

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 281 of 2002

IN THE MATTER OF THE ESTATE OF WANJIKU MACHARIA – DECEASED

JOSEPH MAINA MURUNGARU APPLICANT

Versus

GRACE NYAMBURA GAKUI RESPONDENT/PETITIONER

ISABELLA WANGUI MURUNGARU ... RESPONDENT/OBJECTOR

JUDGMENT

This Judgment is in respect of the summons for revocation dated 28th April 2005. That application is filed by Joseph Maina Murungaru. The background to this matter is that a petition in respect of this estate was filed by Grace Nyambura Gakui. The grandmother of Grace namely Wambui Macharia was a co-wife of Wanjiku Macharia to whom this estate refers. An objection was filed by Isabella Wangui Murungaru and was the subject of hearing before the Honourable Mr. Justice Khamoni. The objection was dismissed and the court by its judgment dated 11th March 2005 ordered that the grant be issued to Grace. The court further ordered that the grant be confirmed within 30 days. That grant was infact confirmed on 23rd May 2007. The present application for revocation is filed by the son of Isabella Wangui Murungaru. He deponed that the estate's only property parcel No. TETU/KABAGE/458 was sold to his deceased father by Gakuhi Macharia now deceased who was a son Wanjiku Macharia. He deponed that he had been on that land since time in memorial. The *Black's Law Dictionary* defines "**time in memorial**" as '**a point in time so far back that no living person has knowledge or proof contradicting the right or custom alleged to have existed since then.**'

Going by the evidence tendered when the objection of Isabella was heard the alleged sale purchase of the above property was said to have been concluded in 1992. It therefore follows that it is not correct for the applicant to say that he has resided on that property since time immemorial bearing in mind the definition quoted above. The deponent further stated that there had been an earlier succession over this estate filed by the deceased son of Wanjiku Machira. That is High Court Nyeri Succession Cause No. 250 of 2000. The deponent stated that instead of Grace continuing with that succession she filed this fresh succession. He alleged that in so doing she was fraudulent. He stated that she also was fraudulent in representing that she was entitled to the whole property yet half of it had been sold to his father. It should be noted that the objection raised by Isabella mother of the present applicant stated that the entire suit property had been sold to her husband the father of the applicant. There is obviously contradiction in that evidence. As stated that objection was subjected to full hearing. The issued of the sale of the estate property to the applicant's father was the main issue at the hearing. The court in its judgment dated 11th March 2005 had this to say in respect of that alleged sale;-

"The alleged contract of sale was concluded between 1982 and 1983 between adults who subsequently lived until 1986 when the purchaser died before the seller died in 1993. Why did they not finalize the transaction up to the required transfer of title? The parties especially the objector, have not cared to let me know the reason. It be realized that as a result of that non completion of the transaction, first the sale agreement became null and void for lack of consent of the relevant Land Control Board the piece of land affected being agricultural land where sale agreements must receive consent of the Land Control Board under the Land Control Act within the prescribed period. Secondly litigation found on

the alleged contract of sale became time barred by the year 2002 when this petition was filed; the right to litigate on the basis of the contract of sale was not available to the objector as a purchaser.

The third problem the objector faces is that her husband was buying the land from Wagura Macharia a person who had no title, in the suit parcel of land, to pass to the objector's husband, Wagura Macharia at best, being a mere beneficiary under his mother who had been registered on behalf of her own house and on behalf of the house of her co-wife Wambui. As such, not only could Wagura Macharia not sell the whole of the suit parcel of land but he could not also sell his beneficiary interest in that land because such beneficiary interest had not crystallized, through a confirmed grant of letters of administration.

..... The fourth problem the objector is facing is that these proceedings concern the estate of Wanjiku Macharia and not the estate of Wagura Macharia. Neither the objector nor her deceased husband was a purchaser from Wanjiku Macharia who died on 6th March 1963 long before the alleged sale agreement came into being. As such there are no provisions of the law, under the Law of Succession Act, enabling the objector make the claim she is now making in these succession proceedings against the estate of Wanjiku Macharia whom the objector clearly says she did not know. From the foregoing therefore, even if the objector's husband paid what is described as purchase price to Wagura Macharia, the objector's claim in these proceedings cannot succeed."

The court as can be seen found that the alleged contract of sale was not valid and was unenforceable. In the present application for revocation the applicant is raising the very same issue raised by his mother the subject of the judgment of 11th March 2005. The raising of the same issue again offends the doctrine of *res judicata*. In the case of HOYSTEAD AND OTHERS V TAXATION COMMISSIONER, (1925)ALL ER RE 56 at P 6 the court stated:-

"The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact;Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted."

The court cannot rehear the issue relating to the alleged sale of that land since a competent court has heard it before and has reached a final decision. The fact that the petitioner Grace Nyambura filed this succession when it is alleged another Succession Cause No. 250 of 2000 was inexistence does not mean she was fraudulent which can lead this court to revoke the grant issued to her. The petitioners in Succession Cause No. 250 of 2000 are all now dead. At the reading of this ruling the court will mention that succession cause with a view to making final orders. In the end the applicant has failed to prove on a balance of probability that the grant issue to Grace Nyambura should be revoked. Accordingly the judgment of this court is as follows:

- 1. That the summons dated 28th April 2005 are hereby dismissed with costs to Grace Nyambura Gakui.***
- 2. The injunction issued on 16th November 2007 in this case is hereby vacated.***
- 3. The costs of the summons dated 26th July 2007 are awarded to Grace Nyambura Gakui as against Joseph Maina Murungaru.***

Dated and delivered this 27th day of January 2009.

MARY KASANGO

JUDGE