



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 623 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE LUCY WANGARI MURAGE (DECEASED)**

**HELLEN WAIRIMU NGURE.....1<sup>ST</sup> APPLICANT**

**MARGARET WANGUI NGURE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**VICTOR WACHIRA KARIUKI.....1<sup>ST</sup> RESPONDENT**

**LOISE WANGARI WACHIRA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court in the summons for annulment of grant dated 29/1/2018. Vide that application Hellen Wairimu Ngure and Margaret Wangui Ngure seek orders;

**1. THAT the grant of letters of administration issued to VICTOR WACHIRA KARIUKI and LOICE WANGARI WACHIRA and confirmed on 27<sup>th</sup> April 2012 be annulled.**

**2. THAT costs be in the cause.**

2. The application is supported by the affidavit of Hellen Wairimu Ngure and premised on grounds namely;

(a) That the proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained by concealment from the court of material facts.

(c) That the petitioners have no right whatsoever to claim the whole parcel of land namely BAHATI/KABATINI BLOCK 1/472 since it does not wholly belong to them.

(d) That the application be allowed in the interest of justice.

3. It is the applicant's case that the grant herein was issued fraudulently and material facts concealed from the court by the administrators of the estate of Lucy Wangari Murage since the administrators knew that LR Bahati/Kabatini Block 1/472 belonged to Margaret Wangoi Murage.

4. The applicant avers that the said parcel of land had been shared out by Margaret Wangoi Murage in her lifetime to her daughter Hellen Wairimu Ngure and to the children of Lucy Wangari Murage, a deceased daughter.

5. The application is opposed and preliminary objection is raised on point of law to wit;

1. That this honourable court lacks the jurisdiction to determine the instant application as the same raises issues of ownership of land can only be handled by an Environment and Land Court or Chief Magistrate's Court.

2. That the issue of ownership of the land is currently before Hon. Oduor in Nakuru CMCC ELC No. 26 of 2018 for determination

between David Maina Kariuki vs. Margaret Wangui Ngure.

6. The application was canvassed by way of written submissions.

7. I have had occasion to consider the summons, the supporting affidavit and grounds, the preliminary objection and the learned submissions by counsel.

8. Of determination is whether the applicant has achieved the threshold set for the revocation and/or annulment of grant provided for under **Section 76** of the **Law of Succession Act**. That section provides;

**Section 76** of the **Law of Succession Act** provides;

**“S. 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 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.”**

9. The main bone of contention by the applicants is that property Bahati/Kabatini Block 1/472 was not the deceased's property as the same was registered in her name on 24/3/2010, two (2) years after her death.

10. Lucy Wangari Murage the deceased herein died on 23/10/2007. In the form P & A 5, the affidavit in support of petition for letters of administration intestate, property Bahati/Kabatini Block 1/472 is listed as one of the assets of the deceased. The petition was lodged in court on 16/12/2010.

11. The applicants have annexed a green card showing that the title to the land in question passed to Lucy Wangari Murage on 24/3/2010. This is slightly over two years from the date of her death.

12. The land register as seen from the green card shows that the title to parcel number Bahati/Kabatini Block 1/472 was in the names of Margaret Wangui Murage upto the 23/3/2010 when title passed to Lucy Wangari Murage who was long dead by this time.

13. To that extent therefore as at 23/10/2007 when the deceased died, parcel number Bahati/Kabatini Block 1/472 was certainly not a free property of the deceased.

14. Free property of the deceased is defined under **Section 3(1)** of the **Law of Succession Act** as;

**“Free property” in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”**

15. As of 23/10/2007, the property Bahati/Kabatini Block 1/472 was certainly not a property of the deceased.

16. For inexplicable reason(s), the respondents did not find it necessary to offer evidence by way of affidavit to controvert the very serious allegations raised in the applicant's affidavit.

17. The respondents have chosen to answer this application through a preliminary objection on a point of law. It is stated that since the application raises issues of ownership, the same can only be handled by an Environment and Land Court or Chief Magistrate's Court. It is also urged that the issue of ownership of the land is currently before **Hon. Oduor** in **Nakuru CMCC Environment and Land Court Case Number 26 of 2018**. I agree with the respondents contention that where ownership of land is in issue, the proper court to adjudicate over the

dispute would be the Environment and Land Court or Chief Magistrate's Court. I concur too that a suit cannot be litigated simultaneously in two courts whether of the same tier or otherwise.

18. Indeed counsel has in his submissions brought a lot of clarity in respect of the issue of the jurisdiction of this court in handling issues of ownership of land in a probate cause. He has relied on various authorities including one by me on this issue.

19. I part ways with respondents in so far as this instant suit is concerned for the reason that what is under test in the current application is the propriety of the grant issued and confirmed by this court and more specifically in so far as it touches on the distribution of parcel of Land Bahati/ Kabatini Block 1/472.

20. As seen from the provision of **Section 76** of the **Law of Succession Act** where the grant is obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case and where the grant is obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, such a grant, may at any time, be revoked or annulled by the court either on its own motion or on application by an interested party.

21. As seen above from the evidence from the lands registry exhibited, parcel of land Bahati/ Kabatini Block 1/472 was not a free property of Lucy Wangari Murage (deceased) at the time of her death. It is however, now in her name as from 24/3/2010. The propriety of this title is a matter the protagonists can litigate elsewhere and I cannot purport, within the scope of this matter, to finally adjudicate on the propriety of this title or otherwise. That is better left to the parties to pursue in the appropriate jurisdiction. What is clear is that the administrator listed the same as a property of the deceased in the form P & A 5 when petitioning for grant. This was clearly a false statement made to the court and something very material was concealed to the court.

22. In view of the above threshold for the revocation or annulment of grant has been achieved by the applicant.

23. So what orders would serve the interests of justice in this matter? The applicants do not challenge the grant claiming either priority entitlement to apply for the grant or any rights as beneficiaries of the deceased herein.

24. The only defect in the confirmed grant is the inclusion of property Bahati/ Kabatini Block 1/472 which prima facie on evidence presented before me was not a free property of the deceased as at the time of her death.

25. As held by *Khamoni J* in **Re ESTATE OF NGUGI (DECEASED) [2002] 2 KLR 434** where the complaint of a person applying for revocation of grant relates to what happened during confirmation process, revocation or annulment should not be sought as the certificate of confirmation of grant can be dealt with without having to cancel the grant of representation. (See also in **Re ESTATE OF GITAU (DECEASED) [2002] 2KLR 430**).

26. In our instant suit as seen earlier, the only defect in the confirmed grant is that it included property Bahati/ Kabatini Block 1/472 which prima facie on evidence presented was not a free property of the deceased at the time of her death.

27. It follows that this property should be removed from the confirmed grant because at the moment it cannot be deemed to constitute the net estate of the deceased, that is, that which she was free to deal with during her lifetime. It is only after the Environment and Land Court has concluded determining the issue of ownership that this Court can then oversee its transmission to the beneficiaries. I however do not think the inclusion of the property warrants revocation of the grant. The court should make appropriate orders it deems fit in the circumstances to serve the ends of justice.

28. In the circumstances, I am inclined to allow the summons herein and make the following orders;

- 1. The certificate of confirmation of grant dated 27<sup>th</sup> April, 2012 is amended by removing therefrom asset described as Bahati/ Kabatini Block 1/472.**
- 2. Any title arising from a transfer of title number Bahati/Kabatini Block 1/472 through transmission on the strength of the certificate of grant in the estate of Lucy Wangari Murage is hereby cancelled.**
- 3. Parties are at liberty to pursue their respective rights in respect of title number Bahati/Kabatini Block 1/472 as they may deem fit.**
- 4. Each party to bear its own costs.**

**Dated and Signed at Nakuru this 7th day of February, 2019.**

**A. K. NDUNG'U**

**JUDGE**