



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 45 OF 1987

IN THE MATTER OF THE ESTATE OF JAMES WAMBUGU NGURI – DECEASED

JANET WAGATWE WAMBUGU.....PETITIONER

VERSUS

BITHA WAMBUGI WAMBUGU.....OBJECTOR

JUDGMENT

This Judgment is the outcome of two applications for revocation and or annulment of grant. The first application is dated 18th July 2003 and was filed by John Nguri Wambugu while the second application is dated 15th September 2003 filed by Isaac Njagi Wambugu. Both applications seek to revoke the grant. When the two applications came up for hearing, learned counsels from both sides recorded a consent order to have them disposed of by affidavit evidence and written submissions.

I have considered the affidavit evidence and the written submissions. For ease of reference, I will refer to John Nguri Wambugu and Isaac Njagi Wambugu as the applicants and Janet Wagatwe Wambugu and Emily Muricho as Respondents. This cause relates to the Estate of James Wambugu Nguri, deceased. The deceased was married to two wives namely Bithia Wambugu (now deceased) and Janet Wagatwe Wambugu. His estate comprised of:

- (i) L.R. NO. NGARIAMA/THIRIKWA/325.
- (ii) Plot No. 4 Njukini.
- (iii) Shares in Gichugu Housing Cooperative Society.
- (iv) Shares in Kenya breweries Ltd.
- (v) Shares in Kirinyaga timber cooperative Society.
- (vi) Shares in south Ngariama Ranching Cooperative Society.

It would appear the dispute in respect of distribution of the Estate was referred for arbitration by the Gichugu Land Disputes tribunal whose award was adopted as the judgment of the Court. It was the basis for the confirmation of grant. The Applicants are now before this Court seeking for the revocation of the confirmed grant on the basis that the Land Disputes Tribunal had no jurisdiction to hear and determine the

dispute under *Section 3(1)* of the Land Disputes Tribunals Act No. 18 of 1990. It is also alleged that some beneficiaries were left out from sharing the deceased's Estate. It is further argued that part of the deceased's Estate was given to his widows yet they were only entitled to a life interest. In a nutshell, the applicants are saying that the grant was obtained and confirmed on the basis of a defective procedure. The Applicants alleged that the beneficiaries were not given a right of hearing.

The Respondents on their part urged this Court to dismiss the two Summons because they lack merit. The Respondents pointed out that the Estate was partly distributed by consent and partly distributed by a panel of elders. The dispute over the land known as **L.R. NGARIAMA/THIRIKWA/325** was arbitrated over by a panel of elders. Its decision is being given effect by the government surveyor's report already filed in court. It is the submission of the respondents that the applications are *resjudicata* because one of the applicants had moved the court to set aside the elders award in vain. The application was dismissed and that the Respondent was granted leave to appeal but has not done so. It is also pointed out that Miss Thungu, learned advocate for the applicants has taken up a position which is in conflict with her client's interest hence her appearance is untenable in law. It is pointed out that the applicants retained the learned advocate and yet they have alleged grave misconduct on her part and her previous clients i.e. the Respondents herein.

Having considered the rival submissions, I have come to the conclusion that the two Summonses should be dismissed for three main reasons. First, it is obvious that the two applications are predicated upon the following grounds:

- (a) The grant was obtained on the basis of defective procedure.
- (b) That the same was also obtained fraudulently.
- (c) The administratrixes have failed to act diligently in administering the Estate.
- (d) That the grant was obtained on untrue allegation of facts.

The aforesaid allegations were not proved by credible affidavit evidence. The Applicants failed to discharge the burden of proof. Secondly, it is not in dispute that the dispute over the share of **L.R. NO. NGARIAMA/THIRIKWA/325** was referred to a panel of elders for arbitration. The award was filed and adopted as the decision of the Court. An application to set aside the award was made but was dismissed. The applicant i.e. John Nguri Wambugu, was given leave to appeal but has not tendered any evidence to show he ever appealed. In my view, the applications are *resjudicata*. Thirdly, there is a conflict of interest by Miss Anne Thungu, learned advocate for the Applicants. I make reference to paragraphs 10, 11, 12, 13 and 14 of the supplementary affidavit of Emily Karimi Murichu, where the deponent has pointed out the conflicting affidavits sworn by the respondent and the applicants in this cause. In one instance the respondent claims she has given land to her sons (applicants) and on the other hand her sons claim they were disinherited. This is clear from the affidavit of Isaac Njagi Wambu who has deposed that he was disinherited by the administratrix. It is curious to note that both parties have retained the services of the same advocate. The law does not allow one advocate to present conflicting claims as it has happened in this cause. With respect, I agree with the submissions of the Respondents that the position taken by Miss Ann Thungu is untenable and is against public policy and legal practice in adversarial systems like ours. It is inconceivable for learned counsel to submit that her client, the Respondent/co-administratrix did not distribute the Estate to her children yet she now holds half of the Estate under the grant. From the material placed before this Court, this Court is entitled to infer that there is a conspiracy between the Respondent backing the applicants to attack the grant in the hope that the issue of distribution will be reopened via these proceedings yet the Applicants were required to appeal.

In the end, I see no merit in the Summons dated 12th July 2003 and 15th September 2003. They are both dismissed with no order as to costs.

Dated and delivered at Nyeri this 18th day of November 2011.

J. K. SERGON
JUDGE

In open court in the presence of Miss Anne Thungu for the Applicant and Mungai holding brief Kibicho for Respondent.