

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Succession Cause 258 of 2004

IN THE MATTER OF THE ESTATE OF WANJOHI MUGAMBI KANGARA(DECEASED)

AND

PETER MAINA MUGAMBI.....PETITIONER

Versus

MARGARET WAMAITHA MUGAMBI.....APPLICANT

RULING

The background of this matter is that Peter Maina the nephew of the deceased petitioned for grant over the estate of Wanjohi Mugambi Kangara. This was filed at Karatina Magistrate’s Court. The only asset of that estate is **IRIAINI/KARIA/152**. The chief’s letter which was annexed to the petition listed a number of beneficiaries who all renounced their right to inherit except Beatrice Wamaitha Mugambi the sister in law of the deceased and Beatrice Ngima Mugambi. Both Wamaitha and Ngima signed consent for the Petitioner to obtain grant. At confirmation Wamaitha filed an affidavit of protest. The court directed that the protest be heard by way of *viva voce* evidence. The matter was heard and judgment was delivered on 15th October 2003. The decision of the court was that both Wamaitha and Ngima were to get ¼ acre each of the land. The balance was to be inherited by the petitioner. Wamaitha moved to the High Court by way of summons for revocation of grant. That was the grant that was issued following the court’s decision by its judgment dated 15th October 2003. The basis of seeking revocation was on the grounds that the grant was obtained by fraudulent means that the Petitioner left out material particulars and that the Petitioner unlawfully obtained a grant contrary to the judgment of the Magistrate’s Court Karatina. What has come up for ruling before court is a summons filed by the Petitioner dated 19th June 2006. In that application, the Petitioner states that the summons for revocation is misconceived because Wamaitha should have filed an appeal against the judgment of the Magistrates Court. This is because all parties were heard before the decision was made by the Court. That application is opposed by Wamaitha and the grounds of opposition are that the application does not lie in law fact or equity. That Wamaitha has exercised her statutory rights within the law.

The main argument in opposition is that the rules relied on by the Petitioner do not afford the court power to grant the orders sought. The application is brought under *Rules 49 and 73* of the Probate and Administration Rules. *Rule 73* provides as follows:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

That rule simply saves the inherent power of the court. The court has inherent power to strike out or dismiss a matter that is an abuse of the court process. As stated before Wamaitha protests to the confirmation of grant as proposed by the Petitioner. The matter was heard by way of *viva voce* evidence by the court. On hearing that evidence the court delivered itself a judgment to the effect that Beatrice and Ngima were to get a ¼ each of the land. The balance was given to the Petitioner. The question that begs an answer is where does fraud come into the confirmed grant which was issued as a result of that judgment? Similarly one would wish to know how Wamaitha can sustain an argument that the Petitioner left out material particulars which resulted in the court’s judgment. Wamaitha argued that three different grants have been confirmed in respect of this estate. It is however, evident that the lower court in the first

instance made a clerical error in issuing the first confirmed grant and by the letter dated 12th February 2004 written by the Senior Resident Magistrate the advocate for the Petitioner was requested to return that grant for rectification. The grant which was dated 3rd May 2004 was superceded by the grant that was issued after the judgment of the court. The lawyers of Wamaitha were aware of the error made by the court because the letter written to the Petitioner's lawyers was copied to them. All in all the court is of the view that the Petitioner's application dated 19th June 2006 is merited. The only avenue open to Wamaitha is to file an appeal against the decision of the lower court. The grounds upon which Wamaitha seeks revocation cannot be argued and be sustained since if they were sustainable one would be accepting that the fraud was committed by the court through its judgment. Accordingly the court grants the following order: The summons for revocation dated 10th June 2004 are hereby struck out with costs to the Petitioner.

Dated and delivered at Nyeri this 2nd day of October 2007.

MARY KASANGO

JUDGE