



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 449 OF 2014

IN THE MATTER OF THE ESTATE OF NJIRU VENGI (DECEASED)

MNB.....APPLICANT

VERSUS

TERESIA IGANDU NJIRU.....PETITIONER/RESPONDENT

R U L I N G

A. Introduction

1. The applicant herein seeks to revoke the grant made to the respondent on the 28/07/2014 and confirmed on the 8/10/2015. The summons is based on grounds that the grant was obtained fraudulently by concealment from the court of the fact that the suit land; that land parcel No. Gaturi/Nembure/xxx was always ancestral land where the whole extended family of the parents of the deceased had lived and continue to live to date and as such the deceased held the suit land in trust for himself and his father's house.
2. The applicant further state that the grant was obtained secretly without informing all the beneficiaries who were and are still living on the said land.
3. In his testimony, the applicant testified that he was born and grew up on the suit land with his late parents and that the land was registered in the name of the deceased in 1961 when he was twelve (12 years old). He further testified that his parents died and were buried on the suit land. Further, the applicant testified that he and each of his siblings including the deceased were shown their individual portions on the suit land which they cultivate. The applicant further testified that he was in possession of the original title deed of the suit land which he had been given by his late mother prior to her death. PW2 corroborated the applicant's evidence on the issue of customary trust.
4. In rejoinder, the respondent stated that the suit land was not ancestral land but land given to the deceased by the Marigu Clan who became the 1st registered owner. Further, the respondent states that the applicant has land elsewhere but continues to forcefully occupy the suit property.
5. The respondent further testified that her parent's in law continued to live on the suit property with the permission of the deceased and that is why they were buried on the suit property. Further, the respondent stated that the deceased was registered as the owner of the suit land in 1961 and as such any one with a claim to the suit property should have raised the same during the lifetime of the deceased who passed only in 1997.
6. The respondent further stated that she informed all the deceased's beneficiaries prior to commencing the probate proceedings but did not inform the applicant for he is not a beneficiary of the deceased. The respondent further stated that this court lacked jurisdiction to entertain a suit based on trust land and only the Environment and Land Court could determine such an issue.

B. Analysis & Determination

7. I have considered the evidence and submissions by both parties in support of their respective cases.
8. It is the applicant's case that the respondent proceeded to obtain the grant over the deceased's estate without involving him and his siblings who currently reside in the suit land. It is the respondent's case that the deceased held the suit land in trust for and his siblings who include the applicant. It is not in dispute that the deceased is registered as the proprietor over the suit land, a registration that was done in 1961. The respondent opposes the summons for revocation on the grounds that the suit land was registered in the name of the deceased who was her husband and as such the only beneficiaries who she was obligated to involve prior to instituting the probate proceedings are her children with the deceased and not the applicant.

9. Under section 26(1) of the Land Registration Act the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

10. I note that the grant was given to the respondent in the estate of her late husband. Under Section 66 of the Law of Succession Act, the respondent ranks higher in priority to apply for letters of administration intestate. The applicant in this case being a brother of the deceased ranks lower.

11. The applicant has not demonstrated that the grant was obtained fraudulently or with non-disclosure of any material facts considering the fact that the estate was that of the respondent's husband.

12. For these reasons, I find that the applicant has not satisfied this court on any of the grounds set out under Section 76 of the Law of Succession Act and as such this application must fail.

13. It is important to note that both parties agree that the applicant and his siblings live on the land in issue LR. Gatari/Nembure/xxx and were brought up there by their parents. The respondent claims that the land in issue was clan land and was registered in the name of the deceased in 1961 to hold in trust for himself and his parents and siblings.

14. The respondent claim that the land originally belonged to the grandfather of the parties who shared it out to the deceased and one Hillum Njiru. The land given to Hillum Njiru was the share of the family of the applicant but part of it has since been sold by the mother of the applicant.

15. The respondent has raised the issue of trust which this court has no jurisdiction to determine. The Land and Environment Court (ELC) is vested with the jurisdiction to hear and determine land disputes. The applicant and his siblings may lodge their claim in the ELC court for determination.

16. The issue of trustees can only be addressed under Rule 41(3) of the Probate and Administration Rules, which provides:

“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 proceeded to confirm the grant.”

17. Since the grant has already been confirmed in favour of the respondent, the court will direct that LR. Gatari/Nembure/xxx be preserved pending the filing of the applicants claim in the ELC court.

18. Consequently, I hereby make the following orders: -

a) That the summons for revocation is hereby dismissed for lack of merit.

b) That the grant is hereby stayed for thirty (30) days pending the filing of the suit, if any, by the applicant in the court of competent jurisdiction.

c) That each party meet their own costs of the suit.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kahare for Fatuma for Applicant

Applicant present