



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 216 OF 2005

IN THE MATTER OF THE ESTATE OF SIMON M. KIRIKA RUGENIO- DECEASED

KAREI RIGINA KIRIKA PETITIONER/RESPONDENT

VERSUS

MAURINE KIANJIA M'ARITHIAPPLICANT/OBJECTOR

RULING

1. **Simon M'Kirika Eugenio** (the deceased) to whom this succession cause relates, died on 29/12/2002. He left behind Land Parcel No. Nkuene/Ngonyi/895 and the following beneficiaries Charles Kirinya, Richard Kimathi, Joseph Kobia John Mutuma, Rachel Gaichungi Michai and Florine Kinya.

2. On 28/10/2010 the applicant herein filed summons for revocation and annulment of grant under section 76 of the Law of Succession Act. The application was based on the grounds stated in the application and the supporting affidavit of Maurine Kiajia M'Arithi who averred that she is a beneficiary in the estate of the deceased by virtue of being his wife as they sired two children Doreen Kagwiria Kirika and Amos Murerwa Kirika. During the lifetime of the deceased she purchased 1.25 acres from Land Parcel Nkuene/ Ng'onyi/619 which was subject to a succession cause. Upon the finalization of the succession cause the deceased herein without her knowledge caused Nkuene/Ng'nyi/895 to be registered in his names as it was the subdivision of Nkuene/Ng'onyi/619.

3. After realizing that the deceased had stolen her land, she sued him before the tribunal and judgement was pronounced in her favor. She therefore accused the petitioner of non-disclosure of material facts to this court which led to the issuance of grant on the basis of misinterpretation of facts.

4. The application was opposed by the replying affidavit and further replying affidavit of Karei Regina Kirika dated 3/10/2014 and 31/3/2017 respectively where she stated that the applicant has never been a wife to the deceased herein. She was his only wife and were blessed with 6 children. Her deceased husband bought Land Parcel Nkuene/Ngonyi/895 and was registered in his names in 1997. He paid the vendors and left records to that effect. Additionally, the deceased had prior to his death transferred to her other parcels of land at Ankamia which were under adjudication. The proceedings before the Land District Tribunal are a nullity as they do not have jurisdiction to adjudicate on matters of title of land.

5. This matter was heard vide viva voce evidence where **OB1 MAURINE KIANJIA M'ARITHI** in her testimony reiterated what was contained in her affidavit dated 28/10/2010. She added that she bought the land herein from Silas Mwiti and Mbae Zacharia and at that time the said land was in their fathers name and they did succession and recorded the deceased name. She claims the land as a purchaser and also a wife of the deceased. They lived and raised their children together. The 1st wife had 6 children who also used to visit her house. OB1 testimony was corroborated by her brother **OB3 BEDAN MBAE M'ARITHI**

6. **OB2 JOSEPH GIKUNDA** a longtime family friend told the court that the applicant herein was married to the deceased herein and in 1994 the applicant told him that she wished to buy some land and together they found the suit land that was being sold by Silas Mwiti and Mbae Zacharia. The applicant entered into an agreement with the said vendors and acquired the land without the help of her husband.

ANALYSIS AND DETERMINATION

7. The question to be answered is **whether the grant issued on 21/5/2007 should be revoked?**

8. The applicant in her submissions argued that she was a wife of the deceased herein and presented witnesses in support of the claim. In addition, she claims that, in Tribunal case no. 67 of 2001 it was determined that Parcel No. Nkuene/Ngonyi/895 be registered in her name. She claims that this court has jurisdiction to hear matters that relate to the suit in question.

9. On the other hand, the petitioner argued that the applicant has failed to prove that she was a wife to the deceased. Moreover, the application is premised on trust and/or contractual affair and this court lacks jurisdiction to hear such a dispute. The claim is on breach of trust or fraud and this court lacks jurisdiction. The applicant annexed proceeding from a tribunal to be enforced herein which this court cannot enforce. Rachael Gachugi an interested party has sworn affidavits that she bought the land from the petitioner after confirmation of grant and Section 93 protects her because she is an innocent purchaser who bought the land after confirmation of grant.

10. Section 76 of the Law of Succession Act governs Revocation or Annulment of grant and 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 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 has ordered or allowed; 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.”

The application before me is for revocation of grant. And I will apply the test provided in section 76 of the Law of Succession Act. However, the application also carries a claim of trust. The petitioner argued that this court does not have jurisdiction to hear disputes on trusts. According to the Court of Appeal in the case of Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge [2017] eKLR :

“In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165 (3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap. 160. Moreover, the Constitution of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b); 20 (2); 21(1), 165 (3) (a) and 164 (3).”

11. I would however add that, in deciding the question of trust, the court will be ascertaining the estate property- which is squarely within this court’s jurisdiction. The issue of trust is not a trifle; it is protracted one and was even a subject of land tribunal between the applicant and the deceased. Without determining this claim in this application, I find that evidence produced, on *prima facie* basis justifies an intense interrogation of the matter in order to establish the estate property. I note that a third party also claims to have purchased the land in question after confirmation of grant, and she seeking protection as innocent purchaser under section 93 of the Law of Succession Act. These are weighty matters which will require proper evaluation in a session specially tailored for that purpose within these proceedings. Such evaluation cannot be undertaken in a revocation application. In my view, revocation of grant legally re-opens proceedings, thus, paving way for plenary hearing and determination of such weighty issues I have alluded to above. I say so because upon revocation, the cause becomes amenable to litigation and resolution of disputes on identity of beneficiaries, ascertainment of estate property and distribution of the estate. I will therefore make appropriate order on the issue of trust after I have determined revocation application.

12. The applicant claims she is a wife of the deceased. On *prima facie* basis, evidence suggests she was a wife of the deceased and had two children of that union. This fact as well as the one on trust were not disclosed by the petitioner. Therefore, the grant herein was obtained by a concealment of material facts. In light of the above I find that the application dated 28/10/2010 has fulfilled the ingredients to revoke the grant and consequently make the following orders: -

I. The grant issued on 21/5/2007 is hereby revoked.

II. As this cause cannot remain without an administrator, and in the best interest of all the parties herein, I appoint both the

applicant and petitioner as joint administrators of the estate of the deceased until otherwise ordered. A grant be issued accordingly.

III. The question of trust on Land parcel Nkuene/Ng'onyi/895 to be determined first so as to ascertain estate property herein. The applicant and the petitioner to tender further evidence, oral and documentary, on purchase of this land within 30 days. The court shall then determine the issue of trust and ascertain the estate property.

IV. In the interest of justice, these orders be served upon the person currently registered as owner of the said parcel of land. The person registered as the proprietor of the said parcel of land shall not however sell or charge or exchange or deal with the said parcel of land in a manner that is prejudicial to these proceedings.

V. Each party to bear its own cost

Dated, signed and delivered in open court this 3rd day of March 2020

F. GIKONYO

JUDGE

IN PRESENCE OF

Murithi for Ken Muriuki for petitioner

Objector in person

F. GIKONYO

JUDGE