



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 496 OF 2008

In the Matter of the Estate of M'Mukindia M'Imanyara (Deceased)

ELIAS NYAMU M'MUKINDIA.....PETITIONER

LYDIA WANJA.....1ST APPLICANT

JULIUS KABURIA.....2ND APPLICANT

-Versus-

BENJAMIN K. KIAMBATI.....1ST INTERESTED PARTY

PETER M. KIAMBATI.....2ND INTERESTED PARTY

ANTHONY MIRITI.....3RD INTERESTED PARTY

SAMASON M. MUKINDA.....4TH INTERESTED PARTY

RULING

Revocation of grant

[1] The significant orders sought in the Summons for Revocation or annulment of Grant dated 13th April 2013 are:

- a. Revocation or annulment of the grant made to the Petitioner, Elias Nyamu M'Mukindia on 9th October, 2009;***
- b. Cancellation of names of persons registered as proprietors of land parcels known as LR. No. NKUENE/KITHUNGURI/1664-1667 and revert the title deeds thereto into the name of the deceased for purposes of distribution to the rightful beneficiaries of the estate.***
- c. Order the petitioner to produce title for LR. NO. NKUENE/UPPER MIKUMBUNE/572; and***
- d. An order for costs of the application.***

[2] The application is expressed to be made under section 76(b) and (c) of the Law of Succession Act,

section 68 of the land Registration Act, rule 44(1) and 73 of the Probate and Administration Rules. It is supported by the affidavit of Julius Kaburia and other grounds set out in the application and submissions filed herein.

[3] The major reasons given for the application include:

a. That these proceedings were filed without the knowledge of the applicants;

b. That the petitioner obtained the grant fraudulently by making a false statement or by concealment from court of material facts and by means of untrue allegation of facts essential in point of law to justify the grant;

c. That the petitioner sub-divided LR. NO. NKUENE/KITHUNGURI/123 into 4 portions numbers 1664 to 1667, transmitted the entire estate to himself and sold the shares due to the other beneficiaries to 3rd parties, thus depriving the rightful beneficiaries of their shares;

d. That the petitioner is not willing to carry out his duties as by law required.

[4] Following the order of court on 30th March 2016 and 29th August, 2016, the application and submissions were served upon the petitioner by way of advertisement on 22nd June 2016 and 21st November, 2016. See affidavit of service filed on 28th November 2016 and 4th October 2017. But, the petitioner did not file response thereto. The other parties filed submissions as directed by the court. The Applicants who are widow and son of the deceased said that they did not give their consent to the filing of these proceedings as required by rule 26(1) of the Probate and Administration Rules. They also denied ever signing the consent to confirmation of grant herein. They further stated that they did not attend court on 9th October 2009. The distribution of the estate was not a product of agreement of parties; it is in fact skewed and most unfair. To add insults to injury, the petitioner did not even administer the estate in accordance with the contrived confirmed grant. Instead, he transmitted all the 4 subdivisions of **NKUENE/KITHUNGURI/123** to himself and sold the shares he indicated to belong to other beneficiaries to 3rd parties namely Anthony Murithi, Benjamin Kamundi and Peter Muteri. The applicant saw overt fraud being committed by the petitioner on the other beneficiaries. They stated that the other estate properties namely **NKUENE/UPPER MIKUMBINI/572** and **BOGETA/LOWER CHURE/124** are intact and remain in the names of the deceased to date. The applicants cited the cases of NYERI CA CIVIL APPEAL NO 61 OF 2014 in support of their stand point. On the basis of the above, they sought for revocation of grant.

We bought land lawfully

[5] Benjamin Kamundi Kiambati filed a Replying Affidavit on behalf of himself and Peter Mureri Kiambati. He averred that they purchased **NKUENE/KITHUNGURI/1666** from the petitioner who was the registered owner of the land. He also averred that, on 10th July 2008, he and David Kinyua Kirima bought from the petitioner and his brother ½ acre of land to be excised from **NKUENE/KITHUNGURI/123**- property of deceased. He stated that they knew the sellers to be the beneficiaries of the estate of the deceased. Thereafter, on 10th February, 2010 they sold the said ½ acre of land to Anthony Miriti. This portion was later registered as **NKUENE/KITHUNGURI/1665** and was transferred to Anthony Miriti by the petitioner. He annexed agreements of sale of the said lands. He claimed therefore, that as purchasers for value without notice of defect in title the third parties will be highly prejudiced by any revocation of the grant. Antony Miriti filed a Replying Affidavit on 22nd March 2016 in which he corroborates what Benjamin stated in his affidavit on the parcel relating to him.

[6] The 1st, 2nd and 3rd interested parties filed submissions on 19th December, 2016 in support of their avowed position that no fraud has been proved as required under section 107 of the Evidence Act. They relied upon the case of **MICHAEL GITHINJI [200] 2009 KLR**. They also argued that as innocent purchasers for value without notice of defect in title, section 93(1) of the Law of Succession Act protects their acquisition as they acquired the lands from a holder of grant of representation and who was the

registered owner.

[7] The 4th interested party also filed submissions on 21st March 2018. He supported revocation of grant on the grounds cited by the Applicants.

DETERMINATION

[8] I will not re-invent the wheel. Section 76 of the Law of Succession Act provides that:-

76 Revocation or annulment 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;

(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.

[9] Arguments herein are that consent to file proceedings and to confirmation of grant was not sought or obtained from or given by the applicants. It was argued further that the proceedings were obtained through fraud and by concealment of material facts essential to justify the grant. And that the petitioner has transmitted shares of other beneficiaries to himself and sold them to third parties- the interested Could these matters cause revocation of the grant in law?

[10] From the arguments presented, the court should find out whether there is enough material to show that:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) 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; or

(c) 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

[11] The applicants stated that they did not give their consent to neither the filing of these proceedings nor confirmation of grant herein. Rule 26 requires consent of persons in same degree or in priority to give

consents to the filing of succession proceedings. Such persons should also be given notice of the proceedings. See section 26 of the Law of Succession Act below:-

26. Grants of letters of administration

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

[12] The signatures on the consent form filed have been denied by the applicants. The 4th interested party has confirmed that the relevant consents were not obtained from the beneficiaries. He submitted that the petitioner filed this cause alone without the consent of the others, registered 4 titles to his name and sold some to third parties. This admission renders support to the claim by the applicants. It is also true that the petitioner transferred the entire **LR. NO NKUENE/KITHUNGURI/123** to himself and sold three parcels thereof to third parties. Of significance also is that the applicants did not attend court during the confirmation of grant on 9th October, 2009. With the impeachment of the consent, the grant issued herein is vulnerable. When I take all the above into consideration, the grant herein was obtained on the strength of false claims, without obtaining the relevant consents and on the basis of concealed facts to court. Grand potency of such facts in causing a revocation of grant was aptly stated in the case of **SAMUEL WAFULA WASIKE vs. HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA) that:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

Defence of bona fide purchaser

[13] But, before I close and make my final orders, let me tackle one important issue. Section 93 of the Law of Succession has been invoked. The interested parties claimed that their acquisitions were lawful and should be protected in law. I note that the petitioner and the 4th interested party attempted to sell part of the estate property before confirmation when they entered into an agreement dated 10th July 2008. The parties in the said agreement particularly in clause 1 and 5 thereof acknowledged that the land subject of the agreement was to be excised from **LR. NO. NKUENE/KITHUNGURI/123** which is registered in the name of the deceased. They even acknowledged that the estate was under succession in court. As confirmation of grant had not been issued, such purchaser will be stalked by two horrors:

(1) Such acquisition is unlawfully obtained and an act of intermeddling with the estate; as such, it does not enjoy any property rights protection. See article 40(6) of the Constitution.

(2) Such persons who obtain property with full knowledge that the property belongs to a deceased person cannot be said to be purchasers without notice of defect in title; they cannot invoke the defence of innocent purchaser for value without notice. In any event, notice may be actual or constructive.

[14] That is not all; I have noted that the grant herein was obtained in a manner that violates the law in a

substantial manner. There is also element of fraud by the petitioner. These matters would rout the transfers by the petitioner. Therefore, nothing would stop the court from revoking the grant. For the above reasons, the grant issued to Elias Nyamu on 19th January 2009 and confirmed on 9th October, 2009 is hereby revoked. The properties in question shall revert to the deceased for purposes of distribution by the court. Given the circumstances of this case, I order each party to bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 29th day of May 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Gichunge advocate for interested party

Mrs.Ntarangwi advocate for applicant

Interested party – in person

Petitioner in person –absent

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F. GIKONYO

JUDGE