



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 367 OF 2011

IN THE MATTER OF THE ESTATE OF MUGWIKA RIMBERIA ALIAS M'MUGWIKA M'RIMBERIA (DECEASED)

JANET KIRUNGI MUGWIKA..... PETITIONER

VERSUS

ALFRED MWITI BUNDI.....APPLICANT

TABITHA NTINYARI M'MUGWIKA 1ST INTERESTED PARTY

AMOS KIMATHI JOTHAM.....2ND INTERESTED PARTY

GEDION KAIMENYI3RD INTERESTED PARTY

DORCAS MAKENA.....4TH INTERESTED PARTY

ALICE MUKIRI JOTHAM.....5TH INTERESTED PARTY

JANE KENDI..... 6TH INTERESTED PARTY

LUCY KARIMI 7TH INTERESTED PARTY

KENYA WOMEN MICRO FINANCE

BANK LIMITED..... 8TH INTERESTED PARTY

MOSES MURITHI JOTHAM.....9TH INTERESTED PARTY.

RULING

1. Before me are summons for revocation of grant brought pursuant to section 76 of the law of succession act, rules 27, 44, 49 and 73 of the law of succession act and section 68 of the Land Registration Act No. 3 of 2012 seeking inhibition orders restricting any kind of dealings over LR No. NYAKI/MULANTHAKARI/243 and the revocation of the letters of administration issued to the petitioner on 4/10/2011 and confirmed on 27/6/2012.

2. The application was based on the grounds on the face of it and on the supporting affidavit sworn on 17th October 2019 and further supporting affidavit filed on 11/11/2019 of Alfred Mwititi Bundi who deponed that the deceased herein was his grandfather. His father was Joel Bundi M'Mugwika was not included in the cause even though the chief's letter indicated that he was son to the deceased. The applicant was additionally not involved in the cause and the suit land, NYAKI/MULANTHAKARI/243 which is ancestral land was first registered in the deceased in the name of the deceased and has since changed hands since the grant herein was confirmed.

3. The deceased herein M'Mugwika M'Rimberia died on 11th November 1993 and the petition for Grant of letters of Administration to the estate were filed on 13th July 2011. Letters of Administration herein were granted to Janet Kirungi M'Mugwika on 4th October 2011 and the same was confirmed on 27th June 2012 when a certificate thereof was issued. In the Application for confirmation, the beneficiaries consented that LR. No. Nyaki/Mulanthakari/243 which was the only asset in the estate be devolved in whole to the said Janet Kirungi M'Mugwika. There was no rider that Janet Kirungi M'Mugwika was holding the said asset in trust for herself and the children of the deceased or dependants. The Letter dated 28th June 2011 introducing the widow and the children of the deceased showed that Joel Bundi the

father of the Applicant herein was deceased and from the application certificate of death shows that he died on 9th May 2002 aged 27 years.

4. The suit land having been transmitted and registered in the name of Petitioner on 1st March 2016 she charged it to KWFT in order guarantee loan facility advanced to the 9th Interested Party and his wife Beatrice Kathure. The 9th Interested Party defaulted in repaying the loan and the 8th interested party exercised the Statutory notice to sell the security.

5. The application was opposed by the replying affidavit of Jeremiah Kanu Muriithi a Credit Risk Manager, North Region of the 8th interested party. He confirmed that the 9th interested party together with his spouse applied for a loan facility and the same was extended vide a letter of offer dated 21/5/2014. The said loan was secured by NYAKI/CHUGU/174 and a third party charge was registered over NYAKI/MULANTHAKARI/243 which is registered in the name of the Petitioner.

6. The borrowers failed to regularize their payments as required which continued to accrue interest and on 13/6/2018 they were issued with a three months' statutory Notice of Sale. The petitioner again failed to react to the statutory notice and consequently the 8th interested party issued them with a 40 day notice of intention to sell, securing the property to recover the entire loan amount plus interest amounting to Kshs. 5,203,177.02.

7. Despite the issuance of all the notices none of the borrowers put forth a viable proposal as to settlement that led to the 8th Interested Party to instruct the firm of view line auctioneers to carry out a public auction. The 9th interested party approached the 8th Interested Party to have a private treaty to dispose parcel No. Nyaki/Chugu/174 and on 31/01/2019 he entered into a sale agreement with Gilbert Murithi Kirunja for a consideration of Kshs. 900,000. Upon payment of the said consideration the 8th Interested Party executed a discharge for NYAKI/CHUGU/174.

8. The partial payment of Ksh. 900,000 could not settle the outstanding loan and therefore the borrowers were issued with a redemption notice. Again the borrower did not put a proposal and the 8th interested party in compliance with statutory requirements put an advert of sale by way of auction in the Daily Nation newspaper published on 8/7/2019 and they instituted Meru CM ELC 216 of 2019 where they prayed for an order for an accounts of the Plaintiffs loan with the defendants and an order of permanent injunction restraining the defendant from selling and/or alienating land parcels Nyaki/Mulanthankari/243 in any way without issuing and/or service of the requisite statutory notices of sale, alternatively a declaration that the intended sale is illegal. The Applicant has not made reference to the suit in the Magistrates court and it is not known whether the same is determined or not.

9. At the time of creating third party charge over NYAKI/MULATHANKARI/243 the 8th interested party claimed they carried out due diligence and that there was nothing on the green card indicating that the petitioner was holding the property as a trustee for any party. They contended that the Applicant herein therefore lacks locus to agitate for his deceased fathers interest in the estate and that an innocent charge just like an innocent purchaser is protected under the law of succession act.

10. The application was also supported by the Replying affidavit of Janet Kirungi M'Mugwika sworn 7th November 2019 the Petitioner herein who stated that the Applicant was in school during the confirmation of grant. The suit land is family land and is occupied and used by all the deceased children. When the land was given to her she knew it wasn't hers alone but for the benefit of all the deceased children. She did not inform the Applicant and the 1-7 interested parties about charging the land and only the 9th Interested Party received and benefitted from the money. This was supported by the affidavit of Tabitha Ntinyari M'Mugwika sworn on 7th November 2019.

11. I have carefully perused the application, affidavits, submissions and the record in its entirety and the issues for determination are

a. Whether to revoke the grant issued on 4/11/2011 and confirmed on 4/10/2011

12. The provision that deals with revocation of grant is Section 76 of the Law of Succession Act that 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 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.

13. It was the applicant argument that he was never involved in the succession matter herein yet his deceased father was a son to the deceased herein and entitled to a share of the estate of deceased. It was therefore his argument that the grant was obtained by concealment of something material to the case. On the other hand the 8th interested party contended that all the beneficiaries of the deceased executed consent to the mode of distribution and therefore the applicant has no locus to file the said application.

14. On examination of the record, It would appear that the father of the deceased was 19 years at the time the Applicant alleges that he was born that is in 1994. That begs the questions as to why the chief who wrote the letter introducing the beneficiaries and the dependants failed to inform the court that the deceased beneficiary Joel Bundi had died but was survived a son namely the Applicant. This court will require to interrogate the chief who wrote the letter to confirm that the said Joel Bundi had such a son and explain why he excluded him. The Identity card of the Applicant was not annexed to the application to confirm that indeed he is the son of the deceased Joel Bundi. The succession cause was initiated and Janet Kirungi M'Mugwika, the deceased widow herein was issued with a grant of letters of administration on 4/10/2011 which were later confirmed on 27/6/2012. On further examination of the record it was noted that all the deceased dependants who were alive consented to the mode of distribution where the suit land was to be registered in the name of the petitioner wholly. When Janet Kirungi M'Mugwika guaranteed the loan taken by the 9th Interested Party and his wife she made a statutory declaration swearing that her spouse died on 11th November 1993 effectively saying that there was no one else claiming the parcel of land in question and therefore it was free of any encumbrances either expressed or implied. She had the opportunity to inform the bank that the property she was using to guarantee the loan to the 9th Interested Party and his wife was an ancestral land occupied by her children and grandchildren.

15. In light of the above and inconsideration that LR. No. Nyaki/Mulanthakari/243 devolved in whole to the Petitioner, I find that the application for revocation is without merit and is therefore dismissed.

16. The Interim order of inhibition made herein on 18th September 2019 is lifted.

17. Costs of this application shall be borne by each party.

HON ANNE ADWERA ONG'INJO

JUDGE

RULING DATED, SIGNED AND DELIVERED BY EMAIL AT MERU THIS 15TH DAY OF OCTOBER 2020.

HON ANNE ADWERA ONG'INJO

JUDGE