



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 141 OF 2012

IN THE MATTER OF THE ESTATE OF MBOGO WAMAE(DECEASED)

MURITU THUKU.....APPLICANT/OBJECTOR

VS.

JOSEPH MWANGI GICHIMU.....PETITIONER/RESPONDENT

RULING

Mbogo Wamae died on the 30th November 2011 at the age of 80 years. According to the Joseph Mwangi Gichimu herein after the petitioner /respondent, the deceased left a written will dated 15th July 2009 in which he appointed him as the executor of that will and in his absence, his nephew by the name Peter Gichimu Mwangi. He then proceeded to

‘give, bequeath and devise absolutely all my rights, title and interests in all that parcel of land known as L.R GIKONDI/KARINDI/92 measuring 1.5 acres to ...JOSEPH MWANGI GICHIMU-ABSOLUTELY’

The will was executed by the deceased in the presence of two persons James Wachira Gioko and Gichugu Honge.

Upon the demise of Mbogo Wamae, the petitioner/respondent filed petition for grant of probate of the will on the 16th February 2012. He annexed to the petition his supporting affidavit, the certificate of death of the deceased, the will and a certificate of official search for the title L.R GIKONDI/KARINDI/92 issued on the 26th July 2011.

The certificate of search shows that the whole parcel was 2.9 acres, that the Muritu Thuku hereinafter the applicant/objector was registered as the sole proprietor on the 14th July 1971. On 23rd November 2006, there is an entry showing that there was **a ‘court order award in Case no. 50 of 2006 in the CMC Nyeri dated 22/11/06 the land be shared between Mbogo Wamae 1.5 acre and Muritu Thuku 1.4 acre.’**

Grant of Probate of written will was made to the petitioner/respondent on the 24th July 2012. A certificate of confirmation of grant was made on the 13th March 2014 and the petitioner respondent was poised to inherit the 1.5 acres of land out of Gikondi/Karindi/92 absolutely.

The time came for transmission of his share to himself. He made an application for partition of the title, a copy of which he filed on the 9th July 2015, with a certificate of official search dated 11th February 2015, indicating an entry made in the register on the 25th July 2014 registering the parcel of land in his and the applicant/objector’s names showing each of their respective shares. These he filed with the summons general dated 4th July 2015 seeking orders that the Deputy Registrar be authorised to sign all the necessary documents on behalf of the applicant/ objector, citing his neglect and or refusal to execute the same to effect the grant.

That application was granted on the 4th of November 2015 and the orders sought were issued.

On 13th December 2016, the applicant/objector filed a Summons for Revocation of grant together with Summons General seeking injunctive orders to restrain the petitioner/respondent, his employees, agents, and any person acting under him from interfering, entering, partitioning, and dealing with the land parcel LR Gikondi/Karinda/92, and a prohibitory order against the said parcel pending the hearing and determination of the summons for revocation of the grant.

Both the injunction and prohibitory orders were granted on the 15th of December 2016.

The grounds for the Summons for revocation of the grant are that;

- a. that the proceedings to obtain the grant were fraudulent,

b. that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of some material facts,

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 the allegation was made deliberately misleading the court

The application was supported by the affidavit sworn by the applicant/ objector and the facts on the face of the application set out thus:

1. that the deceased did not have any land to be willed
2. that the land in question is owned by the applicant absolutely
3. that the deceased had gone to court and lost the petition and concealed this fact from the court
4. that the judgement of the court cannot be challenged by the will.

In the affidavit he depones that there is a valid judgement of this court in Judicial Review No. 286 of 2006 which is annexed as MT 2 which judgement quashed the decision of the award of the Mukurweini Land Disputes Tribunal adopted in Nyeri CMC No. 50 of 2006.

That the petitioner/respondent concealed this fact from the court. That he only came to know about the grant when a private surveyor visited the land on 4th of November 2013 with the intention of subdividing the same.

That the land belonged to him absolutely and he annexed a copy of the title deed. He urged the court to revoke the grant, cancel the petitioner/ respondent's registration and order the rectification of the register to revert the ownership to him.

In opposing the summons for revocation of the grant the petitioner/ respondent filed a replying affidavit on 2nd June 2017. He deponed that he did not obtain the grant fraudulently nor he did not make any false statements in obtaining the grant.

That at the time of filing for succession the records of the land registry Nyeri indicated that the deceased owned 1.5 acres out of LR Gikondi/Karindi/92. That if the applicant had the judgement revoking the ownership of the 1.5 acre by the deceased and it was his duty to present the same to the land registry for the necessary action but he never did so.

The application was heard inter partes on 12th April 2018. The applicant /objector was represented by the firm of Gori and Ombongi Advocates, with Mr. Kinuthia holding their brief while the petitioner/ respondent appeared in person.

Mr. Kinuthia reiterated the contents of the affidavit in support of the summons for revocation of the grant and pointed out that on 18th February 2011, Justice Serگون, in **Misc. Application no. 286 of 2006** determined that the land here in belonged to the applicant /objector. That the grant herein was issued in contradiction to the said judgement. That the grant was subject to revocation under the provisions of section 76 (a) and (b) of the Law of Succession Act.

In his submissions petitioner/ applicant told the court that before the land became applicant objector's, it belonged to Wamae Mbogo who wanted to sell one acre only but the applicant /objector fraudulently obtained the whole parcel of land, through corrupting the Land Control Board.

It was then that Mbogo sued him and the court decided that they would share the land. It was after that the deceased left his land to him. That he the petitioner/ respondent actually did due diligence, conducted search and confirmed that the land indeed was in both names of the applicant and the deceased herein.

I have carefully considered the submissions by each party and the affidavit evidence. The issues are; whether the deceased had any land he could bequeath the petitioner respondent, whether the award no. CMC 50 of 2006 was quashed and if so what is the effect?

The objector's application is grounded on the decision of the High Court in Misc. Application n. 286 of 2016.

In that matter the parties were *Republic of Kenya exparte Applicant vs. Muritu Thuku Applicant and The Chief Magistrate Nyeri, The Mukurweini Land Disputes Tribunal, Mbogo Wamae Respondents.*

It would appear that there was a land dispute between the deceased herein and one Muritu Thuku which went to the Mukurweini Land Disputes Tribunal for arbitration. The tribunal heard the matter and have an award which was adopted in the Nyeri CMC case no. 50 of 2006. That adoption resulted in the order that led to the entry of 22nd November 2006 in the register for the land in dispute.

Through a motion dated 22 December 2006, the applicant objector sought the following orders;

that this honourable court be pleased to grant the applicant an order for such certiorari to move this honourable court to quash and set aside the decision by Mukurweini Land Dispute Tribunal delivered in Mukurweini land disputes tribunal case number 7 of 2005 dated 27th of June 2006 and decree in Nyeri chief magistrate court award number 50 of 2006 adopted on 22nd day of November 2006 subdividing L.R number Gikondi/Karindi/92 to one Mbogo Wamae.

Upon considering the application, the judgment, the following finding

‘I must conclude by stating that the decision of the Mukurweini land disputes tribunal was made without jurisdiction as there was no competent decision to be adopted by the chief Magistrate’s Court. In the end I find the motion dated 22 December 2006 to be well founded it is allowed as prayed costs to the applicant.

Dated and delivered at Nyeri this 18th day of February 2011’.

Mbogo Wamae died on 30th November 2011. The settlement of the dispute between him and Muritu Thuku was set aside because the arbiters had no jurisdiction. He never did pursue the issue whether their determination was right or not.

It goes without saying that the effect of the finding that the arbiters had no jurisdiction was to quash the effect of the entry made on the 23rd November 2006 which had subdivided the land into two portions.

The deceased’s will, was made on 15th July 2009, long before Justice Sergon’s Judgment. By then the entry in the register was ‘valid’ as it had not been challenged. It is true that the petition was filed after the Judgment. However as at the time the certificate of search was obtained on the 26th July 2011, the register had not changed. The petitioner/ respondent was not a party to the above proceedings. Hence it is correct that it was the duty of the applicant/ objector to deliver up the Judgment to the land registrar to enter it in the register. He never did so and cannot be heard to impute ill motives on the petitioner /respondent.

It is also not correct, as alluded to by counsel for the applicant /objector that at the time of drawing the will the lawyers for and the deceased were aware of the developments in **HC Misc. Application 286 of 2006**. However, it is correct that at the time of filing this petition counsel for the petitioner /respondent was aware of the Judgment by Hon Justice Sergon, quashing the decision of the tribunal and the magistrate’s Court. The record shows that on the date the judgment was delivered, Mr. King’ori held brief for Mr. Wahome, who was counsel for the deceased, and later counsel for the petitioner /objector. Instead of appealing against the same or seeking whatever other redress available, it appears from the record that he proceeded to file this matter well aware that the leg on which his client stood had been pulled away by the High Court’s decision in **Misc. 286 of 2016**. He also failed to disclose to the court the existence of that decision.

The applicant/ objector does not escape blame. His laxity in securing his rights was also to blame for this state of affairs.

The applicant /objector relies on s. 76 (a), (b) and (c) of the Law of Succession Act which provides for the *revocation or annulment of grant in the following terms:*

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;

It is clear from the record that in 2009 when the deceased made his will he had transferrable interests in the said property to give to whoever he considered to be his heir. At the time of his death his interest in the property had been quashed by this court by quashing the decision of the Mukurweini Land Disputes Tribunal as having been made without jurisdiction. That rendered it null and void.

If the petitioner respondent did not agree with the decision, he could only have appealed. The quashing of the tribunal’s award which was the basis for the subdivision of the parcel into two, yanked the same out of the will and once again into the realm of a dispute, which dispute the deceased did not pursue nor the petitioner /respondent. As a result, the status quo before the tribunal’s award obtained and is what was obtaining at the time this petition was filed, that the applicant /objector was the sole registered owner of the said parcel of land.

I find therefor that the provisions of sections. 76 (a), (b) and (c), of the law of succession act apply to the facts of this case. Justice Sergon’s Judgment literally removed the property from the deceased’s will. The petitioner /respondent and his counsel neglected to disclose this to court.

Hence the grant issued to the petitioner/ respondent on the 24th July 2012 and confirmed on the 13th March 2014 cannot stand and is and is hereby revoked together with all actions flowing from the same.

Each party to bear its own costs.

Dated Delivered and signed at Nyeri this 24th May 2018

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Court Assistant: Atelu

Ms. Wangari holding brief for Gori and Ombongi Advocates for the Applicant/Objector

The Petitioner/ Respondent in present