



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCC CAUSE NO 290 OF 2011

DAVID MUGENDI NGANDU.....APPICANT

VERSES

SUSANA RWAMBA JEREMIAH..... RESPONDENT

RULING

1. Through summons for revocation and/or annulment of grant dated 12/7/11, the Applicant herein seeks to have the grant issued in Runjenjes succession cause No.156 of 2010 annulled on the following grounds;
 - i. That the proceedings to obtain the letters of administration were defective in substance.
 - ii. That the grant was obtained fraudulently by making false statements or by concealment from the court of something material to the case.
 - iii. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
2. The Applicant in the supporting affidavit alleges that he is one of the beneficiaries of the estate of Jeremiah Njiru Kagwe as the deceased had already sold to him land parcel KAGAARI/KIGAA/5857. He states that the land board had issued the consent to transfer land in his favour before the deceased died. And that despite being aware of these facts the Respondent failed to include the Applicant as one of the beneficiaries of the estate and went ahead to dispose of the portion that was meant for the Applicant. The Applicant says he has developed the land in question extensively and prays that the Respondent be ordered to sign all the necessary documents to effect transfer in the Applicant's name.
3. The Respondent in the replying affidavit states that the Applicant is not entitled to inherit from the deceased as they are not related and that he did not file a formal objection or a cross appeal within the stipulated time despite knowing that the succession cause had been filed at Runyenjes. Instead he filed a notice of appointment of advocate. It's her contention that the Applicant cannot claim ignorance of the existence of the petition. The grant was confirmed after six months as no protest had been filed. The Respondent states that she is aware of the fact that there was a sale transaction with respect to KAAGARI/KIGAA/5857. The Ksh.30,000/= forming part of the purchase price was given to Emilio Nyaga and not the deceased. KAAGARI/KIGAA/5857 was not referred to in the sale agreement between the deceased and the Applicant.(annexed herewith). She further avers that her counsel informed her that the translation done by Mr Alexander Peter Kariithi (who is also the Applicant's advocate) in respect of the sale agreement does not reflect the true translation from Kiambu to English. She denies that the Applicant has taken possession or cultivated the subject land and that the application is an afterthought. She denied that the grant was obtained fraudulently.
4. The Applicant submitted that since the consent from the Land Control Board was obtained before

the death of the deceased the land should be transferred. He also questioned the jurisdiction of the lower court to hear the succession as the value of the estate was over shs.100,000/=. The Applicant attached a copy of minutes of a family meeting regarding the dispute of the said land saying he has developed the said land yet these facts were hidden from the court.

5. The Respondent in her submissions faulted the translation of the sale agreement from Kiambu to English as it was not correct, and that the translation should have been done by an independent person and not the Applicant's advocate. The Respondent states that the Applicant is not a dependant of the deceased. She also raised doubts on the authenticity of the documents presented by the Applicant in support of his application, and denied that the Respondent has made developments on the said parcel of land.
6. **The disputed facts are the following:**
 - a. That there was a sale agreement between the deceased and the Applicant for the sale of KAGAARI/KIGAA/5857
 - b. That part of the purchase price was paid to the deceased
 - c. That the interpretation of the alleged sale agreement was done to reflect the true position
 - d. That the Applicant should be included as a beneficiary of the said land
 - e. That there was a valid consent from the land control board
 - f. That the court at Runyenjes had jurisdiction to determine the matter

7. **Issues For Determination**

- i. Whether there was a valid sale agreement between the deceased and the Applicant in respect of KAGAARI/KIGAA/5857.
- ii. Whether the Land Control Board Consent was authentic.
- iii. Whether the Runyenjes court had jurisdiction to hear and determine the succession cause.
- iv. Whether the Applicant has satisfied the requirements for revocation of grant.

8. **Issue No. (i)**

The Applicant annexed a sale agreement to his affidavit. The same was done in Kiambu and was translated in English language by his advocate. The Respondent alleges that the translation done by the Applicant's advocate is incorrect. I have looked at both agreements and have had the one in Kiambu interpreted for the court by Mr. Patrick Njue the Court Clerk. I agree with the Respondent that the translation is incorrect. The agreement in Kiambu language does not indicate the land parcel number that is the subject of the transaction. It only indicates 'kithaka' which means land. The agreement is dated 1/11/2000 and is witnessed by the deceased, the Applicant and the deceased's son who are all listed as witnesses. The purchase price is indicated as ksh 50,000/=. A consideration of ksh 34,750/= was paid and it was agreed that the balance will be paid by installments. The Applicant also annexed a copy of the consent from the Land Control Board allowing the deceased to transfer the said land to him.

9. Its curious to note that the deceased died on 15/5/2001 and this letter of consent is dated 11/5/2001 just four days before his death. The consent does not have a reference or date of the application for consent which is unusual. When was the application for consent made? There was nothing difficult with the Applicant annexing a copy of the said application. The agreement shows the sale price to be shs.50,000/= while the consent shows it as shs.120,000/=. The person who was allegedly paid shs.30,000/= on 1/11/2000 was Emilio Nyaga and not the deceased. It's not shown that he was receiving it on behalf of the deceased.
10. In the case of **MICHIRA VS GESIMA POWER MILLS LTD [2004] Eklr** the Court of Appeal stated that if the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties. The court cited the case of **SHAH VS SHAH [1988]KLR 289 at pg 292 paragraph 35** wherein the court stated the following in regard to agreements drawn by laymen;

'One must bear in mind that this agreement was drawn up by laymen. They did not use any

legal language and the court can only interpret the sense of their agreement and not interpolate it with any technical legal concept....'

11. In the instant case, the agreement is quite ambiguous as it does not specify the title of the parcel of land that is the subject of the transaction. The title cannot be said to be obvious as the deceased had other parcels of land. The payment by instalments is not stipulated. Was the sale price kshs.50,000/= or ksh.120,000/=?

12. Issue No. (ii)

The Respondent has alleged that the consent from the Land Control Board is not authentic as it is not accompanied by the application for the consent. On the face of it one can see that the date of the application is not indicated neither is it accompanied by a copy of the application. There is nothing to support it.

13. Issue No. (iii)

The Applicant in his supporting affidavit has alleged that the value of the estate exceeded the jurisdiction of the said court. To prove this he attached a copy of the consent obtained from the land board indicating that the consideration paid for KAGAARI/KIGAA/5857 was ksh.120,000/= on 11/5/2001. His own agreement puts the sale price at shs.50,000/=.

This in my view is not sufficient proof that the value of the estate was ksh.120,000/= as consideration paid is not the same as the actual value. The price of the parcel of land could have been inflated by the deceased resulting to the overpricing of the said parcel of land. What could have determined the actual value is a valuation report from an expert. In absence of such proof the court cannot verify his allegations and as such this ground cannot stand.

14. Issue No. (iv)

The Respondent has claimed that the Applicant was all along aware of the fact that there was a succession cause in Runyenjes. He had even engaged the services of an advocate at that time even before the grant was confirmed. It is not clear why he never filed a protest yet he was well represented. In view of the scanty information provided, this court is unable to fully determine whether there was an executed sale transaction between the deceased and the applicant. The best cause of action would be for the Applicant to file a suit against the deceased's legal representative. This way the parties will have a chance to avail witnesses and documents that will enable the court to make a decision. I do find that the Applicant has failed to prove the statutory grounds for revocation of grant and therefore his application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1ST DAY OF AUGUST 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Abubakar for Kariithi for Applicant

Mr. Ithiga for Respondent

Njue/Kirong – C/c