



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 711 of 2003

IN THE MATTER OF THE ESTATE OF JAMES THUOS – (DECEASED)

RULING

Eunice Njango Thuo (hereinafter referred to as ‘Eunice’) filed this petition for grant of representation in the estate of her husband (referred to as ‘the deceased’).

She did not mention Lucy Mukuhi Thuo (referred to as ‘Lucy’) or her children as beneficiaries of the estate, even if it is conceded by her that Lucy is a co-widow of the deceased and that she had children. The only property mentioned in the petition is land parcel called Kabete/Gikuni T.164 (0.22 acres).

She filed her petition on 26th March, 2003, the grant of representation in the intestate estate was issued on 27th August, 2003 and certificate of confirmation was issued on 26th May, 2004. The property was directed to be held by her in trust on her own behalf and on behalf of other beneficiaries.

Thereafter, Lucy filed summons for revocation or annulment of grant dated 6th June, 2006.

It is supported on the grounds set forth on the face of the summons and supporting affidavit of Lucy sworn on 6th June, 2006.

It is on record that the fact that Lucy is a co-widow and that her children are the children of the deceased as per the Law of Succession Act, (Cap 160 referred to as ‘**the Act**’) is not in issue. It is also not in issue that the estate property was disposed off by Eunice without leave obtained from the court.

The summons mainly is based on the ground that Eunice misrepresented herself as the sole widow, and herself and her children as sole beneficiaries of the estate and that she failed to issue citation to Lucy, and her children and/or include them as beneficiaries of the estate.

It is also on record that Lucy is occupying the estate property which has been disposed off by Eunice.

She filed the plaint before Chief Magistrate’s Court, Milimani against Eunice and Interested party (the purchaser) to injunct them from harassing them with threats of eviction on the property owned by the deceased.

Eunice filed an application to strike out the said plaint on the ground that Eunice is a bona fide (sic) administrator of the estate of the deceased.

As per Lucy it was only, in December, 2005 that she was informed by the Area Chief that the Interested party had purchased the estate property and that she should vacate the same with immediate effect.

After she was summoned to the office of Area Chief, she decided to consult a lawyer and the said suit was filed. But thereafter she decided to consult another firm of advocates and was advised to file the summons for revocation, which she did.

It has been contended that Lucy filed the summons under section 76 of the Act after inordinate delay and no explanation for such delay having been made, the summons be held to be incompetent. It was also stressed that the Gazette Notice was duly published and Lucy had not bothered to file the present summons since the year 2003 and even after the certificate of confirmation was obtained.

To determine the aforesaid issue, I shall only have to go back to the provisions of Section 76.

I shall observe, first of all that Section 76 permits filing of summons for revocation whether grant of representation is confirmed or not. It is also unfortunate that Section 76 of the Act has not imposed any time limit to file the summons for revocation. That is the reason the Registry of the Family Division gets clogged mostly by summons being filed very late and also the inability of the Registry to close the files before it, which the other registries are able to do, under the law. Be that as it may, and despite my consistent efforts to get the said provisions duly amended, I am of a strong and considered opinion, that in an appropriate case, the court can strike out or dismiss the summons for revocation if found to be scandalous, frivolous or an abuse of the court process.

Having said so, I do not agree that the present summons is within any of such categories. Lucy has explained in her affidavits and in her evidence, the circumstances under which she was waiting for Eunice to come back to her (which is not denied), and how she came to realize that Eunice had obtained the grant and had disposed off the property. On the other hand, in my view Eunice is more to be blamed as knowing very well, still went ahead and concealed the fact of existence of a co-widow and her children. These facts have been revealed in the affidavits and in evidence led before the court.

In her evidence, Eunice had stated that she had never been separated from the deceased but in her evidence before the Kiambu Land Dispute Tribunal (Document 16 of the bundle of Document), wherein she was the complainant along with the Interested party, and Lucy was the Defendant, she had this to say:

“The plot is a plot hired out of the original land of 2.25 acres given by Gikaru clan. I built on the plot but my husband brought in the Defendant as a second wife. I was not happy and I left him and his second wife (defendant) on the plot and in my home and went to stay in Nairobi.”

Furthermore, she testified before the court that she had eight children but in her Doc.4, (the letter from the chief), only three children are mentioned, namely Monicah Njeri, Jane Wanjiku and Joseph Muroki.

I also note that as per Lucy’s evidence, she married the deceased in the year 1968.

From the evidence before me, it is not in dispute that the estate property T.164 was registered in the name of the deceased on 29th July, 1959. The contention of Eunice that it was purchased by her and put in the deceased’s name as she did not have an identity card, has not been satisfactorily proved. She has agreed that she had moved out of the same on the second marriage by the deceased, which was around 1968. She had however, placed caution on the said property on 29th April, 1982, long before the death of the deceased. Her reliance on the decision of the Land Tribunal also cannot bind this court. It is trite law that the Land Tribunal has no jurisdiction to decide on the title of land over a sale agreement and I do find that it is not binding on me, as it is a nullity. It is trite law that nothing stands on nothing. I shall thus refrain from making further comments on several irrelevant and factually incorrect observations made by the Land Tribunal.

Moreover, Eunice has contradicted herself by saying in her affidavit that she solely arranged for the burial and in her evidence she agreed that Lucy also assisted.

She insisted that she purchased the estate property in her evidence, but in her replying affidavit, she has not only, not mentioned that fact, but averred that she acquired the plot with the deceased (paragraph 11).

On the other hand, the evidence of Lucy was consistent in all relevant and material aspects.

Eunice has also not explained why she did not mention Lucy and her children in the petition even though she agreed their relation with the deceased.

The upshot of all the above is that the grant and certificate of confirmation thereof were obtained fraudulently by making of a false statement or by concealment from the court of something material to the case, and I do find so.

Before I can make final directions in the matter, I shall have to consider the issue of transfer of the property in the name of the Interested party by Eunice.

I have stated that the property was transferred in the name of Eunice in trust (certificate of confirmation dated 26th May, 2004). Thus she held the property as such. It is rightly contended by the learned counsel for Lucy, that consent of the three living children dated 19th March, 2003 which included also the consent to transfer, defies all norms of procedure under the Act. This consent was given before the grant and/or certificate of confirmation were issued. In any event, certificate of confirmation has given the land to her in trust. I do tend to agree from these facts on record that the sole purpose of Eunice to file this petition was to sell the plot behind the back of Lucy.

Now I come to the actual process of the sale of the property. Sale Agreement dated 15th December, 2005 is drawn by Kamangu and Co. Advocates. The sale as per its clause No.6 was subject to Law Society's conditions of sale (1989 edition). The said firm of Advocates represented both the Interested party and Eunice. As per the proprietary section of the property, Eunice is shown to be holding the property in trust. The sale agreement does not mention that fact. More interestingly the property is already shown to be transferred and registered in the names of Interested party as at 6th December, 2005, nine days before the said sale agreement. The title deed produced by Eunice also is dated 6th December, 2005.

Except for the above mentioned anomalies, which fact is bound to raise eyebrows from any discerning person, Eunice has not produced any forms of transfer duly executed, application for registration etc. The purchaser, ought to be aware of the occupation of Lucy on the land and in view of the aforesaid facts, he cannot be held to be an innocent purchaser with value. In my considered view, he has gone along Eunice, to say the least, to get this property transferred in his name, in an improper manner.

The learned counsel for the interested party, has relied on Section 93 of the Act to submit that the transfer to him cannot be invalidated.

The said section does provide:

“93.(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.

(1) 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.”

In addition it is also submitted that Eunice having sold and received the purchase price of this transaction, the title should not be interfered as prejudice will be suffered by Eunice and Interested party.

Neither of them has mentioned prejudice which shall be suffered by Lucy or the deceased brother of the deceased, who claim to be also the beneficiaries of the deceased and accepted as such by Eunice.

The fact that the estate is not fully distributed (which is agreed by Lucy), goes to support further that Eunice had fraudulently obtained grant and sold the property, and I do not have any convincing proof to show that the interested party was a purchaser for value without notice.

Section 143 of the Registered Land Act (Cap 300) gives the court power to rectify the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than the first registration) has been obtained, made or omitted by fraud or mistake.

Similarly, Section 93 of the Act does not give a carte blanche to the persons who have wrongfully obtained transfer or made transfer of the land. By the said section the court has not been made a toothless dog to succumb to such transfer and registration. It is the fundamental principle of Rule of Law that no one can get benefit of his own wrongdoings.

Having satisfied myself that the grant obtained by Eunice was fraudulent by concealing material fact from the court and that the subsequent transfer of the suit property was a carry forward of the said fraud, and having found so, I direct that the grant and certificate of confirmation are hereby revoked and annulled.

The Registrar of Land is further directed to cancel the transfer of parcel of land known as L.R. No.Kabete/Gikuni/T.164 in the names of Eunice Wairimu Muriuki ID/No.0986461 and subsequently in the name of Morgan Njoroge Gakuo ID/No.8518798.

The said land be deemed to be still in the name of Thuo Kamau the deceased herein, and shall be so reverted.

This old matter should be finalized urgently and looking to the exigency of the matter I direct that a fresh/amended grant be issued in joint names of Eunice Wambui and Lucy Mukuhi Thuo forthwith.

Either of the named administrators or both of them shall then file the summons for confirmation within 21 days from the date of issuance of the fresh amended grant.

I shall make order on costs, that Eunice shall pay the same personally to Lucy.

Dated and signed at Nairobi this 25th day of November, 2008.

K.H. RAWAL

JUDGE

25.11.08