



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 506 OF 2011

IN THE MATTER OF THE ESTATE OF MURAGURI MURATHU (DECEASED)

JAMES MURATHU MURAGURI.....PETITIONER/RESPONDENT

VERSUS

WILSON GIOCHE MBARIA.....OBJECTOR/APPLICANT

JUDGEMENT

1. By way of a summons for revocation and annulment of grant under **S.76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**, Wilson Gioche Mbaria seeks orders that the Grant of letters of Administration issued to Murathu Muraguri on the 10/10/12 be revoked and/or annulled on grounds;

1. That the proceedings to obtain the Grant were defective in substance.

2. That the Grant was obtained fraudulently by making of a false statement or by the concealment from the court of some material to the case.

3. 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.

4. That the costs be awarded to the applicant.

2. The summons is further supported by the affidavit of the applicant sworn on the 9/5/17.

3. The application is opposed and a replying affidavit by James Murathu Muraguri is on record.

4. Directions were taken that the matter proceeds by way of oral evidence. The applicant testified and also called Francis Karemeri Kamangara as a witness while the petitioner/respondent testified without calling other evidence.

5. The applicant's case, in a nutshell, is that he is the administrator of the estate of Mbaria Ndere. He produced an agreement dated 9/6/1970 which was written in Kikuyu language and which had been interpreted into English. He also produced an agreement dated 15/11/73 and another dated 7/11/01.

6. Those exhibits are in support that Mbaria Ndere (deceased) had purchased land from Muraguri Murathu. Mbaria was not educated and with the trust among persons during that time, no signatures were appended in the agreements. Mbaria took possession of the land. He was actually buried on the land upon his demise. The land was 14.3 acres.

7. When the petitioner sought letters of administration, he never involved Mbaria and his family yet they were interested parties.

8. Mbaria lodged a summons for revocation which was taken over by the applicant when Mbaria died.

9. PW 2 told the court that he was the author of exhibit 4 which is a sale of land agreement where Mbaria Ndere was purchasing land from Muraguri Murathu (deceased). It is dated 9/6/1970 and Sh. 1240 and a goat was given by Mbaria Ndere. The money was received on behalf of the seller by Shadrack Mwangi. Of all the persons present only PW 2 is alive.

10. PW 2 added that Muraguri Murathu never lived on that land and he never built on the land. He confirmed that he was a neighbour to the family of Mbaria Ndere which lived on the land.

11. In his testimony, the petitioner stated that L.R NO. LOC 19/Gacharageini/735 has always been owned by Muraguri Murathu (deceased) and the applicant has no beneficial interest in the land. He adds that the agreement relied on cannot be genuine documents as Muraguri Murathu never informed his family of any such sale agreement between himself and the said Mbaria Ndere.

12. He added that it is only Mbaria Ndere's mother who had been given a bare occupation licence on the suit in 1969 by the deceased herein which licence expired upon her death.

13. Since Muraguri Murathu did not sign the agreements, they cannot be binding on him.

14. Both parties filed written submissions.

15. I have had an occasion to consider the summons for revocation and/or annulment of grant, the affidavit and oral evidence as well as the submissions by counsel.

16. Of determination is;

1. Whether the grant herein ought to be revoked on the basis that the petitioner concealed the fact that Mbaria Ndere (and his family) were beneficiaries (creditor) in respect of the estate of Muraguri Murathu having purchased LR No. Loc 19/Gacharageini/735.

2. Based on the answer to 1 above, what orders should lie.

17. S.76 of the Law of Succession Act provides;

“S.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.”

18. For the applicant to succeed, he had the burden of proof to demonstrate that Mbaria Ndere had an interest in LR Loc 9/Gacharageini/735 through a purchase from Muraguri Murathu which interest the petitioner was aware of.

19. The balance of proof in civil cases is on the balance of probability. This is expounded in the decision in **Kanyungu Njogu –Vs- Daniel Kimani Maingi [2000]eKLR** where the court held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, that **one probability was more probable than the other.**

20. In our instant suit the applicant has tendered evidence of agreements showing transaction relating to the land between Mbaria Ndere and Muraguri Murathu.

21. The said agreements are not as formal as would be expected in such a transaction in this day and age. But I take judicial notice of the levels of trust among the general populace in the time and the literacy standards then.

22. The applicant has been able to show that there was a land transaction between Mbaria Ndere and Muraguri Murathu and the same was recorded in what is clearly very old note books and the intentions of the parties are clear.

23. Further, there is uncontroverted evidence that Mbaria Ndere and his family have been on the suit land for ages. Mbaria himself was buried there. When Muraguri Murathu died, he was not buried on this land.

24. In what is the clearest indication that the petitioner herein knew of Mbaria Ndere's interest in LR No. Loc 19/Gacharageini/735 and ought to have disclosed it to the court is found in the certificate of official search dated 9/2/11 and which the petitioner annexed to his petition lodged on 23/2/12 gives the information that Mbaria Ndere is recorded as having lodged a caution claiming a purchaser interest in the land. There is also one John Mureithi also claiming a purchaser interest.

25. I countering the evidence, the petitioner indicates that the land could not have been sold as Muraguri Murathu never told his family about it. He states that the agreements were not signed and they are thus forgeries.

26. Suffice it to note that the petitioner cannot authoritatively speak to the authenticity of the agreements between his father at the time stated as he was about 12 years by the time the agreements were entered into.

27. I have stated above that the agreements relied on fall short of the formal agreement for sale of land that we would expect in this age and time. But noting the time and environment within which the agreements were made and as alluded to above the levels of trust and literacy in society, such agreements would suffice by the standards of that time and age.

28. Weighing the evidence before me I am satisfied that on a balance of probability the applicant has demonstrated that the petitioner was aware of Mbaria Ndere's interest in LR No. Loc 19/Gacharageini/735 and ought to have disclosed it to the court at the time he petitioned for letters of administration.

29. Having so found, what, then, is the effect of the failure by the petitioner to include Mbaria Ndere (and his family) as persons with interest on the suit land?

30. In **re Estate of Julius Ndubi Javan (Deceased) [2018]eKLR**, the applicant had bought land LR No. Nyaki/Mulathankari/2244 from the deceased. The consideration was Kshs. 365,000 and he had paid over Kshs. 322,800. He had taken possession of the land and he lived on the land. Deceased, passed on before transfer could be effected. When the administrator of the estate applied for confirmation of grant without including the interest of the applicant the court stated;

“Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement, between the deceased and the applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law. I will give ample justification for taking this position.”

31. The court went on to state;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant. [underlining mine for emphasis]

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the

applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71(2)(a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under section 71(2)(b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given.

(8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

(9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

32. In our instant suit, the petitioner knew that Mbaria Maina was in occupation of LR Loc 19/Gacharageini/735 and they laid a claim on the land. Such material facts were not disclosed to the court at confirmation stage so as to enable the court make an informed decision on distribution of the estate. **S.76 of the Law of Succession Act** requires that where there is a concealment of something material to the case or where there is the making of a false statement in the application for a grant, such a grant is to be revoked.

33. It is my finding that the applicant herein has made out a case for the revocation of grant.

34. Based on this finding, what orders should lie?

35. It emerged that there is a dispute over the ownership of parcel of land No. Loc 19/Gacharageini/735. Under **Order 37 of the Civil Procedure Rules**, the claim by the applicant should be set aside from the succession proceedings to abide the determination of the question in appropriate proceedings.

34. To that extent therefore, and for reasons above stated, I find the summons herein wholly successful and allow the same and make the following orders;

1. The grant issued to James Murathu Muraguri on 10th of October 2012 is revoked.
2. That the petitioner be at liberty to continue with the administration of the estate of the deceased in respect of any other asset other than LR NO. LOC 19/Gacharageini/735.
3. The applicant herein be at liberty to institute proceedings before the right forum within 120 days.
4. An inhibition is hereby issued against the subject land pending any further orders of a court of proper jurisdiction.
5. Each party to bear its own costs.

Dated and Signed at Kisii this 18th day of October 2019.

A.K NDUNG'U

JUDGE

Delivered at Nakuru this 30th day of October 2019.

R. NG'ETICH

JUDGE