations and concealment cannot be answered by the Respondents herein for lack of capacity **Section 82**. All beneficiaries in the cause got their respective shares and some have sold while some may have dealt with them in any manner they deem fit.

44. The Applicant also got a share and title to her share and is in occupation of that portion. This court finds that overturning that state of affairs after more than 7 years will not only open a Pandora box but is likely to lead to endless litigations and attendant costs and family feuds. It is my considered view that the proper application of **Article 159(2) (d)** of the **Constitution of Kenya 2010**, tilts in favour of the Respondents and the Interested Party. The long and short of this is that for the aforesaid reasons this court finds no merit Summons for Revocation of Grant dated 1st November 2019. The same is disallowed but I shall make no order as to costs.

Dated, signed and delivered at Chuka this 29th day of June 2020.

R.K. LIMO

JUDGE

29/6/2020

Ruling signed dated and delivered in the open court in presence of Muthomi for the Applicant, Mutani for Respondents and Mugo for 1st and 2nd Interested Parties.

R.K. LIMO

JUDGE

29/6/2020