



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2422 OF 1995

MARIA WANJA NJAUNGIRI ALIAS WAKAHU MUTHARA (DECEASED)

RULING

This is the application by Mary Muthoni Wachira for orders that the grant of letters of administration in Muranga RM's Succession Cause No. 1861/91 be revoked and annulled on the ground that proceedings to obtain the grant were defective in form as the applicant was equally entitled to petition.

The petition for Grant in the Muranga Succession Cause No. 186/91 was filed by Francis Mwangi Muthara. It was in respect of the estate of Maria Wanja Njangiri alias Wakahu Muthara who died on 15.3.75. Her estate comprised of Land title No. Loc 15/Kangure/751 which is 1.2 acres. Francis Mwangi Muthara described himself as the heir of the estate.

The Grant was given on 19.9.91. Francis Mwangi Muthara then applied for the confirmation of the Grant before the expiry of the six months statutory period on the ground that he wanted to charge the land for a loan to develop another plot in Nairobi. The Grant was confirmed on 19.12.91 and it was decreed that land title loc 15/Kagure/751 be registered in his name.

On 14.9.92 Mary Muthoni Wachira filed a suit against Francis Mwangi Muthara – i.e Civil Suit no. 245/92. In that suit she was claiming half share of Loc 15/Kangure/751 on the ground that her deceased husband Wachira who is a brother of the defendant was entitled to the half share of the land. She averred in the plaint that defendant obtained the registration of the land in his name in the succession case fraudulently as the defendant did not inform her of the succession cause. In the statement of the defence the defendant denied the allegations in the plaint and averred that plaintiff has her own land.

A preliminary objection to the suit was raised by the defendants advocate – His contention was that as long as the Grant in Probate and Administration No. 186/91 had not been revoked the matter remained res judicata. The trial Magistrate however overruled the objection and ordered the suit to proceed to hearing. Eventually the trial Magistrate held that the defendant properly acquired the land from his mother. The court went to hold there to grant the prayers sought by plaintiff would amount to revoking the Grant which power the court did not have.

The present application is opposed on several grounds. One of them is that the application for revocation of the Grant is res judicata as the Muranga Court in Civil Suit no 245/92 decided on the issue. Mr. Njau for the applicant submitted that the dispute is not res judicata as the Grant in Probate and Administration cause No. 186/91 had not been revoked. He was overruled. He reiterated in his written submissions that to grant the prayers in the suit would be tantamount to saying that the Grant Issued was bad in law. The plaint shows that plaintiff was attacking the grant on the ground that it was obtained fraudulently. The plaintiff in that suit was a lay woman. She filed the suit in person and prosecuted the suit in person certainly, she did not know the procedure of challenging a Grant given by the lower court and that is why she filed a suit instead of filing an application for revocation of the Grant in the High Court. Her suit was obviously incompetent can the trial magistrate should have upheld the preliminary objection and struck the suit and advised the plaintiff of the procedure to follow. The suit was

incompetent because the Grant and the confirmation of the Grant are orders of the court. The defendant in the suit was registered as proprietor of the land in dispute by the order of the court. As long as that order maintained the learned magistrate had no jurisdiction to pronounce on the merits of the suit and by doing so he was indirectly but inadvertently deciding on whether or not the Grant should be revoked a Jurisdiction he did not have.

The decision in civil suit no. 245/92 does not make the dispute res judicata as there has never been a competent application for revocation of the Grant. This is the first application in the High Court for the revocation of the Grant. This is the first application in the High Court for the revocation of the Grant The High Court has jurisdiction to deal with it. The decision in Civil suit No. 245 of 1992 does not oust the jurisdiction of this court which is given by statute (i.e The law of succession Act)

Applicants counsel states that the applicant does not insist that the Grant be revoked but insists that the certificate of confirmation be revoked so that the applicant can be heard. It has come to light that the applicants husband Wachira Muthara is registered as proprietor of Land title No. loc 15/Kangure/752 which is 0.89 Hectares. It has also come to light that the respondent is also registered as proprietor of land title No. Loc 15/Kangure/754 which is 1.21 hectare. Applicant states that both her husband and the respondent were given those pieces of land by their father. It is also submitted that the land in dispute – loc 15/Kangure/751 belonged to father of Wachira Muthara and respondent and was registered in the name of their mother.

In the circumstances the claim by applicant of the share of her husband from the land in dispute is not prima facie frivolous. It can be inferred from the fact that the applicant filed suit no. 245/92 and this application after her suit was dismissed that applicant was no aware of the succession case and that if she was aware of it she would have at best claimed a share of the estate.

In the circumstances of the dispute I find that she was a interested person to the estate and her consent to the confirmation of the Grant should have been obtained as provided in Rule 40(8) of Probate and Administration Rules.

The respondent caused the Grant to be confirmed without informing the applicant or obtaining her consent. I am satisfied that respondent obtained the confirmation of the Grant fraudulently by concealment from the Court of the fact that applicant may have been beneficially entitled to the share of the estate.

Consequently, I allow the application with costs and order that:

1. The order dated 19.12.91 confirming the Grant is set aside and the certificate of confirmation of the Grant dated 19.12.91 is revoked.
2. The Register of loc 15/Kangure/751 to be rectified by deleting the names of Francis Mwangi Muthara and Restoring the name of Wakahu Muthara on the Register
3. The applicant to file an affidavit of protest to the application for confirmation of Grant dated 5.12.91 in Muranga RMS Succession cause no. 186/91 within 30 days of the receipt of the original record by Muranga Court.
4. Thereafter the RM/SRM/RM Muranga to hear and determine any dispute regarding the distribution of loc 15/Kangure/751

E. M. Githinji

Judge

8.2.2000

Mr. Kiamia Njau present

Mr. Mbuthia absent

Mr. Kiama

I will inform Mr. Mbuthia of the result. I pray that Deputy Registrar do copy letter forwarding original file to Muranga to us you will also give Mr. Mbuthiaa client leave to appeal

Order: 1. Leave to appeal given to respondent

2. Mr. Kiama Njau to inform Mr. Mbuthia the result of the application

3. Deputy Registrar to copy letter forwarding original record to Muranga to the two advocates.

E. M. Githinji

Judge