



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Miscellaneous Application 48 of 2003

WILSON WAGOCHO MAINA.....APPLICANT

VERSUS

JOHN MWANGI NGARURI1ST RESPONDENT (DECEASED)

NAHASHON GITARI KANG'ARA.....2ND RESPONDENT

AND

WAMURANGA MWANGI.....SUBSTITUTED 1ST RESPONDENT

RULING

WILSON WAGOCHO hereinafter referred to as the applicant, filed an application dated 6th March, 2003 seeking to revoke the grant of letters of administration issued by the Principal Magistrate's Court Kerugoya in Succession Cause number 269 of 1998 on the grounds that it was obtained fraudulently by making of a false statement and concealment from the Court of material facts. The application was expressed to have been brought under *Section 76* of the Law of Succession Act and *rules 44 and 73* of the Probate and Administration rules.

In support of the application, the Applicant deponed that he had filed a succession cause with regard to the instant Estate and the grant was confirmed to him on or about 7th June, 2002 in Kerugoya Principal Magistrate's Succession Cause number 24 of 2001. That at the time, he believed that there was no other cause as he had never been cited to appear until he lodged the certificate of confirmation of grant for registration at the Lands office, Kirinyaga, when he was informed that infact there had been another cause with regard to the Estate of the deceased and land parcel No. **LOC MWERUA/KITHUMBI/1079** hereinafter referred to as "the suit premises" had infact been transferred and registered in the names of **JOHN MWANGI NGARURI** and **NAHASHON GITARI KANG'ARA**, hereinafter referred to as "the respondents". **GAKINDU MWANGI**, deceased, was his brother and was at all material times before his demise the registered proprietor of the suit premises as a trustee for himself, the Applicant and his other brother **NDUGI GOKO**. That though the first respondent knew of their beneficial interest in the Estate of the deceased, he did not cite them in his succession Cause number 269 of 1998 at Kerugoya. The two

respondents had no legal, beneficial or equitable interest in the Estate herein and had all along acted in bad faith and fraudulently prosecuted Succession Cause number 269 of 1998. Finally he deponed that there was an apparent error in that two succession causes had been filed and prosecuted with regard to the same Estate.

In response, the Respondents filed a joint replying Affidavit through the 1st Respondent. They deponed that the application was a sham, frivolous, vexatious and an abuse of the Court process. That the deceased was his son and therefore he had a direct and lawfully recognized interest in his Estate. The Applicant was also his son though by his estranged wife with whom they had separated in 1964. He filed Kerugoya Principal Magistrate's Succession Cause number 269 of 1998 and could not have cited the Applicant as he had no or no validly recognized legal or equitable interest in the said Estate. The grant was issued on 2nd July, 1999 and confirmed on 18th January 2000. The Petition was Gazetted and the Applicant had notice of the same but never objected and or protested. However, he subsequently and unlawfully filed Kerugoya Principal Magistrate Succession Cause number 24 of 2001. Given the foregoing,

averments in ground 1 of the application as well as paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the affidavit in support of the application were false, fraudulent, latently and patently mischievous, incurably defective, frivolous, vexatious and an abuse of the process of court. The Applicant in filing Kerugoya Principal Magistrate's Court Succession Cause number 24 of 2001 all along knew or ought to have known that Kerugoya Principal Magistrate's Court Succession Cause 269 of 1998 existed in which grant had been issued and confirmed. Whereas it was true that there are two succession causes filed in respect of the same Estate, the Applicant is the one who filed the later cause unlawfully and fraudulently and never even cited the Respondents. In any event pursuant to *Section 66* of the Law of succession, the Respondent ranked in priority to the Applicant.

The Respondent filed yet another replying affidavit dated 21st September, 2005 in which he deponed that the deceased was his son born in 1957 by his estranged wife who left the matrimonial home in 1964. Upon leaving the matrimonial home as aforesaid, she got married to one, **MAINA NJUGUA** and had other children with him. The suit premises were registered in the name of the deceased at the request of the Respondent to the clan. The deceased was so

registered when he was a minor and could not thus have acquired land on his own. That since 1964 when the Applicant's mother left his home and that was before he was born, he had never seen him. Accordingly, the Applicant should inherit from his father where his mother is married.

Before the application could be heard and determined, the 1st Respondent passed on. He was however, on 17th September, 2009 substituted by his widow, **WAMURAN'GA MWANGI**.

When the application came up for hearing before me on 28th October, 2009 parties agreed that the same be canvassed by way of affidavits on record and written submissions. I endorsed the proposal. Subsequently parties filed and exchanged written submissions which I have carefully read and considered.

It is common ground that the Applicant was a son to the 1st Respondent's estranged wife who left the matrimonial home in or about 1964 leaving behind the deceased with the 1st Respondent. It is also common ground that the deceased was the registered proprietor of the suit premises. At the request and instance of the 1st Respondent, the clan assigned the deceased the suit premises during land consolidation and demarcation. It is also common ground that

following the passing on of the deceased, the 1st Respondent as a father petitioned for the grant of letters of administration intestate with regard to his estate. The same were issued and duly confirmed. Pursuant to the said confirmed grant, the suit

premises were transmitted to the 1st Respondent. It is also common ground that the Applicant subsequently filed on the same Estate yet another petition for the grant of Letters of Administration intestate. He was issued with the grant that was also subsequently confirmed. In this latter grant, the suit premises were to be shared between the Applicant and **MARY WAGOCHO MAINA**.

It is trite law that an estate cannot be the subject of two causes filed and prosecuted at the same time. It cannot be the subject of two confirmed grants to different administrators. I believe the 1st petition by the 1st Respondent was Gazetted. It is therefore deemed that the Applicant must have been aware of it. He had the opportunity to challenge the same by way of objection and or protest. He did not. He cannot now be heard to claim that the first grant was obtained fraudulently. The Applicant claims that he was not cited in the said petition. I do not think that the 1st Respondent was under any obligation to cite the Applicant considering what has

been deponed to in the two replying affidavits on record. Since 1964 and even before the Applicant was born, his mother moved away and completely severed his relationship with the 1st Respondent, his family and indeed the deceased. In other words, the 1st Respondent was not under any obligation to have consulted or cited the Applicant or his mother because any link that they had with them was severed in 1964. In any event much as the Applicant accuses the 1st Respondent for failing to cite him in the earlier Petition, he is also guilty of the same omission and or mistake. For when he filed Kerugoya Principal Magistrate's Succession Court Cause number 24 of 2001, he too failed to cite the 1st Respondent despite knowing that he had a direct, reasonable, equitable and or legally recognized interest in the said Estate.

The Applicant claims that the suit premises were registered in the name of the deceased in trust for himself, the Applicant and his brother. The relationship between the Applicant and deceased was either one of brother or half brother. That being the case, how could the deceased have been registered as proprietor of the suit premises in trust for his brother or half brother. What stopped the 1st Respondent from prevailing upon the clan to allocate land to the

Applicant if he was in existence at the time, the same way he had done with the deceased. I am persuaded that by 1964 the Applicant was not existing. Accordingly there is no way that the deceased could have been registered in trust for him or any other of his siblings.

The deceased passed on without a family. His Estate therefore could only have reverted to his father who was alive at the time. In any event even assuming that the Applicant had interest in the Estate, the 1st Respondent in terms of *Section 66* of the Law of Succession Act ranks in priority to the Estate of the deceased as opposed to the Applicant who was a mere brother and half brother of the deceased. Thus the 1st Respondent had a superior interest in the Estate of the deceased than compared to the Applicant.

The deceased passed on at the age of forty (40) years on 13th December 1997. According to the written submissions of the Applicant, the deceased was allocated the suit premises by clan elders on or about the year 1962. That would mean that at

the time, the deceased was aged about five (5) years. At that age how can the Applicant claim that he was so registered to hold the suit

premises in trust for them. That allegation is not at all credible. The

deceased was a minor then and could not have acquired the suit premises on his own other than on the basis put forth by the 1st Respondent.

The upshot of the foregoing is that I am satisfied that the grant in respect of Kerugoya Principal Magistrate's Court Succession cause number 269 of 1998 was properly issued and confirmed. I do not discern any element of fraud, any false statement or concealment from the Court of material facts on the part of the 1st Respondent when he filed and prosecuted the same. If anything, it is the Applicant who has been fraudulent. The Applicant in filing Kerugoya Principal Magistrate's Court Succession cause number 24 of 2001 knew or ought to have known that Kerugoya Principal Magistrate's Court Succession Cause number 269 of 1998 existed in which grant had been issued and confirmed. With regard to the two succession causes, the blame squarely lies again with the Applicant. It is him who filed the latter cause unlawfully and fraudulently. The application for revocation and or annulment of the grant is

accordingly denied with costs to the Respondents.

Dated and delivered at Nyeri this 25th day of January, 2010.

M. S. A. MAKHANDIA
JUDGE