



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 125 OF 2014

IN THE MATTER OF THE ESTATE OF NDWIGA MUNANO (DECEASED)

PURITY WANJA NJOKA.....APPLICANT

VERSUS

DAVID GICHOVI NDWIGA..... RESPONDENT

RULING

1. This is a ruling on the application dated 15/7/2014 seeking that the certificate of grant confirmed on 5/5/2013 to be reinstated and that the amended certificate of grant obtained on 8/11/2013 be annulled or revoked as it was obtained fraudulently. The application is supported by the affidavit of Purity Wanja Njoka.
2. In the affidavit, the applicant states that she is one of the beneficiaries (purchaser) of a share of one of the beneficiaries of the deceased's estate through a sale agreement with the petitioner on 20/6/2012 for purchase of ¼ acre out of Ngandori/Kirigi/ 4731 for a consideration of Kshs.190,000/=. She paid a down payment of Kshs.80,000/=. It was agreed that the balance was to be paid in equal installments. During the confirmation of grant on 5/6/2013 she attended court and was given 0.10Ha as agreed by the parties. She finally paid a balance of Kshs.50,000/= in completion of the purchase price.
3. The petitioner thereafter failed to sign the transfer forms and did not pick her calls. On visiting Runyenjes Law Courts she learnt that her name had been deleted and replaced with the name of one Peter Maina Nthiga. The applicant was never served with the application to amend the grant. It is not true as claimed by the respondent that she was served but refused to acknowledge receipt.
4. The petitioner/respondent in the replying affidavit stated that the applicant is not a member or beneficiary of the deceased's family. He admits that he entered into an agreement for sale of ¼ of an acre with applicant who later breached it, the supporting affidavit that the applicant never paid the full price hence the reason why the transaction was not completed.
5. The applicant was served with the application for rectification of grant but never attended court. The respondent contends that the applicant can seek remedy in the ELC court if she so wishes.
6. The parties adduced *viva voce* evidence during the hearing of the case.
7. In addition to what was stated in her affidavit, the applicant testified that the petitioner sold to her the parcel of land so that he could raise money for processing the succession cause. She paid him Kshs.60,000/= on 17/8/2012 which he acknowledged. On 8/10/2012 she paid another Kshs.10,000/= and the petitioner acknowledged receipt by signing a piece of paper. They agreed that she was to pay

Kshs.50,000/= once the grant was issued which included the Kshs.10,000 paid on 8/10/2012 on request by the respondent. On 15/7/2013 she paid Kshs.30,000/= leaving a balance of Kshs.30,000/= which was acknowledged by the petitioner.

8. The petitioner instructed her to pay the surveyor his fees of Kshs.30,000/= which was part of the balance of the purchase price. She paid the amount on 10/7/2013 and the same was acknowledged. Her name was included in the grant confirmed on 23/5/2013. The petitioner has since refused to refund her money even after giving her land to a 3rd party. The price of equivalent size of land has now appreciated to Kshs.400,000/=.

9. The applicant called one witness PW2 who testified that the she is his niece and that on 20/6/2012 he witnessed an agreement/transaction between the applicant and the respondent. It was for sale of ¼ acre out of Ngandori/Kirigi/4731 at a price of Kshs.190,000/=. PW1 paid Kshs.80,000/= as down payment and the balance was to be paid after the conclusion of the succession cause. He said he was not called to witness any further payments.

10. DW1, the respondent/petitioner testified that he entered into an agreement with the applicant who paid him Kshs.80,000/= as down payment on signing the agreement. The balance was to be paid in two instalments. The first installment was paid in August 2012 while the second one was paid on 17/08/2013 being Kshs.50,000/=. On 8/10/2012, he received Kshs.10,000/= and on 15/7/2013 he was paid another Kshs.10,000/= making the total of the money he was paid Kshs.160,000/=. It is not true that the applicant paid the surveyor Kshs.30,000/= and even if she did, it was without the respondent's instructions.

11. The respondent said he included in the application of grant but she declined to pay the balance of Kshs.30,000/=. It was agreed by the petitioner and his brothers that the applicant's name be removed from the confirmed grant. Her name was substituted with the new buyer of the portion that had been allocated to her. The respondent is willing to refund the money with interest of 50% as stipulated in the agreement.

12. DW2 was the respondent's wife and she testified that she is aware that the applicant was buying land from the respondent. She said that she knows that the payments became problematic as they were never paid on time.

13. DW3 is the brother of the respondent and he is aware that the respondent was selling land to the applicant and that she had been included in the confirmed grant. The applicant however refused to pay the balance of Kshs.30,000/= which led to removal of her name from the grant.

14. The respondent denies he authorized the Kshs.30,000/= to be paid to his surveyor. It is not in dispute that the surveyor received the money or that he was the surveyor instructed by the respondent to subdivide the land. The respondent did not challenge the authenticity of the receipt from the surveyor. The respondent expressly admits payment of Kshs.160,000/= and what is disputed is only Ksh 30,000/=.

15. This case was filed on 29/06/2012 only nine (9) days after the applicant paid the Kshs.80,000/= to the respondent. The grant of letters of administration was made on 19/11/2012. During the confirmation of grant, all the beneficiaries were present. Th applicant testified that she was present in court on the material day being 23/05/2013.

16. The respondent filed an application for rectification of grant on 18/09/2013. This was only four months after the confirmation of grant it is not in dispute that the final installment of Kshs.50,000/= was paid after confirmation of the parties as agreed. The respondent then gave the share of the applicant to a 3rd party Peter Maina Nthiga after he had received the total purchase price. He did not disclose how much he was paid for the land by the 3rd party. However, it may be right to draw a conclusion that the price was more attractive than what he had been paid by the applicant more than one year earlier.

17. During the hearing of the application before Runyenjes court, the court noted that the applicant who was a beneficiary in the original grant had not been served before the hearing and another date was taken.

It was ordered that she be served. The process server one G.K. Karuoro stated in his affidavit that he served the applicant at her place of work at Mwea. He does not give any description of the place of work or state the time he served the process. He does not say how he identified the applicant or whether he knew her before the incident. G.K Karuoro says the applicant accepted the service but declined to sign.

18. Due to the scanty information from the process server, it is highly unlikely that the applicant was served with the application for rectification of grant. She denied it in court. It is highly probable that had she been served with the application which was to take away her land, and give it to a stranger, she would have defended her rights.

19. The respondent says that he changed his mind on the applicant's share after she failed to pay Kshs.30,000/=. The applicant proved through a receipt that she paid the surveyor the money. She could not have made the payment without the instructions of the respondent. The confirmation of grant where she was given her share bears her witness that the parties moved smoothly in their agreement without any hitch. The respondent reason for changing his mind must have been dictated by other circumstances other than breach of the agreement. The agreement had already been fully complied with for the application to be bequeathed her share.

20. The respondent did not prove that he served the applicant with the application for rectification. The rectification was therefore done without her knowledge and she was to discover it much later. She was an interested party and was entitled to be served. The act of the respondent was fraudulent for he had been paid to the last penny. The orders for rectification were obtained through fraud by the respondent who designed it for his personal gain.

21. The respondent argued that the applicant should take her claim to the Environment & Land Court. The issue of whether he had capacity to sell or not does not arise because he had validated the agreement by conduct. During the confirmation of grant, the respondent had given the applicant the share she had bought. He could not lawfully take back what he had already given in pursuance to an agreement. The respondent must be estopped from denying the applicant her legal right without any good reason.

22. The 3rd party Peter Maina Nthiga was a purchaser just like the applicant. The law does not prohibit a purchaser from actualizing her right in the circumstances prevailing in this case provided that the parties have agreed.

23. The wording of the application is clear that the applicant is not seeking for revocation of grant under Section 76 of the Law of Succession Act. She is seeking for annulment of the orders for rectification of grant obtained on the 18/09/2013. The effect of the order was to remove the name of the applicant as beneficiary of $\frac{1}{4}$ of an acre out of the deceased's estate and giving it to one Peter Maina Nthiga. The rectified grant was signed by the learned Senior Resident Magistrate on 8/11/2013. The other beneficiaries and their respective shares remained as they were in the original grant confirmed on 23/05/2013. this is a confirmation that the rectification of grant was directed solely at taking away the share of the applicant to give it to a higher bidder.

24. The parties entered into an agreement for sale of $\frac{1}{4}$ of an acre to the applicant which was to be part of the respondent's share in the deceased's estate a consideration of Shs.190,000/=. The agreement was witnessed by the late H.M. Utuku advocate on 20/06/2012. It is not in dispute that the respondent needed funds to process the succession case and that he had agreed with the other beneficiaries.

25. The agreement is admitted by the parties. The only contentious issue is how much money was paid to the respondent. The applicant said she paid the total purchase price which included Shs.30,000/= which was paid to the surveyor on instructions of the respondent. She produced a receipt of Shs.30,000/= issued on 10/07/2013 for partition of land. It is noted that the respondent never raised any issue with the amount paid to the surveyor until he got another buyer to take the applicant's share.

26. I come to the conclusion that the applicant has proved that the orders made on 18/11/2013 for rectification of grant were obtained through fraud and by concealment of facts material to the case. For

this reason I declare the orders *void ab initio* and order reinstatement of the grant confirmed on 23/11/2013. Any transactions based on the said rectified grant are hereby declared *null and void*.

27. The title if any in the name of Peter Maina Nthiga for the $\frac{1}{4}$ acre share is hereby ordered cancelled and substituted with the name of Purity Wanja Njoka.

28. It is hereby so ordered.

29. No orders as to costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 25TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Applicant

Respondent