



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
CIVIL APPEAL NO. 10 OF 2020
IN THE MATTER OF THE ESTATE OF MUTURI KATUMUTA
SAMWEL MUTURI.....APPELLANT
-VERSUS-
GEOFFREY MWANGI WAHUNGU 1ST RESPONDENT
LUCY KIRIGO MUREU2ND RESPONDENT

J U D G M E N T

Introduction

This appeal arises from the proceedings in *Succession Cause No.19 of 2006* in the Estate of Muturi Kamuta (deceased) who died intestate on 24/10/1995 which was in the Senior Resident Magistrate's Court at Chuka.

A grant of letters of Administration in his estate was issued to Agelina Ciakuthii Muturi on 29/5/2006 and later confirmed on 11/10/2006.

1. The estate of the deceased was distributed as follows:

Karingani/Ndagani/2579

Kinyua Muturi Gatumuta - whole

Karingani/Ndagani/2388

Kinyua Muturi Gatumuta - whole

Karingani/Ndagani/2586

Kinyua Muturi Gatumuta - whole

Karingani/Ndagani/2580

Samuel Muturi - whole

Karingani/Ndagani/2585

Samuel Muturi - whole

Karingani/Ndagani/2581

Ediel Kirimi M'Ibwani - whole

Karingani/Ndagani/2583

Dennis Mugendi Muturi - whole

Karingani/Ndagani/2387

Lawrence Mutembei Muturi - whole

Karingani/Ndagani/2577

David Mbaka Muturi - whole

Karingani/Ndagani/2587

David Mbaka Muturi - whole

Karingani/Ndagani/2584

Muthoni Muturi - whole

Karingani/Ndagani/2578

Muthoni Muturi - whole

Karingani/Ndagani/2383

Justin Njue Gatumuta - whole

Karingani/Ndagani/2574 &2575

Agelina Ciakuthi Muturi -As a trustee for the entire family of the late Muturi Katumuta. This grant has never been revoked or set aside. A consent was later entered on 18/1/2011 between the administratrix and Denis Mugendi Muturi an interested party and it was agreed that the District Land Registrar Meru South be directed to dispense with the production of the original title deeds in respect of LR Karingani/Ndagani/2574, 2575 and 2585 during the registration and transmission of documents in favour of the applicant/interested party. The consent was recorded as the order of the court.

2. Later the appellant filed the application dated 15/5/2020 before the trial court. The application was filed under **Rule 73 of the Probate and Administration Rules. Article 159(2)(d) of the Constitution and Section 23 and 26 of the Law of Succession Act.** It was seeking the following orders:

1. That this application be certified urgent and be heard exparte in the first instance in terms of prayer 2.
2. That the honourable court be pleased to issue an order o INHIBITION to inhibit any dealing with parcel No. KARINGANI/NDAGANI/2585 until this honourable court issue further orders.
3. That the honourable court be pleased to restrain the respondents from entering, alienating or interfering in any way the occupation of the applicant of Parcel No. KARINGANI/NDAGANI/2585 until this application is heard and determined.
4. That the honourable court be pleased to order the Land Registrar Tharaka Nithi District to delete the names of the 5th and 6th respondent i.e Geoffrey Mwangi Wahungu and Lucy Kirigo Mureu and insert the name of Samuel Muturi in land parcel NO. KARINGANI/NDAGANI/2585 as per the grant hereto.
5. That the honourable court do issue any other orders it may deem just to grant for the interest of justice.
6. The respondents do bear the costs of this application.

3. The application was argued before the learned trial magistrate and she proceeded to give the impugned ruling on 6/8/2020. The learned trial magistrate held that what was in dispute was the ownership of Land Parcel No.Karingani/Ndagani/2585 and therefore the proper forum for canvassing that issue was in the Environment and Land Court. She dismissed the application with costs.

4. The appellant was dissatisfied with the ruling and moved to this court on Appeal.

The Appeal

5. Vide a Memorandum of Appeal dated 10th August 2020 and filed on 13th August 2020, the Appellant raised 7 grounds of appeal. He

faulted the trial court for:

- a. Dismissing the Application.
- b. Failing to appreciate the explanation he gave for taking long to file the Application.
- c. Confronting and criticizing the Appellant's advocate about the plain, straightforward language used in the Application.
- d. Using technicalities to defeat justice contrary to Article 159(2)(d) of the Constitution
- e. Refusing to give the Appellant his land yet his name is in the grant.
- f. Disregarding the authorities submitted by the Appellant in respect of what should happen where land is fraudulently obtained.
- g. Dismissing a straightforward application since the suit property was the Appellant's share from his father's estate.

6. The appeal was canvassed by way of written submissions filed through the parties' respective advocates on record. The Appellant's written submissions were filed on 17th November 2020 while the joint written submissions of the 1st and 2nd Respondents were filed on 6th May 2021.

The Appellant's Submissions

7. The Appellant stated that as per the grant confirmed by the subordinate court, he was allocated two (2) parcels of land including the suit property. He further states that he was fraudulently shortchanged during the execution of the grant in that the suit property was alienated to a third party. He thus submitted that the ends of justice will only be met if he is given his rightful share of the deceased's estate as per the confirmed grant.

8. On the issue of jurisdiction, the Appellant submitted that the principle of *res judicata* forbade him from filing a fresh land suit as his rightful share to the deceased's estate was identified during the confirmation of the subject grant. The Appellant chose to rely on the authorities submitted in the lower court and urged this court to allow his appeal as prayed.

The Respondents' Submissions

9. The Respondents submitted that the lower court, while sitting as a probate court, did not have the jurisdiction to cancel a title deed. It was the Respondents' position that the proper court clothed with jurisdiction to issue such an order was the Environment and Land Court. The Respondents further submitted that the Respondents were bonafide purchasers for value who conducted their due diligence before purchasing the suit land. They thus urged this court to dismiss the appeal for lack of merit.

Issues for determination

10. From the grounds raised in the appeal as well as the respective submissions of the parties, this court is called upon to determine whether the trial court erred in dismissing the Appellant's application dated 15th May 2020.

Analysis

11. This is a first appeal against the ruling delivered on 6th August 2020 in Senior Resident Magistrate's Court Chuka, Succession Cause No. 19 of 2006. **The principles upon which this Court acts in such an appeal are well settled. In summary, this court must reconsider the evidence, evaluate it itself and draw its own conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. These principles were aptly stated in the cases of Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L.R.**

12. Applying the above principles, I now proceed to examine the subject Application. It was brought under the provisions of **Rule 73** of the **Probate and Administration Rules** and **Article 159(2)(d)** of the **Constitution** and **Sections 23 & 26** of the **Law of Succession Act**. It mainly sought for:

- a. An order of inhibition to inhibit any dealing with the suit property until the court issued further orders.
- b. An order to restrain the Respondents from entering, alienating or interfering in any way with the occupation by the Appellant of the suit property until the Application was heard and determined.
- c. An order compelling the Land Registrar Tharaka Nithi District to delete the names of the Respondents and insert the name of the Appellant in the suit property.

13. It was the Appellant's contention that he was entitled to inherit the suit property as per the grant that was confirmed on 11th October 2016. He averred that the Administrator of the deceased's estate fraudulently transferred the suit property to a third party without any legal authority. The suit property subsequently went through two different owners before it was bought by and transferred in the joint names of the Respondents herein.

14. From the certificate of confirmation of grant dated 11th October 2006, it clear that the suit property was indeed to be distributed to the Appellant. The question which pegs an answer is how the property changed hands from the rightful beneficiary. The trial magistrate confirmed that indeed the applicant was to inherit two parcels, Karingani/Ndagani/2585 & 2580. He was short changed and parcel No.2585 was transferred to 2nd respondent Denis Mugendi on 10/12/2010.

15. It goes without saying that the green card is a crucial document in the land information and management system as it contains all the pertinent information with regard to any registered parcel of land. The green card on record shows that the suit property was first registered in the name of the deceased on 23rd July 1991. The deceased died intestate on 24th October 1995. His widow, Agelina Ciakuthi Muturi, petitioned for a grant of letters of administration and the same was issued on 29th May 2006 and confirmed on 11th October 2006. On 10th October 2010, the suit property was registered in the name of the said Agelina Ciakuthi Muturi as an administrator of the deceased's estate and then transferred to Dennis Mugendi Muturi on the same day.

16. From the confirmed grant, the said Dennis Mugendi Muturi was one of the beneficiaries of the deceased's estate. He was entitled to L.R. Karingani/Ndagani/2583 and not L.R. Karingani/Ndagani/2585 (the suit property). The grant also authorized the Administrator to hold L.R. Karingani/Ndagani/2574 and 2575 as a trustee for the entire family of the deceased.

17. By a consent executed by the Administrator and Dennis Mugendi Muturi and adopted as an order of the court on 18th January 2011, the District Land Registrar Meru South was ordered to dispense with the production of the original Title Deeds in respect of three properties during the registration for transmission of documents in favour of Dennis Mugendi Muturi. The three properties include:

- a. L.R. Karingani/Ndagani/2574
- b. L.R. Karingani/Ndagani/2575
- c. L.R. Karingani/Ndagani/2585 (the suit property)

18. As stated above, the said consent was recorded in court on 18th January 2011. However, the suit property had already been transferred to Dennis Mugendi Muturi on 10th October 2010. It is thus not clear on which legal authority the Administrator acted when she transferred the suit property to Dennis Mugendi Muturi. The Administrator of the estate was named as the 1st Respondent in the Application. However, as earlier noted, the subordinate court dispensed with the first four (4) Respondents named in the Application in the first instant.

19. From the foregoing, the main question that then begs determination is whether the lower court had jurisdiction to issue the orders sought in the Application.

Whether the lower court had jurisdiction to issue the orders sought

From the above background what was for determination before the trial court was a succession matter. The appellant filed an application before the trial court to effect the confirmed grant of letters of administration which had allocated him the land in dispute as his inheritance from the estate of the deceased. The Succession Cause formed the basis for the appellant's application which was before the trial magistrate. The cause was filed under the provisions of **Law of Succession Act**. The pre-amble to the Act states that it is an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for the purpose connected therewith and incidental thereto. This is buttressed by **Section 2(1) of the Act** which provides:-

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The Act further gives the magistrate court's jurisdiction to entertain applications and resolve disputes under the **Act. Section 48(1) of the Law of Succession Act** provides as follows:

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.”

Based on these provisions I find that the trial magistrate was clothed with jurisdiction to entertain the application as what was before her was a succession process which was successfully finalized. The application by the appellant was an incidental matter which arose in the process of administration of the estate of the deceased. Such incidental matters are supposed to be dealt with in the probate and administration court.

Rule 73 of the Probate and Administration Rules 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.”

The Rule gives the Probate and Administration Court wide discretion to issue orders which are necessary in the interest of justice and prevent abuse of the process of the court. The jurisdiction is necessary to give court powers as to ensure that the estate of the deceased is identified, the rightful beneficiaries identified and given their inheritance.

The trial magistrate misconstrued the dispute which was before her when she held that she had no jurisdiction and failed to deal with the issue which was before her. In a succession matter that is, Probate and administration, the executor in the case of probate and an administrator (trix) are necessary parties in disputes arising before and after confirmation of the grant. **Section 82 of the Law of Succession Act** makes provision for the duties of an administrator. **Section 83(i) of the Law of Succession Act** provides as follows:-

i. “To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

The appellant filed the application in court against the administrator. In view of this provisions, the administratrix had a duty upon the application by the applicant to give an account of the completed administration **Section 94 of the Law of Succession Act** provides:-

“(1) Any personal representative who, as regards the estate in respect of which representation has been granted to him-

(a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage;

or

(b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or

(c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or

(d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

(2) Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five thousand shillings.”

The application before the trial magistrate was seeking to recover his share of the estate of his deceased father. It was the administrator as provided under **Section 83(i) and Section 94 of the Act** which I have quoted above who was answerable to the issue raised by the appellant. The trial magistrate therefore erred by dispensing with the first four respondents named by the appellant one of them being the administrator. The trial magistrate did not rely on any provision of the law allowing her to remove a party. Being a succession matter the petitioner was legally supposed to answer the application by the appellant. The trial magistrate had no jurisdiction to dispense with the attendance of the petitioner or any other party for that matter. The trial magistrate erred by removing *parties ‘suo moto’* and particularly the petitioner who was a critical party in the dispute.

It is important to look at the proceedings in the lower court. The Succession Cause was filed by the Agelina Ciakuthi Muturi who is the widow of the deceased. The appellant was one of the beneficiaries. The deceased left behind several parcels of Land. The grant was confirmed on 11/10/2006. The appellant was bequeathed Land Parcels No.LR Karingani/Ndagani/2580 and Karingani/Ndagani/2585. On 18/1/2011 the Petitioner entered a consent with Denis Mugendi to authorize the Land Registrar to dispense with the production of title deeds for Land Parcel No. Karingani/Ndagani/2574, 2575 and 2585. The applicant who was awarded parcel No.2585 was not a party in the consent. The consent was adopted by the court.

The applicant contends that the Land Parcel No. Karingani/Ndagani was transferred fraudulently as the certificate of confirmations shows that the land parcel was allocated to him. The applicant went to court to have the transfer cancelled. The appellant demonstrated that the matter was a succession matter and therefore court had jurisdiction and fraud was committed as the land was taken away from him. The court had jurisdiction to entertain the application.

In succession matter, the High Court has jurisdiction to issue any orders including cancellation of title deeds where the grant is revoked. See **Section 47 of the Law of Succession Act**.

The applicant seeking to have his share of the estate which the court had found he was entitled when it confirmed the grant. The proper forum was the court which had confirmed the grant. The applicant’s claim was against the administrator of the estate. The ends of justice demands that the appellant gets his share from the estate of his father. The 5th and 6th respondents had *no locus standi* to raise a preliminary objection as the dispute was a succession matter which was concluded and they were not parties in the Succession Cause.

It is my view that the trial magistrate erred by holding that the court had no jurisdiction. I order as follows:-

1. The appeal has merits and is allowed.
2. The ruling by the trial magistrate dated 6/6/2020 is set aside.

3. The application by the appellant is reinstated and shall be heard and determined as against all the parties mentioned by the applicant in its application so that they are given an opportunity to be heard.

4. In view of the prayers the applicant is seeking, he should have the application transferred to this court.

5. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 10TH DAY OF FEBRUARY, 2022

L.W. GITARI

JUDGE