



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 32 OF 1998

IN THE MATTER OF THE ESTATE OF GEORGE MWANGI NJOROGE - DECEASED

**ZIPPORAH WANJIRU NJOROGE.....APPLICANT
VERSUS**

ZIPPORAH WANJIRU MWANGI.....RESPONDENT

RULING

By an application entitled Summons for the Revocation or Annulment of Grant (*the application*) dated 11th April 2011 the applicant Zipporah Wanjiru Njoroge sought an order that the "**Grant of Letters of Administration Intestate**" issued to and confirmed to MARY WANJIRU MWANGI on 11th April 2000 but rectified on 19th October, 2010 to insert the name ZIPPORAH WANJIRU MWANGI as administrator of the Estate of George Mwangi Njoroge be revoked.

The application was based upon the grounds on the face thereof, and the Supporting Affidavit of the Applicant. In addition, the Applicant gave oral evidence following directions of court to that effect.

The applicant's case was straightforward. The deceased, the father of the Respondent was granted title by way of gift the property known as RUIRU/BLOCK 2/GITHUNGURI/3948 for purposes of using it as a security to obtain a loan from his employer "**POSTA**" (*Postal Corporation of Kenya*). As fate would have it, the deceased fell sick and never got the loan. The title to the land was however in the custody of the Applicant. The Applicant produced both a copy of the title originally in the name of her husband Joel N. Mbugua, and later in the name of her son George Mwangi Njoroge the father of the Respondent.

It was the Applicant's evidence that the land was transferred and registered in the name of the deceased (*3rd son*) for the sake of convenience to enable him take a loan from his employer, and buy his own land at Banana, within Kiambu District, and later surrender the title to the family or his father. It was never intended to be an absolute gift to him particularly as none of the other sons, senior to him, were given land in the same way.

It was also the Applicant's evidence that she was never consulted by the Respondent on taking out Letters of Administration, and never gave her consent for the Respondent to take out Letters of Administration in respect of her son. The Applicant also contended that since the land fell within the geographical jurisdiction of the High Court at Nairobi, it was part of the fraudulent intent to file the cause in Nakuru. For these reasons, the Applicant prayed that the application be allowed with costs.

The Respondent offered no *viva voce* evidence to controvert what her grandmother, the Applicant said in her oral testimony. The Respondent did however deny the Applicant's contentions in her Replying Affidavit sworn on 13th May 2011 and filed on 16th May 2011. The Respondent's case is that the land

was an absolute gift to her deceased father, and that he was to construct his own homestead on it. The Respondent denied any suggestion of holding the land in trust for the family, and even suggested that the Applicant had stolen the original title from her deceased's father's house prior to his death, and that since all these events occurred way back in 1997, the Applicant was guilty of laches and that her application should be dismissed with costs.

At the end of the Applicants' testimony, I directed respective counsel to file and exchange written submissions, summarizing the factual and legal position of each, the Applicant and the Respondent.

I have considered carefully the rival contentions, and set out my opinion and conclusion in the subsequent passages of this Ruling. Section 76 of the Law of Succession Act, (*Cap. 160, Laws of Kenya*) sets out the grounds for revocation or annulment of the grant, whether confirmed or otherwise. These are -

- (a) *that the proceedings to obtain the grant were defective in substance,*
- (b) *that the grant was obtained by the making of a false statement or by the concealment from the court of something material to the case,*
- (c) *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,*
- (d) *- not issue here.*

In this, the Respondent appears to have been completely ignorant of the terms under which the family made arrangements to have the suitland transferred in the name of her father, the 3rd born son of the Applicant. It is not uncommon in our African Societies for a family to sit together and work out a way to assist one of its members out of a difficult situation, or help him to set himself/herself up. It is common in dowry situations, an elder brother donating a heifer or so to help a brother marry or set up house. It was not unusual for the family to "**donate**" albeit temporarily, land so, that the grantor of the loan is fully secured that the loan would be repaid. If there were default, the whole family would again be involved.

It is of course the common law that covenants concerning land run with the land, and our Law of Contract Act (*Cap. 23, Laws of Kenya*) provides that covenants concerning land must be evidenced by some memorandum in writing. Whereas this is indeed so in purely commercial transactions, where long-held family traditions of mutual help are concerned, the question of trust by the beneficiary of any gesture is paramount.

This is one aspect the Respondent refused to recognize and got stuck with the age old accusation that her grand-mother (*the mother-in-law*) to her deceased mother did not like her mother - the daughter in-law. If this were so, then that would be greater reason to consult her, in matters concerning family property.

In this regard therefore there is much to be believed on the part of the applicant that the land in question though nominally registered in her son's name beneficially remained family land, and subject to administration as family land. This was acknowledged by the Respondent's mother (*the applicant's daughter in-law*), when she had her husband buried within her father's compound or land. Her father would have been buried in the suitland, if it was beneficially his own. That is our law, called custom in African Societies, a son who has acquired or has been granted by his father, beneficially his own parcel of land, would be buried in such land. This was not the case here. I believe the Applicant when she depones in her Further Affidavit of 13th May 2011 that the Respondent lied when she alleges that her later father had deposited stones on the suit land, and that the stones were stolen!

The Respondent's own Affidavit coincides with the applicants averments and evidence that her son died shortly after the title to the land was registered in his name, and the purpose of the transfer was never achieved. It was frustrated by his death. More importantly also, the deceased lived in her house until his death and was buried as already stated, within her or her father's land, and not on his "**own**" land as he did not have any land beneficially.

Finally, the Respondent "**killed**" her, case by her application dated 4th November 2010 and filed on 4th November 2010 supported by an Affidavit, that the title was burnt during the 2007/2008 Post Election Violence. This is not true as Githunguri was not affected by such incidents of violence. This application was not prosecuted and the easy option of loss was taken that the original title was lost, and another was issued to the Respondent. That in my view is an absolute abuse of the processes of law.

In conclusion, the nominal registration of the suit land in the Respondent's father's name, was a matter of utmost good faith. The Respondent was completely unaware of it, and her mother also deceased, who was most probably aware of it, did not disclose to the family that she had filed a Succession Cause in Nakuru.

Although her mother would, as wife to her father, have had preference in matters of administration of his estate, she, and the Respondent were bound to inform the deceased's family, in this case, the Applicant, her brothers-in-law and sisters-in-law of her intention to file, and filing of the petition for Grant of Letters of Administration in respect of her late husband. That is the requirement of Section 66(1) of the Law of Succession Act. Failure to do so was concealment from the court of a fact material to the cause.

For those reasons, I allow the Appellant's summons dated and filed on 11th April 2011, and hereby revoke and annul the Grant of Letters of Administration Intestate issued and confirmed to one MARY WANJIRU MWANGI on 11th April 2000 and rectified on 19th October 2010 to insert the Respondent's name, ZIPPORAH WANJIRU MWANGI as Administrator.

For the purpose of bringing the administration of the estate of the late George Mwangi Njoroge to an end, and in exercise of the discretion conferred upon this court by Section 47(1) of the Law of Succession Act, I appoint the Applicant and the Respondent be joint administrator's of the estate of the said George Mwangi Njoroge (*deceased*).

As there is only one property in dispute, I direct the Administrators to file their respective or joint proposals within 60 days of the date of this Ruling for the distribution of the said property known as RUIRU BLOCK 2 GITHUNGURI/3948.

This being a family matter I direct that each party shall bear its own costs occasioned by the application herein.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of January, 2012

M. J. ANYARA EMUKULE
JUDGE