



REPUBLIC OF KENYA

High Court at Embu

Miscellaneous Application 82 of 2007

JULIUSKAMAU KITHAKA.....APPLICANT

V

WARUGURU KITHAKA NYAGA.....1ST RESPONDENT

ROSEMARY NJOKI NGARI.....2ND RESPONDENT

AND

HALLAN GITARI MUNENE )

GRACE MUNENE ).....INTERESTE

D PARTIES

R U L I N G

This is the application dated 15/10/2009 brought under Rules 49 & 73 of the Probate & Administration Rules for the following orders:-

1. *That this matter be dismissed and/or struck out with costs.*
2. *The prohibitory order registered against the titles of land parcel numbers Kabare/Nyangati/2969 and Kabare/Nyangati/2970 be lifted.*
3. *Costs of this application be provided for.*

It is supported by the affidavit of Hallan Gitari Munene an interested party. He states that him and his wife (2nd interested party) purchased land from Gilbert Muchira Kithaka and Paul Ndambiri Kithaka i.e. LR. No. KABARE/NYAGATI/2969 and KABARE/NYANGATI/2970 respectively. This was on 13/8/1996. The vendors had clean titles which they passed onto them. On 7/4/1997 they learnt of a prohibitory order lodged against the titles. Later the respondent died (HGM-2).

Mr. Kariithi for the now deceased respondent filed a replying affidavit confirming the death of the respondent. An affidavit of verification was filed on 25/4/2013 confirming that Waruguru wife of Kithaka alias Paulina Njeri Kithaka was the respondent herein and she died on 11/7/2006. The applicant/respondent did not file any replying affidavit. The counsels agreed to dispose of this application by way of written submissions.

Mr. M. Kagio for the applicants/interested parties submitted that the applicants for revocation of grant were two but the 2nd one Simon M. Kithaka filed notice of withdrawal dated 19/3/2001 on 28/3/2001. He stated that the respondent who was the only administratrix had distributed the estate to all beneficiaries who had titles. She died in 2006.

The interested parties were also purchasers and had titles to the property they bought and are protected by Section 93 of the Law of Succession Act. He cited Embu High Court Misc. Application No. 1 of 2001, the estate of Kamuthi Munyi

CHARLES GATIMU KAMUTHI - Applicant

VERSUS

EVAN KABURU KAMUTHI – Respondent

which he said was similar to this matter before me.

He further asked the court to lift the prohibitory order issued against titles of land parcel Nos. Kabare/Nyangati/2969-2970. Mr. Magee for the 2nd respondent supported the submissions by the applicants/interested parties. Mr. Njage for the respondent/applicant in his submissions indicated that the court's control of the grant does not end with the death of the administrator generally or in any particular case as this.

He further submitted that the death of an administrator as a trustee does not absolve the administrator of his obligations as a trustee (Section 79 of the law of Succession Act). And that paragraph 20 of schedule 5 of the Act was wide enough to cover the current case. (Ref. *EL RUMHY VS EL BASAMY [1963] EA 438*). He therefore opposed the application for dismissal of the application for revocation.

The succession cause giving rise to the main application herein was Senior Resident Magistrate's Court Kerugoya Succession Cause No. 282/1994. In the said cause the letters of grant were issued to the late Waruguru Kithaka. It was confirmed on 12/01/1996. This is how the estate was distributed

WARUGURU KITHAKA NYAGA 1.11 ACRE

GILBERT MUCHIRI GITHAKA 3.0 ACRE

PAUL NDAMBIRI GITHAKA 2.19 ACRE

JOHN GICHOBI GITHAKA 2.19 ACRE

SPENCER MUTHEE GITHAKA 2.0 ACRE

FRANCIS KABUBA GITHAKA 1.11 ACRE

SIMON MBITI GITHAKA 1.11 ACRE

KAMAU JULIUS GITHAKA 1.11 ACRE

SAMUEL NJAGI PETER 1.0 ACRE

GILBERT MUCHIRA GITHAKA 0.25 ACRE

The respondent/applicant and another (Simon Mbiti Kithaka) moved to the High Court at Nyeri vide Succession cause No. 59/1996 for an application for revocation of grant. In the same matter the respondent/applicant through an amended chamber summons dated 17/1/1997 applied for prohibitory orders against Land No. KABARE/NYANGATI/2969-2978 which had resulted from subdivision of KABARE/NYANGATI/260.

The order for prohibition were granted on 18/3/1997 exparte. The same orders were again confirmed on 11/7/1997 exparte by Hon. Justice Osiemo (rtd). On 6/11/2003 Hon. Justice Khamoni directed that all adult beneficiaries be each served with the main application for revocation of grant.

And on 3/7/2007 the file was transferred to Embu for hearing. The application dated 17/7/2007 for setting aside the prohibitory order issued herein was argued on 13/2/2008 but the court dismissed it. Directions on the main application for revocation were taken on 20/5/2008. When the matter next came before the court on 16/7/2009 the court was informed that the respondent had long died and she was the sole administratrix. Mr. Kariithi for the deceased respondent availed a death certificate as directed by the court. It was then agreed that Mr. Maina Kagio files an application over the issue of the main proceeding

when the respondent had died. This is now the application this court is faced with.

It is not disputed that Waruguru Kithaka died on 11/7/2006 (Death certificate produced). Prior to her death she was the administratrix of the estate of the late Kithaka Nyaga. It is also not disputed that the grant in respect of the estate of Kithaka Nyaga was confirmed on 12/1/1996 and the estate distributed as per the certificate of grant.

At the time the application for revocation of grant was being filed in Nyeri High Court on 16/5/1996 the estate had been distributed and beneficiaries issued with new titles. This can be seen from copies of the register filed herein by the respondent/applicant. The 2nd applicant in the main application for revocation filed a notice of withdrawal from the main application as the same was filed without his consent. The same was filed on 28/3/2001 having been dated 19/3/2001.

Section 79 of the Law of Succession Act provides thus:

***“the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as a personal representative.*”**

According to the evidence on record as at the time of the filing of the main application herein, the administratrix had already distributed the estate to the beneficiaries. It is true as at the time of her death there was a pending application for revocation of grant. The person who filed this grant in 1996 is still alive. It is now 17 years since he filed that application and it has never been prosecuted.

On 20/5/2008 directions on the main application for revocation were taken and this was 2 years after the death of the administratrix. The respondent/applicant never informed the court about this death yet he says he is a son of the deceased. How could this information not have been within his knowledge?

Paragraph 20 of schedule 5 of the Act quoted by Mr. Njage deals with testate estates and not intestate ones. Even if it was broadly stretched to cover intestate ones, the new representative would only deal with the unadministered part of the estate. There is no evidence to show that there was any unadministered part of the estate of Kithaka Nyaga.

It is also true that the applicants/interested parties herein are purchasers of land from beneficiaries of Kithaka Nyaga's estate. They purchased the lands when the beneficiaries had got shares but not titles to their shares. They are therefore protected under Section 93 of the Act which provides

***Section 93(1)***

***A transfer of an interest in immovable or movable property made to a purchaser either before or after***

***the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or valuation of the grant either before or after the commencement of this Act.***

***Section 93(2)***

***A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.***

There is no wrong doing the applicant had raised against the interested parties. It is only the administratrix who could have answered the issues raised by the respondent/applicant. Had the distribution not been complete then the court could have asked the parties to substitute the deceased administratrix. The case of the estate of ***Kamuthi Munyi (EMBU HIGH COURT MISC. APPLICATION NO. 1 OF 2001 Supra)*** and the present one can well be distinguished from the cited case of ***MAAMUN BIN RASHID BIN SALIM EL RUMHY VS HAIDU MOHAMED BIN RASHID EL BASAMY (supra)*** as in the latter case there was part of the estate which had not been administered. And that is why the plaintiff therein was granted letters of administration. The scenario here is different.

The grant here has become in-operative. Even if the grant were to be revoked there would be nothing to distribute. The property was distributed in February 1996 and some of it is in the hands of 3rd parties who bought them from the beneficiaries. The respondent/applicant overslept on his rights and even tried to drag his brother Simon Kithaka into the matter but Simon refused. The law will not assist the indolent.

It is also noted that the applicant also benefited from the distribution. He has his own share. The above being the position I do find for the applicants/interested parties and allow the application dated 15/10/2009 and dismiss Miscellaneous Application No. 82/2007.

The prohibition orders issued against the titles resulting from the land KABARE/NYANGUTI/260 are hereby lifted.

Costs to the 2nd respondent and interested parties.

Right of appeal explained.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF MAY 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Mr. Mutahi for Kariithi for Respondent**

**Njue CC**