



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION NO. 1155 OF 2008

IN THE MATTER OF THE ESTATE OF FRANCIS MUNGAI KARIUKI

PAULINE NGENDO MUTHONDU.....APPLICANT

VERSUS

MARGARET MUTHONI MUNGAI.....RESPONDENT

RULING

1. Francis Mungai Kariuki, the deceased herein died intestate on 18.8.07 at the age of 74 years. He was survived by his widow Margaret Muthoni Mungai (Margaret) and 7 children. A grant of letters of administration was on 18.9.08 issued to Margaret and confirmed on 3.3.2.09. Certificate of confirmation of grant was issued on even date and rectified on 28.7.09 the only listed asset of the estate Title No. Dagoretti/Thogoto/201 (the Dagoretti property) was to be registered in Margaret's name in trust for her 7 children in equal shares.

2. Thereafter, by her Summons dated 12.3.21, Margaret sought a review of the certificate of confirmation of grant to indicate that the estate comprised of half of the Dagoretti property while the other half was owned by George Kariuki Waboro (George), deceased. Margaret also sought to have included as part of the estate of the deceased, Title No. Longonot/Kijabe Block 4/309 (the Longonot property), which was omitted in her application for grant. According to her, the deceased and George owned the 2 properties in equal shares pursuant to a gift. Margaret proposed that the certificate of confirmation be reviewed so that one half of each of the 2 properties is registered to her while the other half is registered to Pauline Ngendo Muthondu (Pauline) as trustee and administrator of the estate of George.

3. On her part, Pauline has filed a Summons dated 7.9.2020 seeking the following orders;

- i) Spent
- ii) Spent
- iii) orders restraining Margaret by herself, her servants, agents, and/or assigns from evicting her from the Dagoretti property.
- iv) Revocation of the grant confirmed on 3.2.09 and rectified on 28.7.09 and nullification of all entries made against the title to the Dagoretti property pursuant to the said certificate of confirmation of grant.
- v) An order that the estate of George is entitled to 1¼ acres, while that of the deceased herein is entitled to ¼ acre in Dagoretti property.
- vi) That an access road be excised from the share of George.
- vii) Costs.

4. It is Pauline's case that George filed Kiambu Senior Principal Magistrate's Court Civil Suit No. 501 of 1992 (the Kiambu suit) against the deceased over the Dagoretti property. She claimed that in its judgment which she exhibited, the Court held that the deceased is entitled to ¼ acre while George is entitled to 1¼ acres of the property. Pauline contended that the decision still stands as it was neither appealed against nor reviewed. She accused Margaret of failing to disclose to this Court of the determination in the Kiambu suit. According to Pauline therefore, the certificate of confirmation of grant which indicates that the Dagoretti property be distributed to Margaret to hold in trust for her children ought to be revoked.

5. For her part, Margaret denied knowledge of the Kiambu suit and that if such suit did exist, the same was filed out of malice as the property was a gift to Francis and George and their interest was proprietorship in common in equal shares. Margaret contended that both occupied the property in equal shares and she does not understand the sudden change of position by Pauline. Margaret further claimed that

the Longonot property was issued in the same fashion as the Dagoretti property and wondered why Pauline did not lay claim to the same. On the judgment in the Kiambu suit, Margaret claimed that the same, if it exists, was erroneously arrived at and having passed its lifespan, was no longer valid or enforceable.

6. Parties filed their written submissions which I have duly considered. The issues for determination are:

- i) Whether the judgment in the Kiambu suit is valid.
- ii) Whether the grant should be revoked.
- iii) Whether the review sought of the certificate of confirmation of grant should be allowed.

Whether the judgment in the Kiambu suit is valid

7. It is Pauline's contention that the judgment in the Kiambu suit has never been appealed against or reviewed. As such, the same still stands. Margaret on the other hand is of the view that the judgment of 17.4.96 of which she claims she was not aware, is no longer valid. She fails to understand why the judgment was not executed and the title to the Dagoretti property regularised to reflect the order in the judgment. Citing Section 4(4) of the Limitation of Actions Act, Margaret contended that the judgment lapsed 12 years later on 18.4.08.

8. Section 4(4) of the Limitation of Actions Act provides:

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

9. In the judgment in the Kiambu suit, the Court found that George owned 1 ¼ acres of the Dagoretti property, while the deceased owned ¼ acre thereof. The 2 exhibited official searches of the property dated 19.7.07 and 13.12.07 indicate that the deceased and George were proprietors in common in equal shares and the title was issued to them on 9.7.70. Similarly, the exhibited green card shows that the Dagoretti property was gifted to the deceased and George as proprietors in common in equal shares. The question that begs is, why did George after taking the trouble to sue the deceased, not enforce the judgment in 1996 when the same was delivered. Why did he not enforce the same and have the register amended when the deceased died in 2007? Indeed, one would have expected the demise of the deceased to jolt George into action. It is noted that George himself died on 1.7.15. Up to the time of his demise, he did not enforce the judgment and the Court has not been told that he took any steps in that regard. The law is clear that no action may be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered. By dint of Section 4(4) of the Limitation of Actions Act therefore, Pauline is barred from seeking to enforce the said judgment, 24 years later.

10. In the case of Willis Onditi Odhiambo v Gateway Insurance Co Ltd [2014] eKLR the Court of Appeal addressed the issue of a party seeking to enforce a judgment out of time and stated:

In other words, the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by Section 4 (4) of the Limitation of Actions Act which is in the following terms:-

“4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.”

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008.

11. And in an earlier case of M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe [2007] eKLR, the Court of Appeal stated:

From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher v Donovan, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession.

12. The Court of Appeal was emphatic that a judgment should be enforced before the expiry of 12 years, failing which the rights of the decree holder are extinguished. Applying the principle set out by the Court of Appeal to this case, I find that George's rights as declared in the 1996 judgment were extinguished by his failure to enforce the same within the stipulated time of 12 years.

Whether the grant should be revoked

13. The jurisdiction of the Court to revoke a grant of representation is stipulated in Section 76 of the Law of Succession Act as follows:

76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

14. An applicant seeking revocation of a grant must establish the grounds set out in Section 76 of the Act. Pauline’s application for revocation of the Grant is anchored on the judgment in the Kiambu suit. The Court has found that the same is no longer enforceable. It follows therefore that her prayer for revocation must fail.

15. Whether the review sought of the certificate of confirmation of grant should be allowed.

From the documents exhibited, it is evident that the deceased and George were registered as the owners of the 2 properties. The searches and green card for the Dagoretti property show that they both owned the properties in equal shares. As regards the Longonot property, the title shows both the deceased and George as registered owners. It does not however state in what proportions they own the same. The presumption therefore is that the deceased and George owned the property in equal shares. This is the tenor of Section 91(2) of the Land Registration Act which provides:

Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

16. The certificate of confirmation of grant dated 3.2.09 and rectified on 28.7.09 indicates that the entire Dagoretti property is to go to the beneficiaries of the deceased. Margaret seeks to have the certificate reviewed to reflect the correct position, *to wit*, that the deceased owned half of the Dagoretti property and not all of it. Margaret further seeks the inclusion of half of the Longonot property which was omitted. From the material before me, I am persuaded that this is the correct position and should be reflected in the certificate of confirmation of grant.

17. Margaret seeks that George’s share be registered to Paulin’s name as trustee and administrator of his estate. It must be noted that this Court has no jurisdiction to deal in this cause, with property that does not belong to the deceased. The Court cannot therefore deal with the part of these properties owned by George or grant the same to Pauline as proposed by Margaret in her application.

18. In the end, having found that the judgment of 17.4.96 Kiambu Senior Principal Magistrate’s Court Civil Suit No. 501 of 1992 is no longer enforceable, it follows that the statutory grounds for revocation of grant have not been established. The summons dated 7.9.2020 being devoid of merit is hereby dismissed. I further make a finding that the summons for review dated 12.3.21 is merited and the same is hereby allowed. Certificate of confirmation of grant to issue as set out herein. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9TH JULY 2021

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... for the Respondent

..... Court Assistant