



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Revision Case 130 of 2000**

ESTATE OF PETERSON GICHOHI HIUHU - DCD

MAINA JOHANA MIANO.....APPLICANT

Versus

LEAH WAMBUI GICHOHI

LEAH WANYAGA GICHOHI.....PETITIONERS

RULING

Maina Johana Miano, the applicant herein, took out the summons dated 25th June 2001 in which he applied for the grant issued to Leah Wambui Gichohi and Leah Wanyaga Gichohi, hereinafter referred to as the petitioners to administer the estate of Peterson Gichohi Hiuhu, deceased, to be annulled. The applicant swore an affidavit which was filed in support of the summons. The petitioners opposed the application by filing the replying affidavit of Anthony Karuri Gichohi.

When the application came up for interpartes hearing parties recorded a consent order to have the application disposed of by written submissions. I have perused the grounds set out on the face of the summons for revocation of grant plus the facts deponed in the affidavits filed for and against the application. I have also considered the written submissions filed by both sides. In the application, the applicant herein, has urged this court to annul the grant given to the petitioners on the following grounds:

- (i) *That the grant was obtained fraudulently by the making of a false statement.***
- (ii) *That the Respondents concealed some factors material to this case.***

It is argued that the Respondents failed to disclose that there was a pending appeal from the judgment of the District Magistrate's court sitting at Kerugoya vide Civil appeal No. 2 of 1972 – over the ownership of L.R. No. Mwerua/Mukure/235. The applicant averred that at the time of taking up letters of administration in respect of the estate of Peterson Gichohi Hiuhu, deceased, the petitioners were aware that Nyeri H.C.C.A. No. 8 of 1973 was pending in respect of the ownership of Mweru/Mukure/235. They failed to disclose this fact. In fact the petitioners are said to have gone a head to distribute the land. The applicant averred that he is entitled to the aforesaid parcel of land in terms of the judgment of Kerugoya D.M's Civil Appeal No. 2 of 1972. The applicant is of the view that the petitioners fraudulently caused the said land to be registered in their names without disclosing the existence of the Appeal which is pending before this court.

The Petitioners are of the view that the application should be dismissed because the succession proceedings did not only involve the property in dispute but it also involved other properties. It is the petitioners' argument that the applicants should have come under s. 74 of the Law of Succession Act. It is the submission of the petitioners that the applicant has no locus standi to bring this application because he was not a party to the previous suits neither has he been substituted. The petitioners aver that the applicant's application has been overtaken by events in that the L.R. No. Mwerua/Mukure/235 has been subdivided into three portions namely:

- (i) **Mwerua/Mukure/1565**
- (ii) **Mwerua/Mukure/1563**
- (iii) **Mwerua/Mukure/1564**

It is also alleged that two of the title holders namely: Anthony Karuri Gichohi and Charles Muthee Gichohi have not been joined as parties to these proceedings. It is also argued that the authority of the personal representatives, the petitioner's herein, ceased upon transmission of those titles to the beneficiaries.

After a careful consideration of the material placed before this court plus the submissions, it is obvious that the petitioners have not denied that they were aware of the existence of the judgment of E.G. Mithamo, learned District Magistrate I vide Kerugoya D.M.C. Civil Appeal No. 2 of 1972, Maina s/o Johana Miano (Minor) through Jotham Ngii (next friend) = vs= Peterson Gichohi in which the learned District Magistrate I made an order directing L.R No. Mwerua/Mukure/235 to be registered in the name of Maina Johana (Minor). There is also no dispute that the petitioners were aware that Peterson Gichohi appealed against the aforesaid judgment vide Nyeri H.C.C.C.A. No. 8 of 1973. That appeal was marked as having abated on 21st July 2008 when it was disclosed that Peterson Gichohi Hiuhu had died on 23rd September 1998. It is also clear that at the time of taking up letters of administration the petitioners were aware that a Prohibitory Order had been registered against L.R. No. Mwerua/Mukure/235 on 14th April 1972 vide Kerugoya D.M.'s Court. The truth is that the petitioners sought to succeed Peterson Gichohi Hiuhu, deceased, in respect of L.R. Mwerua/Mukure/235 while they knew that there was a dispute over the land. They also knew that there was a judgment giving the land to the applicant herein. They were also aware there was a pending appeal filed by the deceased. All the aforesaid facts were not disclosed to the court dealing with the succession cause of Peterson Gichohi Hiuhu, deceased. A critical examination of the submissions of the petitioners will reveal that they are of the view that this application is overtaken by events because the land in dispute has been subdivided and titles issued to the beneficiaries. It is clear from the annexures attached to the affidavit of Leah Wambui Gichohi that L.R. No. Mwerua/Mukure/235 was subdivided into portions and distributed as follows:

- (i) **Mwerua/Mukure/1565 - Leah Wanjara Gichohi and Leah Wambui Gichohi**
- (ii) **Mwerua/Mukure/1563 - Charles Muthee Gichohi**
- (iii) **Mwerua/Mukure/154 - Anthony Karuri Gichohi**

By the time of subdivision and distribution of the aforesaid land, the petitioners were aware of the judgment of E.G. Mithamo, D.M.1 vide Kerugoya D.M. C.C. Appeal No. 2 of 1972 in which the aforesaid land was to have been registered in the name of Johana Miano alias Maina Johana Miano. In fact when Peterson Gichohi Hiuhu passed on, he was substituted with Anthony Karuri to prosecute Kerugoya P.M. Misc. Application No. 33 of 1998 in which the Prohibitory Order raised. The grant was confirmed on 16th March 2001. The Prohibitory Order was raised on 7th June 2001. The appeal was marked as having abated on 21st July 2009. It means the judgment in Kerugoya D.M.C. Civil Appeal No. 2 of 1972 remained unchallenged. The petitioners seemed to have ignored that judgment when they sought to succeed the estate of Peterson Gichohi Hiuhu, deceased. They were bound and barred by the principle of Lis Pendens from interfering with the aforesaid title. They are also guilty of material non-disclosure. They failed to disclose to the succession court that the land i.e L.R. No. Mwerua/Mukure/235 was a subject of an appeal pending before this court i.e Nyeri H.C.C.C.A. No. 8 of 1973. It would appear from the material placed before this court that Anthony Karuri and Charles Muthee were aware of the existence of that judgment and the appeal. They are therefore subject to the principle of lis pendens. That doctrine is stated under section 52 of the Transfer of property Act as follows:

“During the active prosecution in any Court having authority Of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under any authority of the Court and on such terms as it may impose”.

The court of Appeal in the case of Festus Ogada =vs= Hans Mollin C.A. No. 100 of 2007 (unreported) restated the purpose of the doctrine of lis pendens at page 24 as follows:

“The doctrine of Lis Pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in

any manner terminated.

It cannot therefore be true that the applicant's application is overtaken by events. It is true that L.R. Mwerua/Mukure/235 has been subdivided and that the subdivisions have new titles. This court is enjoined to reverse the aforesaid transactions by applying the *lis pendens* principle and in exercise of its inherent power under rule 73 of the Probate and Administration Rules. I find the summons for annulment of grant dated 25th June 2001 to be well founded only in respect of and limited to L.R. No. Mwerua/Mukure/235. It is allowed to that extent. In exercise of my inherent power *ex-debito justitae* I hereby apply the principle of *Lis pendens* by directing the titles which came out of LR. No. Mwerua/Mukure/235 i.e.

(i) L.R. No. Mwerua/Mukure/1563.

(ii) L.R. No. Mwerua/Mukure/1564.

(iii) L.R. No. Mwerua/Mukure/1565.

to be cancelled. Title No. Mwerua/Mukure/235 should be restored and reverted back to the Deceased's name. Costs of these proceedings to be met by the estate of Peterson Gichohi Hiuhu, deceased.

Dated and delivered this 25th day of January 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Waruinge for the Respondents and the applicant in person.

J.K. SERGON

JUDGE