



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**SUCCESSION CASE NO. 10 OF 2017**

**IN THE MATTER OF THE ESTATE OF JOHN KIMOTHO (DECEASED)**

**RULING**

1. Before me is Summons for Revocation or Annulment of Grant filed on 11<sup>th</sup> November, 2014 brought under Rule 44(1) and (2) of the Probate and Administration Rules. The Applicant sought in the main an order that the Certificate of Confirmation of Grant issued on 17<sup>th</sup> June, 2013, at Thika Law Courts relating to succession cause number 311”B” of 2008 be revoked.
2. The Application is based on the grounds that the lower court lacked pecuniary jurisdiction and that the grant was obtained fraudulently.
3. **LYDIA WANGUI MWANGI** filed her affidavit in support of the Summons for revocation and/or annulment of grant. She deposed that she is an interested party by virtue of a purchase in respect of 1 acre out of the parcel of land known as **NDARUGU/GATHAITE/1526** belonging to the deceased. That the same was purchased by her deceased husband **Michael Mwangi Bage**. She contended that she had signed the consent in relation to the institution of the succession cause for the deceased’s estate but the administrators thereafter applied for Grant of Letters of Administration intestate without notifying her that the grant was confirmed and a Certificate of confirmed Grant issued. In effect she was fraudulently left out. She contended that without a court order restraining all dealings on the parcel of land she will be prejudiced and suffer great loss. She urged the court to annul the Certificate of Confirmation of Grant as she is entitled to an acre of the said parcel of land.
4. **ISAAC THUKU KIMOTHO, MARGARET NDUTA KIMOTHO, STANLEY NDURU KIMOTHO, JANE WANGUI MWANGI, LUCIA WANGARI KIMOTHO and TERESIAH WANJIRU KIMOTHO** filed their replying affidavit as administrators and beneficiaries of the deceased’s estate in reply to the summons for revocation of grant. They deposed that the deceased died intestate and had never indicated that the Applicant had bought land from him. They contended that where consent to transfer land has not been obtained from the relevant land control board, the purchase contract is null and void. In any case, they contended, the Applicant lacks *locus standi* to lodge the instant application as there is no contract between her and the deceased. And moreover, she has not obtained letters of administration in respect of her husband’s estate.
5. The court directed that the Summons for Revocation of Grant proceeds by way of viva voce cross-examination of deponents to affidavits, followed by written submissions.
6. **LYDIA WANGUI MWANGI** testified as **PW1**. Adopting her affidavit, she testified that the deceased sold 1 acre parcel of land to her deceased husband in 1990; that the couple grew tea thereon but the husband died before transfer of the said land was effected. She stated that her husband paid Kshs. 48,000/= and that she is presently in possession of the said land where she continues to grow tea. She contended that the administrators herein concealed the institution of this cause from her and had attempted to sell the land to a third party. In cross-examination, she stated that she did not have any records relating to the land purchase or letters of administration in respect of her husband’s estate. She claimed that that the transaction granted consent by the Land Control Board but produced no such record.
7. **STANLEY NDUNGU KIMOTHO** testified as **RW1**. He adopted his replying affidavit filed on 1/12/14 and urged the court to uphold the confirmed grant. In cross-examination by the Applicant, he stated that he had obtained necessary papers from his local chief to enable him apply for the letters of administration and denied the allegations that the Applicant is using the parcel of land. He also stated that he was not aware of the alleged sale and pointed out that the Applicant lacks the requisite documents to prove that her husband purchased the land.
8. **JANE WAITHERA KIMOTHO** testified as **RW2**. She adopted her affidavit sworn on 1/12/2014. In cross-examination by the Applicant, she stated that she was not aware that the Applicant was using the parcel of land. She stated that the allegations that the Applicant grew tea on the said land were untrue. She reiterated that the deceased did not sell the alleged land to the Applicant’s husband.
9. At the close of the evidence by respective parties the court directed that submissions be filed. Only the Respondents filed their written submissions. Through their counsel, it was submitted that the Applicant is not a beneficiary in the deceased’s estate and as such it was not necessary to involve her in the succession cause. Further, it was submitted that the Applicant lacks document to prove that her husband purchased the said 1 acre piece of land from the deceased. And that any sale agreement in respect of land for which no consent had been obtained is deemed null and void as stated by the court in **ELC CASE NUMBER 281 of 2017 Moses Kamande Nyambura vs Francis Munyua Ngugi**. It was asserted that the Applicant did not tender any letters of administration as evidence that she is an administrator of her

husband's estate and in the circumstances lacks legal capacity to institute suit. Counsel urged the court to dismiss the application. That the Applicant was responsible for delaying the transfer of the assets in the deceased's estate, therefore, denying the Respondents quiet and peaceful possession.

10. The court has considered all the matters canvassed. The deceased herein died intestate. There is no dispute that the Applicant is not related to deceased as a beneficiary. Thus, under Rule 7(7) of the Probate and Administrator Rules, her consent was not necessary before the beneficiaries entitled could file and prosecute the succession cause. At best, her interest, if any, would have been indicated under assets and liabilities pursuant to rule 7 (1) (d) of the Probate and Administration Rules.

11. It seems from annexure "LWM5" to the Applicant's supporting affidavit, and particularly **Form P & A5** that in the initial Petition for grant, the Respondents had included the Applicant's name as a "purchaser" but did not reflect any liabilities to the estate in that regard. Subsequently, the Petitioners have disavowed any rights acquired by the Applicant or her husband through purchase of the deceased's land, citing the fact that the deceased did not indicate such transaction, and the absence of records.

12. The Applicant for her part, merely asserted that her deceased husband had entered into an agreement with the deceased herein in 1990 to purchase one acre out of **LR. NO. NDARUGO/GATHAITE/1526** which she claims to be in possession of. No evidence of such possession was tendered and beyond bare assertions, the Applicant did not tender any agreement of sale or consent from the Land Control Board regarding the alleged transaction. The chief's letter (annexure **LWM 1**) cannot be a substitute for such records.

13. Section 76 of Law of Succession Act provides for instances when a grant may be revoked by providing 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 any interested party 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 allegations was made in ignorance or inadvertently**

**d)....**

**e)....."**

14. From the material presented by the Applicant, there is not even *prima facie* evidence that her husband ever transacted with the deceased in respect of the purchase of one acre of the suit property. The fact that her name was initially included in the petition as purchaser did not by itself confer upon her any proprietary rights over any of the deceased's stated assets. And more so in the face of the Respondents' rejection of such claims. The Applicant has not demonstrated any firm ground to justify the revocation of the grant herein in the circumstances. The Applicant apparently abandoned the second ground with regard to the pecuniary jurisdiction of the court and confined herself to the ground relating to alleged purchase of land by her deceased husband. In the circumstances, the application must fail and is dismissed.

**DELIVERED AND SIGNED AT KIAMBU THIS 6<sup>th</sup> DAY OF FEBRUARY 2020**

**C. MEOLI**

**JUDGE**

**In the Presence of:**

Mr. Khisa holding brief for Mr. Njoroge for Respondent

Irene Wangari – Respondent in person

Court Assistant – Nancy/Kevin