



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 52 OF 2000**

**IN THE MATTER OF THE ESTATE OF THE LATE MUHORO**

**WAWERU alias MUHORO s/o WERU (DECEASED)**

**PHILLIP MAGOTHE WERU.....APPLICANT**

**VERSUS**

**WACHIRA WAWERU.....RESPONDENT**

**RULING**

1. The estate relates to the late **Muhoro Waweru alias Muhoro s/o Weru (DECEASED)** who died on the 30<sup>th</sup> August, 1989;
2. The Grant in this dispute was issued on the 28/05/2001 to the respondent herein one Wachira Waweru (**‘Wachira’**) by the Karatina Court in Succession Cause No.6 of 2000;
3. The applicant filed this application on the 10/11/2014 under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Succession Rules stating that the respondent was a step-brother to the deceased; in the application he claimed that the respondent had obtained the Grant to the deceased’s estate fraudulently by making a false statement and/or by concealment from the court of something material to the case; and he sought for the Revocation of the Grant on the following grounds;
  - a) The respondent herein is a step brother of the deceased who is not entitled to share the estate of the deceased herein at all;
  - b) The respondent herein failed to involve the deceased’s spouse and the children thereby misleading the court to obtain the said grant fraudulently;
  - c) The respondent when filling his petition failed to include all the assets of the estate of the deceased and only listed land parcel number Kirimukuyu/Thiu/419 and the rest of the assets were omitted; and
  - d) The said grant has become useless and inoperative through subsequent circumstances.
4. To support his claim the applicant relied on the grounds on the face of the application and on his Supporting Affidavit sworn by the applicant on the 10/11/2014; the respondent (**Wachira**) filed his response to the application on the 7<sup>th</sup> June, 2017 and directions were taken on the 14/06/2017 that the matter proceed for hearing by way of **‘viva voce’** evidence; after the hearing hereof all the parties were directed to file and exchange their respective witness submissions;
5. The matter proceeded for hearing and the applicant was represented by learned counsel Ms. Mwikali whereas the respondent was represented by learned counsel Mr. Kiminda; hereunder is a summary of the applicants’ case and the petitioner’s response;

**APPLICANTS’ CASE**

6. The applicant relied on the supporting Affidavit dated the 10/11/2014; his evidence was that the respondent was a step brother to his father making him his step-uncle; the Karatina Court in Succession Cause No.6/2000 had issued a Grant to the respondent and that his mother had participated in this cause as an objector; this Grant was revoked and a Grant was issued to his mother and the respondent as joint administrators;

7. In the year 2001 his mother donated powers to him under a Power of Attorney to handle and represent her in all matters related to land in particular to the parcel of land known as Kirimukuyu/Thiu/419;
8. The applicant's contention is that the respondent used the old Grant at the Lands Office to change the status of the land and the respondent had gotten himself registered solely and absolutely; this land was to have been jointly registered in the names of his mother and the respondent and he ought to have shared the land with their family which was then deprived of its entitlement; for these reasons he prayed that the Grant be revoked;
9. During cross-examination he confirmed that the respondent and his father were step-brothers; that the land had never been registered in his grand-father's name; that this fact notwithstanding his grand-father, his step grand-mother (the mother to the respondent) and his father had all been buried on this land; that he had been living on this land and that the respondent also lived on this land;
10. He also confirmed that he was aware of the above Karatina Succession Cause and was present and accompanied his mother when the court conducted a site visit to inspect the boundaries of the subject property; the Karatina court's observation was that the boundaries were not clearly marked; and it had directed that the boundary dispute be referred to the Mathira Land Disputes Tribunal; the tribunal made a finding that there were boundaries that divided the land into two portions; that his mother being aggrieved with the tribunal's decision had filed an Appeal with the Provincial Appeals Committee in Nyeri which appeal was dismissed and it upheld the decision of the Mathira Lands Dispute Tribunal; he acknowledged the fact that the Tribunal's decision was adopted by the Karatina Succession Court and also by the High Court sitting in Nyeri where the cause had been transferred to; and that his mother had declined to execute the transmission documents; and that the upheld decision was implemented by the Lands Office Nyeri;
11. It also came out in cross-examination that the parcel of land known as Naru/Moru/Kiamathage Block 1/5 was not included in the Karatina Succession Cause even though his mother's prayer in her objection proceedings was that it be included and be distributed to her; he confirmed that the respondent was not interested in this parcel of land as it had been bought by the applicant's father;
12. To support his case the applicant called Mwangi Magu (**PW2**) and Muchoki Karuri (**PW3**) as his witnesses who adopted their witness statements as their evidence; under cross-examination **PW2** confirmed he knew the applicant, his mother and the respondent; that he was aware of the Karatina Succession Cause and aware of the Tribunal case between the applicant's mother and the respondent and that it was about the shamba; he confirmed being present at the Tribunal sitting and that the applicant was always present but he didn't know whether the applicant was representing his mother; that he was aware that the court had divided the shamba; but did not know whether this decision had been appealed against.
13. **PW3's** evidence stated that he knew the applicant and his mother; that the subject property belonged to the grand-father named '**Waweru**' who had two sons from two different mothers; one was called Muhoro and the other Wachira, who is the respondent herein; that during Waweru's lifetime he had divided the shamba into two and had put up a boundary fence;
14. After this witness testified the applicant closed his case; and reiterated that he wanted the subject property registered in the joint names of his mother and the respondent as the Grant issued on the 15/11/2000 had been revoked.

### **RESPONDENTS CASE**

15. The respondent Wachira waweru opposed the application and filed a statement; during the hearing he stated that he knew the deceased who was his step brother; the applicant is his nephew and his mother was one Nancy Muhoro; the respondent has been living on the subject property since his childhood;
16. He had filed a case in Karatina, succession case no.6 of 2000 against the said Nancy Muhoro; the case was against the subject property which was in the name of the deceased; he agreed with Nancy Muhoro on how to divide the property; according to the Karatina court's determination the land was divided between the respondent and the said Nancy Muhoro and Nancy was satisfied; the applicant is aware of this decision;
17. Before making the decision the Karatina Court visited the property and the applicant was present; subsequently a court order was obtained, survey conducted and the respondent acquired the title deed for Kirimukuyu/Thiu/777 and Nancy Muhoro got title deed for Kirimukuyu/Thiu/776;
18. The respondent proceeded to build a fence on his property and started cultivating on it; the shamba in Narumoru belongs to the applicant's father and the respondent is not interested in it; the respondent produced the proceedings in the Karatina case as "Dexh1";

### **ISSUES FOR DETERMINATION**

19. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether the applicant has made out a case for Revocation of the Grant and Confirmed Grant relating to parcel number Kirimukuyu/Thiu/419;

### **ANALYSIS**

**Whether the applicant has made out a case for Revocation of the Grant and Confirmed Grant relating to parcel number Kirimukuyu/Thiu/419;**

20. Having heard the evidence of all the parties herein and their respective witnesses the following facts are not in dispute; that the subject property was divided into two (2) portions during the lifetime of Waweru (now deceased) who was the grandfather of the applicant; that the deceased herein was the father of the applicant and that he died on the 30/08/1989; and it is also not disputed that there are two succession causes filed in respect of the same subject property namely Karatina Succession Cause No.6 of 2000 and the instant cause; and it goes without saying that the cause filed by the respondent was filed first;

21. Upon reading the Karatina Succession cause proceedings this court notes that the trial court in its ruling ordered that the Grant issued to the respondent alone be revoked and the applicant's mother and the respondent were made joint administrators to the estate of the deceased;

22. Somewhere along the line the matter proceeded to the Mathira Lands Dispute Tribunal; after the matter had been heard and determined by both the Mathira Lands Dispute Tribunal and the Nyeri Provincial Appeals Committee the trial court proceeded to adopt the decision of both bodies and ruled that the subject land be registered in their joint names; the ruling reads as follows;

***“The land parcel Kirimukuyu/Thiu/419 shall be registered in the joint names of Wachira Waweru and Nancy Wakini Muhoro as personal representatives of the estate of the Late MUHORO WAWERU alias MUHORO WERU now deceased.”***

23. The court record reflects that a Certificate of Confirmation was issued on the 28/05/2001 on the same terms set out hereinabove; and from the applicant's own written submissions he acknowledges that this parcel of land was later sub-divided by the two administrators into two (2) equal portions that is Kirimukuyu/Thiu/776 which was registered in his mother's name and Kirimukuyu/Thiu/777 which was registered in the respondent's name;

24. A true construction of the evidence placed before this court by the applicant points to the fact that the applicant's mother never appealed the decision of the Provincial Appeals Committee whereby it upheld the award made by the Mathira Land Disputes Tribunal on the boundary dispute between the respondent and the applicant's mother; this decision was adopted by the trial court and the applicant's mother never appealed against the Karatina court's decision;

25. The applicant's evidence was that he was given the power under a Power of Attorney to represent his mother to the matters pertaining to land; which then means that at all material times he was aware of these material facts and his witness **PW2** and **PW3** corroborated the fact that the applicant had first-hand knowledge of the proceedings at the tribunal, appeals committee and in the Karatina court;

26. The applicant's contention is that the respondent used the old Grant at the Lands Office to change the status of the land and the respondent got himself registered solely and absolutely; he also contends that with the demise of his mother the Grant has become useless and inoperative; by alleging that the respondent used the old Grant at the Lands Office to change the status of the subject property it is evident that it is the applicant who is guilty of deliberate non-disclosure of material facts to this court;

27. The ownership of the subject property was dealt with in the first instance by the Karatina Court; the Certificate of Confirmation dated the 28/05/2001 was issued and the same was effectuated and the subject property was transmitted as per the Certificate of Confirmation; and the property was sub-divided into two (2) portions and transmitted to the applicant's mother and to the respondent; and that this was all done before the demise of the applicant's mother;

28. It came out in cross-examination that the parcel of land known as Naru/Moru/Kiamathage Block 1/5 was not included in the Karatina Succession Cause even though his mother's prayer in her objection proceedings was that it be included and be distributed to her; he confirmed that the respondent was not interested in this parcel of land as it had been bought by the applicant's father;

29. What is apparent is that the property in Narumoru belonged to the applicant's father the deceased herein; and the respondent at all material times has indicated that he has no vested interest in this property at all; and from the evidence on record it is also apparent that there would be no opposition by the respondent on the distribution of the Narumoru property;

30. Therefore, it would have been prudent for the applicant to have filed an application for review of the order of 28/08/2001 to introduce other properties, if any, that may have been omitted; alternatively, the applicant can proceed to finalize this instant succession cause after the exclusion of the subject property;

31. This court is satisfied that there is sufficient evidence on record to demonstrate that proper steps were taken to determine the persons entitled to the subject property; and finds that the instant application for revocation of the grant to be misplaced; as the applicant's entire application does not disclose any element of fraud, or the making of a false statement or of concealment of material facts;

#### **FINDINGS&DETERMINATION**

32. In the light of the forgoing this court makes the following findings;

(i) The Grant issued to the respondent and the applicant's mother as joint administrators and the Certificate of Confirmation of Grant dated 15/02/2008 are both found to have been obtained procedurally;

(ii) The application for Revocation of the Grant and the Confirmed Grant is found to be lacking in merit and it is hereby dismissed;

(iii) This being a family matter each party shall bear its own costs;

It is so ordered accordingly.

**Dated, Signed and Delivered at Nyeri this 13<sup>th</sup> day of February, 2020.**

**HON. A. MSHILA**

**JUDGE**