



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 277 of 1996

IN THE MATTER OF THE ESTATE OF GITUNDU MUCHIRA (DECEASED)

And

LYDIA WAIRIMU MURONDO.....PETITIONER/APPLICANT

Versus

GITHINJI WAMATHIGI MACHIRA.....OBJECTOR/RESPONDENT

R U L I N G

By an application dated 29th July, 2009 and filed in court the following day, **Lydia Wairimu Murondo** hereinafter referred to as “*the applicant*” sought against **Githinji Wamathigi Machira** hereinafter referred to as “*the respondent*” the following orders:-

- 1. That the Honourable court be pleased to rectify the register of land reference number GIKONDI/KARINDI/34 to remove the name of GITHINJI WAMATHIGI MACHIRA so that it reverts to the name of the deceased GITUNDU MACHIRA to whom these proceedings relate.**
- 2. That the Honourable Court be pleased to dispense with the production of the title deed issued to the respondent on 9th February, 1990.**
- 3. Costs of this application to the applicant.**

The application was expressed to be brought under rules 49 and 73 of the Probate and Administration Rules.

The application was supported by the affidavit of the applicant in which in the main she deponed that pursuant to a confirmed grant issued by Nyahururu SRM’s Court, land parcel **Gikondi/Karindi/134** hereinafter referred to as “*the suit premises*” was transmitted to the respondent. However, on 9th April, 1990 she successfully applied in this court for the revocation of the said grant. Following that revocation, a fresh grant was issued and confirmed in the joint names of the applicant and respondent. The confirmed grant was to the effect that the suit premises “**Currently registered in the name of the deceased be transferred to Lydia Wairimu Murondo and Githinji Wamathagi Machira in equal shares....**” The

applicant duly prepared a transfer by personal representative to person entitled under a will or on an intestacy forms to effectuate the confirmed grant aforesaid. However when she presented them to the lands office, Nyaururu, she discovered that in spite of the grant issued by the Nyahururu SRM's Court having been revoked as aforesaid, the register of the suit premises had not been rectified to reflect the changed status of the suit premises. The register still showed the respondent as the sole registered proprietor of the suit premises pursuant to the revoked grant. It was therefore meted out and just that the name of the respondent in the said register be deleted so that the title reverts to the deceased to whose estate these proceedings relate to enable the confirmed grant to be effected.

The application was opposed. Through a replying affidavit sworn by **Julius Machira Githinji** who was allowed by this court to substitute his ailing father in these proceedings, he deposed in pertinent paragraphs that the application had not mentioned him as the respondent though the applicant was aware that he had been substituted in the proceedings and that the application had not been served on him. Thus the applicant had not followed the proper procedure in law. He prayed that the application be withdrawn in the circumstances and a fresh one filed with him as a respondent and served on him as required in law. In his further affidavit dated 12th October, 2009, he deposed that the applicant ought to file a suit seeking the orders sought in the application, that there was no evidence that the grant issued by the Nyahururu SRM's Court had been revoked. That it is the proceedings leading to the grant issued herein that require rectification but not the register of the suit premises. That the applicant initiated these proceedings without consulting the lands office to find out who was the registered proprietor of the suit premises at the time. That if the name of the respondent was removed and or deleted from the register it will amount to revocation of his grant. He therefore prayed for the dismissal of the application.

When the application came up for interpartes hearing, **Mr. Mugo**, learned counsel for the applicant merely reiterated what had been deposed to by the applicant in her affidavit in support of the application. The same goes for the respondent when given a chance to orally submit.

I have now carefully considered the application, the supporting affidavit together with the annexures thereto and the law. It is common ground that the respondent had initially successfully petitioned for the grant of letters of administration with regard to the estate of the deceased herein. This was in Nyahururu SRM's Court Succession Cause Number 3 of 1989. He was duly issued with the certificate of grant dated 23rd November, 1989 in which he became a sole proprietor of the suit premises. It is also common ground that on 9th April, 1990, the applicant moved this court for the said grant to be revoked. Sometimes in April, 1991 the application came before **Tunoi J** and "**By consent the grant of letters of administration made to Githinji Wamathigi Machira on 5th April, 1989 are hereby revoked and declared to be of no effect. Costs in the cause....**" The other limb to the said consent order was that all matters relating to the estate were referred to arbitration by D.O Mukurweini. It appears from the record that the award arising from the arbitration aforesaid was subsequently made. However the same was later set aside by **Ang'awa J** on 15th December, 1994. It is instructive that by the time the consent order aforesaid was being entered into, the respondent had, using the confirmed grant issued by Nyahururu SRM's Court caused the suit premises to be registered in his name by way of transmission.

Following the setting aside of the award, it would appear a way was paved for a fresh grant to be issued. On 10th February, 2000 **Juma J** issued a temporary grant in the joint names of the applicant as well as the respondent. That grant was subsequently confirmed as already stated. From the foregoing brief history of the dispute the applicant cannot be heard to say that the confirmed grant issued in Nyahururu SRM's Court was never revoked. Nor can he be heard to say that the order of revocation by consent issued by this court was to be kept in abeyance pending arbitration as he orally submitted. The record clearly speaks for itself. The respondent has participated in these proceedings right from when he was made a joint administrator with applicant of the estate upto the confirmation of the grant. He did not at all raise the issue that the suit premises did not belong to the estate of the deceased as it had already been transferred and registered in his name pursuant to the confirmed grant issued by the Nyahururu SRM's Court. He is estopped from raising the issue now. In any event having been registered as the proprietor of the suit premises through a grant which has been subsequently revoked, it logically follows that such transmission was automatically revoked. Indeed the consent order revoking the grant was to the

effect that the revoked grant had been declared to be of no legal effect. The respondent knew that the grant which led to him to be registered as the sole proprietor of the suit premises had been revoked. It behoved him to take such steps as to have the suit premises revert to the deceased's estate so that it could be distributed in accordance with the confirmed grant issued by this court. He should have surrendered the title to the lands office so that the lands office at Nyahururu would take such steps as to revert the suit premises to the estate of the deceased. He failed to do so. He cannot now purport to benefit from his own mischief by claiming that since the suit premises did not belong to the estate of the deceased at the time when the grant by this court was issued and confirmed, the prayers in the application are not available to the applicant.

The confirmed grant issued by this court has to date not been varied, set aside nor is it subject of an appeal. The terms of the said grant have not been carried into effect for the simple reason that when the applicant took duly completed forms of transfer by way of transmission in terms of the confirmed grant to the Land Registrar, she found that despite the grant issued by the Nyahururu SRM's having been revoked, the suit premises were still registered in the name of the respondent pursuant to the said grant. The respondent is a beneficiary under the confirmed grant issued by this court. I do not see what prejudice he will suffer if the rectification is ordered so that the suit premises reverts to the estate of the deceased and is thereafter shared out between him and the applicant in terms of the confirmed grant issued by this court.

It cannot be disputed that when the grant which gave the respondent the suit premises was revoked, the suit premises automatically reverted to the estate of the deceased. The Land Registrar, Nyahururu ought but did not cancel the name of the respondent when the said grant was revoked. That fact should have been brought to his attention by the respondent.

Most of what the respondent has deponed to in his two affidavits is irrelevant. In the first replying affidavit, the respondent is faulting the applicant for failing to name him as the respondent and also failure to serve him. That is not a serious objection. The respondent was aware of the application and that is why he appeared in court. It is therefore deemed that he was served. Much as the applicant did not mention him as the respondent in the application I discern no prejudice suffered by the respondent by that failure. In any event the original respondent, the father of the instant respondent was mentioned in the application. As for his further affidavit, it deals with matters which should at best have been the subject of an application for revocation of grant. Indeed he had filed such an application which was subsequently dismissed for want of attendance. In bringing up those matters again in this application the respondent is seeking to argue the dismissed application for revocation of grant through the back door.

For all the foregoing reasons, I find that the application is merited and is accordingly allowed in terms of prayers 1 and 2. I make no order as to costs.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE