



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Appeal 30 of 2007

JECINTA WANJA KAMAU.....APPELLANT

VERSUS

ROSEMARY WANJIRU WANYOIKE1ST RESPONDENT

JOHN MWANGI WANYOIKE.....2ND RESPONDENT

JUDGMENT

This appeal arises out of a ruling dated 3/4/2007 in *Succession Cause No.315 of 1995*. The grounds are set out in the Memorandum of Appeal. This being an appeal in a succession matter the court is authorized to decide on all disputes from the proceedings of the subordinate court.

The complaint is that the Trial Magistrate reviewed an order of confirmation of grant while the revocation of that grant had already been dismissed by High Court and after expiry of 7 years delay and that she sat on appeal of High Court order. Note the confirmation was by a Resident Magistrate at Murang'a. And that Trial Magistrate reviewed consent orders by parties and failing to note that the appellant's right of a purchaser was protected under Section 93 Succession Act Cap 160, Laws of Kenya. Respondents had no locus standi. She had no jurisdiction to set aside the confirmation of a grant except the High Court.

The court has perused the record and it is clear that in the estate of Magondu Karinga who died on 1/7/1988 a petition for letters of administration intestate was made by his wife Beatrice Njeri or in her name. She disputed making the petition. In that application the survivors were listed as herself and Samuel Wanyoike Magondu as son of deceased. There is exhibit mentioned as consent JWK4 but this was not necessary since the wife had priority against the children see Section 66 of Succession Act. The grant was confirmed under Section 73 (3) before expiration of six months. At this stage it was sworn that the land Loc.6/ Ikarangu/2639 was to be shared by:-

1. Samuel Wanyoike Magondu
2. Jacinta Wanja Kamau

There is no explanation where and how Jacinta Wanja Kamau came in and although she was a widow she was not to share her husband's estate. The order for confirmation was made by the court on 21/3/96. The said Jacinta Wanja Kamau got 1.2 acres of deceased land. Thereafter there was an attempt to revoke the grant where the holder of the grant said she was impersonated and did not petition for grant and that the appellant had no right to inherit the land of deceased. In the cause of time the petitioner and her son

died. The application for Revocation of grant were withdrawn. The survivors of the petitioner and her son Samuel Wanyoike Magondu who are the beneficiaries of the estate plot No.Loc.6/Ikarangu/26/39 have pursued the matter and filed a review application to set aside the confirmation of Appellant as beneficiary of 1.2 acres of their ancestors land. The Trial Magistrate after hearing argument from both sides made a review order and set aside the confirmation of appellant as a holder of 1.2 acres of the land. The appellant has now filed this appeal against orders made by the Trial Magistrate.

Review provisions are provided under order 44 of Civil procedure Rules and are applicable to Succession cases as per Rule 6 3 (1) P&A rules. On the grounds of Appeal it is correct that the Revocation application had already been withdraw/dismissed by the time the ruling was made. The delay of seven years is not in ordinate considering that an application to revoke the grant was in progress until dismissed or withdrawn and the original successors died before the issue was resolved by the court. In this case there was no consent orders. The wife of the deceased had priority to obtain the grant. The widow never gave consent to the confirmation of the grant. She protested and due to her age and state of illiteracy it would be unreasonable to doubt her allegation. This issue was never decided upon by court before her death. There was no hearing of the application for confirmation. There was no hearing on the petition of the grant. There cannot be consent without a basis. The law of succession is clear on how distribution of estate is to be done and it would be unlawful to allow distribution to outsiders without any basis.

Regarding the complaint that the ruling was sketchy, I have read the ruling and I do find that the ruling dealt with all issues raised in the application. She addressed her mind to the alleged purchase of land by the appellant found no evidence was advanced to support such an allegation.

I have also perused the record and I do not find any such evidence. On the issue of locus standi the Respondents were direct descendants of the deceased and entitled to inherit the land. They had a direct interest.

I have considered the appellant's case and I find no merit in her appeal. She did not establish her right to inherit the deceased land. The rules of procedure the Civil Procedure Act are only applicable so long as they are relevant to proceedings under Succession Act. I find strict application of order 44 (1) Civil Procedure Rules is not applicable in this case. The appeal is dismissed with costs to the Respondents.

Dated this 6th May, 2008.

J. N. KHAMINWA

JUDGE

6/5/208

Khaminwa- Judge

Njue – Clerk

Mr. Gacheru present

N/A

Read in open court.

J. N. KHAMINWA

JUDGE