



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 58 OF 2016

IN THE MATTER OF THE ESTATE OF SARASTINO M'CHABARI M'UKABI alias CHABARI MUKABI (DECEASED)

AND

MARGARET KARIMI CELESTINO.....PETITIONER

VERSUS

JOHN NJERU MBARE.....1ST PROTESTOR

DAVID MUGENDI MBARE.....2ND PROTESTOR

GEORGE MUNENE MBARE.....3RD PROTESTOR

R U L I N G

1. This matter relates to the estate of the late **SARASTINO M'CHABARI M'UKABI alias CHABARI UKABI** (Deceased) who died on 3rd August, 2015 at Kiang'onde. There was a dispute among the family members of the deceased about whether the deceased died testate or intestate. This court heard all the parties and based on the evidence tendered determined that he died testate and the written *will* left behind was valid. In view of the unproven claims that there were properties which had been excluded from the *will*, I gave liberty to the administratrix or executor, (Margaret Karimi Celestino) to apply for distribution of any property left out of the will and this court would then treat the properties or assets as an intestate estate.

2. George Munene Mbare, one of the objectors of the *will* and the Applicant herein has now moved this court vide Summons for Revocation of Grant dated 4th March 2019 for the following prayers namely:-

i. That this application be certified urgent (spent).

ii. That a stay of execution do issue against execution of the confirmation of grant as per certificate of confirmation issued on 14th February, 2019 pending determination of this application.

iii. That pending the hearing and determination of this application inhibition orders do issue inhibiting all dealings on land parcel No. Karingani/Mugirirwa/57 and 583, Karingani/Ndagani/655 and 895 and Marembo/Rianthiga/1185 and 1219 and the same be served upon the District Land Registrar Meru South for compliance.

iv. That this court be pleased to issue an order suspending all operations of deceased's A/C No. 114845985 at KCB, Chuka Branch pending the hearing and determination of this application.

v. That pending the determination of Summons for Revocation of Grant this court issues orders in terms of prayer 3,

vi. That this honourable court be pleased to issue orders in terms of prayer 4 pending the determination of Summons for Revocation of Grant.

vii. That this honourable court be pleased to stay execution of certificate of confirmation issued on 14th February 2019 pending the hearing and determination of Summons for Revocation of Grant.

viii. That this honourable court be pleased to revoke and/or annul the grant confirmed on 14th February 2019.

ix. That this court be pleased to issue any order it deems appropriate to meet the ends of justice.

x. Costs of this application.

3.The grounds upon which this application is based are as follows namely:-

a) That the Respondent filed this cause secretly and fraudulently and intermeddled with the estate by causing subdivision of the estate from parcel No. Karingani/Ndagani/895 into parcels 10987 and 10988 on 15th January 2016 when the deceased died on 3rd August 2015.

b) That the Respondent fraudulently transferred to herself parcel No. Karingani/Mugirirwa/583.

c) That the Respondent obtained the grant fraudulently through falsehoods and concealment by purporting that the deceased left a will.

d) That the Respondent left out some assets in the estate and undervalued others.

e) That the Respondent is a dishonest person

f) That unless the orders sought are granted the estate stand to suffer.

4.This application is supported by the affidavit of the Applicant sworn on 4th March 2019 where he has reiterated the above grounds adding that he is one of the children of the deceased.He has deposed that the deceased did not left a will and that the *will* left behind is not authentic.

5.The Applicant further claims that the Respondent intermeddled with Karingani/Ndagani/895and has exhibited a copy of the Register from the Lands Office and alleged that the deceased executed subdivision documents on 15th January, 2016 when he was dead.He also questions how the Respondent transferred to herself parcel No. Karingani/Mugirirwa/583 on 17th June 2016 when the deceased had died and has enclosed a copy of Green Card indicative of the same.

6.He has further claimed that he was not notified about this succession cause.In his written submissions the applicant has apparently purported to attach new evidence without leave of this court.A party can only adduce evidence by way of affidavit or oral hearing but cannot at submissions stage tender new evidence as that would have the undesired effect of taking the opposite side by surprise or an ambush without a chance to interrogate the authenticity of the new evidence.

7.The Applicant alleges that the *will* tendered during trial was a forgery and that the Respondent did not seek consent from all beneficiaries before filing this cause.He has relied on the decision in *Jane Kagige Geoffrey & Another -vs- Wallace Ileri Njeru & 2 Others [2016] eKLR* in faulting the Respondent for intermeddling with the estate when the law provides that immovable property cannot be sold or dealt with in any way before confirmation of grant.He has also relied on the decision of *Purity Kaari Gilbert & Another -vs- David Njeru Mugwika [2017] eKLR* where the court emphasized the obligation by a Petitioner to notify all the dependants or beneficiaries when applying for probate or letters of administration of an estate of a deceased person.

8. The Respondent herein, Margaret Karimi Celestino has opposed this application through a Replying Affidavit sworn on 3rd April 2019 and written submissions filed on 24th May 2019 vide Ms Fatuma Wanjiku & Co Advocate.

9. The Respondent has denied operating Account No. 11484985 with KCB. She states that pursuant to the certificate of confirmation of grant dated 13th February 2019, she registered RL19 forms in respect to parcels No. Karingani/Ndagani/655, Karingani/Mugirirwa/57, Marembo/Rianthiga/1185 and 1219 and that the same were transmitted to her on 8th March 2019 in the morning before she was served later that day in the afternoon with the present application and orders which then, in her contention , had been overtaken by events.

10. The Respondent has denied intermeddling with the estate by subdividing parcel No. Karingani/Ndagani/895 into parcel No.10987 and 10988. She alleges that the deceased had, before his demise on 3rd August, 2015, began the process of subdivision and had reportedly signed mutation forms on 26th February, 2015. She has exhibited the copy of mutation form showing subdivision of Karingani/Ndagani/895 into Karingani/Ndagani/10987 and 10988. The Respondent states that she had nothing to do with those subdivisions and also found about the subdivisions done by a surveyor when she later visited the land office.

11. The Respondent has further averred that upon obtaining the certificate of confirmation on 8th March 2019, she registered RL 19 and RL7 in respect of land parcels No. Karingani/Ndagani/10987 and 10988 and had the same transmitted to her mother Grace Ciamairu Mbare as per the will of the deceased.

12. In regard to land parcel No. Karingani/Mugirirwa/583, the Respondent avers that the deceased transferred the property to her on 17th June 2015 and has annexed a copy of the Register (Green Card) as proof that the deceased transferred to her the property prior to his demise.

13. The Respondent has contended that the question of validity of the will was determined vide a Judgment of this court delivered on 13th December 2018. She has pointed out the Applicant has not pointed any asset excluded in the *will* and that the allegation of fraud has not been established. She has contended that the Applicant has not established any basis for revocation of grant insisting that the authorities cited are not relevant to the issues at hand in this application.

14. **Analysis and Determination Law:**

The substantive relief being sought in this application is revocation of grant confirmed by this court on 13th January, 2019 upon determination by this court that the deceased in this cause died testate. Under provisions of **Section 76** of the **Law of Succession Act** which has been invoked by the applicant this court is given the discretion to revoke or annul a grant whether confirmed or not confirmed either on the application of an applicant or on court's own motion on any of the following grounds namely:-

(i) Defect in proceedings leading to issuance of the grant.

(ii) Existence of fraud or fake statement or concealment by a Petitioner/Administrator.

(iii) Untrue allegations of facts even if the facts are presented inadvertently or through ignorance.

(iv) Failure by administrator to diligently to proceed with administration of the estate including applying for confirmation timely.

(v) When the grant is rendered useless due to occurrence of an event.

15. The above grounds can be invoked by any party in moving a court to revoke the grant. Having listed the grounds, let us consider the grounds put forward by the Applicant. The first ground listed by the applicant in this application is fraud and has claimed that the Respondent secretly and fraudulently intermeddled with the estate of the deceased and more specifically that she secretly subdivided Karingani/Ndagani/895 into Karingani/Ndagani/10987 and 10988 on 15th January, 2016 when the deceased died on 3rd August 2015.

16. The Respondent has denied the allegation of fraud and has asserted that the deceased himself carried out subdivision prior to his demise. He has supported her assertions with the mutation forms she has exhibited indicating that the instructions to subdivide Karingani/Ndagani/895 was given on 26th February, 2015 and the work of subdivision was carried out on 22nd June 2015. This court has scrutinized the mutation form and has noticed it was registered at the lands office on 15th January 2015. I have also looked at the certificate of Registration commonly referred to as "**Green Card**" and noted that the parcel Karingani/Mugirirwa/583 was transferred to the Respondent on 17th June 2015. That means that the transactions occurred during the lifetime of the deceased and there is no evidence to indicate that the transactions occurred after the demise of the deceased on 3rd August 2015. The document (Green Card) exhibited by both the Applicant and the Respondent indicates that the entry in respect of Karingani/Mugirirwa/583 happened during the lifetime of the deceased. The entry that occurred on 15th January 2016 as exhibited by the Applicant happened regularly because as shown in the Green Card exhibited by the applicant the property had already passed to her on 17th June 2015. The allegations of fraud therefore in my view do not hold any water. The deceased was within his right to deal with his property in any way he deemed fit in his lifetime. The allegations the deceased dealt with his property posthumously is not supported by facts presented by the applicant. The evidence presented before me on the overall shows that the transactions on subdivisions of Karingani/Ndagani/895 and the transfer of Karingani/Mugirirwa/583 both happened during the lifetime of the deceased and there is nothing to show that any of the transactions was fraudulent. That property (Karingani/Mugirirwa/583) is not part of the estate in this cause. The Respondent has explained that she also learnt later after the demise of the deceased that parcel No. Karingani/Ndagani/895 had been subdivided to parcel No. 10987 and 10988. It is true that the registration of the subdivision was effected after the demise of the deceased but there is nothing illegal about that. The transfer of the resultant parcels No. 10987 and 10988 to the Respondent was done on 8th March 2019 as per the evidence presented and that was after this court had confirmed the grant. That was proper, and legitimate and the Respondent certainly cannot be faulted in that regard.

17. The Applicant further seeks orders in respect to parcel Numbers Marembo/Riathiga/1185 and 1219 but again he has not demonstrated in the entire application and affidavit the basis for faulting the Respondent because the searches exhibited indicate that as at 18th December 2018, the parcels were both registered in the name of the deceased and the change of ownership was by way of transmission pursuant to what was done pursuant to the confirmation of the grant. In the same vein I am not persuaded that the transmission in respect to Karingani/Ndagani/655 was fraudulent in anyway. This court finds that the allegations of fraud made by the Applicant against the Respondent has not been proved and that ground is insufficient to annul or revoke the grant herein.

18. The Applicant has also asked this court to annul the grant herein on the ground that the Will presented was invalid. In my considered view the question of validity of the Will herein is *res judicata*. This court heard the parties on the validity of the will and rendered itself with finality on that issue. Once this court pronounced itself the same issue cannot be relitigated again because of the principle of *Res judicata*. As held in **KAMUNYE & OTHERS -VS- PIONEER GENERAL ASSURANCE SOCIETY LTD [1971] EA 263 'res judicata'** is essentially a bar to subsequent proceedings involving the same issue that has been finally and conclusively been decided by a competent court in a prior suit between the same parties. The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. The Applicant may have been dissatisfied about the finding of this honourable court regarding the question of validity but the dissatisfaction cannot be addressed through summons for revocation of grant or any sort of that application. The Applicant should have appealed to an appellate court for redress. The application to revoke the grant herein on the ground of validity of the will is therefore untenable and cannot be sustained.

19. This court in conclusion finds that the substantive relief being sought in this application (revocation of grant) is not merited and with that finding the other reliefs being ancillary to the substantive prayer, cannot be sustained as there is no basis for the same. I also do not find any merit on the claim that the Respondent proceeded with this succession cause secretly because as I have observed the question of validity of the will was so highly contested and all the Objectors, the Applicant included were fully heard and they had their day in court. He cannot turn back and state that the Petitioner/Respondent did not seek the consent of all the parties pursuant to the provisions of **Rule 26(1)** of **Probate and Administration Rules**. I do not find that the ratio decidendi in the decision in the case of **Purity Kaari Gilbert & Another -vs- David Njeru Mugwika [2017]** is relevant in this application and specifically the context in which the Applicant seeks for the revocation of grant herein. I also agree with the Respondent that the authority in the case of **Jane Kagige & Another -vs- Wallace Ireri Njeru & Others [2016] eKLR** is not relevant because in this cause, the Applicant has not, as observed above, established that the Respondent intermeddled or dealt with the estate of the deceased before confirmation of grant. This court finds that she dealt only with the estate of the deceased after

confirmation of grant was issued to her.

In the end the Summons for Revocation dated 4th March 2019 in its entirety is disallowed for lacking in merit. I will however not make any order as to costs.

Dated, signed and delivered at Chuka this 1st day of July, 2019.

R.K. LIMO

JUDGE

1/7/2019

Ruling signed, dated and delivered in the open court in presence of Kirimi for Applicant and Fatuma for Respondent.

R.K. LIMO

JUDGE

1/7/2019