



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 1725 of 1997

IN THE MATTER OF THE ESTATE OF MUGURE GACHANJA (DECEASED)

RULING

I have before me a summons for revocation of grant dated 21st July, 2003 which seeks revocation of confirmation on the grounds that the Certificate of Confirmation dated 10th day of June, 2003 be annulled as it was obtained by concealment of material facts.

It is on record that the Petition for grant of representation filed by the Administratrix/Respondent herein was opposed by the present Objectors who are nephews of the deceased herein. By my ruling dated 10th May, 2002, I directed that the grant of representation be issued to the Administratrix/Respondent herein simply because she was the daughter of the deceased and she was the first person in order of preference to file the Petition for letters of Administration. By directing that I did not close the doors to the Objectors herein to contest their claims over the estate property and I specially directed that the Objectors can claim their right of inheritance from the estate during confirmation of the grant.

The Administratrix/Respondent herein, despite the above directions, filed the summons for Certificate of Confirmation of the Grant (issued to her in pursuance to aforesaid ruling) without notice to the Objectors herein. She did not disclose also the prior objections of the Objectors herein and nor did she give them notice of her application.

I do agree with the submissions made by the Learned Counsel for the objectors that as an Administratrix of the estate she did not administer the estate as per law and obtained the certificate of confirmation of the grant by concealing the material fact to the court. This is sufficient to revoke the confirmed grant.

However, both the sides adduced evidence to support their contention that they have interest over the estate property, which is Githunguri/Kimathi/127. It shall be thus prudent to arrive at my findings on the respective claims.

The Objectors evidence, in short, was that the deceased was their paternal aunt (sister to their father). They had another sister who was married but returned to their home in the year 1948. She was a disabled person and as per PW.1 Simon Njagaro Wainaina and (a brother to the deceased) at the time of demarcation, he registered the estate property in the name of the deceased as he was a member of adjudication committee. Since her registration, the deceased and all the seven children of her brother agreed that it was a family property and a coffee factory would be built thereon

This did not happen, but instead coffee was planted which was for the Wainaina Family. He also specified that the deceased built her home on Peter's (3rd Objector) land and was also buried on his land.

This fact has not been disputed by the Respondent. No home of the deceased was built on the estate properly. The Respondent when got married, asked to be given a portion of the land on the estate property. The deceased in turn asked the brothers (Objectors) and an agreement was arrived at, to allow the Respondent and her husband to build a temporary house. This agreement was produced in evidence (Ex.1). This is the piece of evidence very strongly relied upon by the Objectors to show that the estate property was not owned by the deceased but was held by her in trust for them. The said agreement was dated 23rd September 1973 which states:

“Today we the four first born sons of Wainaina have come to an agreement to give Kimunyu son of King’acha temporary shelter with Kinyanjui son of Kairu to be residing for the time being before they get their own permanent residence elsewhere”.

It was signed by four brothers and signed as recipients by the two persons referred as well as by the deceased. The Respondent in her evidence agreed that Kamunyu was her husband but, when she was read over the contents of the aforesaid document, simply stated she was not literate and did not know anything about that agreement.

After that agreement, the Respondent was given one acre to cultivate and stay there. The remaining portion of 6.2 acres was subdivided in 13 pieces and given to sons of Wainaina to cultivate. But in cross-examination and in re-examination he stated that the land was distributed after the death of the deceased.

Peter Ndungu Wainaina the 3rd Objector testified. He was eighty years of age when he gave evidence and thus I do note, gave a bit shaky evidence. But he reiterated that the estate property originally belonged to their father and not to the grandfather. He also reiterated that the deceased came back to their father after her marriage and the land was registered in her name during demarcation. He stated during cross-examination that the whole land was not given to the deceased. His brother Waweru had constructed his home in the land after the death of the deceased which was destroyed. He agreed that he was given three acres of land by his father. He also reiterated that the land was registered in the name of the deceased to put up a coffee factory for the whole family.

The Respondent in her testimony stated that she was the only daughter of the deceased and have 14 children all of whom stay in the estate property. She agreed that she used to own one acre before the death of the deceased but refused that the land belonged to the father of the Objectors. She stated that, the land was given to the deceased by her father.

She denied that the deceased ever told her that the estate property belonged to sons of Wainaina (deceased’s brothers). She also agreed that after her marriage she stayed on the property as her husband did not have a land of his own. After denying all the averments made by the Objectors, she agreed that when she and her husband started living on the land the relations between her and the objectors was good.

After stating earlier that she was about 20 years when her grandfather Gachanja died, she stated during cross-examination that she did not know who buried him as she was young when he died. She also agreed that Gachanja was buried on Peter’s (PW.2) land where her mother was also buried. She also contradicted her when she first testified that her married daughters live on the land and immediately thereafter stated that they were not living with her on the land.

She also denied that there was any family meeting with the Objectors after the death of the deceased.

This is the evidence before me, which is, to say the least, inadequate to enable me to go to the root of the ownership.

There are certain undisputed facts,

1. The deceased was a paternal aunt to the Objectors, who returned to their home around 1948 with the Administratrix/Respondent. The parties are thus first cousins.

2. **Their grandfather Gachanja died in 1955.**
3. **The land in dispute was registered in the name of the deceased during demarcation around 1963 which was after the death of the grandparent.**
4. **The fact of plantation of coffee in the land for the family has not been controverted by the Respondent.**
5. **The deceased and Gachanja were buried in the land of Peter (PW.2)**
6. **The Objectors were ejected from the land only after the Certificate of Confirmation of grant was obtained by the Respondent herein.**

With these facts, I have to consider the exhibit No.1 which is an agreement allowing the husband of the Respondent to have a temporary home on the land.

The same is signed by four sons of Wainaina and shows a thumb marks of the deceased as one of the recipient along with the husband of the Respondent.

I pause here to wonder if the Respondent's testimony is right when she said that the land was given to the deceased by her father, then why the deceased would be asking permission from the Objector for her son-in-law to stay on her own land?

The Objectors have given the explanation that the land was registered in her name in trust for the family. The Respondent was totally unable to prove this fact otherwise, and she also agreed that after her marriage she and her husband stayed and built a house on the land as her husband had no land. She thus has stayed on the land even after her marriage and still stays there. Her action of getting the grant confirmed behind the Objectors and evicting them from the land only after she obtained the confirmed grant also give support to the case of the Objectors that the land was divided and the Objectors were cultivating the other portions of the land till they were ejected by her after the confirmation.

I personally may be having sympathy for the Respondent but in absence of adequate evidence to support her case, I am bound to reject her contention.

In the premises aforesaid, I do find that the Certificate of Confirmation of the grant dated 10th June, 2003 was obtained by concealment of material fact and thus is revoked and annulled.

The Respondent to file a fresh application for confirmation including the Objectors and their brothers as beneficiaries.

I do not make any orders as to costs.

Dated and signed at Nairobi this 6th day of March, 2007.

K.H. RAWAL

JUDGE

6.3.07