



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**P & A CASE NO. 220 OF 2012**

**IN THE MATTER OF THE ESTATE OF MUGO KARIUKI (DCD)**

**RASHID KARIUKI MUGO.....PETITIONER**

**AND**

**LEMMY GACHECHE MIANO...INTERESTED PARTY/APPLICANT**

**V E R S U S**

**ANN JUDITH NJERI GACHECHE**

**NEE KARIUKI.....3<sup>RD</sup> BENEFICIARY/RESPONDENT**

**RULING**

This matter relates to the Estate of Mugo Kariuki (deceased) who died intestate on 7/6/81. Temporary letters of administration were issued to the Petitioner Rashid Kariuki Mugo on 12/6/2007. The grant was thereafter confirmed on 27/12/2008. The net estate comprised in Land Parcel No. Kiine/Sagana/65 was distributed as follows:-

Rashid Kariuki Mugo – 3 Acres.

Chomba Mugo Kariuki – 3 Acres.

Anne Judith Njeri Gacheche – 2 Acres.

A summons for rectification of grant dated 25/9/12 was filed by Lemmy Gacheche Miano seeking an order that the name Anne Judith Njeri Gacheche be rectified and be sub- situated with Lemmy Gacheche Miano. This application was heard and a ruling was delivered by Hon. Justice R. K. Limo on 4/11/2014 to the effect that the application lacked merits. The Hon. Judge also revoked the earlier grant and ordered that the two acres which were to go to the respondent Ann Judith Njeri Gacheche be distributed equally between the two beneficiaries Rashid Kariuki Mugo and Chomba Mugo Kariuki. A certificate of confirmation of grant dated 24/11/2014 was issued. The net estate of the deceased Kiine/Sagana/65 was distributed as follows:-

Rashid Kariuki Mugo – 4 Acres.

Chomba Mugo Kariuki – 4 Acres.

It is against this background that the applicant filed an application dated 27/10/2017 in Succession Cause No. 220/2012 (Formerly Cause No. 179/2006 in the Principal Magistrate's Court Kerugoya) seeking orders that this court be pleased to allow prayer -3- of the application dated 26/1/2015. That prayer was seeking an order that the grant of letters of administration intestate confirmed on 4/12/2014 be revoked/annulled. This was filed in Succession Cause No. 179/2006.

The other prayers in the application dated 27/10/17 was that Land Parcel No. Kiine/Sagana/65 be distributed to Rashid Kariuki Mugo 2.37 Acres ,Chomba Mugo Kariuki – 2.37 Acres and Lemmy Gacheche Miano – 2 Acres. That the court do dispense with the production of original Title Deed, Pin Certificate, Identity Card and Passport size photographs of the respondent to enable subdivision and eventual transfers. This amongst other orders.

The respondents though duly served did not file any papers to oppose the application. On 12/10/17 the applicant appeared in court and argued the application dated 26/1/2015. Prayers 4,5,6,7 & 8 were granted. This application was based on three grounds namely that the applicant was the bona fide purchaser of two acres, that the petitioner had since died and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had connived to conceal the fact from the court and the respondents were in the process of sourcing a purchaser.

Upon obtaining the orders, the applicant brought this application dated 27/10/17. I have considered the application. I should point out on the onset that the orders obtained on the application dated 26/10/2015 were obtained in flagrant abuse of court process and by misleading the court. This is because the ruling I have referred to above was issued by Hon. Justice Limo on 4/11/14 in the presence of the applicant had not been reviewed, appealed against or set aside. If the applicant was not satisfied with the ruling, he ought to have appealed or applied for its review. I will deal with the orders later in this ruling.

The applicant having obtained the above orders now seeks orders for revocation of grant to enable the implementation of the orders.

**Section 76(d)(ii) of the Law of Succession Act Cap 160 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 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.***

The applicant is claiming to be a bona fide purchaser. I am in agreement with the persuasive decision by Justice Limo in his ruling dated 4/11/14 that –

***i) the contract under which the applicant claims to have bought two acres out of the estate of the deceased was null and void and therefore unenforceable.***

***ii) Though the applicant is entitled to get his legal fees for any services that he may have rendered to the petitioner, he appears to have chosen unviable option to secure his interests when he was and still has a better option to secure the same.***

The application before this court is not seeking a review of the orders of Justice Limo. I cannot sit on appeal on the decision of Justice Limo. The applicant has not brought this application within the ambit of **Section 76 of the Law of Succession Act** He is not a beneficiary and has not loped in the petitioner who in any case is said to have passed on.

The issue which arises in this application is sale of land before the confirmation of grant. **Section 82 of the Law of Succession Act** provides that personal representatives shall not sell any of the deceased's estate before confirmation of grant. It provides:-

***“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;”***

The applicant who is advocate of the High Court of Kenya entered an agreement dated 8/7/2006. The grant was confirmed on 27/12/2008. On the date of the agreement the grant had not been confirmed. This flew in the face of **Section 82 of the Law of Succession Act** which I have quoted above. Rashid Mugo Kariuki is the Petitioner in this matter which was on going and the grant had not been confirmed. The petitioner had no proprietary interest and had no legal title which he could lawfully pass to the applicant. It should also not escape the eye of this court that the property is agricultural land and for the agreement to be valid and enforceable, it required the consent of the Land Control

board. The applicant did not obtain the consent of the Land Control Board in any case there was a restriction on the title and as such the transaction was null and void. In such a situation the remedy to the applicant lay in the refund of any purchase that might have been paid.

Section 6(1) Land Control Act Cap 301 Laws of Kenya provides Transactions Affecting Agricultural Land.

*“Each of the following transactions that is to say,*

*(a) Sale, transfer, lease, mortgage exchange partition or other disposal of dealing with any agricultural land which is situated within a Land Control area*

*(b) -----*

*(c) -----*

*Is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”*

Under Section 55(1) of the Law of Succession Act no distribution of capital shall be made before confirmation of grant. It provides:-

*“No grant of representation whether or not limited in its terms, shall confer power to distribute any capital assets consisting a net estate, or to make any division of property unless and until, the grant has been confirmed as provided by section 71”.*

It is futile for the applicant to purport to enforce the said agreement. The applicant has no beneficial interest in the estate and as such it would not be in the interest of justice to annul or revoke the grant. The applicant would not benefit in anyway even if the grant were to be revoked or annulled. Section 55 & 82 of the Law of Succession Act prohibited the petitioner from entering a contract of sale of the property of the deceased before the grant was confirmed and no title to land could pass to the applicant. The applicant was in conduct of the Succession Cause and was aware that at the time he entered the agreement the grant had not been confirmed. In view of the above provisions no application for revocation or annulment cannot be sustained in favour of the applicant. The seller who was the petitioner was not the registered owner and had no title that he could pass to the applicant. In a persuasive decision by W. Musyoka, Judge in the case of 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 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 be 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.”*

I am of the opinion that the applicant has not met the requirements of Section 76 Law of Succession Act to warrant the revocation of the grant. He had not entered any agreement with the deceased. In this case the applicant who is pursuing legal fees has other lawful means of getting such fees.

The applicant entered an invalid transaction. It has been held that such transactions like the one the applicant entered with the petitioner are void ab initio as the petitioner lacked capacity to enter an agreement to pass interest in the land. In the case of P & T Housing Co-operative Society Ltd –vs- Divisional Integrated Development & Another (2017) eKLR,

The court held;

*“What comes out in all this evidence is that, the agreement entered into between the parties was void, ab initio and could not be effected for the simple reason that the defendant had no capacity to deal in that land.....*

*My assessment of the evidence is that the contract or agreement was not capable of execution because the defendant was not the owner and did not obtain the Land Control Board consent. There is no doubt that the defendant received the money from the plaintiff, and considering the background of the transaction that payment was in respect of a parcel of land that the defendant could not deal in.*

*The end result is that the transaction having failed the plaintiff’s is entitled to the refund of the amount of money paid to the defendant in the failed transaction”.*

The purported agreement between the applicant and the petitioner to have two acres excised from the Estate and registered in his name was null and void ab initio. The remedy for the applicant is refund. The applicant did not pay any money but the agreement was in exchange of undertaking some legal matters including this cause. The applicant has other options to recover his fees. I am of the opinion that based on

the law and facts this application is without merits.

I will now revisit the orders issued on 12/10/17. This court issued orders in the application dated 26/1/2015. The applicant filed the application with knowledge that Justice Limo had declined to rectify the grant holding that the applicant could not competently apply for rectification and the petitioner had no capacity to execute a valid contract. This determination still stands. The ruling binds the parties as there was no appeal or review. The orders cannot stand as this court cannot sit on appeal against the orders of Justice Limo. Since the court had ruled that the agreement was not valid the applicant was abusing the court process by seeking to enforce orders which had not been issued by this court. The court could not issue a declaration that the applicant was entitled to two acres in an application under **Section 76(1) of Law of Succession Act and Rule 44 (1) of the probate and Administration.** Like in an application for rectification of grant, the applicant could not competently bring an application for revocation/annulment without the petitioner or a beneficiary. This court has discretion to issue orders to prevent the abuse of the process of the court. **Section 47 of the Law of Succession Act** provides:

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient.”***

The rules further gives the court power to make orders in the interest of justice. Rule 73 of the Probate and Administration Rules provides:

***“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the court.”***

I find that the orders issued on 12/10/17 ought to be set aside as they were obtained in fragrant abuse of Court process and in disregard of the decision by Hon. Justice Limo. The applicant is trying to use short cuts to acquire two acres from the estate of the deceased when he is clearly not entitled to get such portion. Thus the court cannot sanction.

**In Conclusion:**

- (1) The application dated 27/10/17 is without merits and is dismissed.
- (2) The orders issued by this court on 12/10/17 in the application dated 26/1/2015 are set aside to prevent abuse of the process of the court.

I make no orders as to costs.

***Dated and delivered at Kerugoya this 22nd day of February 2018***

**L. W. GITARI**

**JUDGE**

**22/2/18**