



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE 122 OF 2002

IN THE MATTER OF THE ESTATE OF MOSES WACHIRA KIMOTHO – DECEASED

AND

TITUS MURAGURI WAROTHE 1ST APPLICANT

JAMES MUITA WANG'ONDU 2ND APPLICANT

LUCY WANJIRU CHEGE 3RD APPLICANT

VERSUS

NAOMI WANJIRU WACHIRA RESPONDENT

RULING

On the 11th January 2008, **Titus Muraguri Warothe, James Muita Wang' Ondu and Lucy Wanjiru Chege**, hereinafter referred to as "*the Applicants*" filed an application dated 7th January 2008 seeking the revocation and or annulment of the grant of letters of Administration issued herein to **Naomi Wanjiru Wachira** hereinafter referred to as "*the respondent*" on 4th July 2003 amongst other prayers. The application was expressed to be brought pursuant to section 76(c) of the Law of Succession Act. The application for the annulment or revocation of the said grant was based on the ground that the Respondent obtained the same by means of untrue allegation in that she concealed from court the fact that the applicants were entitled to a portion of the estate of the deceased.

In support of the application, the 1st applicant on behalf of the other applicants swore an affidavit. In pertinent paragraphs he deposed thus:

“2. THAT between 1998 and 2000 we, the applicants herein respectively bought respective portions of lands (sic) from the above named Moses Wachira Kimotho – deceased

3. THAT the deceased put us respectively in possession of the said portion and we immediately started making tremendous development on these portions of lands (sic).

4. THAT myself and Lucy Wanjiru Chege bought each (1) one acre from the land parcel No. Nyeri/Mweiga/1186 then registered in the name of the deceased Moses Wachira Kimotho and he put us in possession thereof respectively.

5. THAT the 2nd Applicant bought the land parcel No. Nyeri/Mweiga/943 alone and was put in Possession thereof by the deceased wherein the 2nd Applicant started developing the said land(annexed are the acknowledgement of the money Wachira received from James Muita Wang' ondu and the agreement they entered into marked "TMW II")

6. THAT the deceased died on 17th November 2000 at Provincial General Hospital – Nyeri just before he could attend the relevant Kieni West Divisional Land Control Board to facilitate the transfer of the said respective portions and land into our names.

7. THAT during all these transactions of sale and purchase between ourselves and the deceased the Respondent herein Naomi Wajiru Wachira was aware that we had bought the said respective pieces of portions of lands from the deceased.

8. THAT ourselves, the deceased Moses Wachira Kimotho and his wife, the Respondent herein Naomi have been staying and residing at Bondeni Mweiga Location of Kieni West Division of Nyeri District and the Chief of Mweiga Location in that Division has been aware of the sale and purchase transactions between ourselves and the deceased Moses Wachira Kimotho.

9. THAT I believe and (sic) I verily believe the same to be true that the Chief of Mweiga Location where we all stay should have issued the confirmation letter to the Deputy Registrar of this court to ascertain that we all have come from that area and we had bought these portions and/or lands from Moses Wachira Kimotho.

10. THAT the Respondent when filing this succession cause went to the Chief of Aguthi Location of Tetu Division Nyeri District and was given a letter dated 11th March 2002 and by so doing was meant to conceal the whole matter to the court by telling untrue allegations as a result of which she obtained the grant of letters of administration on 30th august 2002 and confirmed on 14th July 2003 to her.

11. THAT all this was done without our knowledge or consent despite the fact that we all live at Mweiga Location about 50 kilometres away from Aguthi Location Tetu Division where the chiefs letter was got to fraudulently obtain the letters of administration to help to conceal all the matters in respect of the estate of the deceased.

12. THAT the grant of letters of Administration intestate should have been issued and confirmed as follows:-

(1) Nyeri/Mweiga/1186 – Titus Muraguri Warothe

– Lucy Wanjiru Chege

(2) Nyeri/Mweiga/943 – James Muita Wang' ondu

(3) Nyeri/Mweiga/478)

(4) Nyeri/Mweiga/1038) Respondent Naomi Wanjiru Wachira

13. THAT I believe and (sic) I verily believe the same to be true that because the Respondent obtained these letters of Administration by means of untrue allegations by concealing the whole matter to the court and the Applicants then this Application for Revocation or Annulment of the said grant is necessary to ascertain the true position of this matter.

These averments briefly sets out the history of this dispute.

The application was duly served on the Respondent who is the wife of the deceased and who had sought

and obtained letters of Administration intestate of the estate of the deceased on 30th August 2002 and had it confirmed on 14th July 2003. Upon service the respondent did not bother to contest the application. She did not file any papers in opposition to the application.

On 18th February 2008, the application was placed before **Kasango J** for directions. Directions in terms that the application be heard by way of viva voce evidence were subsequently given.

On 28th January 2009 the hearing of the application in terms aforesaid commenced before me. However the respondent was once again absent though she had been duly served and an affidavit of service to that effect filed in court. Having perused and considered the said affidavit of service, I was satisfied that the respondent had been served with the hearing notice of the application in good time. There was therefore no reason(s) for her failure to attend court on that day. That being my view of the matter, I directed the applicants to prosecute their application, the absence of the respondent notwithstanding.

First to take the stand was the first applicant. He testified that he came from Bondeni village in Mweiga. That he knew the deceased who was the husband of the respondent. The deceased had in 1998 sold him an acre out of his land parcel number **Nyeri/Mweiga/1186** at a consideration of Kshs.150,000/=. He tendered in evidence a sale agreement dated 23rd October 1998 to that effect. It was his testimony that he duly paid the vendor hereinafter referred to as "*the deceased*", the entire purchase price whereupon the deceased gave him the title deed in respect of the whole suit premises as security pending the subdivision and subsequent transfer of the portion he had bought to himself. He tendered in evidence a copy of the said title deed. Thereafter the deceased put the applicant in possession of the one acre of the suit premises that he had purchased as aforesaid. Subsequent thereto, the deceased applied to Kieni West Divisional land control board for the necessary consent to the subdivision and transfer. However the deceased passed on just before he could attend the said board meeting. This was on 17th November 2000. Whilst all these transactions were ongoing the respondent was kept abreast of the developments as she was always present. Following the passing on of the deceased, the respondent commenced succession proceedings that led to the issuance of letters of Administration intestate that were subsequently confirmed. The respondent however concealed from court the fact that the applicant was a purchaser for value of an acre of the suit premises and was in occupation thereof. Indeed the confirmed grant shows that the suit premises were to be registered in the joint names of **James Ngatia Wachira** and **Elijah Macharia** who are all the sons of the deceased by way of transmission. The interest of the witness is neither noted therein and or even recognised. It is for this reason that the witness was seeking the revocation of the grant on the ground of concealment from court of material facts.

Next to take the stand was the 2nd Applicant. His testimony was along the same lines as the 1st applicant save that he purchased an acre from the deceased's other land parcel of land known as **Nyeri/Mweiga/943**. The purchase price was however Kshs.170,000/= This was on 15th May 2000. He too tendered in evidence the agreement of sale. He too fully paid the entire purchase price. He condemned the respondent for secretly taking out letters of Administration without acknowledging his interest. From the confirmed grant, the land from which he had purchased a portion thereof was to go to **David Kimotho Wachira**, a son of the deceased absolutely. It is for this reason that he was too seeking the revocation and or annulment of the grant.

The 3rd applicant too testified. Her testimony was no different from the 1st applicant's. Suffice to add that she purchased an acre out of **Nyeri/Mweiga/1186** at a consideration of Kshs.160,000/=. This was by virtue of an agreement of sale dated 24th February 1984 which she tendered in evidence. The deceased was duly paid the full purchase price aforesaid and surrendered possession of the portion purchased as aforesaid to the 3rd applicant. It was her further testimony that the respondent knew that she had purchased a portion of the suit premises as she was stopped by the deceased from cultivating further the said portion which was thereafter taken over by the applicant. Since then the applicant has been in continuous and uninterrupted occupation of the said portion which she has extensively developed. She complained that without her knowledge, the respondent petitioned for letters of administration which were granted and subsequently confirmed but in the process she concealed from court the applicant's

interest in the estate of the deceased.

Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked. In the circumstances of this case the grant sought to be revoked has been confirmed. No problem therefore arises. Do the applicants have an interest in the estate of the deceased? Of course they do. They are purchasers for value of a portion of the deceased estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land reference numbers **Nyeri/Mweiga/943** and **Nyeri/ Mweiga/1186** to the applicants respectively. He had been fully paid the purchase price and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent, who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased pursuant to the sale agreements and as required by law made an application to Kieni West Divisional Land Control Board for the necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However he passed on just before he could attend the board meeting.

Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of Administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Indeed in her application for the confirmation of the grant she proposed that land parcel number **Nyeri/Mweiga/1186** some portions whereof had been purchased by the 1st and 3rd applicants be inherited by her sons, **James Ngatia Wachira** and **Elijah Macharia**, absolutely. As for **Nyeri/Mweiga/943**, a portion whereof had been purchased by the 2nd applicant, she proposed that the same goes to yet her other son, **David Kimotho Wachira** absolutely.

The court without the benefit of the applicants' input to the application for the confirmation of grant issued the grant in those terms. I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant. In her distribution proposal, she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with the full knowledge of the respondent. Since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.

That being the case I have no doubt at all that this application is merited. Accordingly it is allowed with costs to the applicants.

Dated and delivered at Nyeri this 10th day of February 2009

M. S. A. MAKHANDIA

JUDGE