



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Probate & Administration 196 of 1988

**IN THE MATTER OF THE ESTATE OF THE LATE KARIUKI WATHANGA CHOTARA
(DECEASED)**

BENSON IRUNGU KARIUKI

MARY MUTHONI KARIUKI APPLICANTS

VERSUS

WINFRED MUTHONI KARIUKI RESPONDENT

RULING

Before the court is an amended summons dated 16th February 2004 which seeks prayers inter alia to revoke the grant of letters of Administration, made to three Administrators of the estate of the deceased, dated 13th February 1996 and certificate of confirmation issued on 7th August 1996. The Three Administrators represent the three houses of the deceased estate and all the houses were represented by different counsel. During the hearing of this summons, the counsel for the 2nd House, though was aware of the hearing dates and duly served for further dates, did not appear.

The summons for revocation is opposed.

By consent of the Counsel, it was agreed that the summons (amended) for revocation shall be heard and determined on submissions made on affidavits, and Notices of Preliminary Objections filed.

The following affidavits and Notices were relied upon:

- 1) **The Objector relied on affidavits sworn by Kenneth Mbugua namely:-**
 - a) **Supporting affidavits sworn on 24th July, 2003 filed to support the original summons dated 24th July, 2003.**
 - b) **Supporting affidavit of the Amended summons sworn on 24th June, 2004.**
 - c) **Further affidavits sworn on 22nd October, 2004 and 30th June, 2006.**

2) **The 1st House relied on:-**

- a) **Replying Affidavits of Mary Muthoni sworn on 4th April, 2004 and 3rd June, 2006.**
- b) **Affidavit of Benson Irungu Kariuki sworn on 11th March 2004 and 14th March, 2004 on behalf of the 2nd Home.**
- c) **Notice of Preliminary Objection dated 23rd February 2006.**

3) **The 3rd House relied on:-**

- a) **Affidavit of Winfred Muthoni Kariuki sworn on 24th May, 2004.**
- b) **Preliminary Objection dated 12th March, 2004 and 15th March, 2004.**

The Objector seeks revocation of the grant and certificate of confirmation on the ground that the certificate included the property bearing L.R. No. 1144/17/XXIX (referred to as the Property) which is not an asset of the estate and thus inclusion of the property be expunged from the list of properties of the estate and the cost of the objection proceedings be awarded to the objectors.

Accordingly, the issues before the court are:-

1. **Whether the Property belonged to the deceased as at his death which was on 9th January 1988, and;**
2. **If not whether the property be removed from the certificate of confirmation issued to the Administrators on 7th August 1996.**

However, I note from the record that a rectified grant was issued on 22nd March, 2006.

Be that as it may, it is the main contention of the objector, which is a limited liability company known as Maai Mahiu Kijabe Longonot Company Ltd, that the property is registered in its name and thus it is not an asset of the estate of the deceased. The affidavits in support of the summons for revocation are sworn by one Kenneth Njuguna Mbugua introducing himself as a Chairman of the Board of Directors of the Objector, and it is further alleged that the deceased was a tenant of the Objector paying rents for the occupation of the property but after his death his survivors have refused to do so.

According to the Objector the deceased acquired only two properties from the objector namely:-

L.R. No. 1144/15/XXIV and

L.R. No. 1144/16/XXIV

It is not in dispute that the property is not registered in the name of the deceased though the Sale agreement dated 2nd April, 1982 between the Objector and the deceased mentions the property as being the property sold along with L.R. 1144/15 and 1144/16 at section 24 (XXIV) Naivasha Town. It is also not in dispute that the two properties L.R. No. 1144/15 and L.R. No. 1144/16 are registered in the name of the deceased.

Strong reliance by the Administrators was placed on the fact that the deceased and the family have been in possession of the property since the execution of the Sale agreement i.e. 1982 upto to-date. That occupation is also accepted by the Objector by averring that the deceased was a tenant and after his death

the survivors have refused to pay rent. But as against that it is also true that I cannot avoid but to note that the objector company has not taken any action for alleged arrears of rent from any of the survivors.

The excuse, that the Petition was only filed in 1988 and the Objector did not know who the administrators were, is totally misplaced. If the deceased was a tenant of the property, what was the purpose of waiting for the Petition for grant of administration to be filed by the survivors.

It cannot be denied that the some of the beneficiaries have been in occupation of the Property before as well as after the death of the deceased.

Similarly, I do note that a suit has been filed by the Administrators to seek declaration of the ownership under adverse possession being H.C.C.S. NO. 991/06 which has been given a new number being H.C. ELC No. 2005/07. It follows from that fact that as of to-date the issue of ownership of the property is pending determination. Mr. Chege, the Learned Counsel for the Objector, has thus vehemently contended that the fact of filing the said declaration suit is a negation of the averments of the ownership of the suit property by the deceased. I may tend to agree with his contention with a rider that, in any event, a suit is pending before the competent court to determine the issue. This court only on the basis of affidavits will not be a proper forum to determine the issue of ownership, but this Court can and do find that possession of the property since the year 1982 has either by the deceased or his survivors not interfered with for whatever reasons and those reasons shall be put forth, and decided upon in the aforesaid case which is pending before the High Court.

Mr. Gichigi, the learned Counsel for the 3rd House has strongly contended that the deponent of all the affidavits namely; Kenneth Njuguna Mbugua is not shown to have authority from the Objector company to file the Objection and swear affidavits and thus the summons for revocation is fatally defective.

The issue of his capacity to file the summons on behalf of the Objector Company is raised and in response thereto Mr. Mbugua – the deponent – has shown letters from Registrar of Companies to show him as one of the directors of the Company. However, it is pertinent to note that he has not shown any document to prove that he is the Chairman of the Board of Directors. There are evidently many directors of the Objector and he is shown somewhere in the middle as a director of the Objector's company in the letters of 1997 and 2002 from the Registrar of Companies. Those letters themselves do not show or prove that Mr. Kenneth Mbugua is a Chairman of the Objector Company. In my considered opinion, he has an obligation to bring forth the proof of his authority to represent the objector company, as a Chairman or as a Director and he has failed to do so. Once he has deponed that he is a Chairman, it is for him to prove the otherwise when his position is challenged.

Despite that fact, it is also evident that the property is not registered in the name of the deceased and despite averments of the acquisition of beneficial interest, that interest till to-date has not been declared by a competent Court as per Law.

In these circumstances, and of course in all the circumstances, the court has been substantive justice and this court has been donned with inherent power, to make such orders as may be necessary for the ends of Justice under Rule 73 of the Probate and Administration Rules. From the facts before me, both sides have some basis to agitate their respective claims before the Competent Court which is pending before the Court in other forum.

What I can do at present, is to see that principle of lis pendence be complied with by the parties on the ground that is to say, the possession and occupation of the property shall not be interfered with pending hearing and determination of the H.C. ELC No. 2005 of 2007.

On the other hand the inclusion of the Property i.e L.R. No. 1144/17/XXIV in the rectified certificate of confirmation of grant dated 22nd March 2006 be deleted and a further Interim Rectified Grant be issued pending further orders of the Court after the determination of the aforementioned case.

Lastly, each party to bear its costs.

Date, Signed and Delivered at Nairobi this **12th** day of **November, 2009**.

K.H. RAWAL

JUDGE

12.11.09