



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 41A OF 2003**

**FRANCIS KANDENGE.....1<sup>ST</sup> APPLICANT**

**JOHN NYAGA KIMANI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JACKSON NJAGI MIRIO.....APPELLANT/RESPONDENT**

**RULING**

The background to this application is necessary. It is gathered from the record comprising proceedings from **KERUGOYA SRMCC No 133 of 2000 FRANCIS KANDENGE & JOHN NYAGA KIMANI vs. JECINTA MUTHONI MURIITHI & JACKSON NYAGA MIRIO.**

That Nyaga Nduku died in 1994. He had one property LR INOI/KARIKO/ 763. His daughter Jecinta Muthoni filed Embu Succession Cause no 34 of 1996. In a sale agreement dated 26<sup>th</sup> February 1996 before obtaining letters of administration, she sold 11/2 acres, part of that land to Jackson Mirio the respondent herein. The parcel 763 was subdivided into two Inoi/Kiriko/ 1711 to the respondent and 1712 to Jecinta.

It turned out that the deceased had sold INOI/KARIKO/763 during his life time in 1976 to the applicants. That sale was subject of a suit Nyeri CMCC 277 of 1982 between the applicants and Nyaga Nduku the outcome of which was that the land was divided into two equal shares, one to the applicants, the other to the sons of Nyaga Nduku. Jecinta Muthoni was found to have acted fraudulently in Kerugoya SRMCrC no 1111 of 1997 with regard to the succession cause and the HCCC 277 of 1982. She was found guilty of the charges, convicted and sentenced.

In the Civil suit the subject of this appeal file the trial magistrate found that the Respondent was not an innocent purchaser for value, that the Jecinta had no capacity to sell the land to him, that the applicants purchase of land from Nyaga Nduku was not controverted. He ordered that the two parcels INOI/KIRIKO/1711 and 1712 be retransferred to the applicants, and to effect that, invoked s. 76 LOSA and revoked the grant issued to Jecinta Muthoni in Embu SRM Succession Cause no. 34 of 1996.

What followed was this appeal by the Respondent herein. The matter was heard and determined by Makhandia J as he then was. In a judgment dated and delivered on the 31<sup>st</sup> January 2008, the judge collapsed all the 7 grounds of appeal into one: ***'Whether or not the learned magistrate had the jurisdiction to revoke a grant of representation issued and confirmed by the Embu PM's court in succession cause no. 34 of 1996'***.

After agreeing with the learned magistrate on all the above facts the judge stated:

**On the material before me I have no doubt that the learned magistrate was right in holding that the Jecinta lacked capacity to enter into an agreement to sell the original suit premises as at 26<sup>th</sup> February 1996 when the agreement for the sale of a portion of the suit was executed. She had by then not obtained a grant of letters of administration to the estate of her deceased father Nyaga Nduku, the owner of the original suit premises. Accordingly the sale agreement she entered into was null and void ab initio. Further I agree with the learned magistrate that the appellant was irregularly included into the succession cause earlier alluded to as a purchaser when he was not. He did not buy the land from Nyaga Nduku and did not therefor qualify as a beneficiary to the estate of the deceased by virtue of being a purchaser. On the material before me I have no doubt that the grant was obtained fraudulently by making false statements or by concealment from court of something material to the case.**

**It is also not lost to me that due to her conduct Jecinta was charged, tried, convicted and sentenced in Kerugoya Magistrate's court Criminal case no. 1111 of 1997. All these were sufficient grounds for the revocation of the grant by court suo moto or on an application of a concerned or interested party...the learned magistrate ...he did not have the jurisdiction. The jurisdiction can only be invoked by the High Court....the appeal succeeds...I ...set aside the orders of the learned magistrate.**

**I will however invoke section 76 of the Law of Succession Act , s. 73 of the P&A Rules and s. 60 of the Constitution and call for the court file in respect of Embu PMC Succession Cause no. 34 of 1996 for further orders and or directions". (emphasis mine)**

It is this final part of Makhandia J's judgment that has kept this case in this court as backlog for the last **10(TEN) years!** Since that order on 31<sup>st</sup> January 2008, over a span of 10 years, the matter has been mentioned more than 25 times before Makhandia J, Serгон J, Ombwayo J, Mativo J, Ngaah J and myself to confirm the whereabouts of Embu PMSucc Cause no 34 of 1996. That file is gone, just like that! A file has no life of its own. Court files are made of paper. They contain paper documents. They have things related to the matter filed written in them, proceedings, orders. A file has neither head, hands nor feet. It has no mind of its own. It cannot decide that, Today I will be here and tomorrow I will go there. Someone makes those decisions. It must be moved physically from one place to the other. For it to be untraceable, cannot have been its own idea! That idea was formed by somebody who moved it and made it untraceable.

It's the actualization of that idea where that file became untraceable that provoked the application that is before me for determination brought by way of Notice of Motion dated 6<sup>th</sup> July 2018 by Francis Kandenge under sections 3A, 3, 1A of the Civil Procedure Act and Order 42 rule 25 of the Civil Procedure Rules.

He seeks the following orders:

1. **THAT** be an order that Embu SPM Succession No.34 of 1996 be presumed as lost or unavailable.
2. **THAT** the court do order that grant issued in Embu SPM Succession No.34 of 1996 be revoked.
- 3., **THAT** the court do issue a flesh grant in the names of applicants FRANCIS KADENGE KANGANGI and JOHN NYAGA KIMANI.
4. **THAT** costs of this application and entire appeal be provided for.

On the following grounds:

1. **THAT** the judge had asked for Embu SPM Succession No.34 of 1996 to be brought for purposes of further orders and directions.
2. **THAT** it is clear from the judgment on appeal that the intention of the court on this Appeal was to revoke that grant.
3. **THAT** in any event the grant was issued without knowledge that the applicants had prior to the death of the deceased NYAGA NDUKU got judgment against him divesting him of the land parcel Number INOI/KARIKO/763 which later resulted in Land Parcels Numbers INOI/KARIKO/1711 AND 1712 in NYERI SRMCC NO.277 OF 1982.
4. **THAT** it is otherwise mete and just to conclude this appeal by revoking the grant in EMBU SPM Succession No.34 of 1996 and issuing a fresh one.

And the supporting affidavit sworn by the applicant on his behalf and that of his co applicant. In the affidavit he reiterates the facts as set out above and added that the order of the court in Nyeri SRMCC 277 of 1982 dated 16<sup>th</sup> May 1994 was for the Executive Officer to execute the necessary documents to have the LR Inoi/ Kariko/ 763 subdivided and transferred to applicants each 1.25 acres and two other persons as joint proprietors of 0.5 acres. He also annexed a green card showing that he had entered a caution on the land in 1977 which caution was removed on the strength of Embu Succession Cause 34 of 1996, by Jecinta Muthoni through fraudulent means on 29<sup>th</sup> September 1996. As a result, the respondent and Jecinta were registered on the strength of Embu Succession Cause 34 of 1996. That because of the pendency of this appeal, he cannot be registered as the proprietor of his lawful parcel of land. That the two of them should be registered as proprietors of 1711 and 1712 respectively.

The respondent opposes the application. He contends that by allowing the application and invoking the provisions of s. 76 Law of Succession Act, the judge brought the appeal to an end and the proceedings in the file ended. That the only path open to the applicants was to appeal against Makhandia J's judgment. That the only place where Makhandia J could make any further orders and directions would be in Embu PM Succession Cause no 34 of 1996 and not in this appeal, which file could not be traced. He annexed a bundle of letters to demonstrate that the Embu file could not be traced.

That the applicant cannot be heard to say that Justice Makhandia intended to revoke the grant because that was a matter that would have required the participation of all the parties. That the original title does not exist and there for each party should live with their end of the judgment.

Parties agreed to dispose of the application by way of written submissions.

Mr. H.K Ndirangu for the applicant cited the full provisions of s. 76 of the Law of Succession, rule 73 P&A rules and s.60 of the repealed Constitution. He argued that the Judge agreed with the lower court's findings of fact except the part where the magistrate proceeded to revoke the grant. That due to the orders and directions intended for the missing file, this appeal remains pending and that this court has the powers to proceed and finalise the appeal by doing what the Judge had intended to do. That the it is clear that the Judge intended to revoke the grant in the Embu file, that the respondents claim was still null and void and that the applicants were still entitled to their portions in INOI/KARIKO/763.

Gitonga DN Advocate for the respondent argued that the orders made by Justice Makhandia with regard to the Embu Succession cause 34 of 1996 were made after he had delivered his Judgement and therefor they had nothing to do with the appeal.

It was argued that the revocation of s. 76 and rule 73 called for the exercise of the court's discretionary powers which must be exercised with caution.

That the Cause in Embu, there was Jecinta Muthoni who was not a party to this appeal, and no orders were served upon her to inform her that the file had been recalled. The counsel posed the question? How can a grant of the lower court be revoked without the original file which issued the same? The respondent's view is that the circumstances of this case do not warrant the exercise of this court's discretion as requested. That the parties should follow up on the Embu file and apply for revocation therein if need be and involve all the parties. That this application is an abuse of process as the applicant '*intends to circumvent and review the appeal herein without following due process*'. Further that the decree the applicants wish to enforce is over 20 years old and is overtaken by limitation of time as per s. 4(a) of the Limitation of Actions Act.

I have carefully considered the rival affidavits and submissions. I have also carefully perused the record and Justice Makhandia's judgement in this appeal.

Several Issues arise:

**1. Is it correct that the orders regarding the Embu Succession no 34 of 1996 were made after the judgment of 31<sup>st</sup> January 2008 and hence have no relationship with this appeal?**

The submission that the orders regarding the Embu Succession Cause no 34 of 1996 were made after the Judgment and have no relationship to this appeal cannot be further from the truth. Those orders form the last paragraph of Justice Makhandia's judgment. They can be seen flowing from his reasoning in complete concurrence with the findings and holding of the learned magistrate that the grant was revocable. He invoked the provisions of s. 76 of the Law of Succession Act. He allowed the appeal on the ground of jurisdiction. He pointed out that it is only the High Court that could exercise that jurisdiction. My understanding of the judgment is that by invoking s. 76 of the Law of succession Act, the judge REVOKED the grant. The only thing remaining was the perusal of the Embu file for purposes of directions and or further orders.

**2. What was the purpose for recalling the Embu Succession File no. 34 of 1996?**

To answer this question, I can only rely on what is written in the judgment as I cannot pretend to walk into the Judge's mind and read it.

i. The judge agreed with the findings of the learned magistrate that the alleged sale by Jecinta to the respondent herein was null and void ab initio. That the Jecinta's father had sold the land before his death to the applicants, that her conviction and sentence confirmed that what she had done was criminal. Hence at this time the respondent cannot be heard to rely on the acts of a convicted wrongdoer as conferring any rights to him.

ii. That the respondent was not a bona fide purchaser for value as he to some extent participated in the fraudulent actions that led to the charging, conviction and sentence of Jecinta.

iii. The judge found that the circumstances were such that this was a grant the court could revoke *suo moto*. Hence he not only allowed the appeal, set aside the learned magistrate's orders but also invoked the provisions of s. 76, revoking the grant in the interest of justice and ensuring that the process of court would not continue to be abused by Jecinta and the respondent herein. Further s.60 of the then Constitution on the High Court's unlimited jurisdiction in both criminal and civil matters. Reading the judgment, he did not need to see the Embu file in order to revoke the grant. The circumstances were so reprehensible that it could not wait.

iv. From the foregoing and taking into account that the Judge agreed with all the findings of fact of the learned magistrate, the call for the Embu file was for purposes of directions to the parties that following the revocation of the grant, there would have been need to appoint new administrators, and have the estate properly redistributed and bring that matter to a close.

**3. Were the rights of parties herein determined by the disappearing act of the physical file Embu Succession Cause 34 of 1996 or the substantive orders in place?**

To answer yes to this question is to allow the court to be bound by the acts of the persons who made the file to disappear. That cannot be. It defeats logic for the respondent to argue that the orders sought herein cannot be granted because the Embu Succession Cause no. 34 of 1996 is missing completely, and at the same argue that the parties ought to pursue the revocation of the grant in the Embu file or file a separate suit.

It appears to me that the Embu file went missing because it was believed that the Judge was calling it up to revoke the grant. The grant was revoked on 31<sup>st</sup> January 2008. The rights of the parties were not determined by the missing file. The rights were determined by the findings of fact and the law. The allowing of the appeal did not confer any rights to the respondent that had been taken away by the learned magistrate. In the judgment the judge states clearly that he agrees with the facts as found by the learned magistrate. My understanding of the judgment is that in revoking the grant the Judge placed the parties where the learned magistrate had placed them in his Judgment.

**4. Are the applicants trying to enforce a decree that has been overtaken by time?**

The history of this matter is known to the parties herein. Neither of them can be heard to drop the time bar card as against the other one, and especially not the respondent. Be that as it may the applicant's interests were confirmed in this appeal by Makhandia J on 31<sup>st</sup> January 2008. If this Embu file had not been made to disappear then the matter would have been over by now.

**5. Should Jecinta Muthoni be involved herein?**

This is a person who was found guilty, convicted and sentenced for intermeddling with the estate herein. How then can she be made a party? If she had never filed that Embu Succession Cause 34 of 1996 we would not be here. She was found to have filed it for unlawful purposes. She cannot be expected to participate in any related proceedings.

**6. What orders can this court make in the circumstances?**

This matter must come to an end. The Embu went is missing without a trace. Jecinta lost interest in the matter having been sentenced for the bad things she did with regard to her father's estate.

It is not in dispute that a grant was issued to her.

In the grant she had fraudulently distributed her father's estate made up of Inoi/Kariko/763 between herself and the respondent whom the judge found did not qualify as a beneficiary.

The Judge agreed with the magistrate that the grant was revocable and invoked s. 76 Law of Succession Act revoking the grant.

The judge agreed with the magistrate that Jecinta's father had sold his land to the applicants long before his demise and that matter had been adjudicated in Nyeri SRMCC 277 of 1984 in 1994.

With the grant revoked the only persons beneficially entitled to the Estate of Nyaga Nduku were the four persons mentioned in the order of 16<sup>th</sup> May 1994 in Nyeri SRMCC 277 of 1982.

The Embu file would have contained directions on how to execute these orders.

The only file here that reflects the Embu PM Succession Cause no 34 of 1996 is the skeleton file that was left in this file.

Now that the original file is completely lost, I will act on the skeleton file.

That the original grant issued to Jecinta Muthoni was revoked on the 31<sup>st</sup> January 2008.

A fresh grant to issue, and certificate of confirmation in the names of the four persons in the order of 16<sup>th</sup> May 1994 in SRMCC 277 of 1982.

**Francis Kandenge Kangangi 1.25 acres**

**John Nyaga Kimani 1.25 acres**

**Francis Kiige and Micah Nyaga Mugi 0.5 acres jointly**

The Deputy Registrar to execute all the necessary documents to effect that grant to bring this ignoble matter to an end.

There are no orders as to costs

Right of Appeal 30 days

**Dated, Delivered and signed this 1<sup>st</sup> march 2019 at Nyeri.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant: Juliet

Mr. DN Gitonga for respondents' N/A

Ms. Mwai for HK Ndirangu for applicant

John Nyaga Kimani

Francis Kandenge

Jackson Njage

**Mumbua T Matheka**

**Judge**

**1/3/19**