



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 41 OF 2005

JOSPHAT MIANO S. CHABANGUE.....APPLICANT

VERSUS

MUTHONI GIKUNGI.....RESPONDENT

RULING

The applicant filed this summons for revocation and annulment of confirmed grant on 1st April 2005. His grounds are:-

1. *The confirmation of the grant was obtained fraudulently by making false statement and by concealing from the court material things to the case.*
2. *The grant was obtained by means of untrue allegation of facts essential in part of law to justify the grant notwithstanding that the allegation was made in ignorance inadvertently.*
3. *The proceedings to obtain the grant were defective in substance.*

The gist of his application is that the deceased had no wife or children and had sold the land to the applicant who was also a clan elder. He repeats the same in his affidavit in support.

The respondent filed a replying affidavit sworn on 19/4/2005 explaining that she was the only surviving close relative of the deceased. She denied knowing the applicant. The matter proceeded by way of viva voce evidence with both parties giving evidence.

The applicant confirmed that the deceased was from his clan. And that he owned land MUTIRA/KANYEI/1668. Before his death he sold the land to one Joseph but refunded the money 2,500/= in 1996. He told them to take the land and the applicant took possession. When he died they informed the respondent who said she did not want the land as she had her husband's.

The applicant wants the land to go back to the clan. The respondent told the court she was the deceased's sister and only surviving next of kin. She said her brother's land could only go to the clan if there was no next of kin surviving. In cross examination she admitted that a Mr. Muriithi used to take care of the deceased. And that the applicant went to the land when the deceased died.

Both counsels agreed to file written submissions which they did. I have carefully gone through the submissions. To correct Mr. Magee, the applicant did not produce before this court any agreement of sale or any proof of payment for the land.

There is no dispute that the deceased herein died on 2/3/98. Its also not disputed that he was the registered owner of land LR. MUTIRA/KANYEI/668. Its also undisputed that the deceased had no wife nor children as at 2/3/98 when he died. Further its not disputed that his only surviving next of kin was his

sister the respondent herein.

The said sister applied for letters of administration which were issued to her and were later confirmed. The above property was wholly inherited by her. The applicant cautioned the land and filed this application claiming interest as a clan elder and purchaser of the land.

It was therefore his duty to prove to this court that indeed he had bought the said land from the deceased prior to his demise. In spite of various documents he had promised to avail nothing was produced before his case was closed. Strange enough in his evidence he was saying he wanted the land to be reverted to the clan. Why would he want the land to revert to the clan if indeed he had bought the land from the deceased? If at all the clan members decided to assist the deceased when he was unwell that was a kind gesture for an ailing member of their clan. But did this give them a right to take over the deceased's property? They could only do so in the absence of any surviving kindred as set out in Section 39(1) of the Law of Succession Act.

Being a clan elder did not place the applicant in this line up of inheritors of the deceased. The respondent while applying for letters of grant had no duty of informing the clan and in particular the applicant what she was doing about her deceased brother's estate.

I do find that the applicant has failed to prove his claims against the respondent. I dismiss the application dated 1/04/2005 for revocation and/or annulment with costs.

Any caution/cautions registered on the land should be lifted forthwith.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Wairimu for Mr. N. Kagio for Applicant

Mr. Magee for Respondent

Parties

Njue CC