



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 8 OF 2018**

**(FORMERLY CM SUCCESSION CAUSE NO. 340 OF 2016)**

**IN THE MATTER OF ESTATE OF KIRAE MUYAWERU alias KIRAI MUYAWERU (DECEASED)**

**NJAUNINI KIMOTHO.....APPLICANT**

**VERSUS**

**MARGERY WAMUGO MUGO....ADMINISTRATOR/RESPONDENT(DCD)**

**AND**

**JULIET WANJOVI MUGO.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**RUSINA KAARI MUGO.....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**RULING**

**A. Introduction**

1. Before this court is the summons dated 6/08/2015 and filed in court on 10/08/2015 which seeks revocation and/or annulment of the grant of letters of administration made to Margery Wamugo Mugo (respondent herein) in relation to the estate of the deceased herein. The said summons is based on the grounds on its face and its supported by the affidavit annexed to the application.
2. In a nutshell, it is the applicant's case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant were defective in substance. It appears that the applicant's claim is that the grant was defective in nature and substance by concealment to the court the fact that he was a creditor of the estate by virtue of being a purchaser and thus entitled to a share of the estate.
3. The application is opposed by the respondent herein vide her replying affidavit sworn on 6/11/2015 wherein she deposed that the applicant does not have *locus standi* in the matter and thus the orders sought cannot be issued. She further deposed that the suit land belonged to her deceased father-in-law (Kirae Muyaweru) and at the time of the execution of the agreement for sale of 1½ acres to the applicant, the suit land was still in the names of the deceased father-in-law and not her deceased husband (Mugo Kiarie) and as such, the said sale agreement is illegal, void and unenforceable in law. Further that, the said sale was subject to sub-division of the suit land and acquisition of the Land Control Board's consent and which conditions were never met and as such, the agreement died a natural death and was void for lack of consent of the Land Control Board.
4. Pursuant to the orders of 7/03/2016, the daughters of the deceased were served with the application herein and filed their replying affidavit wherein they deposed that the suit land was registered in the name of their father (deceased herein) and at no time did he sell any part thereof and neither were they aware of any such sale. As such, the applicant is a stranger to the deceased' estate.

**B. Submission by the parties**

5. Directions were taken that the application be canvassed by way of written submissions. The applicant submitted that he lawfully purchased the suit land from the late Mugo Kiarie being a beneficiary of the estate of the deceased herein and who had his share of the estate. Further that, the conduct of the siblings in acquiescing to the sale in question for decades was an indication of them being complicit to the acquisition of land by the applicant. The applicant further submitted that he had obtained a valid title by virtue of adverse possession having been on the suit land for over two decades within which he has exercised open and notorious use of the land and his tenure has been uninterrupted and undisturbed. Reliance was made on the case of **Kahindi Ngala Mwangadi –vs- Mtana Lewa [2004] eKLR.**

6. The respondent on her part reiterated the contents of her replying affidavit to the effect that the purported sale agreement was void, unenforceable in law for the reasons that the Mugo Kirae (the purported seller) was not the registered owner of the suit land at the time of executing the agreement but was in the name of the deceased and that there was no sub-division and/or obtaining of Land Control Board's consent and which was a prerequisite in the sale agreement.

**C. Issues for determination**

7. I have perused the application herein, the responses thereto and the rival submissions by the parties herein.

**D. Application of the law and determination**

8. As I have already noted, the application herein seeks revocation of the grant made to the respondent herein. The said grant was issued to the respondent herein on the 13<sup>th</sup> February 2013.

9. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the Law of Succession Act and include;

*a) Where the proceedings to obtain the grant were defective in substance;*

*b) Where 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) Where 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) Where 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) Where the grant has become useless and inoperative through subsequent circumstances.*

(See **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** and **re Estate of Agwang Wasiro (Deceased) [2020] eKLR**).

10. The respondent in her replying affidavit deposed that the applicant does not have the locus standi in the subject matter and as such, the orders sought herein cannot be granted. The issue herein is whether the applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before delving into other substantive issues.

11. Section 76 of the Law of Succession Act is very clear that 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.....(emphasis mine).

12. From the perusal of the application before me, it is clear that the applicant is not one of the heirs or survivors of the deceased. His interests in the estate of the deceased herein arise from a purported sale agreement between him and the son to the deceased (Mugo Kirae). As such, he averred that his interest is that of a creditor. So the question which ought to be answered at this instance is whether the applicant is a creditor of the estate of the deceased and hence an interested party?

13. A creditor generally is a person to whom a debt is owing by another person, called the "debtor." It means one who has a legal right to demand and recover from another a sum of money on any account whatever.

14. The applicant deposed that he bought land from one Mugo Kirae who was the son to the deceased herein. He exhibited the sale agreement in that respect and which confirms the same. The said agreement is in relation to the suit land herein (LR. Gaturi/Nembure/41) and which, from the record, was registered in the names of the deceased herein. In my opinion, at the time of the said sale, the said Mugo did not have the capacity to sell the suit land. The applicant did not prove that the said Mugo had the capacity by may be exhibiting a grant of letters of administration intestate issued to the said Mugo Kirai. In fact, from the record, it is clear that the administration of the deceased' estate was bestowed on **Margery Wamugo Mugo**. That being the case, the applicant cannot be said to be a creditor of the estate of the deceased herein. His interest can only be against the estate of the said Mugo Kirai.

15. It is my opinion therefore that he does not possess the requisite locus standi to present the instant application. There is no way he can claim against the estate of the deceased whereas the agreement of sale in question was not executed by the said deceased.

16. The applicant deposed that he had occupied part of the suit land for two decades and thus he was entitled to the said part by virtue of adverse possession. However, as it is now trite, the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime. With respect to matters touching on title to, and occupation of land, the proper forum ought to be the Environment and Land Court which is established under the Constitution of Kenya 2010 and the Environment and Land Court Act, No. 19 of 2011. The issue of adverse possession falls squarely under the jurisdiction of the said court. The Court in **re Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR** which authority I find persuasive held that the doctrine of adverse possession is one of property or land law and is about occupation and user of property, and by virtue of Articles 162(2) and 165(5) of the Constitution 2010, the High Court has no jurisdiction to determine any disputes that centre on occupation and use of land.

17. Considering all the above, it is my opinion that the applicant herein does not possess the requisite *locus standi* to approach this court as he does not have any claim as against the estate of the deceased. Where a party has no locus standi in a matter the court does not have jurisdiction over the same. Further, it is my opinion that the issue as to adverse possession and which doctrine the applicant invited this court to apply in finding that he is an interested party to the estate of the deceased is an issue which this court is bereft of jurisdiction therein.

18. It is trite that jurisdiction is *everything and without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR)*. In the circumstance, it is my opinion that the instant application has no merits and as such the same ought to be dismissed.

19. Orders accordingly.

**Delivered, dated and signed at Embu this 16<sup>th</sup> day of December, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent