



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1940 of 1998 & 439 of 2010

IN THE ESTATE OF MARY MURUGI JOHN, DECEASED

CONSOLIDATED WITH

HIGH COURT CIVIL CASE NO.439 OF 2010

AT NAIROBI MILIMANI COMMERCIAL COURTS

JOHN NJUGUNA MURUGI.....APPLICANT/PLAINTIFF

VERSUS

EMELIA ANNE MBAIRE MURATHE.....1ST RESPONDENT

HARRISON WAMBUA MUSYOKA.....2ND RESPONDENT/INTERESTED PARTY

HOUSING FINANCE COMPANY LTD.....3RD RESPONDENT/INTERESTED PARTY

THE REGISTRAR OF TITLES.....4TH RESPONDENT/INTERESTED PARTY

RULING

1. This Ruling relates to the application by summons dated 26.5.2010 made by **JOHN NJUGUNA MURUGI** (the Applicant) seeking, inter alia, revocation of the Grant of Letters of Administration Intestate made on 28/12/1998 to **EMELIA ANNE MBAIRE MURATHE** and **JOHN NJUGUNA MBAIRE** in the estate of **MARY MUGUGI JOHN** (the deceased).

2. The application is made on the grounds that the Grant was fraudulently made and confirmed (on 28.9.2000) not least because the Applicant being one of the two beneficiaries, was a minor and did not sign the Petition for the Grant when it was made and also when it was subsequently confirmed and that for that reason the Grant was therefore defective and has been used to disinherit him.

3. The record shows that the deceased, **MARY MURUGI JOHN**, died on 20/4/1998. She was survived by a daughter, **Emelia Anne Mbaire Murathe** and the Applicant, **John Njuguna Mbaire Murathe** both of whom were shown in the Petition to be the Petitioners to whom the Grant of Letters of Administration intestate was made on 28.12.1998. But it seems that the deceased had left a Will in which she bequeathed her estate equally to the Applicant and the Respondent as her only two children.

4. The estate of the deceased comprised property number **L.R. 12149/30 Kahawa**, and monies held in **Account No. [particulars withheld]** in the E.A Building Society. When the Petition was filed, **Form P & A5** was filled with the particulars of the ages of the Petitioners which were shown to be 23 years for the Applicant, (John Njuguna Mbaire) and 36 years for Emelia Anne Murathe, the Respondent.

5. The Grant was confirmed on 28/9/2000 and the estate was distributed equally between the two beneficiaries namely the Applicant and the Respondent.

6. A copy of the Certificate of title to property No. LR 12149/30, Kahawa, shows in entry No.3 that the title to the said property was on 27.10.2003 transferred to the names of the Petitioners (Emelia Anne Mbaire Murathe and John Njuguna Mbaire) as beneficiaries of the estate of the deceased. Entry No.4 shows that the property was transferred on the same day, i.e. 27.10.2003 to **Harrison Wambua Musyoka** for a consideration of Shs.500,000/= and that he latter proceeded to charge it to Barclays Bank of Kenya Limited on 29.9.2004 to secure a loan of Shs.4.3 million and on 3.8.2005 a further charge to Barclays Bank was registered to secure a further sum of Shs.1.850,000/=. These two loans totaling Shs.6.15 million seem to have been repaid as entry No. 6 shows that on 16.10.2005 a discharge was registered in respect of both the charge and the further charge.

7. However, on 16.10.2008, the property was charged to the Housing Finance Company of Kenya to secure a loan of a whopping sum of Shs.11.5 million.

8. The ID card attached as annexure JNMI to the applicant's affidavit sworn on 26.5.2012 in support of the summons shows that the **Applicant was born in 1986**. It is not conclusive evidence of the date of birth and does not have the same evidential value as a birth certificate. But the age of the Applicant as reflected in his ID card is not disputed.

9. The Applicant avers that his mother, the deceased, left a will (a copy of which is annexed marked as "JNM 2") in which she bequeathed her estate to the Applicant and the Respondent as her two children, in equal shares with the deceased's sister, **Emily Mbaire Gitu** and the Respondent, **Emelia Anne Mbaire Murathe, as her executors**.

10. When the Petition for the Letters of Administration was made, the Applicant appears to have been aged 12 years and on confirmation of the grant in the year 2000, the Applicant seems to have been aged 14 years. He was a minor without capacity to hold the Grant or property on both occasions.

11. The Applicant seeks orders that the grant be revoked and annulled. He also seeks an order that the Registrar of Titles, Nairobi, be ordered to rectify the Title in relation to property No.R.6/345 LR 12149/30 by restoring it to the deceased's name. An order to declare the transfer of the said property to Harrison Wambua Musyoka null and void is also sought.

12. In his Replying affidavit sworn on 15/07/2011, the interested party, Harrison Wambua Musyoka, avers that the applicant has concealed material facts and "*failed to disclose key pertinent points and is merely trying to hoodwink the court.*" The material facts said to have been concealed are stated to be:-

i. *That the use by the applicant of his name of John Njuguna Murugi reflected in his affidavit in support of the application while his ID card (annexture "JNM 1") reflects the name "JOHN NJUGUNA MURATHE" shows that these are two distinct persons. It is argued that this shows that in absence of a deed poll, the other name is not his and that it relates to somebody else . This argument is of no consequence as it is clear from the evidence that the two names relate to one and the same person, deed poll or no deed poll.*

ii. *That the applicant has not proved that he is the brother of the Respondent or rather, that the Respondent is his sister. This argument is frivolous and is neither here nor there as the Respondent admits that the Applicant is her brother.*

iii. *That the interested party is the bona fide legal owner of the property which he has extensively*

developed having purchased the same from its initial owner and having been registered on 30th September, 2003 as the owner thereof. Whether this is so is a matter for this court's decision.

iv. That the interested party has clean hands having purchased the property on the information that the Respondent had authority to sell the said property. This is a matter of evidence.

13. In his affidavit, the Interested party expressed resentment, shock and dismay that the applicant had come by information relating to his bank Accounts. This reaction was precipitated by the averment in the applicant's affidavit in support of the application in which averment the Applicant stated

i. "that on April 2010 I heard the Interested Party at the suit premises telling a group of people in his company that he was the owner of the said property and that he was desirous of selling it and that it fetched rent of Ksh. 432,000/= per month"

ii. "that the rent collected was being banked in Equity Bank Kimathi Branch, A/C No. [particulars withheld] titled MUS PROPERTIES LIMITED, a limited liability company whose directors are or were the Interested party and the Respondent ." This evidence in my view was not hearsay. It is relevant and admissible.

iii. That the Interested Party was employed by POWERSTAR HOLDINGS LTD which had been appointed by the deceased to collect on her behalf rent from the suit premises.

14. Emelia Anne Mbaire Murathe, the Respondent , in reply to the Applicant's affidavit in support of the application concedes that the applicant, John Njuguna Murugi, is also known as John Njuguna Murathe and that

i. The deceased left a Will dated 30/6/1995 in which she bequeathed the estate to her and the applicant in equal shares (as siblings).

ii. That the Applicant was little when the deceased died and that the Respondent had to take care of him.

iii. That the Respondent turned to the Interested Party, Harrison Wambua Musyoka, to whom she "outlined" her predicament whereupon the latter offered to help her.

iv. That at the time, the Respondent was having " a discreet albeit torrid relationship"

v. That being naïve and trusting, the Respondent gave the Interested Party copies of the deceased's death certificate and other documents and later the Interested Party caused the Respondent to sign some other documents.

vi. That the Interested Party procured a Grant of letters of Administration made to the Applicant and the Respondent although the Applicant was a minor.

vii. That the Interested Party continued to collect the rent from the suit property as agent.

viii. That in the year 2000 the Interested Party requested the Respondent to go to court with a male relative who could pass for the Applicant ostensibly during the confirmation of the grant and the Respondent obliged and took with her a cousin whose name is identical or similar to the name of the Applicant.

ix. That thereafter, the Interested party and the Respondent got into a come-we-stay relationship in the house of the Respondent and that the Interested Party stopped accounting for the rent he was collecting.

x. That the Respondent took the Interested Party as her husband and she went along with everything he asked her to do and the Interested Party got complete control of the estate.

xi. That at the behest of the Interested Party the Respondent signed documents presented to her by the Interested Party for transfer of the estate property to the Interested Party.

xii That the Interested Party **never paid any consideration** for the suit property and that he mortgaged the property with her knowledge and that when the Respondent pestered the Interested Party to return the estate property, the latter wrote to her in his own hand a letter stating “ I have no intention of retaining your plot and will work on the ways of returning it to you. I do not need any curse or (to) suffer because of such.....”

“..... I will be moving out of the house any time I get a house elsewhere. I will walk out of your life and you will be free for another relationship.....”

15. In her further affidavit sworn on 14/12/2011, Emelia Anne Mbaire, the Respondent, reiterated the contents of her affidavits sworn on 8/7/2010 and 11/1/2011 in HCCC No. 439 of 2010 at Milimani. I have perused the same. The Respondent averred that as at the time of the transfer of the suit property to the Interested party, she was in cohabitation with the Interested party in a come-we-stay relationship.

16. On 25/6/2010, the Applicant went to Milimani Commercial Division of this court and filed suit No. 439 of 2010 against his sister, Emelia Anne Mbaire Murathe, and Harisson Wambua Musyoka, seeking inter alia a permanent injunction to stop alienation or transfer of the suit property to a third party and an order to declare the transfer of the property whose registration was effected on 27/10/2003 to Harrison Wambua Musyoka fraudulent and null and void and for an order for the property to be restored to the Applicant and his sister. It seems Housing Finance Company Limited and the Registrar of Titles were subsequently joined in the suit as Defendants.

17. In his Ruling dated the 26/5/2011, made in H.C.C. No.439 of 2010 the Honourable Mr Justice L. Njagi held that he could not effectively dispose of the suit without reference to the succession cause herein (i.e. No. 1940 of 1998). Accordingly, he expunged all the proceedings before him in that suit and directed that the file in the suit (No. 439/2010) be relayed to this Division which has done.

18. **Advocate E.A Ongicho** appeared in these proceedings for JOHN NJUGUNA MURUGI, the Applicant, while Advocate **Abuga Mogusu** appeared for HARRISON WAMBUA MUSYOKS, the Interested Party, and Advocate ALBERT MOMANYI MAKORI appeared for EMELIA ANNIA MBAIRE MURATHE, the first Respondent. Each of these learned Advocates filed submissions which I have read.

19. The matter before me for determination is the Applicant’s application dated 26/5/2010. It seeks revocation of the Grant made on 28/12/1998 in the Estate of **MARY MURUGI JOHN**, the deceased to **EMELIA ANNE MBAIRE MURATHE** and **JOHN NJUGUNA MBAIRE** and restoration of the property known as L.R. No. 12149/30 (IR 67345) to the names of the administrators of the estate, and for orders declaring the transfer of the property to Harrison Wambua Musyoka null and void.

20. **Messrs Muriithi & Ndonge Advocates** went on record on 27/2/2012 for Housing Finance Company Ltd and the Registrar of Titles as evidenced by their Notice of change of Advocates dated 16/2/2012 in which they stated that they had replaced **M/S Ndonge & Associates, Advocates** and contemporaneously filed their submissions.

21. Section 76 of the Law of Succession Act, chapter 160 of the Laws of Kenya vests in this court power to revoke or annul a grant whether or not it is confirmed either on application of a party or of its own motion if it is satisfied, inter alia,

1. that the proceedings to obtain the grant were defective in substance.

2. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

3. 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

4. that the person to whom the grant was made has failed after due notice and without reasonable cause either:-

i. to apply for confirmation of the grant within the year or

ii. to proceed diligently with the administration of the estate or

iii. to produce to the court, any inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 of cap 160 or

iv. that the grant has become useless and inoperative through subsequent circumstances.

22. Has the applicant established grounds for revocation of the grant as per section 76 (supra)?

23. For starters, it is not controverted that the Applicant was a minor aged 12 years or thereabouts when the Petition for a Grant in the estate of his mother was made by his sister on 25/9/1998. **Form P & A 5** being the Affidavit in support of the Petition for the Grant of letters showed the Applicant's age as 23 years and that of his sister, Emelia Anne Mbaire Murathe, as 36 years. The National Identity card of the Applicant shows that he was born on 05/08/1986. It is not in doubt that the Applicant was a minor then. As at the time of the making the petition for the Grant of Letters of Administration, the Applicant was aged 12 years. That fact is not in dispute in these proceedings. The affidavit in **Form P & A 5** sworn by Emelia Anne Mbaire Murathe therefore told a lie. And not only did it tell a lie, it was also a false document as it purported to have been signed by the Applicant who, unarguably, neither knew of it nor had capacity to sign it. It was a forgery. That is ground enough to revoke the grant.

24. The petition too in **Form P & A 80** was a forgery because it purported to have been signed by the Applicant who had no capacity to execute it. That too, without more, is a ground sufficient to revoke the Grant.

25. It is clear that there was no competent or valid petition before the court on the basis of which a valid Grant could be made. The Affidavit of justification of proposed Administrator in **Form P & A 12** was also a forgery not least because it purported to have been signed by the Applicant who was a 12 year old minor who had no capacity to sign and who knew nothing about it.

26. The Grant of representation in the Estate of Mary Murugi John made on 28/12/1998 to Emelia Anne Mbaire and John Njuguna Murugi was made in breach of the provisions of the law of Succession Act, Cap 160. Section 56(1) (a) of the law of Succession Act clearly stipulates that "*no grant of representation shall be made to any person who is a minor*". Moreover, where, as here, there was a beneficiary who was a minor, the law requires two administrators to be appointed. Clearly the issuance of the grant to the Respondent and the Applicant who was a minor was in violation of the provisions of Cap 160. The Applicant's sister, Emelia Anne Mbaire Murathe, committed serious breaches of the law. Her affidavit sworn on 1/6/1998 in support of her application for confirmation of the grant which purported to have been signed not only by her but also by the Applicant was also a forgery as the Applicant was not a signatory and had no capacity to sign. The certificate of Confirmation of the Grant was premised on a forged and incompetent application. I so hold.

27. If matters had rested there, this would have been an easy case in which the court would have simply revoked the grant and cancelled the certificate of the confirmation of the grant but the fraud by Emelia Anne Mbaire Murathe had further ramifications. The evidence shows that she and Harrison Wambua Musyoka **became lovers** and the latter moved into the house of Emelia Anne Mbaire Murathe. The Respondent seems to have considered herself the wife of Harrison Wambua Musyoka in this odd **come-we-stay relationship**. The affidavit evidence submitted shows quite clearly that the Interested party was after a great deal more than just love which seems to have been used by him as a bait. It is evident from

the material before the Court that he feigned love to perpetrate his scheme to fraudulently procure the registration of the suit property to his name. His letter to the Respondent which he has not denied and which is in his own handwriting shows that he paid no consideration for the transfer of the property to him and that the applicant's signature was obviously forged. In his own words, he stated that "*I have no intention of retaining from you the plot and will work on the ways of returning it to you. I do not need any curse or (to) suffer because of such.....*" If he had paid any consideration for the property, the Interested party, Harrison Wambua Musyoka, would not have reacted that way. Conscience seems to have pricked him. It is patently clear that he used his relationship with the Respondent to fraudulently cause the property to be transferred to his name.

28. Blinded by what she thought was love, the Respondent, a woman of over 30 years of age who should have known better, succumbed to the lure of what she thought was love and the imagined marital status. She aided, abetted and assisted the Interested party in the latter's fraudulent scheme. Her claims in her averments that she was naive and was hoodwinked are nothing more than mere lamentations of an imprudent if not immature, inexperienced, and vulnerable young woman.

29. Mr. Abuya Mogusu of **Masire V. Mogusu Advocates** submitted on behalf of the Interested Party that the latter was not a party to the fraud in the procurement of the Grant of Letters of Administration. He termed his client as a bona fide purchaser of the property who had no notice and contended that the Interested Party had "rightfully purchased the property." It was the said counsel's submission that the Applicant and the Respondent were working in cahoots as siblings to defraud the Interested Party of the property he had rightfully purchased. This stance and submission by the Interested Party is clearly made with tongue in cheek. It is flippant. I place no weight or value whatsoever on it. On the contrary I dismiss it as an attempt by the Interested Party to clutch at straws.

30. I have perused the following cases cited by the said Counsel:-

1. Nyagate guto alias Watson Mogere Mogoko V. Maxwell Okemwa Mogere and National Bank of Kenya Ltd, Nairobi H.C. Civil Appeal No.2287 of 2007 and

2. Muchendu V. Waita (2003) KLR 419 and

3. Abiero V. Thabiti Finance Co. Ltd. (2001) KLR 496 and

4. Mbothu & Others V. Waitimu & 11 others (1986) KLR 172

31. These authorities do not lend support to the case of the Interested Party. The facts in the cases are distinguishable from the facts in the present case. As regards Section 23 (1) of the Registration of Titles Act, Cap 281, if the Grant is revoked and the Confirmation is set aside, there will be no legal basis for the transfer of the property from the name of the deceased to the names of the Administrators and hence, the alleged title purportedly acquired by the Interested Party on the transfer to him (the Interested Party) purportedly by the Administrators cannot be said to be indefeasible. The Section does not apply to a case where the holder of a title fraudulently participated in its procurement. It only applies where the person holding the title is innocent in that he was not involved in the fraud resulting in the transfer to him and in the registration of the property in his name. To argue that the holder of the legal title is insulated or protected whether or not he participated in the fraud resulting in the registration of the property in his name as legal owner, is perilously close to saying that the law can be used as an engine for fraud or that the law can be used to protect fraud. Such argument cannot hold good either in law or in equity. It is completely at variance with the dictates of justice and morality not to mention the values and principles in our Constitution.

32. After the promulgation of the Constitution on 27th August 2010, State Officers and Public Officers in Kenya, who include Judges, are bound by Article 10 of the Constitution whenever applying or interpreting any law or the Constitution to apply National values which include equity, social justice,

human rights, the rule of law, integrity and accountability. This Court's original jurisdiction in criminal and civil matters under Article 165 2(a) of the Constitution is unlimited and includes supervisory jurisdiction over any person, body or authority exercising a judicial or quasi – judicial function, but not over a superior Court. It is enshrined also in the Constitution that every person is equal before the law and has the right to equal protection of the law and equal benefit of the law. The provisions of the law of Succession Act are designed to protect estates of deceased persons and property rights by ensuring that estates of deceased persons devolve to those who are legally entitled. This promotes and helps to achieve social order and equity in our society. Decisions of this Court must therefore be in consonance with the Constitution and must promote the National values. Jurisprudence that does not pay attention to injustice cannot endear itself to the public and hence cannot promote public confidence in the administration of justice. Judicial process must at all times be preserved and insulated from contamination.

33. The Interested Party engineered the move that resulted in the process of transfer of the deceased's property to his name. He cannot be allowed to benefit from his fraudulent actions. This Court's aid must be denied when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. The Interested Party cannot be allowed to keep the deceased's property whose title has come to him through fraudulent means in which he has been the principal participant aided by the Respondent.

34. It was submitted by **Messrs Muriithi V. Ndonye** Advocates on behalf of Housing Finance company Ltd, which is an Interested Party, that the latter was innocent.

35. The Housing Finance advanced money to Harrison Wambua Musyoka. The security offered was of a title of a property of a deceased person which had been fraudulently and illegally transferred to the chargor with the chargor's participation.

36. The Housing Finance's innocence in the matter cannot insulate or cure the breaches of the law nor justify denial of the right of the Applicant to have the Grant revoked. Banks and Finance Institutions while lending on security of property recently transferred to borrowers by administrators of estates of deceased persons ought to verify the propriety of the grants registered against titles and ascertain whether or not there is pending litigation relating to the estates. And even where everything looks normal on the face, risk that is no different from that which obtains in relation to other titles not derived from estates of deceased persons cannot be ruled out. That is a predicament or risk that businesses have to live with and take in their stride.

37. The evidence before the Court shows that the Grant of Letters of Administration was registered as entry No.2 on 17.10.2000 and it shows that the Grant was made to Emelia Anne Mbaire Murattha and John Njuguna Murugi as the personal representatives. On 27.10.2003, entry No.3 was made in the title showing that the Grant was ostensibly confirmed and heirs or beneficiaries determined to be Emelia Anne Mbarie Murugi and John Njuguna Murugi who were registered. On the same date (i.e. on 27.10.2003,) a transfer of the title to the property which constitutes the estate of the deceased was registered in favour of Harrison Wambua Musyoka and under entry No.5, a charge was created by the latter and registered in favour of Barclays Bank of Kenya Ltd to secure 4.3 million. A further charge was given by Harrison Wambua Musyoka to Barclays Bank of Kenya and was registered as entry No.6 on 3/8/2005.

38. From the evidence before the Court, it is clear that the application for the grant was incompetent and that the provisions of the Law of Succession Act Cap 160 pointed out above were breached. The Court is enjoined to revoke the Grant for breach of the law. The Court has a duty to protect the interest of the deceased's minor child who is now an adult.

39. When the petition was made and confirmed, the Applicant was not privy to any of the fraudulent dealings. His conduct later when he came of age and discovered what had happened is not material in, and does not impact on determination of the issue of revocation. It is not shown that he had anything to do with the transfer of the estate property to Harrison Wambua Musyoka or the proceeds of the loans taken by the latter on security of the property.

40. It is my finding that the Petition for the grant was defective in substance. It is also my finding that the Grant was obtained fraudulently by the making of a false statement to the effect that the Applicant had signed, which he had not, and by concealment from the Court of the fact that the Applicant was a minor. It is also my finding that the signatures purporting to be of the Applicant in the Petition and in the affidavit supporting confirmation of the grant were forgeries and consequently the grant was also obtained and confirmed by means of an untrue allegation of a fact essential in point of law to justify it. It is also my finding that the Transfer to Harrison Wambua Mysuoka which was registered on 27/10/2003 as entry No.4 in the title No. L.R. 12149/30 (I.R. 67345) was fraudulent and therefore null and void.

41. In the result, the summons for revocation of the Grant succeeds. I allow it and make the following orders:-

1. I revoke the Grant made on 28th December 1998 to Emelia Anne Mbaire Murathe and John Njuguna Mbaire.

2. I also revoke, annul, cancel and set aside the Certificate of Confirmation of the Grant dated 28.9.2000 to Emelia Anne Mbaire Murathe and John Njuguna Mbaire.

3. I order that the registration shown as entry No.2 effected on 17.10.2000 against the title No.L.R. 12149/30 (IR 67345) be cancelled forthwith by the Registrar of Titles, Nairobi.

4. I further order that the entries shown as Nos. 3, 4, 5 and 6 registered on 27.10.2003, 29.9.2004 and 3.8.2005 respectively against the title No.L.R 1214/30 (IR 67345) be cancelled forthwith by the Registrar of titles.

5. I further order that the title to the property No. L.R.1214/30 (IR. 67345) be restored to the name of the deceased, **MARY MURUGI JOHN** by the Registrar of Tiles, Nairobi.

42. The fraud in this case relating to the procurement and confirmation of the Grant by Emelia Anne Mbaire Murathe and the transfer of the estate property No. L.R.1214/30 (IR 67345) Nairobi to Harrison Wambua Musyoka and the subsequent obtaining of loans and charging of the property No. L.R. 12149/30 (IR 67345) by the latter to the Barclays Bank of Kenya Ltd and Housing finance company of Kenya Ltd is referred to the Director of Criminal Investigations to investigate the same with a view to take appropriate criminal action against the culprits.

Dated at Milimani Law Courts, Nairobi, this 29th day of November 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. E.A. Ongecha for the Applicant

Mr. P. G. Murugi for Makori for the Respondent

Mr. Abuga Mogusu for the 1st Interested Party

Messrs Ndonge & Associates for the 3rd and 4th Interested Parties

No appearance for the 2nd Interested Party