



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
SUCCESSION CAUSE 588 OF 1985

IN THE MATTER OF THE ESTATE OF GATHOKORE MUGO – DECEASED

RULING

After summons for revocation was filed on behalf of Macharia Mugo by the firm of Advocates M/s Karago S.N. and Co. on 25th October, 2004, the court on 24th February, 2005 directed that the revocation application be determined by way of submissions. It was directed at the behest of Mr. Karago when he informed the court that the matter be determined by affidavit.

Macharia Mugo (hereinafter referred to as '*the applicant*') has contended that the confirmed grant, (which he had applied to be revoked) was obtained after concealment of a material fact that the applicant is the bonafide beneficiary of the estate herein having had bought the same jointly with the deceased and having lived thereon with his family since 1962 to date.

In the supporting Affidavit, the applicant has deponed that he had bought the property in question jointly with the deceased, as part of a family joint holdings and since he was registered as proprietor of some other family property. The parties agreed that the particular parcel of land be registered in the deceased's names in trust for himself and the rest of their family members. The purported sale agreement was annexed, so were supporting affidavits of two elders. On the date when the matter was listed before this court, the advocate for the applicant sought an adjournment which was refused. However, the applicant and his witnesses were present and they agreed that the court should decide the summons for revocation on the basis of the affidavits. The court did so and the ruling was delivered on 22nd November, 2006.

After lapse of four months the present chamber summons (*sic*) was filed on 21st March, 2007. The reasons for this long delay are not on record.

It seeks two orders namely:

- 1. The Court be pleased to grant a stay of execution of its judgment dated 22/11/2006 and any decrees or orders consequential to or arising therefrom pending further orders from this Honourable Court or the interpartes hearing of this application.**
- 2. The Court be pleased to review, vary and/or set aside its judgment dated 22/11/2006 and any decree or orders arising therefrom and the application for revocation or annulment of grant dated 25/10/2004 be heard and determined on merits.**

The grounds for such prayers are also set forth on the face of the application.

(a) There is an error apparent on the face of the record in that, instead of strictly adhering to the provisions of section 76 of the Act and Rule 44 of the Rules to determine whether the grant had been obtained properly, the Court exceeded the jurisdiction conferred by the said law and went on to determine an issue of trust which could only properly be dealt with under Rule 41 of the Probate and Administration Rules.

(b) There is sufficient reason for reviewing the said judgment for the reasons that:-

(i) What the parties herein had agreed be determined on affidavits was whether the grant herein was obtained fraudulently and by concealment of material facts or not. The respondent did not even bother to contradict the applicants averments that they were not the children of the deceased or that they did not involve the applicant during the confirmation stage of these proceedings.

(ii) Had the proper procedure of revocation of a grant been followed, the applicant would thereafter have called at least 5 witnesses to corroborate his documentary evidence to the effect that the deceased held the land in trust for him.

(iii) The effect of the judgment herein essentially abrogates

the decree of the consanguinity laid down by section 39 of

the Act giving a nephew and a niece of a deceased person

priority over the deceased's own brothers among them the

applicant herein.

(iv) A mere visit to the scene of this estate and an interview with the local administration such as the Chief and Assistant Chief of the area who the applicant intended to call as witnesses and would have proved that the respondent's affidavit was utterly false in that the applicant, his brother and sons have been in occupation of the land I question for ages and not since 2001 as falsely alleged by the respondents.

(v) The judgment, if elected, would uproot and displace several families from a parcel of land on which they have lived since the early 1960.

(vi) The Court failed to take into account the fact that the person who wrote the agreement on which the applicant predicted his claim was at best semiliterate. Fortunately, this person is ready to testify to the contents of the document is issue and be corroborated by at least 4 other people who were present when the sale transaction took place as most of the others have passed on. In deed, knowledge of the fact that the estate was held in trust for the applicant by the deceased herein is a matter of local notoriety.

The application is opposed and grounds thereof are filed on 20.9.08. The issue of error apparent on the face of record was not stressed so much. It is mainly submitted that the court exceeded the jurisdiction conferred by Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. Although it is not stressed, I would reject that contention simply on the ground as the basis of the said summons for revocation was that the Administrator concealed the fact that he was a co-purchaser of the land and that the deceased held the same in trust for him. He had annexed two affidavits of the elders to support his aforesaid claims. The court then held what it did, after considering the facts on the affidavit that the applicant had failed to prove his claims as averred, and refused to revoke the confirmed grant.

His other reasons to show that there are sufficient reasons for reviewing the order made, in my humble view, is an attempt to have a second bite of cherry in respect of the matter.

In any event, I had ruled that there is no concealment of relevant fact as averred by the applicant.

The issue of consanguinity was not a ground of revocation. This matter had a chequered history. This present cause was filed on the basis of the basis of an oral will and not on the basis of an intestate estate.

It is trite law that the litigation should come to an end and that a party has to bring all his claims before the court in order to avoid multiplicity of the litigations.

In my view, I determined the summons for revocation on the basis of the facts before the court and this review application has no legal basis to stand on.

In the premises, I dismiss the application with no order as to costs.

Dated and signed at Nairobi this 11th day of November, 2008.

K.H. RAWAL

JUDGE

11.11.08