



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 73 OF 2004

IN THE MATTER OF THE ESTATE OF KIRERA M'RINGINE NDUMBA (DECEASED)

JOHN KIRIINYA NDUMA M'KIRERA.....PETITIONER

VS

ESTHER GACEKE SOLOMON & 5 OTHERSRESPONDENT

AND

MARY WANJIKU WATHIGO

MARY MWELU GITONGA.....INTERESTED PARTYS

RULING

The applicants/interested parties herein Mary Wanjiku Gitonga filed application dated 5th September 2016 by Chamber summons pursuant to Rules 49 and 73 of the probate and Administration Rules, sections 47 and 93 of the Law of succession Act cap 160 Laws of Kenya, Order 45 Rules 1 and 2 (2) of the Civil Procedure Rules 2010 sections 68 and 69 of the Land Registration Act 2012 and Article 50 (1) of the constitution of Kenya 2010 and all other enabling provisions of the law.

The applicants sought that the court issues a temporary order of inhibition inhibiting the registration of any dealings, dispositions, transactions or entries of any nature over land parcel no. Ntima/Igoki/60 pending the inter parties hearing and determination of this application and thereafter as the court shall order.

THAT the court review, discharge and vacate its decision and/or order made herein as 26th February 2014 revoking the initial grant it had made to John Kirinya Ndumba M'Kireria and all the subsequent orders there from and reinstate the certificate of confirmation dated 17th May 2010.

THAT the court be pleased to review, discharge and vacate its decision made on 25th March 2015 cancelling the 1st and 2nd interested parties title deeds for land parcels no.s Ntima/Igoki/8547 and Ntima/Igoki/8549 respectively and proceed to make an order that the said title deeds be reinstated.

Among grounds for application were that the respondents were actively engaged in the process of disposing of the deceased estate and unless an urgent order of inhibition is issued they will effect disposal of subject land and transfer and 1st and 2nd applicants will suffer irreparable loss and damage.

It was the applicants ground that application was made in good faith and if prayers sought are granted it

will not prejudice the Respondents case. The application was also supported by affidavit of applicants.

Mary Wanjiku Wathiong'o averred that she was owner of parcel No. Ntima/Igoki/8547 which title was issued to her on 15th November 2013 and it resulted from subdivision of Ntima/Igoki/60 which was subject to succession cause herein.

She said she was bonafide purchaser of value having bought the said portion from silvester Ngeta Mutisya on 24th July 2010.

That she did charge the title with Kenya Woman Microfinance Bank Ltd for a loan of Kshs3,000,000 but while negotiating for top up discovered the title had been cancelled and reverted to original title. She said she was never informed when title was being cancelled and her rights under Article 50(I) of the Constitution was violated. She said she was not aware that the grant was revoked by court on 26th February 2014.

She averred that those who misled the court to revoke grant participated in the proceedings and even gave consent for confirmation and distribution of the deceased estate.

She claimed that being a bonafide purchaser her title No. Ntima/Igoki/8547 was protected under the Land Registration Act 2012 as well as under section 93 of the Law of Succession Act Cap 160 Laws of Kenya.

Mary Mwelu Gitonga also swore an affidavit on 2nd September 2016 and reiterated what the 1st interested party had averred in respect to her claim.

Esther Gaceke Solomon filed Replying Affidavit in opposition that the application dated 5th September 2016 and averred that John Kirinya Ndumba was served with application to revoke grant dated 29th October 2013 and was issued and served on 14th November 2013 on Respondent.

THAT order of inhibition issued on 30th October 2013 was made in the presence of John Kirinya Ndumba but in total disregard of the order and in blatant contempt he proceeded to transfer the land to the applicants.

THAT in the circumstance no good title could pass. She averred that applicants were aware of the order of revocation but didn't bother to oppose it.

THAT John Kirinya Ndumba had not challenged the order of revocation. She also averred that her application to cancel subdivision of parcel Nol. Ntima/Igoki/60 was also not challenged and upon court establishing subdivision was fraudulent cancelled the subdivisions. She claimed the Administrator presented forged consent for distribution and confirmation and subdivisions were clearly a product of fraud and illegality. She said the applicants should follow John Kirinya Ndumba for the purchase price they paid as sale was illegal.

She averred that the applicants were not bonafide purchasers and were party to the whole process that was tainted with fraud and illegality and cannot seek to benefit from their own illegalition. She urged that the application be dismissed.

Mary Wanjiku Wathigo send in her supplementary affidavit that she was never served with the application for revocation or even cancellation of the titles and that she is not Mary Wamaitha as stated by the process server but Mary Wanjiku Wathigo.

M/S Mithega&Kariuki Advocates for 1st& 2nd applicants interested parties filed submissions in which the court was urged to allow the application.

M/S MurangoMwenda and Co Advocates for the Respondent also filed written submission in which the court was urged to disallow the application for reasons Silvester Ngeta Mutisya who sold land to Mary

Wanjiku Wathigo is not a beneficiary to the estate of the deceased and his home is not in the list of beneficiaries in the cause. It was argued that Green card for parcel No. Ntima/Igoki/8547 showed the petitioner John Kirinya Ndumba was registered and in transmission on 7th November 2013 and this transferred to 1st applicant.

It was submitted that agreement dated 7th August 2009 is worthless as Silvestre had nothing to pass to 1st applicant.

THAT by 7th September 2009 grant had not been confirmed and even after confirmation Silvestre is not a beneficiary. It was argued the applicant was not a purchaser protected under Section 93(1) of the Law of Succession Act and anything done in relation to the property of a deceased person, other than as authorized by the Act is illegal, null and void and is of no effect. It was argued that Section 45(1) prohibits such transactions which amount to inter meddling and 1st applicant should seek her remedy from the stranger pursuant to section 93 of the succession Act.

The Respondent submitted that the 2nd applicant alleged that her husband purchased from John Kirinya. The sale agreement is dated 7th April 2006 long before confirmation of Letters of Grant as certificate of confirmation is dated 17th May 2010. It was argued that petitioner John Kirinya had no authority to sell deceased land to the husband of the 2nd interested party. They intermeddled with estate property and thereby violated provisions of sections 45(1) of the Act and have no protection under section 93.

It was also submitted that the applicants were not entitled to be served but on direction of the court they were served with the application to revoke grant. That since the applicants dispute serve on account of misspelling of their names, they ought to have applied for cross examination of the process server and not dispute in the submissions.

THAT the application for revocation was not challenged by the petitioner and orders made were also not challenged by appeal, application for review or setting aside. It was argued the applicants had no locus to act as proxies to the petitioner.

It was argued that there was collusion between applicants and the petitioner who has chosen not to say anything regarding allegations made against him

It was argued the then petitioner executed transfers against court order made on 30th October 2013 and effected transfers on 12th November 2013. It was argued that the applicants can't benefit from an act done in disobedience of a valid court order.

The deceased herein M'Kirera M'Ringera died intestate leaving behind 4 sons including John Kirinya the former petitioner herewith and 3 daughters including the Respondent in the application dated 5th September 2016 according to the Chiefs letter dated 8th August 2001. The estate was made up of Parcel no.s L.R Ntima/Igoki/60, Kirimana/Kithina/108 and Nyaki/Thuura/125. The Grant of letters of administration was made to John Kirinya Ndumba M'Kireria on 14th June 2006. On 17th day of May 2010 the grant was confirmed and parcel No. Nyaki/Thuura/125 distributed as follows:

- a) Simon Kinjuki – 1 Acre
- b) George kangoria – 1 acre
- c) Rebecca Kooru – I acre
- d) Esther Kimathi – I acre
- e) John KirinyaNdumba – 1.54 acres

Parcel No. Kirimara/Kithithima/108

- a. John Kiriinya – 3 acres
- b. Silas Muthee and Sabella Gatia and Gakii Ngatia – 1 acre

Parcel No. Ntima/Igoki/60

- a. Gakoromone AIPCA church ¼ acre
- b. Mary Wanjiku Wathigo - ¼ acre
- c. John Kiriinya ndumba – ¼ acre
- d. Mary Mwelu Gitonga – ¼ acre

It is apparent that from the chiefs letter, the names of Mary Wanjiku and Mary Mwelu are not listed as beneficiaries to the estate. They also appear together with Silvester Ngeta Mutisya as having signed consent to confirmation dated 28th November 2008 but their capacities in that regard is not explained. When application for revocation was filed, pending interparties hearing, the court ordered that process of transfer should be stopped forthwith and status quo be maintained. This was on 4th November 2013. Subsequently grant made to John Kiriinya was revoked and granted on 16th April 2014 to George Kangiria and Esther Gaceke Solomon. Copy of title annexed to affidavit of Mary Wanjiku Wathigo shows that title was given on 12th of November 2013 a few days after order barring transfer. The sale agreement is between Silvester Ngeta Mutisya and Mary Wanjiku Wathigo. Silvester is a stranger in this estate and therefore could not have any title to pass to any one. The sale agreement annexure MWW2 doesn't show on which date in 2010 the same was executed and it can't be told whether it was before or after the confirmation of grant. Even if Silvester was a beneficiary to the estate he could not have lawfully transferred the estate property before confirmation of grant. Mary Wanjiku Wathigo cannot therefore say she was a bonafide purchaser. Similarly, Mary Mwelu Gitonga had herself registered as proprietor of a portion of L.R. No. 40 on 12.11.2013 a few days after the petitioner John Kiriinya had been ordered not to effect the transfers. The agreement for sale of land from which she draws her right annexure MMG2 is dated 7th April 2006 between John Kiriinya M'Nkirera and Fredrick Gitonga M'Marete. By this time grant had been issued on 14th June 2004 but confirmation made on 17th May 2010. Distribution had not been done to enable John Kiriinya to deal with the estate property in anyway. It is not explained how Mary Mwelu Gitonga came to be registered if Kiriinya sold to Fredrick Gitonga.

The distribution appears to have favoured John Kiriinya who benefitted from all estate properties unlike his brothers and sisters. He was not an accountable and trust worthy Administrator and as a result he was deprived of grant of letters of Administration. The applicants herein can't unfortunately benefit from the unlawful and illegal conduct of John Kiriinya. If they paid him money then they should claim it from him. The other beneficiaries of the estate can't be deprived of their inheritance because of the dishonest conduct of John Kiriinya.

The application dated 5th September 2016, can't succeed. Same is dismissed with costs to the Respondent.

Ruling Signed, Delivered and Dated this 2nd Day of August 2017.

HON. A.ONG'INJO

JUDGE

In the presence of:

C/A :

Petitioner:-

Respondent:-

HON. A.ONG'INJO

JUDGE