



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 35 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE WOTHAYA

NGUMI alias JANE WOTHAYA W/O NGUMI (DECEASED)

BEATRICE NJOKI MUCHIRI.....APPLICANT

VERSUS

RICHARD MAINA KAHARA.....RESPONDENT

RULING

1. The estate relates to the late **JANE WOTHAYA NGUMI (DECEASED)** who died on the 8th September, 1981;
2. A temporary Grant of letters of Administration was issued to one Njoki Muchiri (**'Njoki'**) on the 23/04/2010 and the same was confirmed on the 11/03/2011;
3. The respondent filed the application on the 13/09/2017 under the provisions of Section 76(a) (b) and (c) of the Law of Succession Act and all enabling provisions of the law; and she sought the following orders;
 - (i) That the confirmed grant made by this Honourable Court on the 11th March, 2011 be revoked/amended and or rectified by deleting the name of the heir named therein of plot **Muhito/Mbuini/163** to be substituted by the name of Njoki Muchiri;
 - (ii) That this Honourable Court do issue an order stopping further proceedings and the execution of RL7 and RL19 Forms until the hearing and determination of this application;
 - (iii) That eviction order be issued against the respondent to vacate from the suit premises land parcel **Muhito/Mbuini/163**;
 - (iv) That costs of this suit be provided.
4. The application was premised on the grounds on the face of the application and to support her claim the applicant also relied on her supporting affidavit made on the 13/09/2017; the respondent **Richard Maina Kihara (Richard)** filed his response to the application on the 3rd December, 2015; prior to the response to the instant application he had also filed an application on the 28/06/2017 seeking orders from this Honourable Court to authorize the Deputy Registrar to execute the transmission documents and the Land Registrar to dispense the production of the documents for the suit property;
5. Directions were taken on the 23/02/2018 that the two applications be consolidated and both be heard concurrently by way of **'viva voce'** evidence; hereunder is a summary of the respective parties claims and responses;

APPLICANT'S CASE

6. The applicant's evidence was that the deceased herein passed on the 8/09/1981 and a death certificate (**PEXh.1**) was issued; a letter was issued by the Chief of Gakindu Location confirming that the deceased was survived by five children; that the Chiefs letter (**PEXh.2**) did not name the respondent as one of the children of the deceased; the children named therein as heirs to the property were, namely;

- (i) Kessiah Wanjiru Wahome – daughter- (deceased)

- (ii) Loise Wangui Wanjohi – daughter - 73 years
- (iii) Mary Wamuchii – daughter- (deceased)
- (iv) Njoki Muchiri – daughter- 71 years
- (v) Purity Wanja Karuiru – daughter - 69 years

7. The applicant in her testimony stated that the respondent was not her brother nor was he related to them at all; that she petitioned and obtained a Grant of the Letters of Administration intestate and was appointed the administrator of the deceased's estate and was issued with a Grant (**PExh.3**) on the 23/04/2010; that the estate comprised of only one property but she could not recall the parcel number; that it was not true that there was a prayer in the affidavit in support of the application for confirmation wherein it was deposed that the suit property be distributed to the respondent; she denied ever signing such an affidavit (**PExh.4**); and denied that she had ever given the respondent's advocates instructions to apply for the confirmation of the grant; she denied any knowledge of the firm of Nderi & Kingati Advocates and had never visited any advocates offices; that she had never authorized the court to grant the land to the respondent; that the Certificate of the Confirmation of Grant (**PExh.5**) was issued but the suit property was erroneously distributed to the respondent instead of the rightful heir;

8. Under cross-examination she confirmed that she was the one who petitioned for and obtained the Grant but it was the respondent who had engineered everything; that he had obtained possession of the land from one person called Wilson Ikamba ('**Wilson**') who had leased the land from 1981 from her late mother; Wilson had since passed on in the year 2000 which was after the demise of her mother; that Wilson only leased the land and that he at no point in time ever bought the said suit property from her mother; that she did not have possession of the Title to the suit property nor did she know the whereabouts of the Title and didn't know who gave it out; she couldn't recall ever getting together with her siblings and couldn't recall ever signing any acknowledgement in 2009; and that she never had the intention of transferring the land to the respondent;

9. That the sons of Wilson had allowed Richard to stay on the land for a period of seven (7) years but didn't know whether they sold the suit property to the respondent; she admitted to living near the suit property and that she had seen Richard building thereon and also cultivating the suit property for over a period of seven (7) years; she stated that during that period she was under the influence of medication but denied being influenced by her daughter; she later recanted and confirmed that the daughter was the one who had told her to change what she had done earlier.

10. The applicant closed her case without calling any witnesses; her prayer was that the confirmed Grant be revoked/amended or rectified and the land be returned to her; that there be a stay of processing RL7 and RL9; that she be declared the rightful heir of the suit property and her name be substituted; and there be an eviction order to issue in respect of the property;

RESPONDENTS CASE

11. The respondent stated that he had known the applicant since 2009; that he had resided on the suit property for over ten years; that he had acquired the land through a friend who introduced him to the Ikamba family and the deceased's family; the senior Ikamba had bought land from the family of Wothaya and were utilizing the land but no one lived on the land; that the land was still registered in the name of the deceased herein;

12. Richard first sought legal advice and was advised that the deceased's family had to be involved in the process as the suit property was still in the name of Wothaya Ngumi (deceased); they started with the succession proceedings and he was accompanied by the deceased's family as well as the Ikamba family and they all went to the Chief's office where the process started from; the applicant was present and fully participated in the process;

13. Armed with the legal advice all the requisite papers were drawn; the succession proceedings went on smoothly and Njoki the applicant was the one who spearheaded the process upto the point of Confirmation of the Grant and a Certificate of Confirmation was issued distributing the land to Richard; the applicant then gave him her photographs, her PIN Certificate and all the requisite documents but at the tail end of the process which was the signing of the Forms RL7 and RL19 the applicant in the company of her daughter visited the respondent and told him that she was not willing to finalize the process; he was asked to sell back the land to Njoki; he did not know nor was he told why she had a change of heart;

14. Under cross examination he confirmed that the suit property was registered in the name of the deceased herein; that he had bought the land when the owner was already deceased and that she passed on in 8/09/1981 and he knew the land belonged to a deceased person; the Sale Agreement was dated the 16/09/2009 and he bought the suit property from Simon and Felix Ikamba and paid Kshs.300,000/-; he confirmed that their names were not on the title document; that he never attended any Land Control Board for its consent; he stated that he knew the children of the deceased who were the deceased's heirs and that he was not one of the children whose names appear on the P&A Form at paragraph 4; that the suit property was listed on the Form and he too was listed at the liability Section;

15. He reiterated that he had sought advice on the law; that he was not told that the process amounted to intermeddling which was illegal; that he had been advised on the route to follow when buying property belonging to a deceased person; that the process was for the beneficiaries to inherit and then pass it on to him; he denied being misled by his advocate and that the property sold to him was not the wrong one as there was an acknowledgment by the heirs that he could occupy the suit property;

16. The applicant was only the administrator of the land and that the agreement to sell the land to the Ikamba's had been done by the deceased and not by the applicant or her siblings;

17. He reiterated that there was an acknowledgment by the beneficiaries dated the 16/09/2009 to which they received Kshs.50,000/-and they

undertook to effect the transfer of the suit property to Wilson Ikamba or his nominee; upon signing the Acknowledgment all the beneficiaries confirmed that they were relinquishing their rights;

18. The applicant thereafter distributed the suit property to him as agreed; the applicant lived about one (1) kilometer away and was fully aware that he resided on the suit property; he stated that he was not willing to sell back the suit property and that is the reason he had opted to file the application seeking for the court to authorize the Deputy Registrar to execute the transmission documents;

19. The applicant's response to the respondent's application was her application for the Revocation of the confirmed Grant;

20. The respondent called no witnesses to support his claim; and prayed that the applicant's application for the revocation of the confirmed Grant be dismissed with costs; and urged the court to allow his application with costs;

ISSUES FOR DETERMINATION

21. After the full hearing the parties were directed to file and exchange written submissions; upon perusing the court record and reading the respective written submissions this court has framed the following issues for determination;

(i) Whether to revoke the Confirmed Grant;

(ii) Whether to authorize the Deputy Registrar to execute the requisite transmission documents;

ANALYSIS

Whether to revoke the Confirmed Grant:

22. **The provisions of Section 76 of the Law of Succession Act give this court the power to revoke a grant whether confirmed or not; and the section reads as follows;**

“76. Revocation or annulment of grant

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.”

23. The applicant has elected to file the instant application to have the confirmed Grant issued herein at her instance revoked; the question that arises is whether the applicant is entitled to make such an application particularly when she was the one who petitioned for and obtained the confirmation of the Grant;

24. She claimed that the respondent had obtained possession of the land from the family of one Wilson Ikamba ('Wilson') who had leased the land from 1981 from her late mother; Wilson had since passed on in the year 2000 which was after the demise of her mother; that Wilson only leased the land and that he at no point in time had ever bought the said suit property from her mother;

25. Her evidence was that she couldn't recall ever getting together with her siblings and couldn't recall ever signing any acknowledgement in 2009; and that she never had the intention of transferring the land to the respondent and her contention was that it was the respondent who had engineered the whole process with the intention of gaining possession of the suit property; the insinuation that arises from her evidence was that the respondent was guilty of intermeddling with her late mother's estate;

26. Section 45 of the Law of Succession defines the act of intermeddling consists of;

'taking possession, disposing or otherwise intermeddling with any free property of the deceased'

27. The acts of Richard the respondent that might be considered as intermeddling with the estate of the deceased is the fact that he entered into an agreement with the sons of Wilson who then allowed him to stay on the suit property which they eventually sold to him for Kshs.300,000/-; the respondent admits that he knew that the Ikambas had no title to the property and that he was dealing with the estate of a person who was deceased; he therefore sought legal advice and with the assistance of the applicant initiated the succession proceedings; he states that he paid the applicant and her siblings a sum of Kshs.50,000/- to facilitate the process;

28. The applicant did not strike this court as being a very truthful person and was indeed being economical with the truth; the applicant admitted to living near the suit property and that she had seen Richard building thereon and also cultivating the suit property for over a period of seven (7) years yet she never interfered with the respondent's possession; her claim was that during the whole period and process she was under the influence of medication and therefore presumably did not know what she was doing; but it is worth noting that she tendered no medical evidence, documentary or otherwise to support this alleged condition;

29. In this instance there is sufficient evidence on record that demonstrates that there was a tripartite agreement between the applicant, the Ikamba's and the respondent which agreement had the blessing of the applicant's siblings who are beneficiaries to Wothaya's estate;

30. The evidence of both Njoki and Richard point to the fact that they were both the drivers of the process and that the applicant had the consent and the blessings of her siblings; this is evidenced from the acknowledgment (**DExh.4**) of Kshs.50,000/- which the applicant and the beneficiaries all signed;

31. The court record also indicates that when the applicant petitioned for the Grant of Letters of Administration she included Richard in the liabilities section and the beneficiaries all consented by signing the Consent Form;

32. It is plain that Richard was at all times acting in good faith and in conjunction with all parties and with the concurrence of all the beneficiaries;

33. The question is does the act of intermeddling invalidate the Sale Agreement entered into between the applicant and the Ikamba's or their nominee; and does this act meet the conditions for revocation of the confirmed Grant; in the case of **Morris Mburugu vs Dennis M'mburugu [2016] eKLR** it was held as follows;

"I think the spirit behind section 45 is that the free property of a deceased person should not be dealt with in a manner that will prejudice any of the beneficiaries or dependants. The court will not allow the provision of the law to be used as a vehicle for fraud. In my view, if the purchaser is shown to be acting in good faith, for the benefit of the estate, in conjunction and concurrence with all the beneficiaries of the estate and that such transaction does not prejudice either the estate or the beneficiaries of the estate, the harshness of the law should be tampered with the equitable principle set out under Article 159 of the Constitution, that substantive justice is the principle behind any application of the law. In this regard, if the dealing with the property of the estate does not prejudice any of the beneficiaries and is supported by or concurred with those section 45 seeks to protect, such transaction should be saved."

34. On the court's assessment of the facts herein it is abundantly clear that the applicant Njoki in her evidence deliberately misrepresented the true nature in which the Grant was obtained and confirmed; it is apparent that she is attempting to use the provisions of the law to fraudulently re-acquire the suit property; from the evidence adduced this court is satisfied that the transactions inclusive of the distribution of the estate had been sanctioned by the applicant and the other beneficiaries and done in concurrence with all of them;

35. The actions of Richard are found to have been done in good faith and for the benefit of the estate and that the same did not prejudice either the estate or the beneficiaries of the estate;

36. The upshot of this is that the applicant's application fails as it is found that the Agreement entered into between the applicant and the Ikamba family and/or their nominee was valid and did not amount to intermeddling; and that it does not meet any of the conditions set down under Section 76 LOSA for the Revocation of a confirmed Grant;

Whether to authorize the Deputy Registrar to execute the documents:

37. The court after having considered all the evidence on record has found that the application for revocation of the confirmed grant to be lacking in merit; what is left is for this court to determine whether to authorize the Deputy Registrar to sign the Transfer Documents;

38. From the evidence adduced there is no dispute as to the beneficiaries but in light of the evidence on record Richards interest in the suit property emanates from the Ikamba family's interest therein which Njoki had knowledge of at all material times that it had indeed been sold by the deceased during her lifetime to them; who later disposed of it to Richard and that this latter transaction was done after the demise of the deceased; under cross- examination Njoki admitted to initiating the succession process but at the tail end she confirmed that she had a change of heart that was largely influenced by her daughter and not by medication as she would have liked the court to believe; she also admitted in evidence that she had no intention of transferring the land to Richard; her conduct can only be described as deplorable as she all along knew that she has no better claim to the deceased's estate than the Ikamba's or their nominee;

39. In the light of the above circumstances this court will allow Richards application;

FINDINGS & DETERMINATION

40. In the light of the forgoing this court makes the following findings and determinations;

(i) The application dated the 13/09/2017 for Revocation of the Confirmed Grant is found lacking in merit and it is hereby dismissed;

(ii) The Application dated 28/06/2017 made by Richard Maina is found to be meritorious and is hereby allowed;

(iii) Njoki Muchiri is hereby ordered to sign all the transmission documents related to land parcel number **Muhito/Mbiuni/163** within 14 days from the date hereof; in default the Deputy Registrar of this court is hereby authorized to execute all the requisite statutory forms in place of the Njoki Muchiri;

(iv) The Land Registrar is hereby authorized to dispense with the production of the transferor's photographs, identity card and PIN Certificate;

41. To bring closure to the matter each party shall bear their own costs in both applications.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 16th day of May, 2019.

HON. A. MSHILA

JUDGE