



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CASE NO. 33 OF 2005
IN THE MATTER OF THE ESTATE OF
WAMWANGI MARIGA..... DECEASED
AND
LINA WANJIRU MWANGI.....PETITIONER

JUDGMENT

BACKGROUND

1. The Petitioner **LINA WANJIRU MWANGI** petitioned for the grant of letters of administration of the estate of **WAMWANGI MARIGA** and named the following survivors:
 - a. LINA WANJIRU MWANGI - Widow
 - b. GRACE WANJUGU MUTHIGANI - Married daughter
 - c. GLADYS WAMBUI NJOROGE - Married daughter
 - d. EUNICE NYAGUTHII NDIKWE - Married daughter
 - e. PAUL WANDAKA WAMWANGI - Son
 - f. RICHARD THOITHI WAMWANGI - Son
 - g. MIRIAM NJERI WAMWANGI - Daughter
 - h. STEPHEN GITHENYA WAMWANGI - Son
 - i. PRISCA NYAWIRA KORAMBU - Daughter
 - j. SIMON MURIITHI WAMWANGI - Son
 - k. VIRGINIA WANJIRU MWANGI - Daughter
 - l. JOSEPHINE WANJIRA MWANGI - Daughter

- m. SIMON NDUNGU MWANGI - Son
- n. EPHRAIM MANGA MWANGI - Son
- o. MARY WAITHIEGENI MWANGI - Daughter
- p. IRENE WANGU MWANGI - Daughter
- q. STEPHEN MARIYU MWANGI - Son

1. The Petitioner cited SIMON MURIITHI MWANGI, EPHRAIM MANGA MWANGI, SIMON NDUNGU MWANGI and STEPHEN MARIYU MWANGI under rule 21 Probate and Administration Rules who entered appearance on 15th February 2005 through the law firm of Gathara Mahinda & co. Advocates and on 3rd May 2006 the grant was issued to the said Petitioner.
2. On 15th September 2006 the Petitioner filed summons for confirmation of the grant and proposed distribution as follows:

a. L.R. No. KIRIMUKUYU/MUTATHIINI/595

- i. LINA WANJIRU MWANGI - 1.2 Acres
- ii. JOSEPH MARIYU MARIGA - 1.2 Acres

b. L.R. No. NYERI/ISLAND FARMS/418

- i. LINA WANJIRU MWANGI - 2 Acres
- ii. EPHRAIM MANGA MWANGI

(in trust for himself and his brother & sister) - 3.6 Acres

3. On 22nd June 2007 SIMON NDUNGU MWANGI filed an affidavit of protest wherein the same deponed that the deceased had two wives and had indicated his wish that the first house of CATHERINE WAIRIMU WAMWANGI gets L.R No. NYERI/ISLAND FARM/418 exclusively while the petitioner (2nd House) of LINA WANJIRU MWANGI gets L.R. No. KIRIMUKUYU/MUTATHIINI/595 exclusively.
4. It was further deponed that the petitioner has been in exclusive occupation of L.R.KIRIMUKUYU/MUTATHIINI/595 that the petitioner had been given NYERI/ISLAND FARM/417 measuring 1.5 acres which she caused to be sold. He therefore proposed the following mode of distribution:
 - i. L.R. No. NYERI/ISLAND FARM/418 to the children of CATHERINE WAIRIMU WAMWANGI
 - ii. L.R.No. KIRIMUKUYU/MUTATHIINI/595 to LINA WANJIRU and her children
5. On 25th November 2009 the application for adjournment by the protestor was denied and the protest dismissed with the grant being confirmed in respect of NYERI/ISLAND FARM/418 as proposed by the petitioner.
6. On 23rd May 2012 the applicants namely IRENE WANGUI MWANGI, STEPHEN MARIYU MWANGI, SIMON NDUNGU MWANGI and MARY WAITHIEGENI MWANGI filed an application under certificate of urgency to restrain the petitioner by way of a temporary injunction from sub-dividing, selling, letting, entering into construction on or in any other manner dealing with the suit land 2 acres of L.R. No. NYERI/ISLAND FARM/418 pending hearing, which application was on 28th May 2012 withdrawn.

APPLICATIONS FOR DETERMINATION

7. On 10th May 2012 the applicants filed an application under section 76 Laws of Succession Act and Rule 44 Probate and Administration Rules for the revocation and or annulment of grant on the basis that the grant was made fraudulently by making of a false statement or concealment from the court of something material to the cause which application was supported by the annexed affidavit of IRENE WANGUI MWANGI.
8. It was deponed that in the year 1971 the deceased relocated the respondent's house to Mathira and settled them in L.R.No. KIRIMUKUYU/MUTATHIINI/595 and that the deceased at the behest of the Respondent sold 1½ Acre of the suit land leaving the mother of the applicant's thereat and that 3.6 acres were distributed to EPHRAIM MANGA MWANGI posthumously.
9. On 4th June 2012 the respondent filed an application under certificate of urgency in which she sought an order that the applicants (respondents) be and are hereby ordered to vacate forthwith from the 2 acres of L.R. No. NYERI/ISLAND FARM/418 allocated to the applicant as per the confirmed grant dated 25th November 2010 on the basis that she had decided to sell her part to third party.
10. In reply thereto the applicant/respondent through IRENE WANGUI MWANGI filed a replying affidavit on 2nd July 2012 in which she deponed that their application for revocation of grant is pending and therefore the grant of the application herein would amount to defeating the just cause of the distribution of the estate. She therefore prayed that status quo be maintained.
11. On 2nd November 2012 directions were given that the two applications dated 8th May 2012 and 12th June 2012 be heard together by affidavit evidence and on 9th December 2013 it was agreed that they be heard by way of written submissions to be filed at the registry.
12. On 1st November 2012 the Respondent filed a replying affidavit to the application for revocation of grant in which she deponed that L.R. No. NYERI/ISLAND FARM/418 was a family land bought by the deceased and that the mother of the applicant colluded with the deceased and sold 1½ acre therefrom and thereafter the deceased relocated her to L.R. No. KIRIMUKUYU/MUTATHIINI/595 and that she applied for grant which was subsequently confirmed on the basis that she be allocated 2 acres of L.R. No. NYERI/ISLAND FARM/418 to combine with her 1 acre in L.R. No. KIRIMUKUYU/MUTATHIINI/595.
13. She deponed that the fact that the applicants have resided in the suit land since 1972 is not sufficient ground to deny her beneficial interest therein.

SUBMISSIONS

APPLICANT

14. It was submitted that the Respondent had previously benefited from the deceased estate during the deceased life time wherein the deceased sold 1½ acres out of the suit land and proceeds from there used to settle the respondent in L.R. No. KIRIMUKUYU/MUTATHIINI/595 a fact which she concealed to court.
15. That by settling the respondent in L.R. No. KIRIMUKUYU/MUTATHIINI/595 the deceased clearly expressed his intention and further in her proposed mode of distribution the respondent gave land to EPHRAIM MANGA MWANGI when he had died.
16. It was submitted that the application was not resjudicata since the previous application was never determined on merit but for want of prosecution

RESPONDENT SUBMISSIONS

17. It was submitted that upon the demise of the deceased there was an alleged meeting on 13th December 2002 where it was agreed to have the suit land shared as proposed since the respondent had already benefited from 1 acre elsewhere.
18. It was submitted that the applicants are not justified to seek the annulment of the grant since they did not appeal against the ruling of 25th November 2009.

ISSUES FOR DETERMINATION

19. From the submissions herein the issues for determination as identified by the court are as follows:-

a. Is the application for revocation of grant resjudicata?

b. Has the Applicants made up a case for grant of orders sought to annul the grant.?

c. Is the respondent entitled to vacate possession of the 2 acres.

20. It is not in dispute that the applicants had filed an affidavit of protest to the proposed mode of distribution which protest was dismissed by Justice Makhandia as he then was for want of prosecution. At that stage in time the applicants claim was based on the mode of distribution of the estate as proposed by the applicants/respondents whereas the current application is for revocation or annulment of the entire grant.

21. For a matter to be resjudicata section 7 of the Civil Procedure Act 2010 provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they are or any of their claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raise and has been heard and finally decided by such court”.

22. The question therefore for this court to answer is whether the issues of annulment or revocation of the grant has been heard and determined by a competent court? Upon the perusal of the court record I find that this issue has never been litigated upon and determined by a competent court.

23. Further it should also be noted that the issues raised in the protest were never heard on merit and therefore even if I were to be wrong in finding as I do that the issue of revocation has never been litigated upon, the same can also not amount to resjudicata as it was not determined on merit but only dismissed on the ground of want of prosecution.

24. I therefore find that the application before the court is not resjudicata and therefore dismiss the respondent preliminary objection.

25. On the issue of revocation or annulment of grant, this court has powers under section 76 of the Law of Succession Act if the court is satisfied that the proceedings were defective in substance or if the proceedings to obtain such grant was fraudulent or by making of a false statement or by concealment from the court of something material to the case. It can further annul grant if it is proved that there was untrue allegations of a fact essential in point of law.

26. From the affidavit of the applicant IRENE WANGUI MWANGI and as confirmed by the respondent in her affidavit in support of her application dated 4th June 2012 and replying affidavit it is clear that the petitioner did not disclose that the applicants have been in exclusive occupation of the suit land for over 40 years and that the petitioner had exclusive occupation of L.R. No. KIRIMUKUYU/MUTATHIINI/595 to the exclusion of the applicants measuring 2.4 acres and that the petitioner had obtained the benefit of 1½ acres from the suit property.

27. I therefore find merit in the application herein dated 8th May 2012 and hereby review the grant issued to the petitioner herein and in its place issue a fresh letter of administration to LINA WANJIRU MWANGI and IRENE WANGUI MWANGI jointly with each party being at liberty to apply for the confirmation of the grant issued herein notwithstanding six months.

28. In view of my order herein above the status quo prevailing in respect of L.R. No. NYERI/ISLAND FARM/418 to be maintained pending the confirmation of the grant herein.

29. This being a family dispute each party shall bear their own cost.

Dated signed and delivered at Nyeri this 28th day of March 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Mr. Kingori and in the absence of the

respondent and her advocate.

J. WAKIAGA

JUDGE