



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 537 OF 2010

IN THE MATTER OF THE ESTATE OF THE

LATE ALICE WANJIRU KARUGU (DECEASED)

PATRICK KANYI WAMBUI.....APPLICANT

VERSUS

ROBERT NJEGA KARUGU

JOSEPH KINYUA KARUGU

JOHN HUIHU KARUGU

PENINA NJERI MUCHORI.....RESPONDENTS

RULING

1. The estate relates to the late **Alice Wanjiru Karugu (Deceased)** who died on the 2nd September, 1990; that her estate comprises of only one property known as Title No. Magutu/Gathehu/198 (**'the suit property'**);
2. The Grant was first issued to **Samuel Muchori Karugu** on the 4/01/2011; who passed on the 10/06/2011 which was before the grant was confirmed and the estate distributed; upon his demise **Robert Njega Karugu** one of the respondents herein was appointed to take over as an administrator and was issued with a fresh Grant on the 18/03/2015 and the same was confirmed on the 3/11/2015;
3. The applicant filed the application on the 17/11/2015 under the provisions of Section 76 of the Law of Succession Act and Rules 44 & 73 of the Probate and Administration Rules and all other enabling provisions of the Law; in the application he claims that the respondents had obtained the Grant to the deceased's estate without informing him of the proceedings from the time the initial administrator passed on; and he sought the revocation of the Grant on the following grounds;
 - (a) The substitution of the initial administrator was fraudulently done by making of false statements, or by concealment from the court of something material to the case;
 - (b) That the substitution was done four (4) years after the death of Samuel Muchori Karugu;
4. The applicant sought orders for revocation of the Grant and that a fresh Grant be issued to Robert Njega Karugu and to himself; to support his claim the applicant relied on the grounds on the face of the application and on his supporting affidavit made on the 22/04/2016; after the respondents filed their responses to the application directions were taken on the 17/10/17 that the matter proceed for hearing by way of **'viva voce'** evidence; all the parties gave oral evidence and at the end of the proceedings the parties were directed to file and exchange written submissions; hereunder is a summary of the applicant's case and the petitioners response;

APPLICANT'S CASE

5. The applicant's evidence was that he bought the suit property from Samuel Muchori Karugu (**'Samuel'**); a Sale Agreement (**'PExh.2'**) dated 18/05/2010 was drawn and signed by Samuel as the vendor and himself as the purchaser; the vendor's son Ephantus Mwangi Muchori was also a party to the agreement; he stated he resided on the suit property from the year 2010 and had been in exclusive possession for over a period of seven (7) years; he had also built a permanent house on the portion he had purchased; he produced the photographs of the

construction which were marked as '**PExh.1**';

6. That all the family members were at all times aware of the sale transaction and the construction on the suit property as the 1st, 2nd and 3rd respondents were his neighbours;

7. The succession process is said to have started at the Chiefs office and he was in attendance when the letter was obtained and he that his name was included in the Chiefs Letter dated the 14/06/2010; Samuel duly informed him when the succession cause herein was filed and Samuel was appointed the administrator; but unfortunately he died before completing the administration process; the brothers then took over the process and completed it behind his back and that they failed to share any information with him from the period after Samuel's demise; he only learnt about the process when he was threatened with eviction as one of the beneficiaries named Peninah had been assigned his portion; due to his non-inclusion in the distribution of the deceased's estate he opted to file an application for revocation;

8. Under cross-examination he confirmed that he had no relationship with the deceased herein and that he had not entered into any agreement with her for the sale of the suit property; and that at the time of signing the Sale Agreement Samuel did not have Letters of Administration for the estate; that the Grant was dated 4/01/2011 and that was when Samuel appointed as an administrator;

9. He stated that Samuel sold the portion that he had been allocated which had been sub-divided and demarcated informally; the applicant entered into the agreement through goodwill as Samuel had the main title but did not have any legal document for his portion; there was no mutation form that he had been shown but there were informal boundaries in existence; by buying Samuel's portion he was not aware that this was an offence of intermeddling;

10. He reiterated that the portion he had purchased was Samuels' which he had possession of for seven years and his claim was only for this portion; that this portion had been pointed out to him by Samuel's daughter named Gathoni on her father's instructions; that all the respondents lived on the suit property and that each brother had their respective portions;

11. His prayer was that the Grant be revoked and a fresh one be issued and the portion given to Peninah be distributed to himself;

PETITIONERS/RESPONDENTS CASE

12. The evidence of the 1st respondent ('**Robert**') (**DW1**) was that the deceased was his mother and that she had six children who survived her; their names were as set out hereunder;

(i) Joseph Kamuyu

(ii) Samuel Muchori

(iii) Robert Njega Karugu

(iv) John Huihu Karugu

(v) Mercy Wamuyu

(vi) Purity Wanjugu Maina;

13. That when his brother Samuel started the succession process he did not involve the family; that he couldn't recall the year he found out about Patrick the applicant herein; that the applicant was not a child or a beneficiary to the estate of his deceased mother;

14. With the demise of Samuel he took over the administration of the estate and distributed the suit property into four (4) portions and the portion for Samuel was given to his son; the portions were shared as follows;

(i) Joseph Kamuyu

(ii) Samuel Muchori

(iii) Robert Njega Karugu

(iv) John Huihu Karugu

15. In cross-examination he confirmed that his deceased mother had four (4) sons and two (2) daughters; he confirmed that he resided on the suit property and that the applicant also resided on the shamba as well, on the portion allocated to Samuel; the applicant had demolished the wooden structure built by Samuel and had built a house on it; each person had his own portion which had been pointed out by their late mother; that the portions were adjacent to each other;

16. That he couldn't recall when the applicant built his house and he didn't know the dealings over this portion; that he had seen the house being constructed and that he knew that Samuel's son Ephantus was in charge of supervising the construction; that his late brother Samuel resided in Nyahururu and was buried there; his wife was also buried there;

17. When the Succession Cause commenced he was never informed by his brother Samuel nor did he sign any documents when the case was brought; he recanted and confirmed that he signed the documents related to the cause; he confirmed that when Samuel died he took over the administration of the estate; even though the applicant was still his neighbor and that he saw the applicant still residing on the suit property he never told him that he was taking over the administration and that he never involved in the process.

18. The respondent stated that he did not agree with the applicant's claim and prayed for the dismissal of this case; and that the distribution to remain the way it was; he also prayed for costs;

ISSUES FOR DETERMINATION

19. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether to revoke the Certificate of Confirmation of the Grant;

(ii) Distribution of the estate.

ANALYSIS

Whether to revoke the Certificate of Confirmation of the Grant:

20. The Court has power to revoke a grant in the circumstances set out in Section 76 of the Law of Succession Act, 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.”

21. The applicant confirmed that he was a purchaser from the initial administrator who passed on before the Grant was confirmed; the respondent Robert was substituted as the administrator and he acknowledged in evidence that he had proceeded to have the Grant confirmed without involving the applicant; because of this omission the applicant seeks to revoke the Confirmed Grant on the grounds that the substitution of the initial administrator was fraudulently done by making of false statements, or by concealment from the court of something material to the case;

22. The respondents nevertheless contend that Samuel the initial administrator having not obtained letters of administration in respect of the deceased's estate had no legal capacity to enter into any Sale Agreement with the applicant; and that this amounted to intermeddling with the property of the deceased;

23. The law is that an administrator of the estate only derives his title only as from the date the Grant of the Letters of Administration and the Title over the property then vests in him from the date of the Grant which in this cause was the 4/01/2011; whereas the Sale Agreement made between Samuel and the applicant and which was produced as 'PEXh.2' is dated the 18/05/2010;

24. The applicable law is Section 45 of the Law of Succession Act which sets out the act of intermeddling and provides that intermeddling with the property of a deceased person consists of ***'taking possession, disposing or otherwise intermeddling with any free property'***; therefore in this instance the act that constitutes intermeddling with the estate was in the form of disposing of a portion of the suit property by Samuel and the taking of possession by the applicant before the Grant had been issued;

25. The question is does the act of intermeddling invalidate the Sale Agreement entered between Samuel and the applicant and does the act

also void Samuels share in the estate; this court thinks otherwise; In **Morris Mburugu v Dennis M'mburugu [2016]eKLR** it was held:-

“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.”

26. The evidence on record shows that the son of Samuel by the name Ephantus was a signatory to the Sale Agreement; which means that Ephantus is legally bound to honour the terms of the agreement;

27. It is noted that the respondent Robert who is now the administrator was economical with the truth in his testimony; in his evidence he stated that he had given Ephantus the portion meant for Samuel; the applicant states that Samuel's portion was given to a beneficiary named Peninah; upon perusal of the application for confirmation filed by Robert and the Certificate of Confirmation dated the 3rd November, 2015 the names appearing therein are as follows;

(i) **Robert Njega Karugu**

(ii) **Joseph Kinyua Karugu**

(iii) **John Huihu Karugu**

(iv) **Peninah Njeri Muchori**

28. The suit property was distributed to the above named in equal shares; the name of Ephantus does not feature in any of the documents; this court reiterates that despite Samuel's actions his share in the estate still remains intact; and that the respondent knew all along that Ephantus was entitled to his father's share and by virtue of Section 41 of the Act Ephantus is indeed entitled to this share; In **Re Estate of Kerubo Mogere (Deceased) [2019]eKLR** it was held:-

“Finally, the position of the deceased's grandchildren is straightforward and is the subject of section 41 of the LSA. Although they are not direct beneficiaries, they are entitled to take the shares of their parents...”

29. The respondent admitted that he was a signatory to the documents when Samuel brought this succession case to court and therefore he had knowledge of all material facts relating to the estate when he took over as the administrator; he also confirmed when giving evidence that he saw the applicant's house being built and that Ephantus was the one supervising the construction; the presumption that can be made is that he was at all times aware of the dealings that Ephantus and his father had with the applicant;

30. He knew all along that Ephantus' entitlement would eventually be passed on to the applicant therefore the act of omitting Ephantus' name is found to be deliberate act of frustrating the contract between the two parties;

31. In the circumstances this court is satisfied that the respondent had knowledge of a material fact related to Ephantus' entitlement which he deliberately concealed from the court when he applied for the confirmation of the Grant; and for these reasons this court is satisfied that the Confirmation of the Grant ought to be revoked as it was obtained by concealment from the court of something material to the case;

Distribution of the estate

32. Upon revoking the Certificate of Confirmation of the Grant this court will not shy away from the issue of distribution of the estate; when Samuel filed the Petition he listed the following as the survivors to the deceased;

(i) Samuel Muchori Karugu (now deceased)

(ii) Robert Njega Karugu

(iii) Joseph Kinyua Karugu

(iv) John Huihu Karugu

(v) Patrick Kanyi Wambui

(vi) Mercy Wamuyu Munyu

(vii) Purity Wanjugu Maina

33. When the respondent took over as administrator and when filing the application for confirmation his list comprised of the following persons;

(i) **Robert Njega Karugu**

(ii) **Joseph Kinyua Karugu**

(iii) **John Huihu Karugu**

(iv) **Peninah Njeri Muchori**

34. This court notes that Robert's list has shortcomings as it appears that he failed to include his sisters when distributing the deceased's estate; when it comes to inheritance at Section 29 of the Act there is no classification of the children of the deceased into categories of male, female, married or unmarried; the Act does not discriminate against the male or female, married or unmarried children of the deceased; Article 27 of the Constitution 2010 provides that every person is equal before the law and goes further to state that there should be no discrimination on any ground including gender and marital status;

35. Samuel is deceased and this court reiterates that he is entitled to a share in the deceased's estate; the applicant's name appears on Samuels list but the direct claim by the applicant to the deceased's estate is found to be improper in law; but all is not lost as his claim lies as against the estate of Samuel and can be enforced against Ephantus;

36. In distributing the estate this court will therefore include the sisters and Ephantus as it is satisfied that they have a right to benefit from the estate; the distribution will be in accordance with Section 38 of the Act, that the estate be divided amongst the following beneficiaries in equal shares;

(i) Robert Njega Karugu

(ii) Joseph Kinyua Karugu

(iii) John Huihu Karugu

(iv) Ephantus Mwangi Muchori

(v) Mercy Wamuyu Munyu

(vi) Purity Wanjugu Maina

FINDINGS & DETERMINATION

37. In the light of the forgoing this court makes the following findings and determination;

(i) The Confirmation of the Grant is found to have been obtained in a manner that renders it defective as it was obtained by the concealment of pertinent facts;

(ii) The application for Revocation of the Confirmed Grant is found to have merit and it is hereby allowed;

(iii) The Certificate of Confirmation of Grant dated the 3rd November, 2015 is hereby revoked;

(iv) The Grant is hereby confirmed in the terms as set out in paragraph 36 hereinabove;

(v) Parties at liberty to apply for further directions;

(vi) Each party shall bear their own costs;

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of May, 2019.

HON. A. MSHILA

JUDGE