



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 59 OF 2013**

**IN THE MATTER OF THE ESTATE OF MURIITHI NGUGA ..(DCD)**

**JANE WANGECI GITHINJI .....APPLICANT**

**V E R S U S**

**BETH WANGUI MURIITHI & 6 OTHERS ..... RESPONDENT**

**RULING**

1. This is an old matter relating to the Estate of Muriithi Nguga (deceased) who died in 1989 at Kerugoya District Hospital. A petition for Letters of Administration was filed by Githinji Chewa in succession Cause No. 27/1993. His claim was that he had bought a one acre piece of land out of Land Parcel No. Inoi/Kariko/270 vide an agreement dated 19/10/1987 between him and the deceased. The Land Parcel No. Inoi/Kariko/270 forms the estate of the deceased. An objection was filed by Bernard Murage a son of the deceased. The cause was not prosecuted and has been pending in court ever since. By an order of Justice Limo Succession Cause No. 27/93 was consolidated with this cause on 9/2/16.

2. The widow of the deceased and the 2-7 respondents filed succession cause No. 354/1994 and obtained a grant which was confirmed on 9/8/1996.

3. The applicant Githinji Chewa Karonyi has applied for revocation/annulment of the grant in an application dated 08/03/2013. He claims that the administrator of the estate Betha Wangui Muriithi obtained the grant vide **Nairobi Succession Cause No. 354 of 1994** without disclosing the existence of **Nyeri Succession No. 27 of 1993** relating to the same deceased person. That the grant was confirmed on 09/08/1996 whereby the deceased's estate **Inoi/Kariko/270** was distributed out as hereunder;

- i. Bernard Murage Muriithi – 2 ½ acres
- ii. Joseph Muriuki Muriithi – 1 ½ acres
- iii. Juliana Wambui Munene - 1 ½ Acres
- iv. Beatrice Kanini - 1 ½ Acres
- v. Faith Wanjiru Muriithi - 1 ½ Acres
- vi. Francis Gioko Muriithi - 1 Acre.
- vii. The land is registered in joint names.

4. That he is related to the deceased by the fact that he purchased 1 acre from him, paid in full and even applied for consent. He had filed **Nyeri Succession No. 27 of 1993** and the 2<sup>nd</sup> respondent Bernard Murage filed objection therein but instead of pursuing the objection proceedings, the 1<sup>st</sup> respondent (mother to the 2<sup>nd</sup> respondent) filed another succession cause **Nairobi Succession Cause No. 354 of 1994**.

5. Unfortunately the applicant passed away on 18/7/17 and was substituted by his wife on 8/12/2017..

6. In response, the respondent stated that the deceased died leaving behind the 7 respondent but the 1<sup>st</sup> and 3<sup>rd</sup> respondent are now deceased. That the applicant secretly filed **Nyeri Succession No. 27 of 1993** without notice to them and has never prosecuted the case. That they are strangers to the land transaction the applicant had with the deceased. That they came to know of the applicant when he filed **Kerugoya LDT No. 56 of 2007** but which orders were reviewed on 09/12/2009. In addition, the applicant also filed **Nyeri Misc Application No. 101 of 1997**

which is still pending in court since he has never prosecuted the application for annulment/revocation of the same grant. That the applicant's claim is a non-starter and if he has any claim he ought to sue the administrator of the estate of the deceased.

7. The Court gave directions that the matter proceeds by way of viva voce evidence. However on 23/11/2018 the parties agreed to change the directions and rely on the affidavits and file written submissions.

8. For the applicant it was submitted the applicant had purchased a portion of one acre from the deceased out of land parcel No. Inoi/Kariko/270. He submits that the issue for determination is whether the grant issued on 9/8/96 should be revoked. He relies on Section 76 of the Law of Succession Act which gives instances where a grant may be revoked/annulled. He submits that the applicant has adduced sufficient evidence to warrant the court to order that the grant be revoked. He submits that the applicant purchased one acre out of land parcel No. Inoi/Kariko/270 which forms the estate of the deceased and he paid the agreed purchase price of Kshs 60,000/- and took possession of the land. He relies on affidavit sworn by the deceased on 19/9/1988 confirming that he had paid the entire purchase price, annexure GCK 3a. It is submitted that the land has never been transferred to the applicant nor has the purchase price paid been refunded. He contends that the applicant is a creditor and ought to be provided for first before the net estate can be distributed to the beneficiaries. Reference was made to Section 86 of the Law of Succession Act. That failure to disclose that the applicant was a creditor was a material none disclosure and renders the proceedings defective. The respondent failed to disclose existence of Succession Cause No. 27/1993. That is matters not that the grant was made inadvertently in ignorance.

It is further submitted that the claim is not time barred.

9. For the respondents it is submitted that they are strangers to the transaction between the deceased and the applicant. That after the conclusion of the Succession cause the land was distributed to his heirs. That the applicant had filed a multiplicity of suits which have not been prosecuted. These are:-

- **Applicant's Annexure "GCK4- objection to making of grant in High court Succ. Cause Number 27 of 1993, Nyeri.**
- **Respondents' annexure "BMM3a"- chambers summons- High Court Misc, Appl. No. 101 of 1997, Nyeri.**
- **Respondents annexure "BMM3b" replying affidavit-High Court Misc. Appl. No. 101 of 1997, Nyeri.**

10. He submits that Section 76 of the Law of Succession Act constitutes the law on revocation of grants but the applicant has not proved that the grant was obtained by concealment from court something material to the case. They submit that the agreement has not been exhibited by the applicants.

11. It is further submitted that the land parcels No. Inoi/Kariko/270 is agricultural land and transactions involve eg the land are controlled transactions which require the consent of Land Control Board. The respondent relied on Court of Appeal decision in David Sironga Ole Tukai -v- Francis Arap Muge & 2 Others (2014) eKLR where the court re-affirmed that under Section -6- of the Land Control Act, without the consent of the relevant Land Control Board a transaction involving agricultural land is void for all purposes. The applicant's remedy is in compensation for breach of contract. That the claim is time barred by dint of Section 4(1) of the Limitation of Actions Act. That the claim to recover land is time barred under Section -7- of the Limitation of Actions Act.

12. The respondents submits that Section 76 (e) of the Law of Succession does not apply as the administrator Bertha Wangui Muriithi (deceased) performed all her duties as provided by Section 83 of the Law of Succession Act as she distributed the land as per the confirmed grant and confirmed by the certificate of official search annexure BMM4.

13. I have considered the application and the submissions. The applicant submits that the issue for determination is whether the grant should be revoked. The law applicable is Section 76 of the Law of Succession Act which provides:-

***"No general legacy or general residuary bequest shall be construed as an execution of any special power of appointment unless an intention in that behalf is clearly expressed or implied in the will."***

14. The applicant is supposed to prove that:-

- i. The proceedings to obtain the grant were defective in substance.**
- ii. The grant was obtained fraudulently by making false statements or concealment of something material to the case.**
- iii. The grant was obtained by means of untrue allegations of facts essential in a point of law to justify the grant whether made in ignorance or in-advantently.**
- iv. Failure by the holder of the grant to apply for confirmation.**
- v. The grant has become useless and in operative due to some circumstances.**

15. Where a party proves any of these grounds the court will order that the grant be revoked.

16. The main contention by the applicant is that there was none disclosure of facts which were material to the case. The claim by the applicant is not based on the interest of beneficiary or a dependant. Section 66 of the Law of Succession Act (to be referred to as "the Act") provides for the order of preference to be given to certain persons to administer the estate. It provides:-

**“A gift made by will shall not of itself raise any presumption that the gift is intended to satisfy or to take the place of a gift, whether or not of equal amount, previously made to the same person by the testator in contemplation of death.”**

17. Though a creditor to the estate can file succession, he has no priority. The respondents are wife and children of the deceased who are also dependant as defined under Section 29 of the Law of Succession Act had priority to file the succession cause. The section provides:-

**“A limited residuary bequest shall have the same effect as a general residuary bequest, subject only to the specific limitation therein expressed or implied.”**

18. The applicant was not a beneficiary entitled to the estate. The respondent depone that they were not party to the transaction between applicant and deceased and only came to learn about it in the Land Dispute Tribunal case No. 56/2007 whose award was set aside. Where a party is not aware of the facts material to the case, failure to disclose those facts cannot be viewed as concealment of such facts. In any case by the time the Land Dispute Tribunal case was filed, the grant had already been confirmed. The applicant had filed Succession Cause No. 27/1993 which he never prosecuted. He also did not file any objection when the respondents filed the confirmation of grant. The respondents disclosed all the beneficiaries entitled to the deceased and the estate of the deceased. There is no prove that the respondents concealed from the court something material to the case. If a party is not aware of existence of some facts he cannot be held liable for failing to disclose them.

19. The respondents have proved that the estate of the deceased has been distributed and the land has been registered in the names of the respondents.

20. These is proved by the certificate of Official Search. The applicant was not a beneficiary but a creditor. His claim lies in suing the administrator of the estate who has a duty under Section 83(d) of the Act to ascertain and pay all his debts. The allegation that the grant has become useless is not tenable. Though the administrator is deceased, she had distributed the estate in accordance with confirmed grant. The grant was effected by the administrator and the fact of her death thereafter does not make it useless. The estate changed hands from deceased to his dependants long before the application for revocation of grant. The claim for revocation so that the applicant can get land cannot be sustained as the land is no longer in the name of the deceased and is not a dependant entitled to the estate. The applicant has failed to disclose any of the grounds under Section 76 of the Act to warrant this court to order a revocation of the grant.

21. The 2<sup>nd</sup> issue is whether the applicant is entitled to the estate as a purchaser. The land parcel No. Inoi/Kariko/270 is agricultural land. For any transaction like the alleged transaction by the applicant, the consent of the land Control Board was required to validate it. I say alleged as the respondent have averred that the agreement was a forgery.

22. This for good reason. The applicant filed a multiplicity of cases which he never prosecuted. This can be construed that he does not have a valid claim. The applicant had filed a sale agreement and acknowledgments showing he had paid Kshs 35,000/- and further 19,700/= making a total of Kshs 54,700/-. He had not filed the affidavit which he has annexed. There is therefore a dispute as to whether he had paid the entire purchase price or that he breached the agreement. This is a claim which requires prove.

23. The 2<sup>nd</sup> consideration is whether he is entitled to get an acre out of the estate based on the agreement.

### **Section 8(1) of the Land Control Act**

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto:

**Section 6 of Land Control Act provides:-**

**1. Each of the following transanctions that is to say –**

**a. The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area.**

**b. The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and use of Land (planning)Regulations, 1961 (L. N. 516/1961) for the time being apply:**

**c. The issue, sale transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,**

**Is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

### **Section 7 of the Land Control Act**

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

24. Pursuant to the provisions of **Section 6 of the Land Control Act**, there must be consent to transfer. Where consent was not obtained, the agreement of the parties became null and void after 6 months, pursuant to **Section 8 of the Land Control Act**. That agreement cannot be enforced and the only remedy for a transaction that has become null and void is for a refund, recoverable as a debt, as provided by **Section 7 of the Land Control Act**.

25. The sale transaction was void for all purposes as no consent had been given by the Land Control Board within the required time and the applicant is therefore only entitled to a refund of the purchase price, upon prove of the sum paid.

26. The Court of Appeal in the case of David Sironga Ole Tukai –v- Francis Arap Muge reiterate that where consent of the Land Control Board is not obtained, the transaction is void for all purposes. A void contract cannot entitle a party to recover land.

**27. Section 4(1) of the Limitation of Actions Act provides:-** \_\_\_\_\_

**“The following actions may not be brought after the end of six years from the date on which the cause of action accrued.”**

28. Since the applicant has not stated when the cause of action accrued, it must be construed that the cause of action arose from the date the grant which he seeks to revoke was confirmed. This was on 9/8/1996. **Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya** provides:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person”.**

29. The applicant filed Succession Cause No. 27/1993. This is the date when the cause of action accrued. At the time of filing the application for revocation of grant in 2013 the claim to recover land was time barred. It is also true that the claim to recover land by the applicant was res judicata. This is based on the fact that the applicant had filed Land Disputes Tribunal Case No. 56/2007. In the Senior Resident Magistrate Court Kerugoya. An appeal was filed in the Appeals Tribunal against an award which awarded him one acre piece of land from the Land Parcel No. Inoi/Kariko/270. The Appeals Tribunal uphold the grant in Cause No. 354/1994. The award was set aside by an order of the Magistrate dated 9/12/2009 Annexure BMM19 and BMM 16 and BMM-2-. The decision of the Trial Magistrate was appealable to the High Court. The applicant did not appeal. The decision of the trial Magistrate sealed the applicant’s claim to recover land after the expiry of the time provided for appeal which is 30 days. **Section 7 of the Civil Procedure Act** provides:-

**“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.”**

30. The Land disputes Tribunal which case is the former suit which was on the same subject matter and the same parties which was finally determined by the order of the Magistrate setting aside the award on 17/12/09. The court was competent to issue the order. The matter fall in all fours under **Section -7- of the Civil Procedure Act**. The claim is re judicata.

31. The claim based on contract was not only time barred at the time the applicant filed application for revocation of grant on 8/3/2013 but was also ‘res judicata’.

For these reasons I find that:-

- i. The application for revocation of grant I without merits.**
- ii. The application is dismissed.**
- iii. Costs to the respondents.**

**Dated at Kerugoya this 21<sup>st</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**