



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2462 OF 2009**

**IN THE MATTER OF THE ESTATE OF EMILY WAIRIMU CHIRA (DECEASED)**

**NANCY WANJIRU NJUGUNA.....APPLICANT**

**VERSUS**

**CATHERINE NJERI NG'ANG'A.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**BETH NYAMBURA KIBIRO.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**SAMUEL CHIRA KIBIRO.....3<sup>RD</sup> PETITIONER/RESPONDENT**

**RULING**

1. The Applicant herein presented an application by way of a summons for revocation of grant dated 23<sup>rd</sup> February, 2018 and brought under Certificate of urgency. The Applicant is seeking that the grant of letters of administration of all the intestate estate of the deceased herein confirmed to the Respondents on 26<sup>th</sup> January, 2016 be revoked and a fresh grant issued.
2. The application is premised on the ground that the grant was obtained fraudulently by making of a false statement and concealment of material facts, and is supported by an affidavit sworn by the Applicant on 23<sup>rd</sup> February, 2018. The Applicant also filed a witness statement and list of documents both dated 18<sup>th</sup> September, 2018 and a further Affidavit dated 19<sup>th</sup> November, 2018 in support of her case.
3. The gist of the Applicant's case is that the Respondents, who are the administrators of the estate of the deceased herein failed to disclose to the court that the property known as Githunguri/Gathangari/2304 which forms part of the deceased's estate is jointly registered in the name of the Applicant and the deceased herein. That in the premise, the court ought to revoke the grant confirmed to the Respondents on 26<sup>th</sup> January, 2016, cancel the sale and transfer of the whole of Githunguri/Gathangari/2304 and find that the Applicant is a rightful beneficiary of a portion measuring 0.20 Ha out of the property known as Githunguri/Gathangari/2304.
4. It is the Applicant's averment that sometime in the year 1995, she purchased a portion of the property known as Githunguri/Gathangari/2304 measuring 0.20 Ha from the deceased for Kshs. 165,000/-. The said portion of Githunguri/Gathangari/2304 is hereinafter referred to as the suit property. She did not however produce a sale agreement instead stating that the agreement was made orally. She urged that upon payment of the purchase price, she took possession of the land and began to cultivate it.
5. On record are copies of various documents presented by the Applicant in support of her claim of an interest in the suit property, being: a Transfer of Undivided Share Form dated 1<sup>st</sup> February, 1996, an application for consent of Land Control Board L.C.R No. 64/96 and the letter of consent, a Requisition for stamp duty Form dated 13<sup>th</sup> March, 2006, an Application for Registration of Transfer and Order dated 15<sup>th</sup> March, 2006 and a Stamp Duty Declaration, Assessment & Pay-in Slip dated 25<sup>th</sup> May, 2005.
6. The Applicant contends that upon her payment of the full purchase price, the deceased, who was the Vendor, became reluctant to facilitate the transfer prompting her to file a Civil Case No. 90 of 1997 in the Senior Resident Magistrate's Court at Githunguri. The deceased filed a defense in that suit on 28<sup>th</sup> February, 1997 in which she admitted the claim in its entirety and judgment was entered in favour of the Applicant herein on 26<sup>th</sup> March, 1997. The order of the Senior Resident Magistrate's Court at Githunguri dated 26<sup>th</sup> March, 1997 is annexed to the affidavit.
7. It is the Applicant's averment that despite the court order, the deceased failed to transfer the suit property to her as ordered, and instead sold the suit property to third parties namely Ruel Ngatia Ndonge and James Njoroge Mahinda, who placed a caution against the property. The Applicant successfully filed an application seeking removal of the illegal caution which application was allowed by an order issued on 8<sup>th</sup> March, 2006 by the Senior Resident Magistrate's Court at Githunguri in Civil Suit No. 90 of 1997. The order is annexed to the Applicant's supporting affidavit and marked NW-3.

- 8.** On 5<sup>th</sup> April, 2007 the then District Officer of Githunguri wrote to the District Land Registrar at Kiambu to remove the irregular caution on the suit property in conformity with the court order of 8<sup>th</sup> March, 2006 and register the property in the name of Nancy Wanjiru Njuguna, the Applicant herein. The letter is marked NW-6 and annexed to the affidavit.
- 9.** The Applicant alleged that sometime in June 2007, in disregard of the court order, the deceased chased her from the suit property. This prompted the Applicant to file an application in the Senior Resident Magistrate's Court at Githunguri which application was allowed on 21<sup>st</sup> January, 2008. An order was subsequently issued compelling the deceased herein to sign the relevant documents to facilitate the transfer of the suit property and in the alternative that the Executive officer to sign the necessary transfer forms. The order is marked NW-9 and annexed to the Applicant's supporting affidavit.
- 10.** Disgruntled with the decision of the Senior Resident Magistrate's Court at Githunguri, the deceased filed an appeal against the decision in the Environment and Land Court at Nairobi in Civil Appeal No. 42 of 2015. The deceased unfortunately passed away on 9<sup>th</sup> March, 2009 before the appeal could be heard and determined, and the Petitioners/Respondents took no action to substitute the deceased in the appeal. On 20<sup>th</sup> May, 2016, upon an application by the Applicant herein, Justice S. Okong'o issued a ruling that the appeal filed by Emily Wairimu Wachira, the deceased herein, had abated. The order extracted from the said ruling is marked NW-10.
- 11.** Following the ruling, the 1<sup>st</sup> Petitioner/Administrator filed an application on 26<sup>th</sup> July, 2016 seeking that the court review and set aside the order issued on 20<sup>th</sup> May, 2016 in ELC Civil Appeal No. 42 of 2015 on the ground that there is an error apparent on the face of the record of the ruling. Later on 4<sup>th</sup> November, 2016 the Applicant herein filed an application in the same cause seeking an interim injunction against the deceased's estate in relation to the suit property and authorization for the Deputy Registrar to sign the transfer forms.
- 12.** The two applications were heard concurrently and dismissed by an order made by Okong'o J on 6<sup>th</sup> October, 2017. In his ruling, the learned Environment and Land Court Judge noted that the appeal had abated and upon abatement, the orders of stay of execution initially granted in the appeal on 25<sup>th</sup> February, 2009 lapsed. The learned Judge directed that the Respondent should therefore seek assistance from the Executive Officer of Githunguri Senior Resident Magistrate's Court with regard to signing of the relevant transfer documents as had been ordered by Hon. L. K. Mutai (SRM) on 21<sup>st</sup> January, 2008.
- 13.** The Applicant averred that following the decision of the Environment and Land Court, she conducted a search on the suit property only to learn that the Petitioners/Respondents had filed an application for confirmation of grant of letters of administration and stated therein that the suit property constitutes the deceased's net intestate estate. The Applicant was not listed as one of the beneficiaries.
- 14.** In response to the application, the Petitioners/Respondents filed a Replying Affidavit sworn on 17<sup>th</sup> September, 2018 by Catherine Njeri Ng'ang'a, the 1<sup>st</sup> Petitioner/Respondent and a list of documents dated 30<sup>th</sup> January, 2019. Catherine is a daughter to the deceased herein and one of the administrators of the deceased's intestate estate.
- 15.** According to Catherine, the deceased subdivided the property known as Githunguri/Gathangari which measured 15 acres on 14<sup>th</sup> September, 1995 into ten (10) portions each measuring one and a half (1½) acres. The deceased shared nine (9) of the portions of title numbers 2301-2309 amongst her children and retained a portion measuring one and a half (1½) acres for herself.
- 16.** Catherine stated that the Applicant was a close friend of the deceased and cultivated a portion of the land before the subdivision in 1995. She averred that the only reason the Land Registrar issued a title in the joint names of the Applicant and the deceased in the year 2007 was because the Applicant represented that she was a daughter to the deceased, who had been taken ill at the time, and that the original title had been misplaced. Catherine's allegations were however not supported by any documentary evidence.
- 17.** Catherine contended that the deceased never went to court on 28<sup>th</sup> February, 1997 or on 23<sup>rd</sup> March, 1997 as shown in the proceedings of the lower court in Civil Suit No. 90 of 1997. She accused the Applicant of being a fraudster driven by greed to grab the deceased's land. Further that the only letter requesting the District Land Registrar to uplift the restriction on the suit land was issued on 14<sup>th</sup> July, 2016 and not 5<sup>th</sup> April, 2007 as indicated by the Applicant. I note however that contrary to Catherine's statement, there are two distinct letters written on different dates, both addressing the issue of removal of the restriction placed on the suit land.
- 18.** There is a letter dated 5<sup>th</sup> April, 2007 authored by the District Officer, Githunguri and addressed to the District Land Registrar. The letter is annexed to the Applicant's supporting affidavit and marked NW6. The second one to which Catherine Ng'ang'a makes reference is a letter dated 14<sup>th</sup> July, 2016 authored by the Deputy County Commissioner Githunguri Sub-county and addressed to the Land Registrar Kiambu. Both letters address the removal of the restriction placed on the property.
- 19.** While Catherine asserts that the deceased was never a party to the proceedings in Civil Suit No. 90 of 2007, the certified copy of the proceedings produced in court tell a different story. According to the proceedings, the deceased was present and participated in the proceedings, and was even represented by Counsel. It is curious that on one hand Catherine denies that the deceased participated in the proceedings of Civil Suit No. 90 of 2017 while on the other hand, she states that the deceased was dissatisfied with the ruling issued therein and filed an appeal No. 42 of 2016 in the Environment and Land Court at Nairobi. Without more therefore, her assertions have no basis.
- 20.** Catherine asked the court to call for the original file of Civil Case No. 90 of 1997 to ascertain the correctness of the proceedings produced herein. This issue was further addressed by Mr. Ondieki who submitted that while the proceedings demonstrate that the court that issued the order dated 26<sup>th</sup> March, 1997 was presided over by Hon. M. Rungere (SRM), the order itself indicates that it was issued by Hon. Winfred O. Lichuma (Ag. RM). Counsel took issue with the authenticity of the proceedings of the lower court stating that they are marred with grave discrepancies. He invited the court to take judicial notice of the discrepancies which he said point to 'fraud'.

21. The question of the authenticity of the lower court proceedings is however not an issue to be determined before this court. This is an issue which ought to have been raised before the Environment and Land Court in which the appeal against the lower court decision was filed and during which time the proceedings were relied upon. I note that Okong'o J in his ruling of 6<sup>th</sup> October, 2017 in ELC Appeal No. 42 of 2015 pointed out that the order of 23<sup>rd</sup> March, 1997 was made by Hon. M. Rungare (SRM) and not Hon. Winfred O. Lichuma (Ag RM) as indicated in the extracted order.

22. It is my considered view that the lower court proceedings have been produced in the present cause merely to show that there was a Civil Case No. 90 of 1997 whose decision the deceased appealed against in the Environment and Land Court. And further that the grant herein was confirmed during the pendency of the appeal, which dealt with the ownership of the suit land. This is bearing in mind that the 1<sup>st</sup> Administrator/Petitioner participated in the proceedings of the appeal in the Environment and Land Court.

23. Learned Counsel Mr. Nyakiangana filed written submissions dated 24<sup>th</sup> January, 2019 on behalf of the Applicant in which he reiterated the contents of the Applicant's pleadings and submitted that the Applicant had made out a case for revocation of the grant issued herein. He urged the court to revoke the grant confirmed to the Petitioners/Respondents and order that the distribution and subsequent confirmation of the grant be done afresh.

24. In response to the application, learned Counsel Mr. Ondieki filed written submissions dated 30<sup>th</sup> January, 2019 on behalf of the Petitioners/Respondents. Counsel reiterated the contents of the pleadings filed by the Petitioners/Respondents and submitted that the application for revocation of grant as filed is bad in law and a waste of the Court's time. That the grant which the Applicant seeks to revoke was not obtained fraudulently as all the children of the deceased were present in court and a notice was published in the Kenya Gazette for the requisite sixty (60) days.

25. The application filed by the Applicant herein seeks revocation of the grant confirmed to the Petitioners/Respondents on 26<sup>th</sup> January, 2016 with regard to all of the deceased's intestate estate. The circumstances that can lead to the revocation of a grant are set out in **section 76** of the **Law of Succession Act** which provides thus:

**“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;...”**

26. Mr. Nyakiangana submitted that **section 76** of the **Law of Succession Act** empowers this court to revoke or annul a grant “on application of any interested party or of its own motion.” That as a purchaser of a portion of the deceased's property, the Applicant qualifies as an interested party with standing to challenge the confirmed grant herein.

27. The Applicant is challenging the grant issued herein on the ground that it was obtained by the concealment of material facts. The Applicant argues that in applying for confirmation of grant, the Petitioners/Respondents failed to inform the court that there was pending a suit over the disputed ownership of the suit land.

28. Mr. Nyakiangana submitted that the present suit was filed in bad faith with the sole purpose of depriving the Applicant of her rightful ownership of a portion of the suit property. That the Petitioners/Respondents filed the application for confirmation of grant without disclosing to the court that there was pending an appeal No. 42 of 2015 in the Environment and Land Court at Nairobi, and as such, the Certificate of Confirmation of Grant was obtained fraudulently based on falsehoods and concealment of material facts.

29. To buttress his point, Mr. Nyakiangana referred to the case of **Musa Nyaribari Gekone & 2 others vs. Peter Miyianda & another [2015] eKLR** and **Re Estate of Julius Ndubi Javan (deceased) [2018] eKLR**.

30. Mr. Nyakiangana urged that the primary duty of a Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. That in doing so, the estate property must be identified and any dispute pertaining to the ownership of the land resolved before such property is distributed.

31. On the issue that the agreement for sale of the suit land was made orally, Mr. Nyakiangana submitted that the agreement was admitted by the deceased in court and should have been taken into consideration in the confirmation of the grant and the subsequent distribution of the deceased's estate. Counsel asserted that the registration of the Applicant as co-owner of the suit property was done pursuant to a judgment on admission in the lower court, which judgment has never been set aside.

32. Mr. Ondieki on the other hand stated that it was suspect for the Applicant to claim that the contract for the purchase of the suit land was done verbally and that she took possession of the suit land upon payment of the purchase price without a single witness to corroborate her story. That the Applicant cannot claim ownership over the suit land without any documentary proof thereof by virtue of **section 3(3)** of the **Law of Contract Act**. Counsel urged that the purported agreement for sale was therefore void as it was not in writing.

33. Mr. Ondieki contended that the Applicant is not entitled to any claim in the deceased's estate as she is neither a beneficiary nor a bona

fide purchaser. That the Applicant's claim is fraudulent having colluded with Land officials to cause the suit land to be registered jointly in her name and that of the deceased.

34. While this court is alive to the fact that **section 3(3)** of the **Law of Contract Act** requires that contracts for the disposition of an interest in land be in writing, I am of the view that that is an issue that ought to have been canvassed in the appeal, or in the lower court. The decision of the lower court appears to have taken into account the oral agreement and the admission of the agreement by the deceased herein.

35. Needless to say, the documents presented in the instant case indicate that the oral agreement alluded to was made in the year 1995. This was admitted to by the defendant in court and judgment on admission entered on this basis on 26<sup>th</sup> March, 1997. I note however that **section 3(3)** of the **Law of Contract Act** came into effect on 1<sup>st</sup> June, 2003, and the agreement which predates the section is therefore not subject to the section.

36. In applying for confirmation of grant, the Petitioners/Respondents failed to inform this court that there was pending an appeal in the Environment and Land Court on the decision issued by the lower court pertaining to the ownership of the suit property. This is despite the fact that the administrators herein, were party to the appeal proceedings and even filed an application therein.

37. Having established that there was pending a suit over the ownership of the suit property, a fact which is material to this case, and that the Petitioners/Respondents failed to make full and fair disclosure of this material fact, I find that the grant confirmed on 26<sup>th</sup> January, 2016 was obtained fraudulently by the concealment of material facts from the court.

38. Once the appeal in the Environment and Land Court abated, the stay of execution of the orders of the lower court made on 21<sup>st</sup> January, 2008 directing the deceased herein to sign all the relevant transfer forms lapsed. There is nothing on record to demonstrate that the orders of the lower court made on 23<sup>rd</sup> March, 1997 and 21<sup>st</sup> January, 2008 have been set aside. As such, the Applicant is entitled to ownership of the suit land and ought to have been enlisted as a beneficiary in the summons for confirmation of grant.

39. From the evidence on record, it is clear that the Petitioners/Respondents were overtly dishonest in their representation that the whole of the suit property belonged solely to the deceased and the application for confirmation of grant was therefore based on non-disclosure. The Petitioners/Respondents failed to disclose a material fact, namely that the Applicant herein has a beneficial interest as a purchaser of a portion of the suit land. The Applicant is therefore entitled to the revocation of grant as sought. Any transfer or agreement of sale of the Applicant's portion of the suit land based on that grant is therefore void ab initio and are hereby nullified.

40. By virtue of the above, the 1<sup>st</sup> Petitioner/Respondent to whom the suit property was assigned in the mode of distribution had no land to sell or property to pass to any third party, and any such third party cannot therefore seek refuge in **section 93** of the **Law of Succession Act**. This is because at the time of confirmation of the grant, the Applicant herein was the rightful owner of the suit land.

41. I note however that even where a party has set out a case under **section 76** of the **Law of Succession Act**, the court has the discretion to make orders as it considers fit in the circumstances and is not bound to issue orders for the revocation of the grant as sought. (See - **Angelas Maina vs. Rebecca Waiyego Mwangi and Another Succession cause 692 of 2012, [2016] eKLR**). In the instant case, a revocation is not necessary for the ends of justice to be met.

42. In the premise therefore, the revocation is not granted. The application filed by way of summons dated 23<sup>rd</sup> February, 2018 is hereby allowed, limited to the following orders:

(a) The sale and transfer of all the property known as Githunguri/Gathangari/2304 to third parties namely Stephen Chege Kiarie and Teresia Wanjiku Ndungu be and is hereby revoked and the Title Deed issued pursuant to the said sale be and is hereby revoked and cancelled.

(b) The Administrators to file a fresh mode of distribution which incorporates the Applicant herein within 45 days.

(c) A conservatory order be and is hereby issued barring any sale, transfer or alienation of all the property known as Githunguri/Gathangari/2304 pending distribution.

(d) Costs to the Applicant.

**SIGNED DATED and DELIVERED in open court this 14<sup>th</sup> day of May, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicant.**

**In the presence of .....Advocate for the Petitioners/Respondents.**