



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 283 of 2006

IN THE MATTER OF THE ESTATE OF MARY NJERI MWANIKI – DECEASED
AND
EVANS MUTHII KIMANI APPLICANT
VERSUS
JAMES NYAMU MURIITHI RESPONDENT

R U L I N G

On 6th June 2008 the parties herein took directions on the summons for revocation or annulment of grant dated 12th May 2006 and filed in court on 22nd June 2006 in terms that the same be heard by way of affidavits. To this end the Respondent filed his replying affidavit sworn on 4th June 2008. Again when the matter came up for hearing interparties on 20th November 2008 the parties agreed to file written submissions in support of their respective positions. Consequent upon that agreement respective parties filed their written submissions through **Messrs Magee was Magee & Co. Advocates** for the applicant and **Wangechi Munene & Co. Advocates** for the respondent. From the affidavits filed the history of this cause would appear to be as follows:-

The Summons for Revocation and or annulment of Grant have been brought by one **Evans Muthii Kimani** hereinafter referred to as “*the applicant*”, a grandson to the deceased **Mary Njeri Mwaniki**. **Mary Njeri Mwaniki** it would appear was killed by her son, **Maxion Kimani Mwaniki** the father of the Applicant in 1987. He was subsequently arrested, tried, convicted and sentenced to seven years imprisonment for an offence of manslaughter. The said **Mary Njeri Mwaniki** was the registered proprietor of land parcel **Mutira/Kathare/432** hereinafter referred to as “*the suit premises*”. The suit premises were a subdivision of the original land parcel No. **Mutira/Kathare/149** owned by her late husband, **Mwaniki Kioi**. After **Mwaniki Kioi** died succession proceedings were commenced which resulted in the subdivision of the initial **Mutira/Kathare /149** into three portions and were transferred and registered in the names of the following by way of transmission.

- (a) **Mary Njeri Mwaniki – wife – Land parcel No. Mutira/Kathare/432.(the suit premises)**
- (b) **Maxion Kimani Mwaniki father to Applicant – Land parcel No. Mutira/Kathare/430,**
- (c) **Joyce Ciriku Mutugi, wife to Julius Mutugi (son of deceased) – Land parcel No. Mutira/Kathare /431.**

The late **Mary Njeri Mwaniki** then approached the **James Nyamu Muriithi**, hereinafter referred to as “*the respondent*” being the Assistant Chief of the area, claiming that **Maxion Kimani Mwaniki** was harassing them as a family and wanted to sell the suit premises and relocate from the area. The respondent offered to exchange his 5 acre parcel of land known as No. **Abuthuguchi/ Mukandune/850** with **Mary Njeri Mwaniki’s** land parcel No. **432** and **Joyce Ciriku Mutugi** land parcel No. **Mutira/Kathare/431**, both which measured five (5) acres. Consent of the land control board to the transaction was sought and obtained. However before **Mary Njeri Mwaniki** could sign the transfer forms in favour of the Respondent in respect of the suit premises she was killed by her son **Maxion Kimani Mwaniki** as aforesaid. This necessitated succession proceedings for the estate of **Mary Njeri Mwaniki** to be undertaken. Grant of letters of administration were issued to the other son of the deceased **Ephantus Muriuki Mwaniki** vide Kerugoya SRMC Succession Cause No. 65 of 1987. However one **Grace Kagio**, mother to the applicant, representing the interest of her husband, **Maxion Kimani Mwaniki** who was then serving the jail term, lodged her objection to the grant being issued to **Ephantus Muriuki Mwaniki**, on allegation that if the same were granted, he would transfer the suit premises to the Respondent. The court overruled her objection, observing that there existed a transaction of exchange of land between the deceased **Mary Njeri Mwaniki** and the respondent herein.

After the grant was confirmed, the suit premises were then transferred to the Respondent who was the 2nd Objector to the succession proceedings, having proved that he had exchanged his land parcel No. **Abothuguchi/ Mukandune/850** with the deceased's suit premises and **Joyce Ciriku Mutugi's** land parcel No. **Mutira/Kathare /431**.

The applicant's father **Maxion Kimani Mwaniki** was however dissatisfied with the outcome and whilst in prison instituted in this court HCCC No. 201 of 1992. **Maxion Kimani v/s Ephantus Muriuki and Joyce Ciriku Mutugi**. In the suit the plaintiff sought the cancellation of the titles issued following the subdivision of the original land parcel **Mutira/Kathare/149** as aforesaid. The matter was however referred by this court to arbitration by Kirinyaga land Disputes tribunal. The Kirinyaga District Land Disputes Tribunal however held that the Applicant's father **Maxion Kimani Mwaniki** be given one (1) acre out of the suit premises and the Respondent herein, be given the whole of land parcel No. **Mutira/Kathare/431** and also be given back his land parcel No. **Abothuguchi/Mukandune/850**.

Maxion Kimani Mwaniki being dissatisfied with this ruling appealed to the Provincial Land Disputes Appeals Committee, Central Province. The appeals Committee having carefully listened to the dispute and applying the law of Succession Act held that the deceased's son, **Maxion Kimani Mwaniki** was not entitled to inherit any portion of the estate of his deceased mother whom he had killed. Instead it directed that the land parcel number **Mutira/Kathare/431** and the suit premises be given to the respondent herein and in return land parcel No. **Aboguthuchi/Mukandune/850** be registered in the name of **Joyce Ciriku Mutugi**. This was after the appeals tribunal had observed that there was a transaction of exchange of parcels of land between the Respondent, the deceased as well as Joyce Ciriku Mutugi.

This award of the appeals tribunal was subsequently adopted as a judgment of the court vide Nyeri CMCCC No. 40 of 1999, **Maxion Kimani Mwaniki v/s James Nyamu, Ephantus Muriuki Mwaniki, James Muriithi Nyamu and Joyce Ciriku Mutugi**. Still dissatisfied, **Maxion Kimani Mwaniki** appealed to this court vide HCCA No. 94/1999 – **Maxion Kimani v/s Ephantus Muriuki Mwangi, Joyce Ciriku Mutugi and James Nyamu**. However on 29th January 2003 **Ombija J** recorded the following consent order with regard to the appeal.

“By consent the appeal herein be and is hereby withdrawn with costs of Kshs.5000/= to the respondent to be paid within 14 days from the date hereof”

As the matter stands today therefore, the provincial land disputes Appeals Committee award that was adopted as the judgment of the court on 23rd September 2003 still remains the judgment of the court. Since it has not been overturned on appeal, nor reviewed and or set aside, it is still binding on the parties. It was as a result of judicial or quasi judicial proceedings and therefore cannot form the basis for the applicant to seek the revocation of the grant.

In seeking the revocation of grant, the applicant claims that the respondent to whom the grant was issued was a stranger to the estate of the deceased's and that the applicant was excluded in the sharing out of the deceased's estate yet he was nearer the deceased in consanguinity than the respondent.

Ideally the applicant being the grandson of the late **Mary Njeri Mwaniki** ranks higher in priority than the respondent in the administration of the estate of the deceased. However the grant was not issued to the respondent on the basis of consanguinity but because the respondent was able to demonstrate that he had an interest in the estate of the deceased. Much as it is true that the respondent is not a member of the applicant's family, however the transfer of the land to the respondent was actually effected by **Ephantus Muriuki Mwaniki**, the son of the deceased who had earlier petitioned and obtained a grant of letters of Administration with regard to the deceased mother's estate. This was after the court in succession cause number 65 of 1987 aforesaid was satisfied that indeed there had been an exchange transaction involving land between the deceased, **Joyce Ciriku Mutugi** and the respondent. This is therefore contrary to the submissions by counsel for the applicant that the court had declared that there was no exchange transaction between the said **Mary Njeri Mwaniki** and the respondent. From the confirmed grant dated 28th April 1989, the suit premises were to be transferred and registered in the name of the respondent absolutely. This decision was informed by the fact that the court recognised that there had been as already stated an exchange of parcels of land involving the deceased, respondent and **Joyce Ciriku Mutugi**. This followed a successful petition for the grant of letters of administration of the deceased's estate by her other son which were granted whilst the applicant's father was languishing in jail. The respondent cannot therefore be held to have been at fault when the process leading to his acquisition of a portion of the deceased's estate was a legal process. In any event the applicant's parents I am informed are still alive and are the ones who should ideally have brought the instant application and if one is talking of priority, they obviously rank higher in the decree of consanguinity to the applicant.

Section 96(1) of the Law of Succession Act outlaws a sane murderer from sharing in his victim's estate. It is not in dispute that the applicant's father killed his mother, the deceased. It is the deceased estate that is the subject of these proceedings. He cannot thus inherit a portion of the deceased estate. In the circumstances of this case he cannot use his son to try and get what the law expressly forbids him from getting. Indeed it is my view that the applicant could only claim a portion of his deceased grandmother through his father. He was never a dependant of the deceased at least going

by what is on record. Since his right to the estate of the deceased could only accrue through his father and since by virtue of section 96(1) of the law of Succession Act, his father is forbidden from inheriting the estate of his deceased mother whom he killed, the applicant cannot on his in own right now purport to claim the estate of the deceased. Nor can he claim the right to administer the estate. His claim to the estate could only come through his father. Since his father could not claim a portion of the deceased's estate, the applicant's right to the estate of the deceased too was extinguished. By bringing this application purporting to be in his own right, the applicant is merely trying to circumvent the strict provisions of section 96(1) of the Law of Succession Act. That cannot be allowed.

In any event under section 76 of the Law of Succession Act, a grant of representation, whether or not confirmed, may be revoked or annulled if the court is satisfied that the proceedings to obtain the same were defective in substance. I do not discern any such defect in the circumstances of this case nor has the applicant stated so in his application. The grant too can be annulled or revoked if it was obtained fraudulently or by making of a false statement or by concealment from court of something material to the case. There is nothing in the application, the supporting affidavit as well as the applicant's written submissions that would remotely suggest any of the foregoing. The grant may also be nullified if it is proved that there was untrue allegation of a fact essential in point of law. This is not the case here. The allegations made in support of the petition were factual and truthful. In any event the applicant could not have been considered for a share of the deceased's estate as by then he was a minor and could not even pass as a dependant of the deceased. In any event his interest in the estate could only percolade downwards through his father.

Further I would wish to point out that when the proceedings leading to the grant of letters of administration intestate were ongoing, the applicant's mother, **Grace Kagio Ndege**, objected to the petition. It can therefore be safely assumed that the applicant's interest if any was duly and properly articulated by his said mother who was an objector in the petition and who wanted her husband, the applicant's father to be appointed as an administrator of the estate of his deceased mother.

There is no evidence that the person whom the grant was made has failed to seek its confirmation. This is yet another ground upon which a grant may be annulled and or revoked. If anything, the evidence on record reveals that the person issued with the grant proceeded diligently with the administration of the estate of the deceased and had the grant confirmed as required. Finally there is no evidence that the grant issued herein as aforesaid had become useless and inoperative through subsequent circumstances. This is the final ground upon which a grant can be annulled or revoked.

In the end therefore whichever way one looks at this application it is doomed to failure. The applicant has miserably failed to bring himself within any and or all of the aforesaid grounds upon which a grant can be annulled and or revoked. The applicant claims that the grant was obtained or issued to the respondent wrongly as he is or will never be a member of the family. The Law of Succession Act does not impose a duty to petition for the grant of letters of administration only on family members. Neither section 51 of the Law of Succession Act nor rule 7 of the Probate and Administration rules imposes such restriction. It does appear to me therefore that anybody with an interest in the estate of the deceased may petition for the grant of letters of administration, whether a relative or not. The applicant's application again falls on this ground as well.

In the end I have come to the inevitable conclusion that the application dated 12th May 2006, lacks merit. Accordingly it is dismissed with costs to the respondent.

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

M. S. A. MAKHANDIA

JUDGE