



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 1 OF 2002

IN THE MATTER OF THE ESTATE OF JAMES MUIRURI KAMAU - DECEASED

LUCY WATAI KAMAU

GRACE NJERI KAMAU

MARTHER WAMBUI NDUNG'U

ELIZABETH WANGARI KAMAU.....APPLICANTS

HELLEN WAMBUI KAMAU

AGNES WANJIRU KAMAU

DORCAS WANJIRA KAMAU

- VERSUS -

LUCY WAWIRA MUIRURI.....1ST RESPONDENT

HANNAH MUTHONI KAMAU.....2ND RESPONDENT

JUDGMENT

1. James Muiruri Kamau died on the 23rd July 2001. A grant of letters of administration was issued to Lucy Wawira Muiruri and Hannah Muthoni Kamau and confirmed on 20th April 2007.
2. Lucy Watai Kamau, Grace Njeri Kamau, Marther Wambui Ndung'u, Elizabeth Wangari Kamau, Hellen Wambui Kamau, Agnes Wanjiru Kamau and Dorcas Wanjira Kamau took out a summons for revocation or annulment of the said grant on 7th May 2012 which summons was filed in Court on the 9th May 2012.
3. That summons is opposed and on 26th March, 2015, directions were given that the same be disposed of by way of oral evidence.

THE APPLICANTS' CASE

4. The Applicant's case opens with the evidence of Hannah Muthoni Kamau (OW1) who in a strange twist is named as the 2nd Respondent to the summons for revocation or annulment of grant (her being one of the administrators of the estate of James Muiruri Kamau under the now impugned grant).

5. In the evidence, she avers that the deceased was her son. All the Applicants herein, are her children. She states that parcel of land Bahati/Wendo Block 5/51 was at the time of death of the deceased herein, registered in the deceased's name. She was at a loss how this land was transferred to the deceased (her son) yet the land was initially registered in the name of her husband.

6. OW1 adds that at one time there were proceedings before the Land Disputes Tribunal against the 1st Respondent in which her (OW1's husband) stated that the subject land was his. The proceedings are annexed among the list of documents filed. Apparently in those proceedings OW1 was the claimant. Arthur Kamau Muiruri, her husband is listed among persons "present on the claimant" (*sic*). That claim was against Lucy Wawira Muiruri (the 1st Respondent herein) who is a daughter in law to the then claimant (Hannah) and who is also a 2nd Respondent herein. In those proceedings, Arthur Muiruri is quoted as stating that he had transferred the land to the deceased herein to hold as a trustee.

7. It is instructive to note that the conclusion of the tribunal hearings resulted in a finding that the land belongs to Arthur Kamau Muiruri and the tribunal proceeded to order cancellation of title. That, in Law, was certainly an irregular finding and order.

8. On cross examination, OW1 admitted that she and her husband initiated the Succession Cause herein without involving Lucy Wawira Muiruri, the 1st Respondent herein and wife to the deceased.

9. She denied that her husband sold the land at Kshs. 200,000/= to deceased herein. She denied that in her statement she indicated that the land had been transferred to her son to hold in trust.

10. She confirms that her husband had land at Ruguru. It was registered in the husband's names, Arthur Kamau, that at the tribunal, the said Arthur in answer to a question had indicated he had given Land Parcel Number Wendo Block 5/51 to James Muiruri (deceased herein). That land (Ruguru) has since been transferred to her name. That land is 6 acres and is where she lives.

11. She admitted that the grant herein was confirmed by consent.

12. OW2, Peter Kariba Kamau told the court that he is a son in law to Arthur Kamau Muiruri. The said Arthur, who was father to the deceased herein James Muiruri Kamau, told him that he had transferred parcel No. Bahati/Wendo Block 5/51 to James (Deceased) to hold in trust.

13. On cross-examination OW2 when shown a consent issued by the Bahati Land Control Board confirms that the consent was in respect of a sale transaction between Arthur and James and the consideration was Kshs. 200,000/=. He confirms there is nothing thereon to show a trust.

14. OW2 confirms further that the subject land is now subdivided into 2. Lucy holds parcel No. Bahati/Wendo Block 5/185. Hannah (OW1) holds 3 acres at Wendo.

15. Grace Njeri Kamau (OW3) is a sister to the deceased. She told the Court that there was a case at the tribunal where the tribunal confirmed that the subject land was held in trust. By then James, the deceased had died.

THE 1ST PETITIONER'S/RESPONDENT'S CASE

16. The 1st Respondent's case is anchored on her testimony and that of Samuel Kamau Muiruri her son.

17. The 1st Respondent's evidence is that she married the deceased (James) in 1986. They have 2 issues of the marriage being Caroline Karimi and Samwel Kamau.

18. Upon the death of James, her mother-in-law (OW1) petitioned for letters of administration without involving the 1st Respondent and her children. The 1st Respondent petitioned for letters jointly with Arthur Kamau Muiruri in Cause No. 85 of 2002. The Court later ordered 1st Respondent and OW1 to be joint administrators. She (1st Respondent) agreed to cede 3 acres of the subject land and to remain with

3 acres. A consent was signed and grant was so confirmed.

19. The 1st Respondent eventually acquired title to her portion in respect of the new sub-division LR. No. Bahati/Wendo Block 5/185 (3 acres). The other 3 acres were registered in the names of Hannah (OW1).

20. She added that the deceased bought the said land from Arthur Kamau Muiruri, his father. She produced as exhibits a transfer form, consent from the Land Control Board and the title deed to the land. In the consent the consideration is stated as Kshs. 200,000/=.

21. She denied that her husband was a trustee. She stated the land belonged to her husband and she should therefore be allowed to inherit her 3 acres which are now in her name.

22. On cross-examination, she states that she ceded her right to the other 3 acres. This was because she was suffering.

23. Samuel Kamau Muiruri, a son to the deceased herein, said his family was chased away by his grandmother who claimed the 1st Respondent was not married to the deceased. He asked the Court to give them the 3 acres of land at Wendo farm which belonged to his father.

24. At the close of the 1st Respondent's case counsel sought to have the file in respect of Succession Cause No. 85 of 2002 availed to the Court by the Deputy Registrar and I note the Deputy Registrar complied.

SUBMISSIONS

25. Both parties filed written submissions.

26. For the applicants, it is submitted, *inter alia*, that the issues for determination are;

1) Whether the deceased herein was holding the Land Parcel Bahati/Wendo Block 5 (*sic*) (Wendo farm) as a trustee for himself and the applicants herein.

2) Whether the Parcel of Land Bahati/Wendo Block 5 (*sic*) (Wendo Farm) forms part of the deceased's estate.

27. On issue (1) above, counsel makes reference to **Section 126** of the **Registered Land Act Cap 300** (repealed) which provided;

“A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee” but the register shall not enter particulars of any trust in the register”.

28. I am referred to the decision in **Karisa Madumbo Mweni – vs – Kavumbi Kitsano Chengo & 2 Others** where it was amplified that Section 26 of the Registered Land Act provides that there is no need to indicate in the register that one is a trustee but the principle of trust can be inferred from the circumstances of the case. The section does not exclude recognition of a trust provided that it can be established by way of testimony.

29. Reliance is also placed on the holding in **Pius Mugo Njogu – vs – Kirwere Njogu [2015] eKLR** while quoting from **Mbothu and Others – vs – Waitimu and Others 1986 K.L.R 173**, where it was held;

“The Court never implies a trust save in cases of absolute necessity. A party relying on the existence of a trust must lead evidence to prove the same”.

30. Therefore, it matters not that the registration of the deceased as the proprietor of the suit parcel was not so described with the additional words “as trustee” , the same cannot be used as a ground to disinherit the Applicants. His capacity as a trustee can be established by way of cogent testimony and/or evidence.

31. It is urged that the evidence adduced at the tribunal is essential evidence in proving the existence of a trust.

32. The fact that Arthur Kamau Muiruri continued working on the land even after the transfer, it is stated, is prove that the land was held in trust. (See **Wilberforce Muthinga Nguru & Another – vs – Hezron Maina [2016] eKLR**. See also **Section 28** of the **Registered Land Act** (now repealed).

33. Reliance is also placed on the Kikuyu Custom where it is stated that an elder son inherits land to hold in trust for the rest of the family and such is the custom as was exercised by the deceased's father herein when he transferred the land to the deceased for the deceased to only hold in trust for the applicants herein. (See **Henry Mwangi – vs Charles Mwangi C.A. No. 245 of 2004 Nyeri** as quoted in **Pius Mugo Njogu – vs Kirwera Njogu (2015) eKLR**).

34. On whether the subject land formed part of the deceased's estate, counsel submits that the deceased's estate is his free property which property he was legally free to dispose during his lifetime and whose interest in the said property had not and will not be terminated by reason of his death.

35. It is submitted that as a trustee, the deceased's interest in the property was extinguished upon his death.

36. Reference is made to the holding in the **Estate of Salome Mukami Kariuki (Deceased) 2016 eKLR** where the Court stated;

“testator can only therefore freely dispose of such property as belongs to them absolutely or property that they have absolute control over. Property held in trust does not belong absolutely to the trustee; although in law he is the legal owner therefore. He deals with such property subject to the trust. He holds the same for the benefit of others, and he cannot legally deal with it in a manner adverse to the interests of the beneficiaries. The property does not belong to him, so he cannot sell it or gift it in any manner to anybody. He can only deal with it in ways that advance the interests of the beneficiaries. Property held in trust for others, does not belong to the trustee, therefore the same is not free property, and it cannot be disposed of by will... if the said asset was not available for willing away by the deceased and the interest she held in it terminated upon her death. It follows that the same is not available for disposal in succession proceedings, whether testate or intestate. The property was subject to trust. The said trust terminated upon the death of the trustee, meaning therefore that the property thereafter reverted to the children of the marriage...”

37. It is the Applicants' conclusion that the grant herein was obtained fraudulently by the making of a false statement of fact and by concealment from the Court of something material to the case and by means of an untrue allegation of a fact essential in point of Law to justify the same. It is only fair and just that the grant be revoked.

THE 1ST RESPONDENT'S SUBMISSIONS

38. Counsel for the 1st Respondent summarises the issue for determination as;

1. Whether the Applicants are entitled to orders sought for revocation of grant.

39. It is urged that the Applicants anchored their application on grounds that the grant was obtained fraudulently by making a false statement and concealment of material fact from the Court and that the grant was obtained by means of an untrue allegation of fact to justify the grant.

40. The Applicants' case is thus that the 1st Respondent concealed facts in obtaining the letters of administration. They claim that their father gave the land to the deceased to hold in trust for them and it should not have formed part of the estate. They also claim they were unaware of the succession cause.

41. It is the Respondent's case that this is a cause in which the applicants parents have actively participated. Initially, the parents attempted to take out letters of administration excluding the 1st Respondent. The 1st Respondent on hearing this filed her own petition which petition the said parents sought to join as co-administrators. All this time Land Parcel no. Bahati/Wendo Block 5/51 was listed as part of the deceased's estate.

42. The Applicants cannot in the circumstances of this case be said to have been ignorant of the going ons in the above petitions and the issues must have been discussed at the family level given that African families are close knit and issues concerning deceased persons are discussed at length within the family.

43. In any event, none of the Applicants is a beneficiary of the deceased and the 1st Respondent had no duty to inform or involve them.

44. It is urged that there is evidence that the land was sold to the deceased. There is a consent of the Land Board. There is a consideration of Kshs. 200,000/= and the title document to the land. If the Land was being given as a gift or a trust, nothing would have been easier than for the parties to indicate so in the application for consent.

45. The parents did list this property as an asset of the deceased in Succession Cause No. 1 of 2002.

46. The authenticity of the proceedings before the Land Tribunal is questioned. The same were filed in 2008 and the 1st mention was on 23/7/2001. 23rd July 2001 is the date deceased died. The mention is coming before the claim is filed!

47. No evidence has been adduced to prove that the land was given to the deceased to hold in trust.

48. It is further urged that the applicants have not satisfied the requirement of Section 76 of the Law of Succession Act to warrant the revocation of the grant. The whole scenario is one geared towards disinheriting the 1st Respondent.

49. I am referred to the decision in **Jeff Suleiman Abdalla and Another – vs – Duncan Otieno Ogwang [2011] eKLR** where *Makhadia Asike J* (as he then was) observed;

“that the objector had failed to demonstrate to the court's satisfaction that in obtaining the temporary grant, the petitioner did so through fraud. All steps required in Law to be followed by the Petitioner before such grant was issued were scrupulously followed.”

50. It is the 1st Respondents case that she had been through hell and high waters in trying to fight to inherit her husband's estate. She has had to concede to half of her husband's Land to be inherited by the mother-in-law and now they want to take all from her.

Analysis and Determination

51. I have had occasion to consider the summons for revocation of grant, the supporting affidavit and grounds, the replying affidavit, the oral evidence and submissions on record.

52. Of determination is whether the applicants have met the threshold set out in Section 76 of the Law of Succession Act to warrant the revocation of the grant herein.

53. Section 76 of the Law of Succession Act provides;

“Section 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 has ordered or allowed; 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 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.

54. A brief capture of the history of this matter is necessary in an attempt to lay bare the facts as they emerge.

55. James Muiruri Kamau is a son to Arthur Kamau Muiruri. James pre-deceased Arthur. During his lifetime Land Bahati/Wendo Block 5/51 was transferred from Arthur to James. There is conflicting evidence as to the circumstances of that transfer.

56. Upon the death of James, his parents being Arthur and Hannah (OW1) petitioned vide Succession Cause No. 1 of 2002 for letters of administration to his estate. They listed Bahati/Wendo Block 5/51 as part of the assets of deceased (James).

57. On hearing of petition No. 1 of 2002, the 1st Respondent (Lucy) out of what appears to be ignorance of the Law or wrong advise filed Petition no. 85 of 2002 where she also in form P & A 5 listed the parcel of land No. Bahati/Wendo Block 5/51 as part of the assets of the deceased (James).

58. Fast forward, the 2 petitions were consolidated vide a consent of the parties recorded in Court on 20/4/2007, the grant was confirmed in terms *inter alia* that the 1st Respondent and Hannah Muthoni Kamau (OW1) were to get a ½ share each for Bahati/Wendo Block 5/51.

59. It is this grant that is now the subject of attack by the Applicants who are all children of Hannah Muthoni Kamau. Despite being a Respondent to the application, Hannah has now taken a pivotal position as the main witness for the applicants notwithstanding the fact that the consent recorded by her and Lucy is still in place.

60. That attack on the grant is based on the fact that the 1st respondent should not have included Parcel No. Bahati/Wendo Block 5/51 as part of the assets of James Muiruri Kamau (Deceased) as he held that land in trust.

61. It is alleged that the certificate of confirmation of grant was obtained by making of a false statement or by concealing that James was registered as the owner of the land to hold it in trust for the applicants.

That is the summary of the averments in the affidavit of Hellen Wambui Kamau in support of the Summons for the revocation of grant.

62. It is plain and obvious, and that should be common ground, that the applicants are not beneficiaries of the estate of James Muiruri Kamau (Deceased).

63. It is also true for a fact that the 1st respondent (Lucy) listed Parcel of Land No. Bahati/Wendo Block 5/51 as an asset in the estate of James in the form P & A 5 they filed in Succession Cause No. 1 of 2012.

64. It is again true that the said James had a title to the said Land.

65. In the absence of a proper legal challenge, nothing would stop the 1st respondent from listing the property as part of the assets of the deceased. I have perused the record and note that at the time the petition was taken out, an official search was carried out and a certificate of official search issued confirmed the deceased (James) as the legal owner of the subject land.

66. To that extent, if the Applicants held that the said title was held in trust for them, it would be incumbent upon them to mount a legal challenge against the estate of the deceased through the administrator of the estate.

67. In essence, what this gives rise to is a position of competing interests in land. The question arises as to whether this ground suffices to warrant the revocation of a grant and whether this court has the necessary jurisdiction to entertain a suit seeking determination of a question of land held in trust.

68. It is noteworthy that the Applicants are not claiming any interest as Dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. They lay a claim against the estate of the deceased.

69. As held **In the matter of the Estate of Kimani Kinuthia [2008] eKLR**, their claim cannot in Law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed. What they can legally do is to mount a legal claim over whatever asset they may have an interest in an challenge the title.

70. I quote with approval ***Ibrahim J*** (as he then was) in re the Estate of Kimani Kinuthia (Deceased) *Supra* where he stated at page 4;

“Secondly, I do not think that these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of a trust. This is not the function of a Succession Court where the claimant is neither a beneficiary or a dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an estate by third parties”.

71. The Court went ahead to hold that the Court had no jurisdiction to determine the claim of trust or to give any relief in respect thereof.

72. Similarly **In the Estate of Richard Karanja Javan [2014] eKLR**, ***Musyoka J*** had this to say at page 2;

“It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the Registered Land Act Cap 300 Laws of Kenya (now repealed). It was a first registration By dint of Section 143 of the Registered Land Act, the said registration cannot be faulted. There is Judicial authority on this in *Obiero – vs – Opiyo & Others (1972) E.A. 227* where it was held that a first registration is indefeasible even if fraud is proved.

There is therefore no merit in the applicant's case. Even if she had a case that there existed a trust in her mother's favour, the same ought to be established in a suit before the Environment and Land Court.”

73. And finally on this point the decision **In the matter of the Estate of Mbai Wainaina (Deceased)** where again **Musyoka J** had this to say at page 3 paragraph 16, 17 and 18;

“The Applicants claim that Kiganjo/Gachika/460 was held by the deceased in trust for them and therefore that makes them heirs to his estate. Whether the deceased held Kiganjo/Gachika/460 in trust for the Applicants is a matter of both fact and Law. It is incumbent upon the Applicants to establish that such a trust did exist. The issue is whether the Applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what is deposed in the affidavit sworn on 17th April 2012 by John Ng'ang'a Wainaina in support of the application.

Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate Court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the Probate Court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

74. From the foregoing, the Applicants' application seeks orders that are not available under Section 76 of the Law of Succession Act that provides for revocation of grant.

75. Even if for a moment this Court was to entertain the prove of a trust as a ground for revocation of grant, the evidence adduced in support thereto is of the weakest nature.

76. Hannah Muthoni Kamau (OW1) herself listed the subject property as an asset of the deceased without any qualification.

77. There is evidence by way of an application for consent before the Land Board, the consent and the title issued where tellingly, it is clear in the application for consent to transfer, the nature of transaction is described as a sale and consideration given at Kshs. 200,000/=.

78. The tribunal proceedings relied on by the applicants are not helpful to their cause. The proceedings are being held when James (Deceased) had already died. No evidence is tendered that Lucy was appointed an administrator of the estate then to give her locus standi to represent the estate of James in those proceedings.

79. Strangely a mention date given (23rd July 2001) is actually the date when deceased died. It is not explicable how the proceedings could have a mention date on the date deceased died. The said proceedings being against his (deceased's) wife.

80. The finding of the tribunal, if at all, is illegal on the face of it given that the tribunal would have no powers in Law to cancel title.

81. In any event such a finding was not adopted as orders of court as required in Law.

82. As correctly pointed out by counsel for the Applicants, and as held in **Pius Mugo Njogu – vs – Kirwere Njogu [2015] eKLR**,

“the Court never implies a trust save in cases of absolute necessity. A party relying on the existence of a trust must lead evidence to prove the same.”

83. My finding is that the Applicants have not proved a trust on the part of the deceased at all.

DETERMINATION

84. With the result that the issue of determination set out hereinabove answers in the negative. The Applicants have miserably failed to reach the threshold for revocation of grant. I dare add that the 2nd Respondent and who testified for the Applicants is lucky to have a share of the estate of the deceased through the consent orders confirming the grant which orders I have not been moved to interfere with.

85. I find no merit in the summons for revocation of grant dated 7th May 2012 and I dismiss the same. I note that this is a family matter. But in the totality of the circumstances of this case, the 1st Respondent is entitled to costs. I award her the costs to be agreed or taxed.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG'U

JUDGE