



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 26 OF 2006

N THE MATTER OF THE ESTATE OF THE LATE

PHILIP MUTULILI WAMBUA – (DECEASED)

BETWEEN

PRISCILLA NTHOKI MUTUILLI.....PETITIONER/RESPONDENT

VERSUS

SAMUEL MUTUKU MWIKYA.....INTERESTED PARTY/APPLICANT

RULING

Introduction

1. By Summons for Revocation or Annulment of Grant dated 19th September, 2017, the Interested Party/Applicant herein, **Samuel Mutuku Mwikya**, seeks in substance an order that the grant of letters of Administration confirmed on 4th July, 2016 be revoked and/or annulled and that the interested party/applicant be included in the list of liabilities/creditors to the estate of **Philip Mutulili Wambua** (deceased).

Applicant's Case

2. According to the Applicant, he is an interested party in the estate of the deceased in that he purchased the property known as **Kangundo/Kawethei/1984** in the year 1984 at a consideration of Kshs 100,000.00 which he paid fully by the year 1988 after having paid Kshs 52,830/= while the balance was settled by giving t deceased his coffee plantation being **Kangundo/Kawethei/1963**. Thereafter the applicant took possession and has stayed thereat ever since as that is where he had built his home and cultivates the same.

3. According to e Applicant the Respondent was one of the witnesses when he purchased the said property from the deceased. However the family of the deceased has been trying to evict him from the land which attempts have been the subject of arbitration between the deceased's family and the applicant's in which it was resolved that the deceased's family should not interfere with the applicant's possession of the property.

4. However the Applicant realised that the Respondent failed to include him as a liability to the deceased's estate and the grant was confirmed on 4th July, 2016. According to the Applicant, despite the fact that the property known as **Kangundo/Kawethei/1963** which he had given the deceased in exchange for the property known as **Kangundo/Kawethei/1984** was not included in the list of assets belonging to the deceased, the deceased's son, **Munywoki Mutulili**, has purported to sell the said property to one **Benedict Muema**. It was therefore the Applicant's case that by the said action, the Respondent and her son are intent at disinheriting him of the two properties.

5. In a rejoinder to the Respondent's response the Applicant reiterated the foregoing and insisted that he performed part of his agreement by delivering vacant possession and ownership of **Kangundo/Kawethei/1963** and that it was the Respondent's son who sold the same and yet the Respondent has declined to transfer **Kangundo/Kawethei/1984** into the Applicants names. It was the Applicant's case that Kshs 100,000.00 cannot be said to be throw away price in 1984 hence the averment that the deceased was out to assist him is untenable. The Applicant insisted that it was not him who withdrew the objection but that it was the deceased who was the objector.

6. According to the Applicant, the clan deliberated over the matter and it was agreed that **Kangundo/Kawethei/1984** be transferred to him while he was to transfer **Kangundo/Kawethei/1963** to the deceased and that he kept his part of the bargain by not interfering with the deceased's ownership of **Kangundo/Kawethei/1963**. While admitting that he appealed to the Minister, he averred that the decision was issued in his favour to the effect that he was to get half of **Kangundo/Kawethei/1984** while he was to keep **Kangundo/Kawethei/1984** but

when he sought to implement the decision the deceased failed to show up in attempt to defraud him and keep both parcels. The Applicant asserted that the deceased and his family have all along been using **Kangundo/Kawethei/1963** while he has been using **Kangundo/Kawethei/1984** where he interred the remains of his wife which plots had not been registered during the lifetime of the deceased since the survey was done in 1970's. The Applicant averred that the Citation was not dismissed but was closed.

Determination

7. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

8. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

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;

9. In this case the applicant's case seems to be based on grounds (b) and (c) above. His contention is that the petitioners did not disclose the fact that he is a beneficiary of the estate of the deceased having entered into an agreement with the deceased to purchase the deceased property known as **Kangundo/Kawethei/1984** in part exchange of his own property known as **Kangundo/Kawethei/1963**.

10. In **Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002**, Makhandia, J (as he then was), while revoking the grant in question expressed himself as hereunder:

“Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration Rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked. In the instant case the applicants are purchasers for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

11. In this case, the fact of the agreement between the deceased and the Applicant herein is not denied. What is in dispute is whose actions or inactions frustrated the completion of the transaction. It is further agreed that the Ministry of Lands and Settlement heard the dispute and partly allowed the Applicant's appeal arising from the Kawethei Adjudication Section Appeal Case No. 366 of 1996 in respect of Parcel No. 1984 and it was directed that the Applicant should get about half of the land in dispute for the money he had paid, Kshs. 48,000/= which was about half the total amount of Kshs 100,000.00. The Ministry further ordered that the plot that was to be given in exchange to clear the balance be disregarded or left to be claimed back by the Applicant.

12. The Applicant however avers the Respondent's son, **Munywoki Mutulili**, has purported to sell the said property to one **Benedict Muema**, a transaction which the Respondent contends she was unaware of. What is however intriguing is that one of the persons indicated as a witness to the said transaction is one **Sammy Mutuku**, who the Respondent contends is the Applicant herein. If the Applicant's case is that the effect of their agreement with the deceased was that the property known as **Kangundo/Kawethei/1963** had already been taken by the Deceased while he had taken over Land Parcel No. **Kangundo/Kawethei/1984**, then the question would be why was he a party to a transaction which in effect amounted to a negation of the decision by the Ministry that the same land reverts back to him. In fact it is this conduct that the Respondent contends amounts to intermeddling with the estate the deceased. However that is a matter for another day.

13. What is not disputed is that the Respondent was aware when she applied for the grant that the Applicant had a claim for part of **Kangundo/Kawethei/1984** but did not disclose this fact.

14. Just like **Okwany, J** in **Joseph Moswagi Mabeya vs. Alfred Gichana & 4 Others [2016] eKLR**, I find that the Applicant has made out a case and satisfied the conditions for the revocation and/or annulment of the grant. Consequently I do allow the application and order that the grant of letters of Administration confirmed on 4th July, 2016 be revoked and/or annulled and that the interested party/applicant be included in the list of liabilities/creditors to the estate of **Philip Mutulili Wambua** (deceased). Land Parcel **Kangundo/Kawethei/1984** to revert to the names of the deceased to await distribution during the confirmation of the grant.

15. Each party to bear own costs of the application.

16. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of September, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Akonya for Mr Nzaku for the Respondent

CA Geoffrey