



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 5 of 1999

IN THE MATTER OF THE ESTATE OF NYAGA MBURUGU.....DECEASED.

MUGAMBI NYAGA.....PETITIONER

V E R S U S

JUSTUS NJAGI KANAMPIU.....DEFENDANT

R U L I N G

This Ruling relates to an application dated 13th August 2001 in which the Applicant (Justus Njagi Kanampiu) seeks the following orders:-

1. That an order be issued to inhibit any dealings on Land Parcel No. Mwimbi /Murungi/1410 until the application herein is heard inter - partes.
2. That the application be fixed for inter partes hearing for orders that:-
 - (a) the court do revoke or annul grant herein,
 - (b) the applicant (interested objector) be given orders extending time of filing of an objection.

The Application was based upon the Supporting Affidavit of the Applicant and the following grounds:-

- (i) that the grant is fraudulent;
- (ii) the grant was made on representation and concealment of material facts;
- (iii) the requisite procedure in applying for grants was not followed;
- (iv) that the rightful beneficiary entitled to Plot No. Mwimbi/Murugi/1410 has been omitted in the petition and intended distribution as shown on record.
- (v) that Parcel No. Mwimbi/Murugi/1410 is supposed to be transferred to the applicant as he bought the same from the deceased.

Prayer No. 1 of the Application was granted by order of court on 13th August 2001. Further orders restraining the Defendants and 7 others from entering, cutting trees, fence, crops, destroying houses structures or whatsoever interfering with the Applicant's occupation and user of Mwimbi/Murugi/1410 until further orders of the Court or until the matter herein is heard and determined were granted on 23rd September 2003, and were confirmed on 2nd October 2003, and are subsisting to date.

The issue in this Ruling is therefore whether the Grant of Letters of Administration made to the Respondent and confirmed by a Certificate of Confirmation of Grant made on 26th July 2001 should be revoked.

Revocation or annulment of grants is governed by the provisions of Section 76 of the Law of Succession Act which reads-

76. A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained by the making of a false statement or by concealment from the court of something material to the case;
- (c) that the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof or such longer period as the court has ordered or allowed or,
 - (ii) to proceed diligently with the administration of the state; or
 - (iii) to produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced such investigation or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

The applicant's contention and case is that the grant was obtained by the making of false statement or by concealment from the court of something material to the case. The Applicant contends that the Respondent concealed from the court the material fact that he had bought from the Respondent's deceased father, a portion of the land previously known as Mwimbi/Murugi/19, which was subsequently subdivided into two parcels, Mwimbi/Murugi/1410 and Mwimbi/Murugi/1411 and the applicant was entitled to Parcel No. Mwimbi/Murugi/1410.

In his Replying Affidavit sworn on 3rd December 2001 the Respondent (Mugambi Nyaga) denies the Applicant's interest in the said parcel of land and depones in paragraphs 4-9 thereof as follows:-

- i) that the applicant is not a dependant of the deceased and cannot inherit any of the property of the deceased, (para 4)
- ii) that he and the family of the deceased are not aware of any sale of land parcel No. Mwimbi/Murugi/1410 and I do believe that there was no such sale (para 5),
- iii) that it is not true that the applicant is in possession of the said land, (para 6),

- iv) that the alleged transfer is a forgery, (para 7),
- v) that the estate of the deceased ought to be distributed as ordered and this application should be rejected (para 8), and
- vi) that I duly complied with the procedure for obtaining a grant in respect of the estate of the deceased (para 9)

The issues having been joined for the Applicant to prove his case for revocation of the Grant, he must show in terms of the provisions of Section 76(a), (b) or (c) thereof as the respondent has contended, that he obtained the grant by complying with all the procedure required under the Law of Succession Act; and denies any suggestion of making any untrue statement of fact, or concealment of any material fact contrary Section 76 (a) & (b) thereof.

Like in all parts of Kenya land issues are emotive. No party wishes to lose an inch of land. People will fight and kill over it and more often than not will lie rather than admit if such admission would lead to the loss of that inch or parcel of land. The situation in this case is not different, except that there has been no killing save for confrontation between the respondents family, against the Appellant, hence the issue of restraining orders which are still in force. Has the Applicant proved his case for the revocation of the grant? This is the evidence.

From the evidence of both the Applicant [P.W.1) and the Land Registrar, (Meru South District) (P.W.2 and indeed the Respondent himself (D.W.1) there is no doubt that the Original Parcel of land Title No. MWIMBI/MURUGI/19 was subdivided into two parcels of land and were given two land numbers Mwimbi/Murugi/1120 comprising 1.0 Ha. and Murugi/Murungi/1410 comprising 1.01 Ha. Although the mutation produced by the Land Registrar does not show the beneficiaries the consent to the mutation of the original Plot (Mwimbi/Murugi/19) shows that Justus Njagi Kanampiu the applicant was to get 2.50 acres out of the sub division (PEXh.9).

It was also the evidence of the Land Registrar (P.W.2) that under the old procedure, a seller of land would at the same sitting of the Land Control Board, obtain a consent for the sub-division and also transfer of the land. The procedure had now changed. Consents for the sub-division and transfer are applied for and are considered separately, first the sub-division, and then transfer. In this case consent was applied for and was obtained. It is dated 25th September 1979. (P. Exh. 9) P.W.1 also produced a Transfer of Land Form, (P.Exh.6) duly executed by both Nyaga Mburugu (deceased) and the Applicant (Justus Njagi Kanampiu).

It transpired in the evidence in-chief by the Applicant that a letter dated 14th August 1998, (P.Exh.3) mentioned the Applicant's name as a beneficiary of the estate of the late Nyaga Mburugu. However, another letter written by the same Chief (P.Exh.4) does not contain the Applicant's name. In the subsequent evidence before me by P.W.3 (Chief Jasper Kiambi M'Tuaritha) confirmed from the record from his (the Chiefs Office) showed that the late Nyaga Mburugu had sold Parcel No. Mwimbi/Murugi/1410 to Justus Njagi Kanampiu but he had not done the transfer.

What clearly emerged from the evidence of P.W.1 (the Applicant) and D.W.3 Chief Jasper Kiambi M'Aritha) and D.W.4 (Retired Senior Chief Zachary Njine Ngaine) and despite protestations from the Respondent, is that the Respondent and obviously with accomplices had part of the Chief's letter of 14th August 1998, addressed to the Executive Officer, Meru Law Courts, "excised" and pasted the balance onto page 2, thereof, and thereby omitting reference to the Applicant and thus presented to the court essentially, a forged document.

As already observed above land is an emotive issue. However, the "Mzee" of the home, and owner of land had for whatever reason, sold the land, and a purchaser had come and settled on it. Those arrangements unless tainted with fraud must be respected by his scions or later generations. It is not open for them to say that such arrangements of sale (as the Respondent did in his evidence) did not exist, or even deny knowledge of a neighbour who you see and share the same disputed land.

Mr. Gatari Ringera has argued in his submission that the Chief's Letter is of no relevance to the Applicant's case as there is no requirement in law for attachment of a Chief's letter to an application for grant of Letters of Administration. I accept that there is indeed no provision for attachment of a Chief's letter to an application for grant of letters of administration. A Chief's letter is however primary evidence of who the beneficiaries are of the deceased's estate. That is the reason why the petitioner relied on it, and obviously sought to and altered it. If it is such primary evidence to the Petitioner, It is as much to an objector who relies on the same primary evidence of his interest as a purchaser.

For the avoidance of doubt as his statutory role, section 46 of the Law of Succession Act, (Cap 160 laws of Kenya) gives an Administrative Officer, a Chief and the Assistant Chief specific duties to protect the free property of a deceased person, whenever a report is made to him by any person who appears to have a legitimate interest in the estate of the deceased. A report having been made to him by a person who appeared to him to have a legitimate interest in the estate of the deceased Nyaga Mburugu, the Chief had a statutory duty to notify either the Public Trustee (under Section 46(5) of the Act) or as in this case, inform the Executive Officer of the Court of impending Application for succession.

As for the Petitioner it is his statutory duty under both Sections 51 and Sections 82 and 83 to ascertain the assets and liabilities of the estate of the estate. The presence of the Applicant in the suit land was such a liability which the applicant ought to have stated but instead concealed in the application for Grant of Letters of Administration and in the Confirmation thereof. Concealment of such a material fact is a ground for annulment and/or revocation of Grant in terms of Section 76 (b) (c) thereof.

Finally the necessary consents having been obtained for the transfer of the land purchased by the applicant and the applicant being also in possession of the land, the Petitioner will be well advised to acknowledge the Applicant's interest and execute the transfer to the Applicant, once a new grant of letters of administration is taken. Save as in this paragraph stated the applicant succeeds in terms of paragraph 2 thereof. There shall be orders accordingly.

Dated, Delivered and Signed at Meru This 13th Day Of July 2009

M. J. ANYARA EMUKULE

JUDGE.