



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 65 OF 2013

**IN THE MATTER OF THE ESTATE OF WANJOKA NJAGI alias STELLA WANJOKA
NJAGI (DECEASED)**

AND

JULIUS MUGO MUCHIRI..... APPLICANT

VERSUS

NJIRU K. NJAGI.....1ST RESPONDENT

EDWARD MUGO MUNENE.....2ND RESPONDENT

RULING

1. This ruling relates to the estate of WANJOKA NJAGI alias STELLA WANJOKA NJAGI (Deceased) who died on 10th March, 2005. The ruling is in respect to the summons for annulment of grant dated 24th September, 2010 taken out by JULIUS M. MUGO MUCHIRI the applicant herein. The applicant is seeking the annulment of grant issued to NJIRU K. NJAGI and confirmed on 18th February, 2010 vide Kerugoya Senior Resident Magistrate's Court Succession Cause No. 136 of 2006 on the following grounds namely:
 - i. *That the grant was obtained and confirmed fraudulently or by concealment from the court of something material to the case.*
 - ii. *That the proceedings to obtain the grant were defective in substance.*
 - iii. *That the applicant was kept in the dark about the succession cause until a purchaser of that property known as Baragwe/Guama/1088 sought to evict him.*
 - iv. *That the applicant is a beneficiary of L.R. NO. BARAGWE/GUAMA/1088 and that the amendment of the grant to include that property deprived him of his rights over the said parcel.*
 - v. *That the court lacked jurisdiction to entertain the succession matter as the value of the estate was over Kshs.100,000/=.*
2. The applicant has in support of his application sworn an affidavit which was sworn on 24th November, 2010. What is pertinent in the affidavit is the grievance by the applicant concerning the amendment of the grant made by the subordinate court on 18th February, 2010 which included

- that property known as L.R. BARAGWE/GUAMA/1088. In his opinion the property is worth over Khs.100,000/= which then was beyond the monetary jurisdiction of the subordinate court. The other ground behind the application is the fact deposed by the applicant that he has been in occupation of the said property since 1959 and that over time he has developed it.
3. The applicant has faulted the respondent for concealing from the succession court that the property in question was a subject of several court cases and in particular Nyeri Civil Appeal NO. 195 of 2005 between the applicant and the respondent's mother. The applicant has conceded however, that the appeal abated vide a ruling dated 22nd May, 2008 which he exhibited in his affidavit as exhibit 4.
 4. The applicant has further deposed that there were stay orders against the judgment of court in Nyeri H.C.C. No. 57 of 1998 and that an attempt by the respondent to go round the stay orders were thwarted by the High Court vide a ruling dated 29th April, 2005 which held that the orders of stay from the Court of Appeal were in place and execution or substitution could not be done.
 5. It is the applicant's contention that the deceased in this cause held the property in dispute in trust for the applicant as the applicant and his family have been in occupation of it since 1959. The issue of trust in his view has not been decided and is pending in the Court of Appeal. He has taken issue with the respondent for not disclosing this fact to the succession court.
 6. The applicant in his written submissions, made through Igati Mwai, learned counsel for the applicant, has contended that the respondent acted in bad faith by disposing of the land in dispute to one Edward Mugo Munene when the stay orders were in force.
 7. The respondents have opposed the Summons for Revocation of Grant through a replying affidavit sworn on 15th December, 2014 and written submissions made through the firm of M/S Rugaita & Co. Advocates.
 8. The first respondent Njiru K. Njagi has deposed that land parcel No. **BARAGWE/GUAMA/1088** was originally in the name of his father NJAGI GACOKI (Deceased) whose estate was the subject matter in Kerugoya Resident Magistrate's Court Succession No. 77 of 1988. In that cause the 1st Respondent has deposed the applicant had applied for letters of administration as a brother of the deceased but that his deceased mother objected and the court determined that the applicant was to get 2 acres while the objector (1st Respondent's mother) was to get 4 acres out of the estate which then comprised that parcel known as **BARAGWE/GUAMA/108**. It has been deposed that the applicant as a result of the ruling subdivided the estate into two parcels:
 - i. **BARAGWE/GUAMA/1088** measuring 2 acres; and
 - ii. **BARAGWE/GUAMA/1089** measuring 4 acres.

That parcel No. **BARAGWE/GUAMA/1088** is now the subject matter in this cause.

9. The respondents have contended that the deceased was dissatisfied with the above decision in Kerugoya Resident Magistrate's Court Succession Cause No. 77 of 1988 and filed an appeal vide Meru High Court Civil Appeal NO. 60 of 1991 to challenge the same and that the High Court made a favourable judgment to her. The copy of judgment is annexed to the affidavit of Njiru K. Njagi as exhibit "NKN2".
10. It is the respondent's contention that the applicant never contested the judgment in Meru High Court Civil Appeal No. 60 of 1991 (which was later transferred to Embu and registered as (Embu High Court Civil Appeal No. 20 of 1996). He is said to have instead chosen to file a civil suit in Nyeri High Court (Nyeri High Court Civil Case No. 57 of 1988) where he lost the case and filed an appeal in the Court of Appeal (C.A. No. 195 of 2005). The respondents have further submitted that the 1st respondent's mother later passed on and this made the 1st respondent to petition for letters of administration in respect to the estate of her late mother which he did in Kerugoya Senior Resident Magistrate's Court Succession Cause No. 136 of 2006 which is now the subject of this application.
11. The respondents have submitted through counsel that there is no appeal pending as Civil Appeal No. 195/05 abated vide a ruling of the Court of Appeal delivered on 22nd May, 2008 which is exhibited as NKN 4 in the said replying affidavit.
12. The 1st respondent has responded to the applicant's contention that he acted in bad faith by

- applying to amend the grant to include the disputed parcel (BARAGWE/GUAMA/1088) by stating that when he petitioned for letters of administration in Kerugoya Senior Resident Magistrate's Court No. 136 of 2006 he listed parcel No. **BARAGWE/GUAMA/1089** as the only asset as he knew that her late mother had already sold parcel No. **BARAGWE/GUAMA/1088** to the 2nd respondent and that it was only when he went to register transmission of **Plot No. 1089** that he noticed that the disputed parcel No. 1088 had reverted back to her late mother and hence the basis for his going back to court for rectification of grant to include parcel No. **BARAGWE/GUAMA/1088**. The parcel was then transferred formally to the 2nd Respondent.
13. The Respondents have accused the applicant for being vexatious and taking them in circles in court for years without an end and have contended that revoking the grant would serve no useful purpose as it would only prolong litigations.
 14. I have considered this application and submissions by both counsels. It is true that the parties in this cause have had a long history of many years of litigation in various courts and I have noted the comments made by courts at different levels at different times during those many years and I concur with the sentiments expressed by those courts. There comes a time when litigation must come to an end.
 15. The application for revocation or annulment of grant is brought under **Section 76 of the Law of Succession Act Cap 160** which lists grounds upon which a grant may be revoked either on an application by an interested party or by the court on its own motion.

I have considered the grounds upon which the applicant seeks

to revoke the grant which in summary as listed above are concealment, fraud and lack of jurisdiction. These grounds are indeed among the grounds listed under **Section 76 Law of Succession Act** as the grounds upon which a party can move a court to revoke a grant. It is important to note that however a party who alleges existence of a fact under **Section 107 of the Evidence Act Cap. 80** is under duty to prove those facts.

16. To begin with the question of jurisdiction, the applicant has contended that the subordinate court lacked the jurisdiction to entertain the cause because the property in dispute was worth more than Kshs.100,000/=. It is true that when the subordinate court entertained the cause vide Kerugoya Senior Resident Magistrate's Court NO. 136 of 2006 its monetary jurisdiction was limited to Kshs.100,000/= under **Section 47 of Law of Succession Act** (Now amended). The applicant however, has not placed any material before this Court to establish the value of the property comprising the estate at the material time. This Court is unable to establish as a matter of fact and law that the subordinate court lacked the jurisdiction to entertain the matter when it did. It is also apparent that the applicant in view of the reasons which I will touch on in this ruling was, in raising this issue was clutching on any straw to save himself from a boat that was apparently sinking under the weight of the law.
17. The applicant has raised the issue of concealment and stated that the 1st respondent concealed from court the fact that there were pending cases involving parcel No **BARAGWE/GUAMA/1088**. I have gone through the exhibits annexed to the affidavits of both the applicant and the 1st respondent and it is quite clear that the succession dispute between the applicant and the 1st respondent's mother was settled with finality vide the judgment delivered on 2nd June, 1995 (VIDE Meru High Court Civil Appeal No. 60 of 1991. The reasons informing my finding are that the decision in Kerugoya Senior Resident Magistrate's Court Succession Cause No. 77 of 1988 which granted the applicant 2 acres of land out of the estate of (Njagi Gachoki – deceased) comprised in **BARAGWE/GUAMA/108** and resulted in **BARAGWE/GUAMA/1088** – measuring 2 acres and **BARAGWE/GUAMA/1089** measuring 6 acres, was as I have said, overturned by the judgment on appeal vide Meru High Court Civil Case No. 60 of 1991 (later Embu High Court Civil Appeal No. 20 of 1996). That court made a decision that the subordinate court was wrong to give the applicant the 2 acres which are now the subject of this application and ordered that the parcel be inherited by only the lawful heirs to the deceased (Njagi Gachoki) and certainly the applicant was found not to be one of the heirs in that decision. The applicant instead of appealing against that decision chose a different option which was to file a suit against the

administrator vide Nyeri High Court Civil Case No. 57 of 1998. I have looked at the copy of decree exhibited as NKM 3 in the replying affidavit of the 1st Respondent which shows that the applicant actually lost the suit to the respondent's late mother. He appealed against the decision in the Court of Appeal vide Civil Appeal No. 195 of 2005. Unfortunately the respondent's mother passed on during the pendency of the appeal and the applicant never moved, within the stipulated time in that court, to substitute the respondent's mother. That appeal consequently abated as per the ruling of that court dated and delivered on 22nd May, 2008 and exhibited as NKN 4 in the 1st respondent's affidavit. The stay of execution granted in respect to Nyeri High Court Civil Case No. 57 of 1998 automatically abated with the abatement of the appeal. The applicant's contention that there is still an appeal pending or that the order of stay is still in force is obviously a misconception as nothing can be far from the truth.

18. The 1st respondent while petitioning for letters of administration in Kerugoya Senior Resident Magistrate's Court Succession Cause No. 136 of 2006 only listed **BARAGWE/GUAMA/1089** as the asset comprising the estate of her late mother and only moved the court later in February, 2010 to amend the grant to include the disputed parcel **BARAGWE/GUAMA/1088** in the confirmed grant. By that time this Court finds that there was no matter pending in court and I find no basis for the applicant to fault the 1st respondent for any concealment. This Court finds that at that stage of the proceedings there was no case or appeal pending and therefore the 1st respondent cannot be faulted for concealing what was not there.

19. I have considered the effect of the revocation of grant herein and my considered view is that the applicant in essence is asking this court to overturn the judgment of the court dated 2nd June, 1995 in Meru Civil Appeal No. 60 of 1991 (Embu H.C.C.A. No. 20/96). The High Court in that decision as I have said overturned the subordinate court's decision which as indicated had granted the applicant **BARAGWE/GUAMA/1088**, the disputed parcel herein. That is untenable in law as this Court cannot overturn a decision of a court of concurrent jurisdiction. That judgment can only be entertained in the Court of Appeal. The applicant cannot describe himself as an interested party any more because his lawful interests in the disputed property was lawfully extinguished vide the above cited decision and in my view this application is legally unviable and can only be summed up as part of the applicant's journey to seek justice through a futile route. It is in that regard that I agree with sentiments of Khamoni J., (as he then was) that as far as this cause is concerned, litigation has to come to end as it must at some stage and that time beckons now. This summons for revocation whichever way it went in my view could not serve any useful purpose in the face of the decisions in Meru High Court Civil Appeal No. 60 of 1991, Nyeri High Court Civil Case No. 57 of 1998 and the Court of Appeal C. A. No. 195 of 2005.

In the end I find no merit in the Summons for Revocation of

Grant dated 24th October, 2010. The same is dismissed with costs.

That is the ruling and decision of this court.

Dated and delivered at Kerugoya this 14th day of June, 2016.

R. K. LIMO

JUDGE

14.6.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Igati for applicant present

Wairimu for Respondent present

Ruling signed, dated and delivered in the open court in presence of Igati Mwai for the applicant and Wairimu Advocate for Respondent.

R. K. LIMO

JUDGE

14.6.2016