



**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 56 OF 2019**

**IN THE MATTER OF THE ESTATE OF**

**WANGARI GUCHU (DECEASED)**

**BETWEEN**

**HENRY GUCHU KAMAU .....APPELLANT**

**AND**

**WANJIKU KIARII ..... RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. B.M. Ekhubi, PM dated 14<sup>th</sup> March 2019 at the Thika Magistrates Court in Succession Cause No. 212 of 2010)***

**JUDGMENT**

1. This is an appeal against the ruling and order of the trial court dismissing the appellant's summons for revocation of the confirmed grant of letters of administration duly confirmed made under **section 76** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* ("the LSA").
2. This matter concerns the estate of Wangari Guchu ("the deceased") of Nembu Village, Kiamwangi Location in Thika District who died on 26<sup>th</sup> February 2005. Her son, Henry Guchu Kamau ("Kamau"), the appellant herein, lodged the petition for grant of letters of administration intestate on his own behalf and his sisters; Paulina Murugi Mbugua and Alice Njeri Njoroge. The deceased left behind several properties; RUIRU MUGUTHA/BLOCK 1/T.936, RUIRU RUIRU EAST BLOCK 2/2982 and 2983, GATUANYAGA/NGOLIBA/BLOCK 1/74 and KIGANJO/NEMBU/1033 ("Plot 1033").
3. Before the grant was issued, the respondent, Wanjiku Kiarri ("Wanjiku"), filed an objection to the grant on the ground that she was entitled to 1.5 acres of Plot 1033 which had been purchased by her husband, the late Kiarie Kimani, from the deceased. She stated that the matter was arbitrated by elders and the award read in **Nairobi HCCC No. 2054 of 1984**. In due course, the objection was settled and the grant of letters of administration intestate issued to the appellant and respondent on 26<sup>th</sup> January 2011.
4. On 8<sup>th</sup> September 2010, Wanjiku filed a summons for confirmation of grant. In her affidavit in support of the summons, she proposed that all the properties of the deceased devolve to the appellant except Plot 1033 to be shared between her and the appellant. She was to receive 1.5 acres while the appellant would retain 3.8 acres. The grant was confirmed on that basis and a certificate of confirmation issued on 16<sup>th</sup> September 2011 along the lines proposed. The appellant refused to assist in effecting transfer to the respondent her share leading her to file several applications seeking the court's assistance to compel him to execute the documents of transmission and to surrender the original certificate of title for Plot 1033.
5. The appellant filed the summons for revocation of the confirmed grant dated 15<sup>th</sup> May 2012. The main ground set out in the face of the application and the supporting deposition was that the grant and certificate of confirmation was obtained by fraudulent concealment of material facts. That the respondent fraudulently presented herself as the administrator of her late husband's estate knowing very well she had not taken out letters of administration of her late husband's estate, the original claimant of the property. The appellant also complained that the advocate purporting to represent him in recording the consent comprising the respondent's objection did not have a practicing certificate at the time and was not instructed by him to record the consent.
6. In her replying affidavit sworn on 18<sup>th</sup> June 2012, Wanjiku stated that she was the administrator of the estate of Kiarie Kimani. She further stated that at the time Kamau petitioned for the grant of letters of administration, he knew that her family had been occupying 1.5 acres of Plot 1033 for a period of over 30 years which was demarcated by a boundary and was developed yet he did not disclose this when he lodged the petition. When she learnt that Kamau had petitioned for the grant, she instructed her advocate to file an objection. When the

parties appeared in court with their advocates, Kamau did not object to the grant being issued in their joint names. Wanjiku also urged the court to appoint a surveyor to measure and confirm the area occupied by each party.

7. Wanjiku further stated that her counsel on record filed an application for confirmation as Kamau failed to do so and when the matter came up for hearing on 7<sup>th</sup> September 2011, he indicated his advocate was not in court. The court adjourned the matter to 14<sup>th</sup> September 2011 for hearing and since the appellant did not protest, the application was allowed.

8. The summons was heard by oral testimony. Kamau (PW 1) testified and called Alice Njeri Njoroge (PW 2) on his behalf while Wanjiku called Gabriel Kamau Kiarie (RW 1) as witness.

9. Kamau testified that his advocate on record at the material time did not have instructions to record a consent making Wanjiku a co-administrator. That Wanjiku was a stranger to the estate and that her claim was unsubstantiated. He accused Wanjiku and her son of intermeddling with the estate by building houses on the deceased's property. He told the court that Wanjiku should make her claim to the estate of Mutharia Kingata from whom her husband purchased the land. He referred to **Civil Case LS4 of 1964** where the court directed the deceased be registered as sole proprietor of Plot 1033 and dismissed the claim by Mutharia Kigata against the deceased. The deceased's daughter, PW 2, supported the appellant's case. She testified that the deceased was the owner of Plot 1033 and that Wanjiku was not related to them. She stated that the deceased had never parted with her property or sold it to Mutharia Kingata or Kiarii Kimani.

10. Kamau, RW 1, recalled that Wanjiku secretly filed the petition without involving Wanjiku yet Wanjiku's husband, Kiarii Kimani, had purchased a portion of Plot 1033 in 1973 and that the family lived on the land. He stated that Wanjiku only received 1.5 acres purchased by her late husband from the deceased. RW 1 further testified that the existing boundaries between the deceased and the respondent were clearly marked and that the family had lived on the land for over 40 years.

11. The trial magistrate considered that evidence in light of the provisions of **section 76** of the **LSA** and held that the appellant had not established or met the threshold necessary for the grant to be revoked.

12. The appellant has challenged the decision of the trial magistrate in the memorandum of appeal dated 12<sup>th</sup> April 2019. The parties' advocates have both filed written submissions in support of and in opposition to their respective positions.

13. Counsel for the appellant submitted that the respondent did not have any interest in the deceased's estate hence she could not petition for grant of letters of administration. He further submitted that the respondent was not a dependant within the meaning of **section 29** of the **LSA** and could not be appointed as an administrator under **section 66** of the **LSA**. The appellant's case was that he did not consent to the respondent's involvement in the matter which was procured by his advocate behind his back. He pointed out that since 1973 and in several suits, the respondent's husband and later herself had claimed 1 acre but she mischievously claimed 1.5 acres in the application for confirmation.

14. Counsel for the appellant cited **Muriuki Musa Hassan v Rose Kinyua Musa MRU Succ. Cause No. 62 of 2012 [2014] eKLR** where the court held that the interested party who was not part of the deceased's family could not have a claim directly against the estate. Counsel for the appellant also submitted that the trial magistrate failed to consider and determine whether the respondent had the standing to make a claim for the deceased's estate and whether the grant was obtained fraudulently. Counsel for the appellant relied on **Rubo Kipngetich Arap Cheruiyot v Peter Kiprof Rotich ELD CA Civil Appeal No. 128 of 2008 [2013] eKLR** where the Court of Appeal held that, "*Claims by third parties to deceased person's properties although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits*" to support its case.

15. The respondent opposed the appeal and supported the decision of the trial magistrate. Counsel for the respondent submitted that the appellant had not proved fraud to the level required as required by the law. Counsel cited **Augustine Johnstone Moi Kiriga v Catherine Muthoni Isumali Karimi MRU HC Succ. Cause No.93 of 2016 [2017] eKLR** where the court held allegations of fraud must be proved by cogent evidence.

16. Counsel for the respondent further submitted that the respondent was not a 3<sup>rd</sup> party but a beneficiary of the estate since her deceased husband had purchased a portion of the property from the deceased. Counsel relied on the case of **Re Estate of Julius Ndubi Javan MRU HC Succ. Cause No. 720 of 2013 [2018] eKLR** where the court held that personal representatives of the deceased are bound by the deceased's obligations. In the circumstances, the respondent contended that she was entitled to benefit from the estate of the deceased.

17. The central issue for determination is whether the trial magistrate erred in law and in fact in exercising discretion to dismiss the application for revocation. That issue turns on the interpretation and application of the provisions of **section 76** of the **Law of Succession Act** which provides as follows:

**76.Revocation or annulment of grant 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;**

18. Under the aforesaid provision, the court is called upon to determine whether **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.**

19. The first issue I wish to dispose of is the contention that the objection by the respondent that led to the grant of letters of administration to the appellant and respondent was compromised without his consent. The appellant, in his deposition, admits that he instructed J.G Waweru, Advocate whom he later learnt had not taken out a practicing certificate. This issue cannot be laid at the feet of the respondent, who was also represented by an advocate. Whether or not he had the right to practice, he was the duly appointed agent of the appellant and as such he had ostensible authority to bind the appellant as against third parties. That consent could only be set aside on grounds that a contract would be invalidated like fraud or misrepresentation in which the respondent was implicated (see *Hirani v Kassam* [1952] 19 EACA 131 and *Kenya Commercial Bank Limited v Specialised Engineering Limited* [1982] KLR 485). This is not the case here and I would not set aside the grant of representation only on that ground.

20. The second issue raised by the appellant is the capacity of the respondent to agitate the case on behalf of her deceased husband who she contended had purchased part of the Plot 1033 from the deceased. This position was rebutted as the respondent produced a grant of letters of administration dated 26<sup>th</sup> September 2002 issued to her for the estate of her husband Kairie Kimani in *Thika SPM Succession Cause No. 171 of 2002* thus entitling her to make the claim.

21. The substantial ground raised by the appellant is that the respondent was a stranger to the estate of the deceased as she was merely a 3<sup>rd</sup> party claiming an interest based on the purchase of land from another party. The issue of the respondent's entitlement, was the subject of **NAIROBI HCCC NO. 2054 of 1984 (Wangari Guchu v Wanjiku Kiarie)**. It appears that the court directed that the matter be resolved by a panel of elders and by a decision dated 2<sup>nd</sup> November 2019, the Panel of Elders presided over by the District Officer, Gatundu decided that part of the land was sold to the late Kiarie's family for Kshs. 5,000/- and that, *"a deal of selling land was entered and finalized, a boundary was marked in presence of the elders but since there was no transfer of land effected a dispute has arisen after a prolonged period."*

22. I find that the issue of the respondent's entitlement was resolved in **Nairobi HCCC No. 2054 of 1984** and cannot be re-litigated in the succession. The issue raised by the appellant is that the respondent is claiming 1.5 acres and not 1.0 acre as she had claimed in the earlier proceedings. From the decision I have quoted, it is clear that the boundary was marked and parties had living on the land as neighbours for a long period of time. That is why the trial magistrate ordered a survey to be done to establish the precise area occupied by each party. A report was prepared and given to the court and in the ruling, the trial magistrate stated as follows:

*[6] The Court directed a surveyor to prepare a report and which was presented to the Court to give a clear picture of the situation on the ground. From the report, the Respondent occupies 1.5 acres and the Petitioner occupies 3.8 acres.*

23. The totality of the evidence shows that the respondent was a person entitled to a part of the deceased estate, a matter that had been litigated and was the subject of an elder's award confirmed by the court. The respondent's objection was allowed by consent. The acreage of the ground that had been marked by elders, as acknowledged in the elders' decision and adopted by the court, and occupied by the respondent for a period of over 40 years was duly ascertained. The respondent disclosed all these facts in the objection application.

24. The appellant did not establish any fraud on the respondent's part in pursuing these proceedings. Having re-evaluated the material before the trial magistrate, I agree with the learned trial magistrate that the appellant did not establish the grounds for revocation of grant under **section 76** of the *LSA* and his summons for revocation was properly dismissed.

25. This appeal is dismissed with costs to the respondent. All interim order in force are now discharged forthwith.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of JUNE 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Gatonye instructed for Waweru Nyambura and Company for the appellant.

Ms Maina instructed by Ndungu Mwaura and Company Advocates for the respondent.