



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 285 of 2005

ALIAS LUCY MIRIGO KARUIRU..... DCD

AND

PETER KARUIRU KABURI APPLICANT

VERSUS

GEOFFREY NDEGWA KARUIRU..... PETITIONER

JUDGMENT

Geoffrey Ndegwa Karuiru petitioned for letters of administration intestate on 15th May 1984 over this estate. The petition was filed before the resident magistrate at Nyeri. In so petitioning the petitioner stated that he was the only person who survived the deceased. The Resident Magistrate court at Nyeri granted him temporary grants on 25th May 1985. That grant was confirmed on 8th August 1986. The application before court which is the subject of this judgment is the summons for revocation dated 31st May 2006. That application is filed by Peter Karuiru Kaburi. The applicant described himself as the grandson of the deceased. He deponed that the grant was obtained fraudulently by the petitioner who described himself as the only son surviving the deceased. That the petitioner knew that the deceased was survived by his brother Francis Kaburi Karuiru. Francis was the father of the applicant. That the petitioner failed to inform other members of the deceased family that he was instituting the succession cause in the magistrate's court. On the grant being confirmed on 8th august 1986 the petitioner obtained the land parcel numbers Nyeri/Island Farm/Parcel Nos. 250 and 251 in his name. The transfer into his name was 21st August 1986. the applicant stated that the deceased was survived by the following:-

- a)Gichingiri Karuiru
- b) Francis Kaburi Karuiru
- c)Geoffrey Ndegwa Karuiru
- d) Peris Nyawira Gathara
- e)Lydia Njami Muhuhi
- f)Zaweria Konyu Karuiru

The applicant deponed that the transfer of those properties into the petitioner's name rendered the family of the deceased destitute as they were not allowed to cultivate or to use the land in any manner. That action was said to have rendered them squatters in the forest. He therefore prayed that the grant would be revoked. The application was opposed by the petitioner. The petitioner stated that the allegations by the applicant were baseless. That the succession cause in the magistrate's court was properly filed having followed the correct procedure. That on 24th august 1988 Francis Kaburi Karuiru the father of the applicant filed SRMCC 110 of 1988 claiming amongst other things a declaration that the petitioner was registered as proprietor of the properties of this estate in trust for himself and the said Kaburi. That claim was denied by the petitioner by the defence filed. The matter was referred to arbitration where the wife of Kaburi who

was by then deceased was substituted. On 16th October 1990 the applicant herein by an application was substituted in place of Kaburi deceased. The dispute of where Kaburi was to be buried arose and was also referred to arbitration. The applicant and his mother wanted to bury the late Kaburi on the property of this estate. That claim for burial was dismissed. The dispute of Kaburi seeking a declaration that the land was held in trust for him was dismissed by an award of the arbitration. The award was as follows:-

1. *The plaintiff did not produce documents to proof of any role played by his father in acquiring the land under dispute. He did not also produce documents to show he assisted in any way in paying the land loan or his involvement in the development of the plots.*
2. *The plaintiff did not produce external witness except his mother to corroborate his claim or ownership. The family witness Mrs. Rachel Gachingiri supported the defendant's claim.*
3. *The mother of the plaintiff did not corroborate his evidence with documents to support her husband's claim of ownership.*
4. *For the part of the defendant the members of tribunal found out he seemed to speak the truth he produced documents to show that he wholly paid for disputed land. He also produced documents to show that he wholly paid the development loan.*

The applicant filed an appeal against that award which appeal was dismissed. The petitioner stated that the grant of letters of administration to himself and the eventual transfer of the estate property was known to the applicant's father, mother and the applicant himself from 1986. It is clear that the petitioner does not deny that there were other persons who survived the deceased apart from himself. That being so rule 7(1) of the Probate and Administration Rules ought to have been complied with. That rule requires when one is petitioning for grant to provide the following particulars:-

- i) *The names, addresses, marital state and description of all surviving spouses and children of the deceased, or where the deceased left no surviving spouse or child, like particulars of such person who would like succeed in accordance with section 39(1) of the act;*
- ii) *whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and if so details of it;*

To have failed to supply those particulars as provided in that rule renders the procedure followed in petitioning and obtaining of grant to be defective. The grant is therefore liable to be revoked under section 76 Cap 160. The question that arises is whether the previous suit namely SRMCC 110 of 1988 which was eventually referred to the tribunal bars the applicant from moving the court for revocation. The court responds in the negative. It is after all clear from the pleadings that that case was filed by Francis Kaburi Karuiru deceased. On his death there was substitution whereby the applicant took over the case. Substitution does not mean that the claim in that case turned to be that of the applicant. Rather it remained the claim of Francis Kaburi Karuiru deceased. Francis deceased in that case claimed that the petitioner secretly and fraudulently filed the succession of this estate without disclosing that he too was a son of the deceased. Francis was seeking for an order that the petitioner held half of the estate in trust for him. The eventual decision reached by the tribunal related to the claim by Francis deceased and not the applicant. The applicant by the present application seeks for his right as a grandson of the deceased. Grandchildren are recognized in the table of consanguinity on the second schedule of Cap 160. I am of the considered view that the decision of the tribunal on a matter touching succession was ultra vires the land Dispute Tribunal Act. The petitioner in opposition to summons for revocation stated that the applicants knew of the succession matter some twenty years ago. Presumably his argument is that the applicant is barred from seeking revocation by passage of time. Section 76 however provides;-

“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”

The passage of twenty years if at all does not defeat the applicant's application. The other issue to consider is whether the applicant's application is defeated by the fact that the deceased's property is now registered in the name of the Petitioner. Section 93 of the Law of Succession Act refers to transfer of immovable property to a purchaser. Such transfer is valid and is not affected by revocation. That section provides as follows:-

“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act. (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses,

duties and legacies of the deceased have not been discharged nor provided for.”

That section is not applicable in this matter. The property does not seem to have been transferred to a third party. The property is therefore traceable. The judgment of this court is as follows:-

- 1. That the grant of letter of administration issued to Geoffrey Ndegwa Karuiru on 25th July 1986 and confirmed on 8th August 1986 by the Resident Magistrate in Nyeri SRM'S Succession Cause No. 124 of 1984 be and is hereby revoked.*
- 2. The court does hereby issue prohibition over parcel No. Nyeri/ Island farm/250 and 251 until further orders of this court.*
- 3. A fresh grant be and is hereby issued jointly in the names of Peter Karuiru Kaburi and Geoffrey Ndegwa Karuiru.*
- 4. Leave is hereby granted for grant issued as No. 3 above to be confirmed by either administrator immediately even though the six month's period has not expired.*
- 5. The costs of the summons dated 31st May 2005 shall be borne by Geoffrey Ndegwa Karuiru to be paid to Peter Karuiru Kaburi.*

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

JUDGE