



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
SUCCESSION CAUSE NO. 86 OF 2012
IN THE MATTER OF THE ESTATE OF GATHIMBA MWARITHA....DECEASED
AND
MUGO MWARITHA KATHIMBA.....PETITIONER
VERSUS
CHIENGO GATHIMBA MWARITHA.....RESPONDENT

JUDGMENT

1. The applicant **Mugo Mwaritha Kathimba** filed summons for revocation and/or annulment of grant under **rule 76 The Law of Succession Act Cap 160 and Rule 44 of the Probate and Administration Rules**. He seeks orders that the letters of administration confirmed on 15th December, 2014 be revoked and set aside as it was obtained fraudulently by making false statement on the concealment from the court of something material to the case by the respondent herein.

2. The application is supported by the affidavit of Mugo Mwaritha sworn on 19th February, 2016. The applicant is stating that during the confirmation of grant himself and other beneficiaries were not aware of the mode of distribution as it was not read out. The administrator included land parcel number **MWERUA/KAGIOINI/265** which belonged to the applicant and not to the estate of the deceased. Further that Land Parcel Number **MWERUA/KITHUMBU/140** was distributed contrary to the wishes of the beneficiaries. He further deposed that the Land parcel No **MWERUA/KAGIOINI/265** ought not to have been included in the confirmation of grant as it had been sub-divided into four portions **2623, 2624, 2625 and 2626**.

3. The Respondent **Chengo Gathimba Mwaritha** opposed the application and filed a replying affidavit sworn on 2nd March, 2016. What he is contending is that the applicant knew the mode of distribution as it was pleaded in the affidavit in support of the application for confirmation of grant annexure CGM -1- which was served on the applicant. Upon being served the applicant did not oppose the application nor did he file an affidavit of protest. The Respondent deposes that the mode of distribution was read by the judge to all the beneficiaries who were in Court and nobody opposed so the grant was confirmed. With regard to Land Parcel No. **MWERUA/KAGIOINI/265** it belonged to the deceased as shown by certificate of official search and extract of title annexure CGM -3-. The applicant purported to sub-divide the land in 2014 before the confirmation of grant annexure CGM4. He prays that the subdivision and the resultant title deeds be cancelled. He is further stating that what can be done to the grant is a rectification to read **MWERUA/ KAGIOINI/265** which due to a typing error reads

MWERUA/KITHIMBU/265. He prays that the application be dismissed.

4. The application proceeded by way of *viva voce* evidence. The issue for determination is whether the grant was confirmed through concealment and fraud. From the record the grant was confirmed on 15th December, 2014. Those who were present were Mugo Mwaritha Kathimba ID 6036825 who is the applicant, Chengo Gathimba Mwaritha ID 3199812, Julius Murithi Mwaritha, Margaret Warware Mwai ID 3131941, Ndegwa Mwaritha ID 0753366 and James Gitari Mwaritha ID 3662001. The Court ordered that the grant be confirmed. The applicant was present in court. He was in court upon being served with the application for confirmation of grant. In his testimony the applicant stated that his land **MWERUA/KAGIOINI/265** was wrongly included in the estate of the deceased. He admitted that he was in Court when the grant was confirmed but he changed his mind when the grant included his land. The supporting affidavit to the application for confirmation of grant had listed the land Parcel **MWERUA/KITHUMBI/140** 3.5 acres and **MWERUA/KAGIOINI/265** – 5.1 acres. The applicant did not oppose the application for confirmation of grant though he was present in court.

5. The applicant when he testified in Court did not produce the title deed for land parcel No. **MWERUA/KAGIOINI/265** which he claims is his property. Be thus as it may, the Respondent annexed the extract of title for **MWERUA/KAGIOINI/265** which shows that the land is registered in the name of Gathimba Mwaritha. A certificate of official search dated 8th November, 2013 shows that the land parcel **Mwerua/Kagioini/265** is in the name of Gathimba Mwaritha who is the proprietor, annexure CGM – 3. The applicant admitted in cross-examination that the land belonged to his grandfather. According to him the land was given to him by the clan. He did not however, adduce any evidence to proof that he was given the land.

6. The Respondent has proved that the land Parcel number **MWERUA/KAGIOINI/265** formed part of the estate of the deceased when this cause was filed. The applicant admitted that he sub-divided the land before the grant was confirmed. He obtained title deeds and allocated the land to himself and his three brothers. The applicant did not adduce any evidence to show how the land was transferred to him when this cause was pending in court or where he got the authority to sub-divide the land. I find that the applicant has not proved that the land parcel No. **MWERUA/KAGIOINI/265** ever belonged to him. By sub-dividing the land, obtaining title deeds and giving it out to his brothers was intermeddling with the estate of the deceased. He further acted fraudulently by sub-dividing the land before the grant was confirmed. The Respondent has shown that the sub-division was done in 2013. Contrary to what he told the court that he has attached the copy of the title deed on this application, no such title is attached. All what he attached are the resultant parcels after subdivision shown on certificates of official search for parcels No. **2623, 2624, 2625** and **2626**. The Applicant is seeking to revoke the grant based on his fraudulent acquisition of the land of the deceased. He has not come to court in clean hands. He was not truthful as he testified that he said no to the confirmation of grant a fact which is not borne out by the record.

7. In his submissions the applicant stated his main ground was that the confirmation of grant issued by this court included land parcel number **MWERUA/KAGIOINI/265** which belonged to him and not the deceased. I find that the applicant has not proved this ground. The petitioner has proved that all along and during the pendency of this cause the land was owned and registered in the name of the deceased as the absolute proprietor. The applicant was present in court when the grant was confirmed and he did not object. There is no valid ground proved to warrant this court to set aside the grant.

8. The applicant cannot be heard to say he was not aware of the mode of distribution when it is clear that he was in court when grant was confirmed and never objected. The Respondent told the Court that the beneficiaries had agreed at the chief's office on the mode of distribution. It is after they agreed that they attended court for confirmation of grant to affirm what they had agreed at the chief's office. The applicant appeared in court. The applicant has not shown what the Respondent concealed from court.

9. The Court may revoke the grant as provide under **Section 76** of the **Law of Succession Act**. There are grounds which a party has to proof. It is provided:

“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 untrue allegation of a fact essential in point of law to justify the grant to not withstanding that the allegation was made in ignorance or inadvertently.”

d.

e.

10. The applicant based his application on fraud and concealment from the court of something material to the case. The mode of distribution was not concealed to the beneficiaries. The application for confirmation and supporting affidavit were served and confirmation was done in open court. As pointed out Land Parcel No. **MWERUA/KAGIOINI/265** has been shown to belong to the deceased and therefore part of the estate of the deceased. There is no proof that the petitioner ever concealed any material facts.

11. The applicant faulted the mode of distribution. As submitted by the respondent, the applicant did not lead any evidence to show that the mode of distribution was in any way detrimental to him or any of the beneficiaries. None of the beneficiaries was called to testify. The affidavit in support of the application of confirmation of grant shows that the properties were shared according to the houses since the deceased had three wives. The applicant has his portion from the first house. All the properties were identified and the shares of the beneficiaries. There is nothing proved on a balance of probabilities that the respondent concealed material facts. It is not sufficient for a party to allege that material facts were concealed, the party must lay before the court sufficient evidence to prove the allegation. In **Misc Application No. 9/2009 John Waweru Nyamu & Others -V- Lucia Wangige H.C. Kerugoya**, R. K. Limo J., declined to revoke the grant as the two grounds of concealment and fraud had not been proved. I am in agreement with the finding. The fraud and concealment being one of the grounds upon which the court can revoke or annul grant must be proved.

12. The applicant created a situation whereby he sub-divided land belonging to the deceased and now comes to say the land does not belong to the estate. It is the applicant who has committed a fraud and the court cannot allow him to benefit from such conduct. I find that the Applicant has not proved fraud or concealment to warrant the Court to revoke the grant. I find that the Applicant has not tendered any evidence to prove any of the grounds envisaged under **Section 76** of the **Law of Succession Act**. The Summons for Revocation of Grant must fail.

13. I must address the issue of the land parcel No. **Mwerua/Kagioini/265** which it has been proved belonged to the deceased but was sub-divided by the protestor and title deeds issued. The certificate of official search for **Mwerua/Kagioini/265** was as 8th November, 2013 registered in the name of Gathimba Mwaritha, **annexture CGM 3**. The land was subdivided on 18th February, 2014 and the protestor was registered on title number **2623** and other title deeds number **2624, 2625, and 2626** issued out of the sub-division. Others who were registered apart from the protestor are James Gitari Mwaritha, Julius Muriithi Mwaritha and Ndegwa Mwaritha. The applicant had no authority to sub-divide and allocate land belonging to the estate of the deceased. He sub-divided and allocated land to his sons who were not beneficiaries. It is not clear how the Land Registrar allowed the sub-division of a deceased estate and issued title deeds without following a confirmed grant of letters of administration. The sub-division and issuance of title deeds was no doubt fraudulent. I find that the title deeds should not be allowed to stand. I order that the title deeds number **Mwerua/Kagioini/2623, 2624, 2625 and 2626** be cancelled and title

deed for **Mwerua/Kagioini/265** to revert back to the estate of the deceased and be distributed as per the confirmation of the grant. The title **Mwerua/Kithumbu/265** was a typing error. **Section 74** of the **Law of Succession Act** provides that errors may be rectified by court, that is errors in names, descriptions of time and place etc whether before or after confirmation of the grant. The Respondent deposed that the Court ordered the rectification of the grant to reflect the land parcel as **Mwerua/Kagioini/265**. The grant should therefore be rectified to reflect the correct land parcel to read **Mwerua/Kagioini/265**.

14. I find that the protest is without merits and is dismissed with costs.

Dated and delivered at Kerugoya this 28th day of April, 2017.

L. W. GITARI

JUDGE

Read out in open Court , all parties present, court assistant Naomi this 28th day of April, 2017.

L. W. GITARI

JUDGE

28.04.2016