



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO.392 OF 2013

IN THE MATTER OF THE ESTATE OF MBUI KABUGIDECEASED

BELINDAH KARIUKO MITAMBOAPPLICANT

VERSUS

KAGONDU MBUI1ST RESPONDENT

JOSEPH MWANIKI MUCHIRI2ND RESPONDENT

CHARITY WANGARE NJAGI3RD RESPONDENT

JUDGMENT

1. This matter relates to the estate of MBUI KABUGI deceased who died intestate on 1.1.1982. The 1st Respondent KAGONDU MBUI commenced proceedings on the lower court in 1992 in respect of the estate of her deceased husband MBUI KABUGI. The deceased was survived by his wife who was the Petitioner in lower court and the 1st Respondent in this application. The deceased was also survived by his five daughters. The only son of deceased MITAMBO MBUI predeceased his father and was survived by his widow and some children.

2. A grant of Letters of Administration was issued to KAGONDU MBUI and was confirmed on 20.7.1993. The estate of the deceased which was BARAGWE/KARIRU/364 was distributed as follows;

• **BARAGWE/KARIRU/1167**

KAGONDU MBUI - 4 ACRES

• **BARAGWE/KARIRU/1168**

GITARI MITAMBO - 3 ACRES JOINTLY

NJAGI MITAMBO

BELINDA KARIUKO MITAMBO

• **BARAGWE/KARIRU/1169**

JOSEPH MWANIKI MUCHIRA - 3 ACRES

3. From the submissions by Mr. Muchiri for the Respondents it is stated that KAGONDU MBUI died before the commencement of the hearing of this application. BELINDA KARIUKO MITAMBO died much later after testifying. She was substituted by her daughter JOYCE WAIRIMU GACHOKI.

4. BELINDA KARIUKO filed an application for revocation of grant dated 30.9.1993.

APPLICANT'S CASE

The applicant's claim that the petitioner failed to provide for her other 3 grandchildren. That Joseph Mwaniki Muchiru is a total stranger to

their family and ought not to be given land. That she has been in exclusive possession of the whole land before and after sub-division and the petitioner obtained the grant after concealment of the full extent of her entitlement. That she is a daughter in law of the deceased and wife to his deceased's son and the petitioner failed to serve her with citation before obtaining the grant. That she ought to inherit the whole estate for herself and her children. And the petitioner was only entitled to enjoy a life interest according to kikuyu customary law. That the respondents have transferred **BARAGWE/KARIRU/1167 and 1169** to Evans Njagi Njure.

5. 1ST RESPONDENT'S CASE

In her response, she claimed to be the widow of the deceased and filed succession proceeding vide **Kerugoya Succession Cause No. 233 of 1992**. That the applicant was aware of her filing the proceedings and kept her informed of the progress until the grant was confirmed. She had informed her that she would get 2 acres together with her sons, the 2nd respondent 3 acres which she had sold to him to enable her meet costs of the succession proceedings and she was agreeable to it. That she had a right to a share in the deceased's land and a right to sell the portion to enable her meet the costs of the succession proceedings and to administer the estate.

6. 3RD RESPONDENT'S CASE

In his response, he stated that he bought **BARAGWE/KARIRU/1167 and 1169** between June 1996 and August 1999 vide two separate sale transactions. He obtained the relevant consents and the applicant did not object to the transfers. That he was issued with Title deeds as a bona fide purchaser for value.

Law of Succession Cap 160 came into operation on 1st July, 1981. The deceased passed away on 1.1.1982 after the commencement of the Act therefore the Act is applicable for administration of his estate. Section 2(2) of the Act provides that;

The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

The issue of the deceased dependants is not in dispute, the 1st respondent was the widow while the applicant was a daughter-in-law having been married to his son who is deceased. The 2nd respondent was a purchaser before the confirmation of grant was issued.

7. As per the evidence adduced in court, the 1st respondent was the widow of the deceased and together they had 6 children, five daughters and one son. The said son called MITAMBO MBUI is deceased and was the husband of the applicant herein and they had been blessed with 5 children, 1 boy and 4 girls. The 1st respondent had obtain confirmation of grant of her husband's estate **BARAGWE/KARIRU/364** which was sub-divided into 3 portions. The 1st respondent sold the estate to the 2nd respondent before confirmation of grant in order to assist her in meeting the costs of the succession proceedings. Thereafter the 1st and 2nd respondents sold their portions to the 3rd respondents.

8. ISSUES ARISING;

1. SALE BEFORE CONFIRMATION OF GRANT

Under **Section 82 of Law of Succession Act**, the personal representatives shall not sell any of the deceased's estate before confirmation of grant. It states:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers –

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(ii) no immovable property shall be sold before confirmation of the grant;

9. A contract to sell land which form the estate of the deceased or any purported sale before the confirmation of grant is null and void and it goes against the express and mandatory provisions of Section 82 of the Law of Succession Act. It is an act of intermeddling with the estate which is a criminal Act punishable as provided under Section 45 of the Law of succession Act. It provides;

No intermeddling with property of deceased person (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

10. The purported sale of the land by the 1st Respondent before the confirmation of grant was intermeddling with the estate of the deceased. The purported sale before confirmation of grant does not give title to the purchaser as the person was not the registered owner and could not

give good title. Under *section 35 of the Act* the widow had a lifetime interest and had no capacity to sell.

Getruda Atsieno Ouma v Peter Joseph Osogo & 3 others [2016] eKLR

In a case where the objectors bought land before confirmation of grant, the court held;

“...if the Objectors have a good and valid claim, then they should seek to enforce their claim against the Deceased Estate in a civil suit before the Environment and Land Court.”

In ***Re Estate of Michael Gachihi Mbui (Deceased) [2016] eKLR***

In a similar case, the court held;

“The record reveals that the person from whom Ndiritu Gikaria acquired the subject property was not the registered owner thereof, and therefore he could not possibly have had any legal title to convey to him. The said person was neither an administrator of the estate of the deceased, and therefore he could not possibly transact with him over estate property. Even if he were an administrator, he would still have had to contend with section 82(b)(ii) of the Law of Succession Act.....

In any event, the claim by Ndiritu Gikaria is not against the estate of the deceased herein, for he never transacted with the deceased, or with the administrators of the estate of the deceased. His claim can only be against the person he transacted with, and should that person be dead, his claim should directed against that person’s estate in a civil suit properly brought before the proper forum, or in a cause relating to the estate of that person.”

11. The sale of the deceased’s estate before confirmation of grant was null and void.

The second consideration is revocation of grant. This is provided under section 76 of the Law of Succession Act. It provides;

REVOCAION OF GRANT

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

12. The court will revoke a grant if it is proved that the proceeding to obtain the grant were defective in substance, the grant was obtained fraudulently by making of a false statement that the grant was obtained by means of untrue allegation of a fact or by concealment from the court of something material to the case.

13. A party needs only to prove any one of these grounds or he may prove all of these grounds. The applicant testified and called two witnesses in support of her case that she was not involved in the proceedings. Her evidence was confirmed by the 2nd Respondent’s witness BERTHA MUTHONI NDAMBIRI. She confirmed that the applicant did not attend a meeting at the Chief’s office and she did not attend court. There was no evidence to show that the applicant participated in the succession cause. The proceedings were defective as the Respondent made false statements and concealed material facts from the court.

14. It is pointed out that the estate was distributed to a stranger that is the 2nd Respondent who was not a beneficiary to the estate of the deceased. The 2nd Respondent was purchaser who stated that he drafted the sale agreement and the price was paid in cash.

15. It is submitted that the 1st Respondent only had a life interest and had no capacity to dispose off any part of the estate. With these grounds the applicant has established sufficient grounds to warrant this court to order a revocation of grant. The grant was obtained fraudulently and by means of untrue allegation as a stranger to the estate was listed as a beneficiary and was given a big chunk of land.

16. The Counsel for the Respondent has argued that the 1st Respondent informed the applicant of the date for court appearance through her son in law NDAMBIRI MARAGWA but the applicant chose never to attend. There was no evidence tendered to show that she was ever informed. The mode of informing the applicant through another person is not an acceptable mode of service. The fact that the applicant never appeared in court is prove that she was never informed.

17. The Counsel for the Respondent has also raised the issue that the 1st Respondent and applicant were not substituted and therefore the application for revocation is incompetent. ***Section 76 of the Law of Succession Act*** gives Court wide powers to order the revocation of grant. Under the sections the court can order a grant to be revoked ether on an application by any interested party or of its own motion. The court can order revocation of grant even without being moved by any party.

My view is that though the applicant and the 1st Respondent are deceased the court is nevertheless clothed with jurisdiction to consider the application and issue appropriate orders.

18. The Counsel for the Respondent urged the court to find and hold that the issues raised by the application were procedural technicalities which did not prejudice the application in any way and that justice was done to the applicant and invoke the relevant provisions of Rule 73 Probate and Administration Rules and Article 159 2 (d) of the constitution and uphold the grant. He referred this court to the case of **Peter Karumbi Keingati & 4 Others Vs. Dr. Anne Nyokabi & 4 Others Application No.235/2014 Court of Appeal.**

19. I have considered the submission that the court do ignore the irregularities and dismiss them as technicalities. The irregularities cannot be dismissed as procedural technicalities. It would be setting a bad precedent by allowing a party to get away with criminal acts of intermeddling with the estate of the deceased and distributing a large portion of the estate to persons who are not beneficiaries entitled to the estate. The court must say not to such impunity by putting things right and ensuring strict compliance with the law. The application for revocation of grant has merits. **Section 76 of the Law of succession Act** provides that the grant may at anytime be revoked or annulled. I order that the grant confirmed on 20.7.1993 be revoked. The applicant or her personal representatives shall move the court appropriately for confirmation of a fresh grant.

Each party to bear its own costs.

Dated at KERUGOYA this 20th day of December, 2019.

L.W. GITARI

JUDGE