



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MISC SUCCESSION CAUSE NO. 28'B' OF 2013**

**IN THE MATTER OF THE ESTATE OF NGARE GIKUNJU Alias NGARI GIKUNJU (DCD)**

**MADRINE WARWARE.....APPLICANT**

**V E R S U S**

**HENRY KABIRU W. WARUHIU.....1<sup>ST</sup> RESPONDENT**

**LYDIA WARWARE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Ngare Gikunju alias Ngari Gikunju deceased. A grant of letters of administration to his estate which comprised land parcel No. Mutira/Kirimunge/870 was confirmed on 3/6/09. The estate devolved to Henry Kabiru (whole share).

2. The applicant, Madrine Warware has filed an application dated 19/2/2010 seeking an order that the grant which was confirmed on 3/6/2009 be revoked and or annulled on the grounds that the proceedings to obtain the grant were defective in substance and the grant was obtained fraudulently by making a false statement or the concealment from the court something material to the case by the respondents.

3. That the proceedings to obtain the grant were defective in substance and the grant was obtained fraudulently. The grounds are that –

**a) That the grant confirmed on 3/6/2009 be revoked and/or annulled on the grounds that the proceedings to obtain the same were defective in substance and the grant was obtained fraudulently by making of a false statement or the concealment from the court of something material to the case by the respondents herein.**

**b) That the proceedings to obtain the same were defective in substance and the grant was obtained fraudulently by making of a false statement of the concealment from the court of something material to the case by the respondent herein.**

4. The suit land **Mutira/Kirimunge/870** was the subject matter of the **LDT Case No. 37 of 1997** and the respondent Lydia Warware was present and gave evidence. The suit land was in the names of Ngare Gikuyu and he had transferred it to Johnson Wanjohi Kinyenye but the transfer was nullified. The award read in the presence of all parties declared the suit land belonging to Ambui clan and therefore belongs to Francis Ngigi Mathia. The award was adopted as judgment of the court in **Baricho LDT No. 6 of 2003**.

5. Despite the judgment, the respondent filed **Succession Cause No. 18 of 2009** in respect of the deceased Ngare Gikunju and his estate **Mutira/Kirimunge/870** which grant was confirmed in the names of Henry Kabiru Waruhie. That the introductory letter from Chief Kanyeki-ini location was confirmed not to be authentic. In addition, the grant was confirmed in less than 2 months in absence of any application to court to reduce the said period.

6. The 1<sup>st</sup> respondent Henry Kabiru opposed the application and filed a replying affidavit sworn on 11/5/2010. He states as follows:

In his replying affidavit, the 1<sup>st</sup> respondent stated that the applicant has already filed Succession no. 116 of 2007 and there is no mention of the subject land Mutira/Kirimunge/870. That the land dispute tribunal case was null and void since the tribunal illegally dealt with issues pertaining to title registered under Cap300. In addition, the award was adopted while Francis Ngigi Mathia was deceased. That he rightfully bought the suit land from the 2<sup>nd</sup> respondent who is the only beneficiary to the estate of Ngare Gikunju. That when the succession cause was taken out in 2009, the deceased was the registered proprietor of the suit land and the 2<sup>nd</sup> respondent was the only beneficiary.

7. The second respondent never filed a Replying affidavit. He was represented by I. Nganga Advocate who on 21/11/2018 informed the

court that he had lost contact with his client but was ready to proceed.

8. The applicant testified in court and was cross-examined. The 1<sup>st</sup> respondent did not adduce evidence but his counsel applied to rely on his affidavit. The court allowed the application but with caution since the court had given directions that the matter be heard by way of viva voce evidence and he was not cross-examined.

9. The parties agreed to file written submissions. The applicant filed submissions through his advocate, Ramadhani M. Abubakar on 4/12/2018. No submissions were filed by the respondent.

10. The applicant filed submissions and urged the court to consider that the suit land is within the jurisdiction of Baricho Law Courts and the deceased and parties thereto are Residents within the jurisdiction of Baricho Law Courts. The parties failed to disclose that there was a decree in favour of Francis Ngigi Mathia, the applicant's husband which remains unchallenged. That the introduction letter by Chief of Kanyekii Location was a forgery. The grant was confirmed in favour of a person who was not named in the Chief's letter and in P & A forms. The grant was confirmed in less than two months in absence of any application to the court to reduce the said period contrary to the Law of Succession Act which requires confirmation to be after six months. The property subject to the succession cause was not part of the estate of the deceased Ngare Gikunju alias Ngari Gikunju by virtue of a decree of the court and so the property Mutira/Kirimunge/870 should not have been included as part of the estate. He prays that the grant be revoked.

11. I have considered the application, the affidavits and the submissions. This has no doubt been a protracted dispute which has been in the Land Disputes Tribunal and the courts.

12. The issue which arises for determination is revocation of grant. The Law of Succession Act provides for revocation of grant where the proceedings to obtain the grant were defective in substance, was obtained fraudulently and through concealment from court of something material and making of false statement. **Section 76 of the Law of Succession Act** provides:-

**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***

13. The applicant depones that the 2<sup>nd</sup> respondent failed to disclose that there was a dispute over Land Parcel No. Mutira/Kirimunge/870 which was heard and determined by the Land Dispute Tribunal Case No. 37/1997 whose Judgment was that land Parcel No. Mutira/Kirimunge/870 belongs to Francis Ngigi Maathia who should succeed Githinji Mathia. The award was adopted in Land Dispute Tribunal case No. 6/2003 at the Resident Magistrate's Court Baricho and there has been no appeal. The decree is annexure MW5. That at the time of filing the succession cause No. 18/02 the 2<sup>nd</sup> respondent was aware that the land belongs to Francis Ngigi Mathia.

14. The Award of the Land Disputes Tribunal in Tribunal Case No. 37/97 annexure MW-3- shows that the decision was that the Land parcel No. Mutira/Kirimunge/870 belongs to Ngigi Mathia. The award of the tribunal was adopted as the order of the court and a decree was issued, **Annexure MW-5-**

15. At the time the decree was passed the land was registered in the name of Ngari Gikunju, **annexure MW3**. Ngari Gikunju had transferred the suit land to Johnson Wanjohi Kinyenye. However the said transfer was nullified by a court order dated 25/3/95 which was by consent before Senior Resident Magistrate Kerugoya. **Annexure MW4** and Johnson Wanjohi Kinyenye was ordered to vacate the land or be evicted.

16. It would mean that after the transfer was cancelled the land remained in the name of Ngare Gikunju.

17. The second respondent filed succession cause No. 18/2009 at Gichugu Law Courts and obtained a grant which was confirmed on 3/6/2009 giving the whole share in land parcel No. Mutira/Kirimunge/870 to Henry Kabiru Waruhiu.

18. From the foregoing it is clear that at the time of filing the succession cause No. 18/2009 at Gichugu, the 2<sup>nd</sup> respondent was aware of the fact that there was a decree which had awarded the land to Francis Ngigi Mathia. It therefore follows that the 2<sup>nd</sup> respondent obtained the grant fraudulently by concealment from court something which was material to the case.

19. At the time the respondent filed the succession, a decree of the court had awarded the land to the applicants husband. A question arises as to whether at the time of filing the succession cause, the land belonged to the deceased Ngare Gikunju and whether it was property which could devolve to his beneficiaries. What was the effect of the decree which had ordered that the land belongs to somebody else other than the deceased to whom the estate related.

20. The civil procedure act defines a decree as follows:-

***“means the formal expression of an adjudication so far as regards the court expressing it conclusively determines the rights of***

*the parties with regard to all or any of the matters in controversy in the suit and may be either pre-liminary or final, it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91 but does not include –*

*a) any adjudication from which an appeal lies as an appeal from an order, or,*

*b) any order of dismissal for default.*

*Provided that for the purpose of appeal decree includes judgment and Judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up “(emphasis mine).*

21. There has been no appeal. The ownership dispute over Land parcel No. Mutira/Kirimunge/870 was conclusively determined when the decree was issued. My view is that the decree issued in the Land Dispute Tribunal Case No. 6/2003 stands as an encumbrance over the title. Encumbrance is defined as an impediment or burden, or a hindrance obstacle and so on. With regard to land an encumbrance is a claim against the property by a party who is not an owner and can impact on the transferability of the property and restrict its free use until the encumbrance is lifted.

22. A succession court is restricted when dealing with estates of the deceased and can only deal with the free estate of the deceased. **Section 2 of the Law of Succession Act** defines estate to mean –

**“means the free property of a deceased person”.**

23. My finding is that since there was a decree which had determined that the land did not belong to Ngare Gikunju and 2<sup>nd</sup> respondent was aware of the decree having participated in the proceedings before the Land Disputes Tribunal, the property land Parcel No. Mutira/Kirimunge/870 was not a free property of the deceased. The proceedings in the Baricho Succession Cause No. 18/2009 where the impugned grant was issued were therefore defective in substance.

24. Where a decree has been issued declaring ownership, the decree is sufficient and can be used to transfer ownership. What was pending was the transfer of the land to Francis Ngari Mathia as ownership had been determined.

25. The 2<sup>nd</sup> respondent filed the succession cause at Gichugu whereas the court with jurisdiction was Baricho. The 1<sup>st</sup> respondent Henry W. Waruhie was not a petitioner, the letter from the Chief dated 19/3/2009 was a forgery as the Chief confirmed that it was not issued by his office, **annexure MW-7, 8 & 9**. The letter did not mention the 1<sup>st</sup> respondent as a beneficiary of the deceased. Though 1<sup>st</sup> respondent was mentioned in form -9-, it was not stated what relationship he had with the deceased.

26. The question is why the 2<sup>nd</sup> respondent would file the case in Gichugu when the land is in Baricho where there is a court with Jurisdiction. This could only be in furtherance of fraudulent acts. It should also not escape from this court that the grant was confirmed within a period of two months without any application being made. **Section 71(3) of the Law of Succession Act** provides that:-

**“The court may on application of holder of a grant of representation direct that the grant be confirmed before the expiry of six months from the date of the grant if it is satisfied -----“**

This implies that a party must file a formal application before the Judge giving reasons why the grant should be confirmed before the stipulated period of six months. The court would then exercise jurisdiction to allow the application or not.

27. Under **Section 71(1)** the grant is confirmed after expiry of six months unless the court directs it be confirmed within a shorter period on application under **Section 71(3)**.

28. The confirmation of the grant within a two months without an application was irregular and further shows that the proceedings to obtain the grant were defective as they were contrary to the express provisions of the **Law of Succession Act**.

29. The respondent depones that he bought the land from the 2<sup>nd</sup> respondent. This contradicts the grant as the proceedings in the succession cause do not indicate that he was a buyer but a beneficiary. He further depones that the proceedings before the Land Disputes Tribunal were null and void as the tribunal had no jurisdiction as the land had title and the award was adopted while the said Francis Mathia Ngigi was deceased.

30. I have considered the averments by the respondents and find that the jurisdiction of this court is limited in its scope to intestate and testamentary succession and the administration of estates of deceased persons. The preamble to the **Law of Succession Act** provides:-

**“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purpose connected there with and incidental thereto”**

The issues raised by the respondent are matters which are best argued in the court seized with jurisdiction to deal with land disputes which is the Environment and Land Court.

31. I find that the applicant has proved that the grant was obtained through concealment of material facts and in proceedings which were defective in substance and fraudulently as there was no application to confirm it before the expiry of six months. These are sufficient

grounds to warrant this court to order the revocation of grant as provided under **Section 76 of the Law of Succession Act** which I have cited(supra).

32. For these reasons, I find that the application has merits. I allow the application and order that the grant which was confirmed on 3/6/09 in the Principal Magistrate's court at Gichugu be revoked. I award the costs to the applicant.

**Dated at Kerugoya this 26<sup>th</sup> day of June 2019.**

**L. W. GITARI**

**JUDGE**