



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION CAUSE NO. 1 OF 2019

IN THE MATTER OF THE ESTATE OF OBEDI NDWIGA RUBARITA- DECEASED

ERASMUS NJIRU MUTO.....APPLICANT

VERSUS

RUSIA GICUKU MUTO.....PETITIONER/RESPONDENT

RULING

A. Introduction

1. The applicant herein moved this court by way of summons dated 29.07.2019 seeking revocation of the grant issued to the respondent herein on 24.09.2014 and confirmed on 27.10.2014 in Runyenjes Principal Magistrate's Court Succession Cause No. 92 of 2014. He further prayed for the costs of the application.
2. The said summons is based on the grounds on its face and further supported by the applicant's affidavit annexed to the application.
3. The applicant's case is that Land Parcel No. Kyeni/ Mufu/1829 (the suit land herein) belonged to the deceased herein (Obedi Ndwiga) but who entered into a sale agreement to sell the same to the applicant's father one Muto Gachienja in 1974 at a consideration of Kshs. 6,250/-. That pursuant to the said agreement his father paid to the deceased herein Kshs. 3,580/- leaving a balance of Kshs. 2,670/- payable before 2.02.1974 failure to which the said agreement would be rescinded. However, his father was unable to pay the balance of the purchase price and thus the contract was rescinded. That the deceased herein approached the applicant offering to sell the said suit land to him and wherein he bought the same at Kshs. 150,000/- in the year 1985.
4. That the Embu North Land Control Board gave consent to the deceased for the sale of the suit land and subsequently the deceased executed the transfer forms in his favour and thereby effectively transferred the said land to him and he embarked on the process of having the same registered in his name and paid for the registration of the same in his name. However, the same was impended by a caution which had been lodged by one Peterson Kamau Muto and which caution he embarked on the process of removing and which was removed on 5.01.2015 but when he got the copy of the suit land's register he discovered that the same had been registered in the names of the respondent herein vide Succession Cause No. 92 of 2015 and which cause he later learned that had been filed at Runyenjes Senior Principal Magistrate's court.
5. It is his case further that the registration of the suit land in the names of the respondent herein was illegal and fraudulent as the suit land belonged to him and does not form part of the estate of the deceased herein as when the deceased executed the transfer forms in the applicant's favour, he effectively transferred his rights and interests therein to the applicant and the respondent herein filed the Succession cause well aware that he (applicant) was the rightful owner thereof. Further that the respondent was issued with the grant on 22.09.2014 and the same was confirmed on 27.10.2014 in less than 6 months and which was irregular and unlawful and meant to perpetuate fraud as there were no reasons for the grant being confirmed before the lapse of six months.
6. Further that the proceedings in which the grant was obtained were defective in substance and the grant and the certificate of confirmation of the same ought to be revoked and that the respondent willfully and knowingly concealed from the court facts which are material (that the suit land belongs to him) so as to unlawfully deprive him of the suit land.
7. The application is opposed by way of a replying affidavit sworn by the respondent on the 23.09.2019 and wherein she deposed that she got married to one Muto Gachienja (I will refer to him as the respondent's husband) in the year 1968 and at that time the respondent's husband was in occupation of the suit land herein and they established their matrimonial home on the said land. That the respondent's husband and the deceased herein entered into an oral agreement for the sale of the suit land and which was reduced into writing in the year 1974 and the respondent's husband paid the deceased herein a sum of Kshs. 3,580/- leaving a balance of Kshs. 2,670/- . That however, the respondent's husband was unable to pay the balance and he approached the applicant herein (his son) in 1975 to clear the balance and as a compensation, the respondent's husband was to give the applicant LR Kyeni/ Mufu/2153 and which land was transferred to the applicant on 4.11.1975.

8. However the suit land was not transferred by the deceased herein to the respondent's husband and when she realized the same she approached one Martha Wambura Obed (the widow of the deceased) in the year 2014 about the issue of transfer of the land to her husband and the said widow of the deceased acknowledged the sale of the suit land from the deceased to the respondent's husband and that she gave her a go-ahead to commence succession proceedings to enable her (respondent) inherit the same on behalf of her husband. That she followed the procedure required and had the grant issued and confirmed before six months as she was sickly and that her husband had four wives including herself but before his demise, he had settled his wives and children in their respective parcels of land and she had been settled on the suit land where she lived with her children from 1968 to date. She further deposed that the applicant had not exhibited any sale agreement between himself and the deceased herein and he is only trying to fraudulently acquire the same contrary the agreement with her late husband.

9. There is another replying affidavit sworn by Martha Wambura Obed who deposed that she is the widow of the deceased herein that prior to his demise, the deceased had informed her that he had sold the suit land to the respondent's husband and further that the respondent's husband had cleared the purchase price and the suit land belonged to the respondent's husband's family and they (respondent's family) had been in occupation of the same even before the sale of the land to the respondent's husband (in 1974). That the respondent approached her and she gave her the permission to apply for the grant of letters of administration and which was confirmed.

10. Directions were taken that the parties do file their respective witness statements and the summons do proceed by way of *viva voce* evidence. The directions were duly complied with.

B. Evidence at the hearing of the summons

11. At the hearing of the summons, the applicant testified as PW1 and wherein he basically repeated the averments in the summons and supporting affidavit. He further adopted his witness statement dated 2.12.2019 as his evidence in chief and further adopted his list of documents filed on 21.01.2020 (dated 20.01.2020) as exhibits and which were marked as PExts 1-17. He testified that he bought LR Kyeni/Mufu/2153 from his late father (the respondent's husband) and which was a sub-division of LR Kyeni/Mufu/1117 and that he was the owner of the suit land herein. In cross examination he testified that the respondent was the 4th wife to his deceased father (respondent's husband) and that she lives on the suit land and the other wives of his father had been settled on other land parcels by the respondent's husband (applicant's father) but the respondent was living on LR. Kyeni/Mufu/438 and not the suit land herein. That his father (respondent's husband) made part payment in relation to the suit land and he (applicant) paid the balance but he has never lived on the suit land. He further testified that he bought the suit land from the deceased herein at Kshs. 150,000/- and that they did not enter into a written agreement. His evidence was consistent in re-examination. The applicant proceeded to close his case.

12. The respondent testified as DW1 and wherein she adopted her replying affidavit sworn on 5.09.2019 and her witness statement filed in this court on 3.12.2019 as her evidence in chief and further produced her list of documents filed in this court on 30.01.2020 as her exhibits 1-4. She gave evidence that the applicant herein was given land parcel number Kyeni/ Mufu/2153 by her (respondent's) husband so that he could assist him to pay the deceased the balance to the suit land and that the applicant has never occupied the suit land nor hired it out but she is the one who has been in occupation of the same since 1968 and she is the current registered owner pursuant to a succession cause in Runyenjes Court. In cross examination, she testified that she got married in 1968 and her husband was in the process of buying the suit land from the deceased herein and by the time her husband died in 1984, he had not obtained consent from the Land Board over the same. That the suit land belonged to the deceased herein but he sold it to her husband and that she is supposed to inherit the suit land herein and the applicant has no right over the same as his mother had been given a portion of land by the respondent's husband and that she cultivates the whole of the suit land together with her children.

13. Further that when she filed the succession cause, she informed some of the family members but she did not inform the applicant herein and those whom she informed told him that they did not have any claim over the suit land and that she included all the children of the deceased but she did not know that she ought to have included the other beneficiaries (when she was referred to Form P&A 5 in Succession Cause 92 of 2014. In re-examination she reiterated that she filed the succession cause subject of these proceedings with the blessings of the deceased's wife and since she was sickly, she requested the grant to be confirmed before the scheduled time.

14. The respondent further called one Marthe Wambura Obed who testified as DW2 and adopted her witness statement dated 2.12.2019 and her replying affidavit sworn on 5.09.2019 as her evidence in chief. Her evidence both in chief and in cross examination was to the effect that the respondent herein is in occupation of the suit land together with her children and that the same was sold to the respondent's husband and not to the applicant and she was not aware of the sale of the suit land to the applicant.

C. Summary of the written submissions

15. The parties herein proceeded to file their written submissions in support of their rival positions. The applicant generally submitted that the sale between the deceased and the respondent's husband was void by virtue of section 8 of Land Control Act for failure to obtain Land Control board's Consent as required by section 6 of the Act and that the respondent's right was to have the refund of the amount already paid as consideration as it's provided under section 7 of the said Act. Further that he was the rightful person to inherit the suit land as he had bought it from the deceased herein.

16. It was submitted on behalf of the respondent that the applicant did not produce the sale agreement between him and the deceased herein and/or any document to prove payment of the purchase price by himself and that in absence of a written sale agreement between him and the deceased herein, then the sale was void by virtue of Section 3 of the Law of Contract Act Cap 23 Laws of Kenya (which requires that all transactions in relation to land must be in writing). Further that the agreement having been entered into between the applicant and the deceased in 1974 and the land Control Board's Consent having been given on 9.10.1985, the sale was void by virtue of section 8 of the Land Control Act which requires that the consent must be obtained within six months of making of the agreement.

D. Issues for determination

17. I have considered the pleadings herein, the replying affidavit by the respondent, the oral evidence tendered before me and further the rival

submissions filed herein and I note that it is not in dispute that the deceased herein was the registered owner of the suit land being Land Parcel No. Kyeni/ Mufu/1829. Further, it is not disputed that the respondent herein petitioned for grant of letters of administration intestate in relation to the deceased's estate being the suit land herein in Runyenjes Principal Magistrate's Court Succession Cause No. 92 of 2014 and that she was issued with the grant on 24.09.2014 and the same was confirmed on 27.10.2014. It is this grant which the applicant seeks that it be revoked. It is my considered view that the main issue for determination herein is whether the said grant ought to be revoked.

18. The grounds under which a grant of representation may be revoked are provided for under section 76 (a) - (e) of the Law of Succession Act Cap 160 of the Laws of Kenya. **It is clear therefore that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds.** However, the court is bestowed with the powers to revoke the grant on its own motion so long as there is evidence of the existence of any of the conditions provided under section 76. (See **Matheka and Another –vs- Matheka [2005] 2 KLR 455**). Further from the reading of section 76 above, it is clear that the same deals with revocation of grant and not the process of confirming the grant or the certificate of confirmation of grant (See **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR**).

19. From the pleadings herein, it is clear that the application is premised on conditions (a), (b) and (c) and which provides that, *a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

20. The applicant's case as I have explained elsewhere in this ruling is basically that he bought the suit land herein from the deceased and as such the respondent obtained the grant fraudulently as she did not involve him and further that she concealed material facts to the effect that the applicant was the owner of the suit land. He attached a Land Control Board's Consent in respect of the said sale and further the Transfer forms allegedly executed by the deceased herein in his favour.

21. Despite the respondent herein having submitted that the said documents were obtained fraudulently and behind the back of her deceased husband, there was no evidence which was tendered to prove the said fraud. It is trite law that where fraud is alleged **fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.** {See **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR**}. The standard of proof *required where fraud is alleged is higher than in ordinary civil matters (balance of probabilities) but it ought not to be one beyond a reasonable doubt as in criminal cases.* (See **Ndolo -versus- Ndolo (2008) 1 KLR (G&F) 742**).

22. **The respondent having not tendered evidence as to the fraud on the part of the applicant in acquiring the said Land Control Board's Consent and the Transfer Form all in his favour, it is clear that the applicant herein is an interested party in relation to the deceased's estate and that he has a locus standi to bring the instant application and the same is properly before this court.**

23. **The above notwithstanding, it is clear that the dispute between the applicant and the respondent herein is in relation to purported sale of the suit land to the applicant and also to the respondent's husband. As such, the issue is who is the rightful owner of the suit land? In fact, the parties in their submissions brought up the issue of the Land Control Act having not been complied with, the consent to the sale to the applicant having been obtained after the lapse of six months after the agreement between the applicant and the deceased, the agreement between the respondent's husband and the deceased herein having been void for want of Land Control Board's Consent under section 6 of the Land Control Act amongst other issues. The applicant further testified as to having occupation of the suit land ever since she was married (1968). In my view, the dispute between the parties herein revolves around ownership of the suit land.**

24. **It is now trite that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime. With respect to matters touching on title to and, and occupation of land, the proper forum ought to be the Environment and Land Court which is established under the Constitution of Kenya 2010 and the Environment and Land Court Act, No. 19 of 2011. This court (High Court) has no jurisdiction to determine any disputes that centers on ownership, occupation and use of land. Further, the issue as to the ownership once raised in a succession cause, they must be resolved before such property is distributed.** (See **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR**). The applicant ought to have presented the instant issue before the court with competent jurisdiction which is the Environment and Land Court.

25. However, as I have already stated elsewhere in this ruling, this court has the jurisdiction to revoke a grant *suo moto*. However, even where the court can revoke a grant *suo moto there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.* (See **Matheka and Another –vs- Matheka (supra)**).

26. **The applicant having based his application on the process of obtaining the grant by the respondent herein, it is my view that this court ought to examine the said process and determine whether the same was as per the requirements laid down by the Law of Succession Act Cap 160 and the Probate and Administration Rules 1980. The suit land was immediately before the respondent filed for letters of administration registered in the names of the deceased herein and thus it is expected that his children or spouse(s) ought to have petitioned for letters of administration in relation to his estate. It is clear that the respondent herein was not a daughter of the deceased and thus she was not a beneficiary *per se*. However, this does not mean that she cannot be an administrator of the estate of the deceased so long as the other beneficiaries consent to the same.**

27. Section 51 of the Act provides that application for grant ought to be by way of a petition. Under Section 51(2) of the Act, the petitioner is supposed to include information as to;-

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; (h) a full inventory of all the assets and liabilities of the deceased.

28. The Act provides for the persons who are entitled to petition for letters of administration and as a general rule, the order of priority is the one provided for under section 66 of the Act. Rule 26 of the **Probate and Administration Rules** provides that:-

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

29. The import of this rule is that where for instance a petitioner is a child of the deceased, the consent from the other children of the deceased ought to be obtained. A grant is liable to revocation where such consent was not obtained. In **the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994** the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed. (See also **Antony Karukenya Njeru –vs- Thomas M. Njeru [2014] eKLR** and **In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003** where in both cases, a grant of letters of administration was revoked since persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration).

30. The applicant was not a beneficiary of the estate of the deceased herein and as such, the respondent had no duty to inform him. Further he was not a creditor of the said estate as the suit land had not been transferred to him and neither was there any encumbrance registered by the applicant in relation to the suit land. In **Alexander Mbaka –vs- Royford Muriuki Rauni & 7 Others [2016] eKLR** where the Court held that: -

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

31. As such, the applicant’s claim having not crystalized, the respondent herein had no obligation in law to consult the applicant while petitioning the trial court for the grant of letters of administration.

32. However, in this case, the evidence on record (being the chief’s letter annexed to the petition before the trial court and which pleadings were produced as evidence before this court) clearly indicates that the deceased herein had two wives. DW2 herein swore an affidavit in the said cause on 24.06.2014 and wherein she deposed that herself and her family had no objection to the respondent administering the deceased’s estate. However, she did not attach the consent by the said members of her family and neither did she depose as to having authority to swear the affidavit on their behalf. There was nothing which was stated as to the whereabouts of the other widow of the deceased and/or her children. The respondent’s position being a widow to the purchaser of the estate property ranks lower in priority than those of the widows of the deceased and their children and their consent was a legal requirement before the grant was made to her. It is my view that as such, the procedure of obtaining the grant by the respondent was defective for want of consent to persons of equal or lesser priority as required by the Law.

33. Further, from Form P & A 5 filed in the trial court, the respondent indicated herself as the only beneficiary of the estate. This amounts to non-disclosure of material facts. In my view, if she had disclosed the existence of the other beneficiaries, the court would not have made the grant to her more so now that there was no consent by persons of equal or higher priority (children and/or widows of the deceased). It is my considered view that the respondent deliberately left out the said beneficiaries so as to have the grant made in her name and to the disadvantage of the said beneficiaries. Their whereabouts is not known and neither the whereabouts of the other spouse of the deceased herein.

34. In the case of **Albert Imbuga Kisigwa –vs- Recho Kawai Kisigwa, Succession Cause No.158 OF 2000**, Mwita J. noted thus:

“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

35. It is my considered view that for the interests of the other beneficiaries of the estate of the deceased herein be taken into account and further in the interests of justice, the grant made to the respondent herein is hereby revoked. The respondent to file for fresh letters of administration and in doing so, comply with the law.

36. Further, the court notes that the dispute between the parties herein is one that involves ownership of the suit land, the same ought to be resolved before the suit land can be distributed, the applicant is at liberty to pursue his claim over the suit land in the right forum.

37. This being a succession cause, each party shall to bear his/or her own costs.

38. It is so ordered.

Delivered, dated and signed at Embu this 11th day of May, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent