



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 425 OF 2013

IN THE MATTER OF THE ESTATE OF GRACE WANGARI KINYANJUI (DECEASED)

DAVID KIARIE NGUMI.....OBJECTOR/APPLICANT

VERSUS

STEPHEN KAHURANI NJUGUNA.....ADMINSTRATOR/RESPONDENT

RULING

1. Stephen Kahurani Njuguna obtained letters of administration for the estate of Grace Wangari Kinyanjui who died on the 18/6/07 on the 12/11/12 at the Senior Resident Magistrate Court Thika. On the 26/2/11 the Objector/Applicant David Kiarie Ngumi filed a summons for revocation of the grant under Order 45 and 46 of the Law of Succession Act and under rule 44(1) and 73 of the Probate and Administration Rules. In the said application he seeks to be granted the following orders;
 - i. That an order do issue restraining the administrator /respondent his agent, servants or persons claiming or through him from evicting, demolishing structures, harassing or otherwise interfering with the Objector/Applicant's quiet users or occupation of Plot No. Dagoretti/Riruta/T.83 pending the hearing and determination of the Summons.
 - ii. That an order do issue prohibiting all dealings in land parcel No. Dagoretti/Riruta/T.83 until the summons is heard and determined.
 - iii. That the grant made by the Senior Resident Magistrate Court at Kajiado on 9th May 2012 and confirmed on the 12th November be revoked.
 - iv. That the title No. Dagoretti/Riruta/T.83 issued to Stephen Kahurani Njuguna be cancelled.
2. Upon being served with the application the administrator/respondent filed a replying affidavit dated the 6/5/13 together with a notice of Preliminary Objection.
3. The grounds in the Preliminary Objection are as follows;
 - a. That the summons were bad in law in that it did not comply with section 76 of the Succession Act and Rule 44 of the Probate and Administration Rules, in that it was not brought under Form107.
 - b. That the Court does not have jurisdiction to deal and grant the orders sought by the applicant.
 - c. That the applicant lacks locus standi to file the application.
 - d. That the application as drawn is wholly incompetent and an abuse of the due process of the court.
4. When the matter came up for hearing of the objector's application dated 25/2/12 parties decided that the preliminary objection be heard first. Mr. Gakaria for the Administrator/Respondent submitted as follows; That the 2 issues for consideration in the Preliminary Objection is on

jurisdiction and the other on competence of the application. On jurisdiction he argued that the dispute between the objector and the respondent is over Land Parcel Dagoretti/Riruta T.33, both claim to have purchased the said land from the deceased and it is now registered in the name of the respondent/administrator. That this court is a family court with special jurisdiction to deal with matters related to family issues and that disputes between the 2 parties is not one of family members but of purchases for value. That since the property is now registered in the administrator's name and not the deceased then the matter should be heard in the Environment and Land Court. To support this argument counsel relied on 2 cases namely in the matter of the **Estate of M'Irera M'Ngaruthi (deceased) S/C No. 52101 and S/C No. 68 of 2007 Ileri Nyaga –vs- Karani Ngari & another.**

5. It was further submitted that the applicant's summons seeks to revoke the grant yet a grant is used for the purposes of distributing the estate and that the title is with a 3rd party who is alive and not deceased.
6. On competence of the application Mr. Gakaria argued that the application is incompetent as it is drawn under the heading summons for revocation yet the sections quoted deal with intermeddling with the estate and that rules 44(I) and 73 is for directions only; That the application as drawn is mixed up with the interim relief the applicant seeks. He sought to have the application struck out with costs to the respondent.
7. Mr. Njuguna in response argued that as was held in the case of **Oraro –vs-Mboya [2005] 1KLR** a preliminary objection can only be raised on point of law and not on facts; that the issue of who is the current proprietor is a question the court will have to look at; that the land has not left the administrators hand ; that nowhere in the Act is the title of an administrator protected from cancellation in the event the grant is revoked; that section 93 of the Act protects the title of a purchaser in the event of revocation of a grant; that an administrator is a trustee and is bound to act in good faith both at the point of obtaining the grant and the administration. On the competence of the application Mr. Njuguna argued that there is a typographical error in citing sections 45 & 46 but rule 44 (1) and 73 are properly invoked; that the error does not in any way affect the application and that they are errors that can be cured by an amendment; that Rule 73 of the probate and administration rules gives the court the powers to make just orders and that once the said rule is invoked then the Respondent cannot say that the application is incompetent. It was further argued that in the event the court finds that there is a defect in the proceedings then the court has the power to revoke the grant *suo moto* based on the documents on record. Section 48 and 49 of the Succession Act Cap 160 limits the Magistrate Court's jurisdiction. Counsel distinguished the cases relied by the respondent from the current suit.
8. In reply Mr. Gakaria submitted that the administrator is a purchaser in the lower court and is also protected under section 93 of the Act. That the court should look at the matter of the dispute when considering jurisdiction and should not go into the contents of the application. The administrator asked this court to uphold the Preliminary Objection.
9. I have considered the oral submissions made. The provisions of law relied on by the parties. It was in order for the respondent to raise the issue on the court's jurisdiction. I also agree with the Respondent that a Preliminary Objection can only be raised on point of law. However the applicant has drawn this court's attention the fact that the grant that was issued was contrary to the provisions of section 48 and 49 of the Law of Succession Act cap 160. I will take up this issue first because the Respondent holds a title after having moved to the lower court and obtained a grant and used it to transfer the deceased's title.
10. The sale agreement that has been exhibited dated 2/2/02 shows that the Respondent bought land parcel no. Dagoretti/Riruta/T.38 for Kshs.1.7 Million which he paid in installments. There is no dispute that that the respondent obtained a grant from the Senior Magistrate Court at Kajiado on the 9/5/12 which was letter confirmed on the 12/11/12. As a court I cannot close my eyes to an irregularity on record. Section 48 of the Law of Succession Act gives the Territorial jurisdiction of Magistrates. Under the section 48 a Resident Magistrate can only handle matters which gross value does not exceed one hundred thousand (100,000/-) shillings. The property the Respondent bought was worth 1.7 Million. He ought to have moved to the High Court to seek the grant. I need not make a finding on the issue of jurisdiction. The facts speak for themselves and therefore under section 76 (a) of the Law of Succession Cap 160 I revoke the grant that was issued by the lower court on the 12/11/12. On the issue of ownership of the subject parcel land this court is of the view

that the parties move to the Environmental and Land Court for determination on who owns the said piece of property. Each party to bear their own costs. It is so ordered.

Dated signed and delivered this 16th day of December 2014

R. E OUGO

JUDGE

In the Presence of:

.....**OBJECTOR/APPLICANT**

.....**ADMINSTRATOR/RESPONDENT**

M/s Charity

COURT CLERK