



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 146 OF 2010

(IN THE MATTER OF THE ESTATE OF WATHURE MUKINYO - DECEASED)

AND

LUCY WATIRI WATHURE..... APPLICANT

VERSUS

RICHARD RUCHATHI WATHURE)

PETER MACHARIA WATHURE)

JOHN MURIUKI WATHURE)..... RESPONDENTS

RULING

1. By summons dated 1st March 2010 the Applicant LUCY WATIRI WATHURE sought an order that the confirmed grant obtained by the Respondents in Karatina Senior Resident Magistrate's court Succession Cause No. 45 of 2006 in the matter of the estate of WATHURE MUKINYO on 5th August 2009 be revoked and or annulled.
2. The application was grounded on the grounds that;-

- a) The proceedings to obtain the said grant were defective in substance.
- b) The grant was obtained fraudulently by the making of false statements and representation by the Petitioners and by concealment from the court of material fact that the petitioner and respondents had their own parcels of land left to them by the deceased and that the deceased left to the Applicant Konyu/Baricho/2364.
- c) The Petitioner presented a forged letter of consent and that after the confirmation of grant the petitioner had attempted to have title to Konyu/Baricho/2364 transmitted to parties herein without notifying the applicant who resides on the parcel of land.
- d) The petitioner failed to disclose to the court that the deceased had prior to her death allocated each and every beneficiaries their respective parcels of land as follows;-

(i) RICHARD RUCHATHI WATHURE - 2

LR KONYU/BARICHO/2367 - 0.405Ha

(ii) PETER MACHARIA WATHURE

(iii) JOHN MURIUKI WATHURE LR KONYU/BARICHO/2365 - 0.405Ha

(iv) LUCY WATIRI WATHURE LR KONYU/BARICHO/2364 - 0.405Ha

3. The application was supported by the affidavit of the applicant in which she deponed that the deceased was his father and the respondents her elder brothers and that prior to his death the deceased had allocated his land to all the beneficiaries and that after his death the respondent filed succession wherein they were pursuing distribution of LR NO. KONYU/BARICHO/2364 without informing her.
4. It was further deponed that she never consented to nor signed the consent before Maina Karingithi Advocate and that she filed her objections but was not considered favourably. It was deponed that when the grant was being confirmed she was not given an opportunity to raise objections due to a false affidavit of service indicating that she had been notified and that the respondents after the grant was confirmed have attempted to have LR NO. KONYU/BARICHO/2304 subdivided which if allowed will deprive her of the only parcel of land she relies on.
5. It was further deponed that the petitioner did not disclose to the lower court that he and the other brothers had their own respective parcels of land from the subdivision of LR KONYU/BARICHO/1064.
6. In reply to the said application the respondents through the 1st respondent RICHARD RUCHATHI WATHURE filed a replying affidavit on 18/6/2010 in which he deponed that the application is defective since the applicant is a co-administrator and therefore cannot revoke grant issued to herself. It was deponed that if the applicant was dissatisfied with distribution she should have filed an appeal.
7. It was deponed that the confirmed grant has been executed by the Executive Officer when the applicant refused to execute it and that LR KONYU/BARICHO/2365, 2366 and 2367 were not part of the estate of the deceased.
8. It was deponed that the deceased had expressed his wish to sub-divide LR KONYU/BARICHO/2364 amongst the four beneficiaries in terms of the distribution made by the court. It was further deponed that the applicant did not attend court though duly served and therefore the application is an afterthought to prevent full execution of grant.
9. Directions were given that the application be heard by way of written submissions and affidavit evidence which have now been filed.

SUBMISSIONS

10. On behalf of the applicant it was submitted that the grant was obtained through concealment of material facts and fraud on the part of the respondents and that before his death the deceased had distributed his parcel of land to each and every of his dependants save that the applicant could not obtain a title to her parcel since she was still a minor.
11. On behalf of the respondents it was submitted that the circumstance of the case does not warrant revocation or annulment of the grant since she was an objector in the lower court and was made a co-administrator and remained so and that under Section 50(1) of the Law of Succession if she was dissatisfied with the distribution should have filed an appeal and that the grounds raised does not satisfy the requirement of Section 76 of the Law of Succession.

BACKGROUND

12. It will be in the interest of justice to set the background of this matter before determining the application as here under;-

The 1st respondent petitioned for grant of letters of Administration in the matters of the estate of WATHURE MUKINYO and in the said application the letter of introduction from the chief named the following as surviving the deceased;-

- a) Richard Ruchathi Wathure - son
- b) Peter Macharia Wathure - son
- c) John Muriuki Wathure - son
- d) Lucy Watiri Wathure - unmarried daughter

13. On 27th October 2006 the applicant filed a cross petition for grant of letters and an objection to making of grant and on 19th August 2008 the grant was issued to RICHARD RUCHATHI WATHURE and LUCY WATIRI WATHURE and on 20th March 2009 an application for confirmation of temporary grant issued on 13th August 2006 was made in which it was proposed to distribute the suit property as follows:-

- a) RICHARD RUCHATHA WATHURE - 0.122Ha
- b) PETER MACHARIA WATHURE - 0.122Ha
- c) JOHN MURIUKI WATHURE - 0.122Ha
- d) LUCY WATIRI WATHURE - 0.122Ha

14. On the strength of an alleged affidavit of service filed on 24th June 2010, the grant was confirmed in the absence of the applicant and on 16th October 2009 the respondent filed an application for the Executive Officer to execute transmission document on behalf of the applicant which application was allowed. On 15th February 2010 the law firm of Muchoki D.M. & CO Advocates wrote to the Executive Officer of Karatina SRM's court.

15. It is also clear from the court record that on 27th June 2007 when the applicant's objection was being heard evidence was led by one KABUGA MAINGI (OW 2) that the deceased had subdivided his land into four equal portions which shares have gone to each of his children and the Applicant was informed by the court that the issue of distribution will come at the time of confirmation of grant.

ISSUES

16. With the background and the submissions by the parties the court has identified the following issues for determination:-

- a) Is the applicant entitled to bring in an application for revocation of grant?
- b) Has the applicant made up proper case for revocation of grant?
- c) What order should the court make?

17. This matter was filed before the Resident Magistrate's court in Karatina who made an order confirming the grant. Any party who is dissatisfied by the same order is entitled to move to this court for revocation and or annulment of grant provided that he/she satisfy the provisions of section 76 of the Law of Succession. I therefore find that the applicant is properly before this court. See the case of JOSEPHINE WAMBUI WANYOIKE V MARGARET WANJIRA & others Nairobi Court of Appeal Civil Appeal No. 279 of 2003 where the court held that, once a grant has been confirmed the only recourse a dissatisfied party has is for revocation of grant.

18. On the issue of whether the applicant has made up a case for the grant of orders sought it is clear that at the time of making an application for confirmation of grant the respondents did not disclose to court that they had been provided for during the life time of the deceased. Whether issue should have been taken into account by the court in determining the issue of equitable distribution. It is also clear that the respondents did not disclose to the court that the applicant was in actual

occupation of the suit property and therefore the grant herein is liable to be revoked upon those grounds.

19. However having taken into account the history of this matter and noting that the same has been pending since 2006 it is not to the best interest of justice to revoke the grant herein but for the reasons stated by the applicant in her affidavit in support I hereby set aside the certificate of confirmed grant issued on 5th August 2009 and grant leave to the applicant to file a protest to the proposed mode of distribution herein within the next 14 days from the date herein.

20. This being a family dispute each party to meet their own costs.

Dated and delivered at Nyeri this 27th day of June 2014.

J. WAKIAGA

JUDGE

Court: Ruling is read in the presence of Mr. Gori for Mr. Maina and the applicant in person in the absence of her advocate.

J.WAKIAGA

JUDGE

27/6/2014