REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2012

FORMERLY EMBU HIGH COURT MISC. APPLICATION NO. 12 OF 2008

MWAI KARABA..……..……..……..…….APPLICANT

-VERSUS-

EDITH WARUGURU MWANIKI…….....…….....1ST RESPONDENT

ALFRED KARIMI MWANIKI……..……....……..2ND RESPONDENT

RULING

1. **MWAI KARABA**, the applicant herein, took out Summons for Revocation/annulment of grant dated 24th January, 2008 seeking to revoke a grant made by the **Senior Resident Magistrate's Court** in a **Succession Cause No. 205 of 2005** before that court issued on 29th July, 2006.

2. The grounds upon which the Summons for Revocation were taken were as follows:

> ***(i) That the confirmed grant was obtained by the makingof a false statement or by concealment to the court of something material to the case.***
>
> ***(ii) That the grant was obtained by means of untrueallegation of a fact essential on a point of law to justify the grant; and***
>
> ***(iii) That the grant has become useless and inoperativethrough subsequent circumstances and was otherwise secured by a process that amounts to an abuse of the process of court.***

3. The applicant in his supporting affidavit sworn on 24th January, 2008 deposed that he was a brother to Mwaniki Karaba, the deceased herein and that his deceased brother was registered owner of that property known as **L.R. NO. INOI/THAITA/437** comprising the estate herein but that he held the property in trust for himself and their late mother, Wangige Karaba who died in August, 1986.

4. He further deposed that their late mother Wangige Karaba was buried in the same estate and so to another brother Muriithi Karaba who died in the year 2000. According to the applicant, the deceased was registered as proprietor of the property forming the estate herein during demarcation as their father had passed on. He maintained that he has been living on part of the estate since 1950s to the present and that he had instituted civil proceedings against the deceased in 2001 before a Land Disputes Tribunal where decision in his favour was made as he was given 2 acres out of the disputed portion of land that now

forms the estate herein. He annexed proceedings from the tribunal and marked them as "MK1" as a demonstration that he had been awarded 2 acres from the estate by the Land Disputes Tribunal.

5. The applicant further annexed copies of order from court vide L.D.T. No. 24/02 at Principal Magistrate's Court Kerugoya adopting the award from Land Disputes Tribunal and Provincial Land Disputes Appeals Tribunal showing that an appeal by the deceased was dismissed. The annexture are marked "MK2" and "MK3" respectively.

6. The applicant has faulted the petitioner in this cause for filing for a grant of letters of administration in respect to the estate of deceased person secretly without disclosing the applicant's claim on the estate and that the Court issued and confirmed the grant without being informed of the applicant's existence and his claim. He reasoned that he could have protested had he been accorded a chance to do so prior to the confirmation of grant.

7. When this matter came up for directions on the manner in which it was to be disposed of, the parties asked to be allowed to file affidavits and submissions in support of their respective positions and this Court gave the same directions. The applicant filed his submissions in support of his summons for revocation of grant while the respondents chose not to file any replying affidavit to contest what had been deponed by the applicant but filed submissions in response to the written submissions made by the applicant raising points of law as the main basis for the opposition of the application. I will first consider the submissions made by the applicant.

8. In his written submissions the applicant reiterated the contents of his affidavit in support of his application. He faulted the Petitioner for not disclosing him in Form Probate and Administration 5 and undervaluing the estate by stating that it was valued at Kshs.300,000/- which still was beyond the pecuniary jurisdiction of the court. He added that the grant had the effect of totally disinheriting him from his lawful claim of 2 acres of land out of the estate comprised in **L.R. NO. INOI/THAITA/437** where he claims to have lived since 1958.

9. The respondents on their part submitted purely on points of law in opposition to the application. In their written submissions dated 3rd July, 2015, the respondents contended that this court lacked jurisdiction to entertain the applicant's claim in a succession cause arguing that the claim is based on trust which should be handled by Environment and Lands Court. They further submitted that the award given vide **Kerugoya P.M. L.D.T. No. 24/02** had no effect as the same subsequently was reportedly set aside.

10. On the issue of jurisdiction of the lower court to handle the cause, the respondent urged this Court to take up the cause and distribute it in accordance with the law.

11. They further faulted the statements filed by the applicants arguing that the same should have been by affidavits as per ***Rule 63*** of **Probate and Administration Rules.**

12. The respondents further contended that the award of the Land Disputes Tribunal did not confer any right to the applicant and that the applicant's claim can only be presented to the Environment and Land Court and that it was wrong for the applicant to come to this court.

13. I have considered the application before court. I have considered the arguments from both sides.

The issues raised by this application are:

(1) Whether the facts as presented by the respondents warrants revocation of grant pursuant to ***Section 76*** of **Law of Succession Act.**

(2) Whether this Court has jurisdiction to entertain the applicant's claim.

(3) Whether the lower court had jurisdiction to entertain the cause in the first place.

14. On the first question of whether the facts presented disclosed or established any of the grounds envisaged under ***Section 76*** of the **Law of Succession Act,** the affidavit in support of the application is mainly based on the fact of concealment. Under paragraph three of the affidavit in support, the applicant deposed that the respondents concealed from court the fact that the deceased herein held the estate in trust for himself, his late mother and his late brother – Muriithi Karaba. The other alleged concealment was the fact that the petitioner did not disclose the fact that there existed a claim which had been filed and finalized before a Land Disputes Tribunal. I have seen the annextures marked "MK1", "MK2" and "MK3" and noted that indeed there existed a land case which was entertained and a decision reached by the now defunct Land Disputes Tribunal.

15. The question that needs to be addressed here is even supposing the decision is still valid because though the respondents submitted that the decision was later quashed, there was no evidence by way of affidavit or otherwise showing that the decision was quashed so if the decision is valid, is this application the right forum or procedure to execute the decision? Certainly a successful party in land case whether in a court of law or Tribunal like it was in this case cannot enforce a decision therein through a succession cause. That in every respect would be an abuse of court process.

16. This Court does not see how a disclosure to the fact that there was a decision in the Land Disputes Tribunal which had been passed on 4th February, 2003 during the lifetime of the deceased could only be relevant after demise of the deceased in 2005. If the applicant was indeed successful and the decision not quashed by court as claimed, the applicant should have simply executed the decree and obtain his title deed based on the court's judgment that adopted the Tribunal's decision and passed the decree. The applicant did not do that and the only assumption that can be inferred is that he has no valid decision in his favour.

17. This Court finds that the applicant could be having a claim based on trust on the estate. However the respondents have submitted that the proper forum to ventilate the issue is Environment and Land Court which is mandated by law to entertain such disputes. I find this contention valid. This is because the applicant is not saying that he is claiming the estate of the deceased as a child or dependant to the estate. He has brought the application based on a chose in action which he had over the estate of the deceased and for good measure he has deponed and demonstrated that the dispute with the deceased was over ownership of part of the land forming the estate – 2 acres to be exact and that the same had been ventilated at the now defunct Land Disputes Tribunal which was a creature of a statute passed by parliament in 1991 to try to resolve land disputes in Kenya. At the moment the Environment and Land Court is seized with the jurisdiction to deal with the dispute as provided by the Constitution (Article 162 (2) and Environment and Land Court Act.

18. This Court sitting as a succession court draws its jurisdiction over estates of deceased persons from Cap 160 Laws of Kenya which is an act of parliament passed intended to enable this Court deal with testamentary succession, intestate succession and administration of estates of deceased persons. The law is only applicable in administration of estates of deceased persons pursuant to ***Section 2*** of the act and it would be stretching the law beyond its limits if this Court was to apply the law to solve myriad ownership disputes over land. For me as I have said there are sufficient mechanisms and adequate land laws established to solve such disputes and this Court is not best suited as a succession court to deal with the same.

19. On the issue of jurisdiction of the lower court to entertain the cause even after the petitioners had indicated in their petition that the estate was worth Kshs.300,000/- I find that it was inadvertent mistake by the lower court in view of clear provisions of ***Section 48*** of the Law of Succession Act which limits the jurisdiction of the lower court to just Kshs.100,000/-. The limit in my view though a bit ridiculous in view of the inflation and steep rise in land value is the position of the law currently and this Court has to apply the law as it is and make recommendations to the law Reform Commission to look into the said monetary limit with a view to enhancing it in order to make it relevant to the current situations. But that as it may, I find that the lower court lacked jurisdiction and though the Applicant raised the issue in his submissions, and not listed as a ground in his Summons for Revocation of Grant, the issue is a point of law which can be raised at any stage. Consequently this Court shall proceed on its own motion under

Section 76 of the law of Succession Act to revoke the grant issued on 26th January, 2006 and confirmed on 2nd July, 2006. A fresh grant is hereby issued under ***Section 66*** of the **Law of Succession Act** to Edith Waruguru Mwaniki and Alfred Karimi Mwaniki. The two appointed administratrix respectively and administrator are at liberty to apply for confirmation at any time in view of the age of the cause. In sum, save for what I have found above, I find no merit in the Applicant's Summons dated 24th January, 2008. The same is disallowed but I will make no order as to cots. It is so ordered.

Dated and delivered at Kerugoya this 26th day of October, 2015.

R. K. LIMO

JUDGE

26.10.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Ogeto holding brief for Munene for Respondent

Ngangah holding brief for Kahiga for applicant present

Afred Karimi 2nd Respondent present.

COURT: Ruling signed dated and delivered in the open court in the presence of Ogeto holding brief for Munene for Respondent and Ngangah holding brief for applicant and Alfred Karimi Mwaniki the 2nd respondent.

R. K. LIMO

JUDGE

26.10.2015