



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1708 OF 2015**

**IN THE MATTER OF THE ESTATE OF HENRY WAMITI NG'ANG'A**

**MIRIAM MUGURE WAMITI .....APPLICANT**

***VERSUS***

**JACINTA NJERI NGANGA.....RESPONDENT**

**RULING**

**PLEADINGS**

The deceased died on 6<sup>th</sup> October 2004.

The Applicant Miriam Mugure Wamiti, through a Chamber Summons Application dated 05<sup>th</sup> October, 2015 sought the following orders,

- a. Pending hearing and determination of this application, the Applicant is granted orders restraining the Respondent herself, servants, agents from sub dividing, processing title deeds and interfering with quiet possession of L.R.LOC.2/GACHARAGE/670
- b. To review, vary and/ or set aside the order of this Court granted on 10<sup>TH</sup> of June, 2008
- c. To set aside all orders consequent upon the grant of orders of 10<sup>th</sup> June 2008
- d. An order that confirmation of grant herein be done afresh so as to include the participation of the beneficiaries as required by the probate and administration rules

The Applicant Miriam Mugure Wamiti deposed that the land, LOC.2/GACHARAGE/670 is family land and she and her family reside on the said land. The Respondent brought surveyors to subdivide the land without taking into account the developments the Applicants' family has made on the land.

The Applicant obtained grant of letters of administration over the deceased's estate on 16<sup>th</sup> August 2005. By the Respondent's summons for revocation and annulment of grant of 9<sup>th</sup> March 2007, Hon. Justice Onyancha by the judgment of 10<sup>th</sup> June 2008 revoked the said grant and issued a fresh grant in terms of orders of **Muranga S.P.M.C.C. No. 38 of 2002**. The mode of distribution of the suit property was as follows;

- a. Jacinta Njeri Nganga to get 6.0 acres
- b. Jonathan Kang'ang'a to get 1.5 acres
- c. Henry Wamiti to get 1.5 acres

The aggrieved party did not appeal against the orders of Muranga S.P.M.C.C. No. 38 of 2002. The

Applicant contends that this matter was application for revocation of grant and not an Appeal and the orders granted ought not to have been granted in the judgment by the Hon. Justice D A Onyancha delivered on the 10<sup>th</sup> of June, 2008.

The Applicant also questioned why the court did not apply the determination given by the Tribunal elders on the 22<sup>nd</sup> of August 2000. The Applicant claims that there is sufficient reason to compel this court to review its decision since the judge granted orders that were not prayed for. She wasn't given a fair share of the land and is praying for the confirmation of grant to be done afresh.

The Respondent filed Replying affidavit on 23<sup>rd</sup> November 2015 and deposed as follows in objection to the instant application; she is an elderly lady who has been pursuing this claim since 1991. She had sued Henry Wamiti Ng'ang'a, the late husband to the Applicant, Miriam Wamiti Mugure in **Murang'a S.P.M.C.C. No. 38 of 2002** and judgment was issued in her favor during the deceased's lifetime. The Applicant is not only well aware of the court proceedings but also of the judgment. The Applicant never appealed the judgment, which represents the ownership and individual rights, holdings and just entitlements of the suit property Loc 2/Gacharage/670. The Respondent also claims the Applicant rushed to file this Succession Cause in Nairobi in order to defraud her of her rightful share and to have the grant irregularly issued. Had she felt at all displeased or dissatisfied with the ruling; she should have appealed against it.

The deceased could not dispose of land he did not already own; he was merely a trustee of the land. This court cannot rule on that which does not exist or confer rights that are not recognized by law. The Applicant in applying for grant failed to disclose the orders in **SPMCC 38 of 2002** and left the court to turn a blind eye to what is the backbone of this case.

**The Law of Succession Act Section 3 defines "free property" thus;**

***"in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;"***

The Respondent stated the prayers sought are not tenable; the issues raised are **res judicata** and this Court is **funtus officio**. The Applicant has not complied with the mandatory requirements to warrant a review and instead the Applicant ought to pursue an appeal. The purported review is lodged late in the day, there is no error on the face of the record and due diligence was not applied in discovery of material and relevant facts.

The Respondent is urging the court to consider the determination by the area elders on how the deceased's estate ought to be distributed. The elders' decision was not final and was later referred to the court thus resulting in a court order dated 30<sup>th</sup> August 2004. The matter having been referred to the Magistrate's court one cannot later move back and depend on a Preliminary decision by the Tribunal of Elders.

Both learned Counsel for the parties agreed to canvass the application through written submissions; Mr. Osoro Mugikuyu for the Applicant filed written submissions on 26<sup>th</sup> February 2016 and Mr. Kirubi Mwangi Ben for the Respondent filed written submissions on 9<sup>th</sup> December 2015 and both delved in detail on the issues raised in the pleadings on behalf of their clients.

### **DETERMINATION**

**Order 45 Rule Order 45 Rule1 CPR 2010** provides; for the Applicant to obtain review of the Court decree or order, it would only be on the basis of discovery of a new and important matter which after the exercise of due diligence was not within the Applicant's knowledge and could not be produced at the time the order or decree was granted, or on account of an error apparent on the face of the record or for any sufficient reason.

I have considered the arguments presented by both the Applicant and the Respondent.

The genesis of this matter is that the paternal Uncle late Joseph Warimwe to Samuel Nganga, Jonathan Kang'ang'a and Henry Wamiti Nganga was the original owner of the suit property Loc 2/ Gacharage/670 measuring 9.3 acres. Nganga Joseph Warima (Samuel Nganga) died on 3<sup>rd</sup> January 1985 and Jecinta Njeri Nganga, his widow is the Respondent herein and she obtained grant of letters of administration for her late husband, the deceased's estate on 7<sup>th</sup> October 1991. The Respondent sued the deceased of this Succession Cause; the late Henry Wamiti Nganga in **Muranga SPMCC 38 of 2002**. The matter was referred to the Elders for arbitration by consent of the parties. The proceedings and elders award of 4<sup>th</sup> December 2002 are annexed to the Respondent's Replying affidavit. The award was filed in Court and adopted as an order of the Court on 30<sup>th</sup> August 2004. The matter was determined during the lifetime of the deceased (he died on 6<sup>th</sup> October 2004) and his family knew of his share in the suit property. It was agreed that the deceased though registered as owner of the suit property, he was registered as trustee on behalf of himself and his 2 brothers. In both the award and Court order the suit property was to be distributed amongst the families of the above stated brothers and the stated shares. It is evident from the pleadings that the Applicant did not present the Court with material evidence of litigation over the suit property and resulting Court orders. Hence the grant issued on 16<sup>th</sup> August 2005 was revoked and a fresh grant issued to include the beneficial interest of the family of Nganga Joseph Warima and Jonathan Kanganga in the suit property.

The Court was right in setting aside the grant issued on nondisclosure to this court of the outcome of litigation. The ruling by the lower court in Murang'a **SPMCC No. 38 of 2002** clearly set out the rights and holdings thereof and the Hon. Judge Onyancha could not overlook that which was legally binding on the parties. The Hon. Judge was right based on the facts presented to the Court at the time to revoke the grant and issue a new grant with the confirmed grant in line with the decision of the **Muranga SPMCC 38 of 2002** whose orders were not reviewed or appealed against by any of the parties.

The matter would end here but on reading the judgment of Hon. Justice Onyancha of 10<sup>th</sup> June 2008 the Court made no reference to Elders proceedings and award over the same suit property between the same warring parties in form of the report dated 22<sup>nd</sup> August 2000 marked **MW4** annexed to the Applicant's Supporting Affidavit filed on 5<sup>th</sup> October 2015. The import of the report is the award that reads as follows;

***“The Tribunal elders find that the Court to use any means it deems fit to have the disputed land Loc. 2/ Gacharage/670 subdivided into 3 portions***

***3.0 acres to Jecinta Njeri Nganga, 3.0 acres to Jonathan Kang'ang'a and 3.3 acres to Wamiti Nganga respectively. Wamiti should be registered 3.3 acres of land because he has been trusted as he did not interfere with that land either by selling a r charging it.”***

This Elders award was not disclosed and or presented to this Court during the hearing and determination of the summons for revocation of grant proceedings before Hon. Justice Onyancha. Clearly this is new information that is important that ought to be considered in determination of distribution of the estate of the deceased's estate and the suit property. Although the judgment of this Court was legal, regular and valid, crucial evidence and information in form of the Elders award by the District Land Tribunal Kigumo Division dated 22<sup>nd</sup> August 2000 was not presented by the parties so that this Court would determine between the 2 Elders awards this one and the one of 4<sup>th</sup> December 2002 which one was valid reasonable, fair and appropriate. The Court was robbed the opportunity to grant orders on the basis of the totality of evidence and to make an informed decision.

As the matter stands now, although the Court granted valid orders, this Court cannot affirm the decision and judgment because the parties omitted crucial evidence that is important in determination of distribution of this estate. Should either of the Elders awards be upheld or a separate new mode of distribution be adopted? Did the original owner (paternal Uncle) write an agreement of sale of 5 acres as

alleged? If so why was it not attached to the 2nd Elders Award? What informed the division of the suit property into 3 acres each to each of the 3 brothers' families? In light of the various developments by the 3 sons' families what would be the just fair and equitable distribution of the suit property to all 3 brothers' families? All these questions are left unanswered if the judgment of the Court remains intact without consideration of the Elders award of 22<sup>nd</sup> August 2000. It is strange it was not filed in Court and adopted as a Court order. No reasons are advanced as to why this award was abandoned and another Elders Award was sought and filed in Court and enforced.

Therefore due to the above explained circumstances and especially the fact that the Elders award of 22<sup>nd</sup> August 2000 was not disclosed and presented as evidence in this Court the judgment of 10<sup>th</sup> June 2008 is reviewed due to discovery of new and important information which forms a sufficient reason to set aside the said judgment and confirmed grant. The parties are allowed the opportunity to canvass proposed mode of distribution and fresh summons for confirmation of grant be filed. Any objector may file objection and alternative mode of distribution for the Court to hear and determine. This process will include the participation of the beneficiaries.

After careful consideration of the evidence I have come to the conclusion that the Applicant has a legal basis for review on the basis of non disclosure of the earlier Elders' award of 22<sup>nd</sup> August 2000 which was not presented to this Court in determining the application for revocation of grant.

**COURT ORDERS**

The following are the final orders of this court,

1. **The grant of letters of Administration issued on 10<sup>th</sup> June 2008 by the Honorable Judge D A Onyancha is set aside and all consequential orders.**
2. **A new summons for confirmation of grant application shall be filed after participation of all beneficiaries in distribution of the suit property L.R. No LOC 2/GACHARAGE/670**
3. **Any objector or aggrieved party may apply and file objection with alternative mode of distribution for the Court to determine**
4. **Each party shall own costs**

**READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>st</sup> DAY OF MAY 2016**

**MARGARET W. MUIGAI**

**JUDGE**

In the presence of,

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