



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 118 OF 2009

IN THE MATTER OF THE ESTATE OF JOSEPH NJENGA NJOKA (DECEASED)

PATRICK GITARI NJOKA1ST PETITIONER/APPLICANT

LYDIA WAMBUI.....2ND PETITIONER/APPLICANT

VERSUS

JANE MUIKAMBA NJENGA.....RESPONDENT

R U L I N G

1. The applicants in their summons dated 3/03/2015 seeks for revocation of the grant issued and confirmed in favour of the respondents on 8/07/2010. The application is supported in separate affidavits of applicants.
2. It is deposed that the land L.R. Mwea/Tebera/B/969-1127 measuring 34.72 acres did not belong to the deceased absolutely. Further that the deceased held part of the land in trust for the late Thomas Kiragu Njoka late father of the applicants as a “muramati”. It is contended that under Embu customary law it was common for the eldest son in the family to be registered as proprietor of family's land to hold in trust for himself and his younger brothers. The deceased and the late Thomas Kiragu Njoka were bothers and that his children (applicants herein) are entitled to a share of the land. The land was distributed to the applicant and her children disregarding the interests of the applicants.
3. The respondent in her replying affidavit deposes that the application is fatally defective ad an abuse of the due process of the court. She states that she was appointed the administrator of the estate in accordance with the law and that she lawfully distributed the estate to her children and various purchasers. The land in question was owned by the deceased Joseph Njega Njoka absolutely and that the applicants are total strangers.
4. The respondent states that the father of the applicant the late Thomas Kiragu Njoka owned land No. 58 Tebera Section of Mwea Irrigation Settlement Scheme measuring 5.0 acres which was inherited by his children including the 1st applicant through a court order dated 25/06/2009 vide Wanguru SRM Succession Cause No. 36 of 2007.
5. The previous land cases against the deceased and his family instituted by the applicants have been dismissed including Embu High Court J.R. No. 11 of 2009. Finally, that the summons is not supported by the provisions of Section 76 of the Succession Act which sets out the ground for revocation of grant.
6. The respondent had filed a preliminary objection dated 17/03/2015 which I believe was abandoned when the parties decided to proceed with the application. The ground on which the objection was based

is included in the replying affidavit.

7. The application was argued by way of written submissions filed by Messrs Eshuchi & Co. Associates for the applicants and Messrs Kiguru Kahigah & Co. for the respondent.

8. The only issue in this application is whether the application satisfies the test laid down under Section 76 in relation to revocation of grant. However, I wish to first make some observations on other side issues raised in this application.

9. The applicant's affidavits raise the issue of land ownership between the deceased and his late brother Thomas Njega Kiragu. This is a land dispute that cannot be determined in this cause. It is a matter for the Land and Environment Court which was in existence at the time the application was filed in the year 2015.

10. The applicants challenge the ruling of Wanjiru Karanja, J. in Embu J.R. No. 11 of 2009. The ruling was delivered on 15/02/2010 and no appeal was filed against the decision. The procedure that the applicant ought to have followed was appeal against the ruling which was in favour of the respondent herein. The award of the Land Disputes Tribunal in LDT case and decree of the Senior Resident Magistrate LDT No. 14 of 2008 issued on 9/02/2008 was quashed.

11. The dispute related to seven parcels of the land L.R. Mwea/Tebere/B/971, 977, 980, 987, 988, 1118 and 1120 which had resulted from sub-division of the original land of the deceased. In this regard, I find that this court does not possess the jurisdiction to review the ruling of a court of equal status. The ruling is still valid to date since the applicants chose not to challenge it on appeal.

12. I note that the submissions of the applicants focus on the land dispute and relies on several related decisions which are not relevant to this application.

13. Regarding this application for revocation of grant, the court will be guided by Section 76 of the Succession Act. It provides for the following grounds that must be proved:-

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;

14. The 1st applicant has not given any ground for revocation of grant in his affidavit. The 2nd applicant in paragraph 7 of his affidavit states that the grant "was fraudulently obtained through material disclosure" and that the properties listed in the grant do not belong to the respondent. The rest of the content of the 30 page affidavit does not explain the alleged fraud, or non-disclosure but extensively dwells on the ownership dispute of the land. The applicant has a duty to not only explain the ground he relies on but to satisfy the court on the same.

15. In answer to the alleged fraud and non-disclosure, the respondent states that she filed the succession cause and followed it up in an open and transparent manner. She denies that there was any fraud or non-disclosure of any facts material to the case.

16. This cause like any other succession case was gazetted inviting objections from any interested party to the issue of the grant of representation. No objection was filed in court within the period of 30 days

provided for by the law. The case proceeded to conclusion with the grant being confirmed and estate distributed. The case was in court for about one and a half years and not even a protest against confirmation was filed by the applicants.

17. The respondent applied and was appointed as the administrator as the widow of the deceased. This was in consistence with the law which place her over and above any other relative of the deceased. The applicants are nephew and niece of the deceased respectively and are claiming the land which they say was their deceased father's share that was held in trust for him. Being nephew and niece of the deceased, the applicants do not qualify to be appointed administrators of the deceased's estate since there is a widow and children. Their prayer for revocation of grant is therefore misplaced.

18. It is not in dispute that the applicants shared their late father's property in Wanguru Succession Cause No. 36 of 2007 where they were rightful heirs. If they believed they were, the right time was to file an objection to the grant of letters of administration. In this cause, the applicants are not beneficiaries and the respondent was under no obligation to involve them in the estate of her husband. The applicant should file the alleged land dispute in the right court.

19. It is my considered opinion that the applicants have not proved any of the grounds for revocation of grant as stipulated under Section 76 of the Act to justify revocation of the grant.

20. I find no merit in this application and I dismiss it with costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF SEPTEMBER, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Mwangi for Kahiga for respondent

Mr. Gitonga for Wandeto for applicant