



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.1 OF 2017

IN THE MATTER OF THE ESTATE OF SUSAN SOLOMON MACHARIA (DECEASED)

A N D –

HARUN MUIRURI KOGIE.....1ST RESPONDENT

V E R S U S

GEOFFREY MURIGI NJUGUNA.....2ND RESPONDENT

STEPHEN NDUGNGU NJUGUNA.....OBJECTOR/APPLICANT

JUDGMENT

This matter relates to the estate of Susan Solomon Macharia who died intestate on 1/9/2009.

A grant of representation in respect of the said estate was issued to Harun Muiruri Kogie on 18/1/2011. The grant was confirmed on 28/10/2011 whereby the only asset of the estate, Nyandarua/Sabugo/4001 was to devolve and be registered jointly among the 9 beneficiaries of the deceased's estate in equal individual shares while 3 acres were to devolve to a purchaser, Geoffrey Murigi Njuguna.

By the summons dated 6/6/2013, Stephen Ndungu Njuguna, the objector, sought to have the grant confirmed herein revoked, or annulled. Pending the hearing of the summons, the objector also sought an order of injunction to restrain the administrator/respondent from transferring, disposing, or charging plots Nyandarua/Sabugo/4001, 4002, 4003 and 4004 which were subdivisions of plot Nyandarua/Sabugo/2119 and that there be a stay of execution of the certificate of confirmation.

The application was premised on grounds that the subject grant was obtained fraudulently by concealment from the court of material facts; that Harun Muiruri Kogie is not a rightful beneficiary to the estate and the property in issue belongs to other people but not the deceased.

The objector also filed an affidavit in support of the application in which he averred that he is the son of the late Njuguna Kibuba Kirutu, who was the owner of Nyandarua/Sabugo/2119. The deceased, Susan Solomon was the objector's sister and daughter to Njuguna Kibuba. The objector stated that the land was fraudulently subdivided by the deceased, Susan Solomon without the knowledge of Njuguna Kibuba when he was still alive; that the land was subdivided without the Land Control Board consent and on finding out about the subdivision, the objector reported to the DCIO Nyahururu who placed a restriction on the land and requested for consent to subdivide but that Susan (deceased) never availed any. He filed HC.Succ.50/2012; that even after a restriction was placed on the land, Harun Muiruri, a son of the deceased, was given a letter by the chief of Sabugo and he filed this Succession cause without his knowledge and distributed the land to the people who are not beneficiaries. According to the objector, the beneficiaries of the property are the family of Njuguna Kibuba Kirutu who include:

- 1. Rahab Njoki Njuguna (Widow)**
- 2. Susan Njeri Solomon (daughter) - deceased**
- 3. Stephen Ndungu Njuguna (son) - objector**
- 4. Margaret Nduta Njoroge (daughter) – deceased**

The petitioner (respondent) Harun Muiruri filed a replying affidavit opposing the application. He averred that the objector is his uncle and not a dependant of the deceased; that he is a grandchild of Njuguna Kibuba Kirutu and that prior to his death, Njuguna Kibuba subdivided his land Nyandarua Sabugo/2119 into several plots; that plot 4001 was given to the deceased and transferred to the deceased on 7/5/2009; that the objector had filed HCC.1/2009 against Njuguna Kibuba (HMK.1) over the same land; that on 7/9/2009 the applicant filed an application

to stop burial of the deceased on the subject land but was not successful; that the objector purported to file a suit against, the deceased, Susan Solomon 3 years after her demise and that the objector is a vexatious litigant.

Directions were taken in this matter on 19/6/2014, that the objection be resolved by way of viva voce evidence. The parties were allowed to file their witness statements which they did.

The objector's case was heard first.

PW1 Steven Ndungu, the objector who is a brother to the deceased reiterated the contents of his affidavit and statement and added that his father, Njuguna Kibuba owned two pieces of land, Nyandarua/Sabugo/2119 and another in Timboroa; that he resided at Sabugo with the father till his father told him to go and live at Timboroa in 1976 but left his family back at Sabugo; that the deceased was by then married in Murang'a; that he was called back to Sabugo because the father wanted to give the land in Timboroa to his daughters; that in 2007 during land clashes, the deceased returned to Sabugo from Timboroa with all her children and started to cultivate on plot 2119; that Susan subdivided plot 2119 into plots 4001 – 4004 and transferred the land to herself Upon discovering the subdivision, the objector tried to place a caution on the register which the registrar declined to do. He reported to the DCIO who placed a restriction on the land on 15/9/2010 and that is when he filed Nakuru H.C.50/2012 (now ELC.193/2018) after he found that Susan had no consent to subdivide the land; that even with the restriction in place, the petitioner went ahead to file this Succession Cause after he got a letter of introduction from chief of Sabugo area instead of Dundori Location. PW1 also stated that when Geoffrey Muiruri bought the land, there was a caution filed and that the land was sold bought before the Succession process was over i.e. on 28/8/2010 and he wants the land to revert to plot 2119 in the names of Njuguna Kibuba Kirutu.

The petitioner Haron Muiruri (DW1) testified that the deceased (Susan) was his mother who left behind 9 children and that she left behind Nyandarua/Sabugo/4001. He said that only his mother's children are entitled to inherit from her and the purchaser Geoffrey Muiruri. He said that the land was given to the deceased by her father Njuguna Kibuba Kirutu when he was alive and that the objector has his own land in Sabugo Scheme; that the objector was not represented Njuguna Kibuba's estate because he has no letters of administration in respect of the said Njuguna Kibuba; that the objector had a dispute over the same land with his father Njuguna Kibuba and he had even sued the father in HCC.1/2009. DW1 denied that there was a restriction placed on the land at the time he filed these Succession proceedings and that the grant was confirmed before he knew of the restriction; that he applied to court to have the restriction removed and it was removed.

DW3 Geoffrey Muiruri Njuguna stated that he knows both the objector and the petitioner; that the petitioner sold to him 3 acres of land which was excised from Susan Solomon's land and he got a title Nyandarua/Sabugo/5654; that before the sale, they made an agreement before the chief and the title was still in the names of Susan Solomon. He denied knowing that the land had a dispute.

After hearing the parties and considering the rival submissions, the issues that lend themselves for consideration are:

- 1. Whether the objector has a locus standi in this matter;**
- 2. Whether there are good grounds to revoke the grant in terms of Section 76 of the Law of Succession Act;**
- 3. Whether the prayers sought in the summons can be granted;**

There is no doubt that the plot in issue, Nyandarua/Sabugo/4001 was once part of plot 2119 that was registered in the name of the objector's father, one Njuguna Kabuba. I have seen the green cards of the subdivisions emanating from plot 2119 which were exhibited by the objector. The new titles were opened on 28/5/2008. Plot 4001 was opened 8/12/2008 and title issued to the deceased, Susan on 7/5/2009.

Parcel 4002, title was issued on 9/12/2008 and title issued to Peter Njuguna Njoroge on 7/5/2009. Parcel 4003 –title was issued on 9/12/2008 and a restriction was registered on 8/9/2010. It seems that the said parcel of land is still in the name of Njuguna Kibuba Kirutu, the objector's father.

Parcel 4004, title was issued on 8/12/2008 and issued to Elijah Kihingu Macharia on 7/5/2009.

The court was not told exactly when Njuguna Kibuba, the original owner of Plot 2119, died. However, it is clear from the exhibited green cards that the owner of the original parcel 2119, did the subdivision and the resultant plots, 4000 – 4 were transferred to other people. There is no evidence that the deceased, Susan was the one who subdivided and sold the said land. The objector alleges that Susan, the deceased fraudulently, subdivided and sold the land when Njuguna Kibuba, the registered owner of the land was still alive. In law, whoever alleges must prove. The onus lies on the objector to prove fraud on the part of the deceased (Susan). The objector also needed to prove that the registered owner of the land did not subdivide and sell the land himself.

It is not in dispute that the objector had filed a suit against his father, Njuguna Kibuba **Nakuru HCC.1 of 2009 – Stephen Ndungu Njuguna -vs- Njuguna Kibuba Kirutu**. The plaint was attached by the petitioner as HMK.1 – In that case, the objector was seeking cancellation of titles Nyandarua/Sabugo 4001-4004 and that 6 acres of land be transferred to him. In the plaint, the objector alleged that he had contributed to the payment of Nyandarua/Sabugo 515 to the Settlement Fund Trustee and that it was later subdivided to farm plot 2119 and that the father had subdivided it without his consent.

The question is, if the objector sued Njuguna Kibuba for subdividing parcel 2119, how can he now allege that it is the deceased, Susan, who fraudulently subdivided the land and maybe sold the plots. Had Susan been part of the fraud, she would have been enjoined to that suit HCC.1/2009. In my view, the objector's allegation of fraud remains as such, because so far, there is no evidence to prove that Susan acted fraudulently or that she is the one who subdivided parcel 2119.

The objector seeks the revocation of grant issued to the petitioner. Section 76 of the Law of Succession Act, sets out situations when a grant can be revoked or annulled, Section 76 provides as follows:

“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 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.”

Having considered the evidence on record in its totality, I cannot say that the objector has brought his case within the purview of Section 76 of the Act. As per the record, the parcel 4001 was transferred to the deceased by her father. The objector is not one of the beneficiaries to the estate of Susan because he is not her child.

The objector, so far, has not filed any Succession Cause to wind up his father’s estate. He has filed **Nakuru HCC.50/2012 (Now Nyahururu ELC.193/2018) Stephen Ndungu Njuguna v Elijah Macharia, Machara Njeri Kogie, Haron Muiruri Kogie and Peter Njuguna Njoroge**. The said suit is yet to be prosecuted or determined. Since the objector is not a beneficiary of the deceased’s estate, he does not have the *locus standi* to bring this application. If he has a claim over parcel 4001, then he must prosecute the suit, **Nyahururu HCC.193/2018 (Nakuru HCC.50/2012)** first.

The deceased’s (Susan) children (beneficiaries) have no objection to the confirmation of grant. Part of the deceased’s land was sold to Geoffrey Muriqi and the beneficiaries are not opposed to the land being transferred to him.

In the end, I find that the objector has not laid any basis for this court to order revocation of grant and I hereby dismiss the application for revocation with costs to the petitioner/respondent.

Dated, Signed and Delivered at NYAHURURU this 10th day of December, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Sigilai holding brief for Mr. Waiganjo for Petitioner

Mr. Ndwiga holding brief for Mr. Muthanwa for Objector