



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 22 OF 2014

(IN THE MATTER OF THE ESTATE OF M'NAMICHIRA M'IBURU (DECEASED))

PETER GITONGA MICHIRA.....APPLICANT

VERSUS

PETER NJOGU WANJOHI..... RESPONDENT

JUDGMENT

By a summons for revocation or annulment of grant dated 9th January, 2014, the applicant sought for the orders for transfer of the Nyeri Resident Magistrates' Court Succession Cause No.231 of 1988 to this honourable court and for revocation of temporary grant of letters of administration made to the respondent by the resident magistrates' court in that succession cause on 17th October, 1989 and confirmed on 17th May, 1990. The grounds upon which this latter order was sought were that the grant was obtained fraudulently by the making of a false statement in that the respondent is neither a beneficiary of the deceased's estate nor is he the deceased's dependant; that the proceedings to obtain the grant were defective in substance as no consent was sought from or a citation issued to the rightful beneficiaries of the deceased's estate; and, the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant. The final order which the applicant sought was that of an injunction to restrain the respondent from alienating, wasting or in any other way dealing with the parcel of land known as **LR. No. Laikipia/Kalalu/78** pending the hearing and determination of the summons for revocation of grant.

The summons was supported by the affidavit of the applicant himself which he swore on 9th of January 2014. In that affidavit, he swore that he was the son of the deceased who died on 31st of July 1984. Apart from the applicant, the deceased was also survived by his widow, and several other children. Prior to his demise, the deceased owned the property referred to as **LR. No. Laikipia/Kalalu/78** which comprised his estate.

The applicant deposed that the respondent was only their neighbour and not related to the deceased in any way; however, upon his father's demise, the respondent relocated the deceased's entire family to Meru, at the applicant's aunt's place. Subsequently, without the knowledge or consent of the applicant's mother or any member of the deceased's family, the respondent filed succession cause in the magistrates' court in respect of the deceased estate; the grant of letters of administration was made to him and later his deceased father's estate was transferred to the respondent upon confirmation of the grant on 17th of September, 1990.

The applicant deposed that he later learnt that the respondent purported to have purchased this land from his mother after the deceased's death. He contended that as a result of the respondent's actions his entire

family had been rendered destitutes and had effectively been disinherited.

The respondent swore and filed a replying affidavit opposing the applicant's summons. He contended that he is now the registered owner **LR. No. Laikipia/Kalalu/78** which he alleged was sold to him by the applicant's mother and whom he acknowledged was the sole surviving widow of the deceased and therefore the rightful beneficiary of the land in question.

The respondent further swore that with the consent of the deceased's widow, a temporary grant in respect of the deceased estate was made to him on 17th October, 1989. That by an application made on 15th of May, 1990, he applied to court for confirmation of the temporary grant. His application was allowed and on 17th of May, 1990 the temporary grant was not only confirmed but the magistrates' court also ordered that the estate be transferred to his name. He urged the court to dismiss the applicant's summons.

Directions were taken to the effect that the summons be heard by way of oral evidence and so parties were heard on 1st February, 2016.

The applicant largely rehashed the depositions in his affidavit and added that the respondent deceived his mother and took his father's land upon the latter's death despite the fact that he was buried on the same land. He only discovered that the respondent had transfer the land to his own name when he went to pursue the title deed from the land's registry. He later discovered that the respondent had effected the transfer after filing a succession cause in which he obtained the grant that enabled him to transfer the land to himself as its absolute owner. It was his evidence that none of the applicant's family members was aware of the succession cause.

The respondent on the other hand admitted that the deceased was his neighbour and that while he was ailing he took over the responsibilities of supporting his wife; he even bought the casket in which the deceased was buried when he finally died. He later bought the deceased's 5-acre land from his widow at the price of Kshs 65,000/=. He produced an agreement of sale dated 3rd of October, 1988 purportedly executed by him and the deceased's widow disposing of the land.

It was his evidence that the deceased's widow and his son gave him the consent to obtain a temporary grant in respect of the deceased's estate; the grant was later confirmed and the estate transmitted to him; accordingly, he was registered as the proprietor of the land in question.

The respondent admitted that, even as the deceased's entire estate was transmitted to him, he was aware that the deceased had nine children some of whom were minors.

The magistrates' court record show that the petition for letters of administration intestate of the deceased estate was filed by his widow, Thirindi Muchira Iguru sometimes in 1988. The petition was gazetted in the Kenya Gazette of 3rd February, 1989 and the grant was made to her on 17th of May 1990. Curiously, on the same date, the magistrates' court purported to confirm what that record referred to as "temporary letters of administration" purportedly issued to the respondent on 17th October, 1989 in respect of the deceased's estate. The confirmation was based on the respondent's application dated 19th April, 1990. In the schedule to the certificate of confirmation of grant, the deceased's estate was transferred to the respondent absolutely. Armed with this certificate, the respondent transferred the deceased's land, **Title No. Laikipia/Kalalu/78** on 18th September, 2007; he was issued with a title deed on the same date.

These undisputed facts show petition for grant of letters of administration of the deceased's estate was flawed from the very word go. To begin with, although the deceased's widow petitioned for the grant of letters of administration, as she was rightly entitled to, being the only surviving wife of the deceased and thus ranked prior to any other person eligible for such a grant, she could not be a sole administratrix of the estate considering that some of the deceased's children who survived him were minors. In these circumstances, a continuing trust for their benefit automatically came into being and where such a trust exists, **section 58 (1) (a)** of the Act expressly prohibits the grant of letters of administration in respect of an intestate to one person unless that person is the Public Trustee or a Trust Corporation. This provision

of the law is couched in mandatory terms and therefore non-compliance with it rendered the petition fatally defective and the subsequent grant made to the petitioner null and of no legal consequence.

Secondly, even with all its defects, it is not the grant made to the deceased's widow that was confirmed; what was confirmed was what was referred to as "a temporary grant" which was issued and subsequently confirmed in what one would consider as bizarre circumstances. I so describe the circumstances under which it was issued because, first, the law does not provide for the so-called "temporary grants"; it is only under **section 54** of the Act that the Court is empowered to limit a grant of representation for a particular purpose. If such a grant was necessary, then it could only have been made to the petitioner if she could satisfy the court that circumstances demanded for such a grant pending the issue of a full grant; for instance, if she could demonstrate that the grant was required for collection or preservation of assets comprising the deceased's estate. Second, whatever the case, there is no way such a grant was going to be made to the respondent who, not being related to deceased in any way, was for all intents and purposes, a total stranger to the deceased's succession cause. Third, the only grant that was eligible for confirmation was the full grant in respect of which the requisite notice had been issued in the government gazette.

Thirdly, the transmission of the deceased's estate is purported to have been made on the basis of, not the grant that was made to the petitioner, but on the basis of the much maligned 'temporary grant'. This document obviously had no legal basis but even then, the agreement which the respondent produced in court to support his argument that he bought the deceased's land shows that the land was purportedly sold either before the petition for grant of letters of administration was filed or during its pendency.

It has been demonstrated that the petition was non-starter **ab initio** but even if it had been filed procedurally, still the deceased's widow could not purport to dispose the whole or any part of the deceased's land before the confirmation of grant and without this court's authorisation. According to **sections 35** and **36** of the Act, she was only entitled to life interest in the property; her disposal of the property or part therefore was restricted to her maintenance (and the deceased's survivors) and subject to the consent of the court. (**See section 37 of the Act**). The purported disposal of the deceased's land flouted these provisions, if it was to be assumed that the petition for the grant of letters of administration was valid.

In the absence of the court's authority, the disposal of the deceased's estate was also in flagrant breach of **section 45 (1)** of the Act which states:

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

The breach of this provision is a criminal offence which attracts penal consequences; the penalty is prescribed in **subsection (2)(a)** of **section 45** to comprise a fine of Kshs 10,000/= or imprisonment for a term of one year or both fine and imprisonment.

It is evident that the purported contract of sale between the deceased's widow and the respondent was nothing more than an instrument through which they intermeddled with the deceased's estate. Having been entered into in breach of the law, it was also an illegal contract.

I agree with the applicant that every rule in the book was broken in respect of the succession of the deceased's estate. Ultimately, I am inclined to find that the applicant's summons dated 9th January, 2014 meets the threshold set by section 76 of the Act on at least three grounds; that the proceedings to obtain the grant were defective in substance; 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; and, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. Accordingly, I hereby make the following orders:

1. The purported temporary grant made to the respondent and the grant made to the petitioner on

17th May, 1990 are hereby revoked and/or annulled.

2. The district land registrar, Laikipia District Land Registry is hereby directed to cancel the registration of Peter Njogu Wanjohi as the registered proprietor of **Title No. Laikipia/Kalalu/78**.

3. The title deed issued in the name of Peter Njogu Wanjohi as the registered proprietor of **Title No. Laikipia/Kalalu/78** is hereby revoked.

4. The registration of land comprising **Title No. Laikipia/Kalalu/78** shall revert to the deceased's name M'Namichira M'Iburu pending the filing and determination of a formal petition for grant of letters of administration of his estate.

5. The respondent shall bear the costs of this application.

Orders accordingly.

Signed, dated and delivered in open court this 30th January, 2017

Ngaah Jairus

JUDGE