



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCC. CAUSE NO. 15 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE GEORGE GIKUNDI- (DECEASED)

DAVID KITHINJI JOSPHAT.....APPLICANT

VERSUS

STELLA KAARI.....PETITIONER/RESPONDENT

J U D G E M E N T

1. Before me is Summons for Revocation of Grant dated 18th June 2018 taken out by David Kithinji Josphat, the Applicant who has besides seeking for revocation of grant issued vide Chuka Chief Magistrate's Court Succession Cause No.441 of 2016 is also seeking the following other reliefs;

(a) Prohibition of any sale, transfer, lease; subdivision or any other form of interference whatever pertaining land parcel L.R. Mwimbi/Kiraro/1275 pending determination of this cause.

2. The grounds upon which this application is based are listed as follows: -

a) That the grant was obtained through misrepresentation and concealment of material facts.

b) That the grant was obtained by means of untrue allegations of facts essential on a point of law to justify the grant.

c) That all beneficiaries were never consulted prior to obtaining the grant and distribution of the estate.

d) That the Respondent left out some of the beneficiaries.

e) That the Applicant is a purchaser for value of that parcel known as MWIMBI/KIRARO/1275 having brought it from the deceased herein on 2001.

f) That the Applicant took possession of the land pursuant to the agreement and has been living there from 2001 to date.

g) That the deceased died on 26th January 2009 before he could formally transfer the suit land to the Applicant.

h) That by reason of the foregoing the Applicant is a creditor to the estate and that his claim should be determined in accordance with Section 66 of the Law of Succession Act.

(i) That the deceased family including the Applicant knew and were aware of the transaction but still excluded him in the distribution of the estate thereby prejudicing him as he has constructed permanent residence among other developments.

3. The Applicant has backed the above grounds with his affidavit sworn on 18th June 2018 where he has reiterated the above grounds and exhibited copies of agreement and acknowledgment by the deceased of the payment of entire amount in consideration.

4. In a further affidavit sworn on 22nd October, 2018, the Applicant deposed that he paid the deceased a total consideration of 48,000/- which was the agreed consideration. He has exhibited a copy of the agreement, of sale, acknowledgment by deceased of the total payment, an application to the Land Control Board for consent to transfer Mwimbi/Kiraro/1275 (suit land) in favour of the Applicant, and a consent to that effect from Land Control Board dated 26th July 2001.

5. In his evidence before court during the hearing, the Applicant reiterated the contents of his affidavits and added that the deceased died in an accident before effecting the transfer of the suitland to him. He added that the deceased had sub divided his parcel of land (MWIMBI/KIRARO/1146) into two portions with one portion (suitland) going to the Applicant and the remaining portion (MWIMBI/KIRARO/1276) going to him (deceased).

6. He further testified that he has been in occupation of the suitland for over 18 years now and has planted bananas, put pumped water, planted trees among other developments. He faulted the Petitioner/Respondent for concealing that fact to the court when applying to administer the estate.

7. When pushed as to why he had tendered an unclear copy of an agreement by Respondent's Counsel the Applicant stated that he has a clear original at home and conceded that though the transaction was witnessed by elders, the Petitioner/Respondent did not witness the transaction.

8. In his written submissions, the Applicant has contended that he has a legitimate interest on the suitland by virtue of being a purchaser for value. He contends that the evidence he has tendered in this court is sufficient to support his claim on the estate. He faults the Respondent's claim that he is a tenant insisting that he was not paying a rent and the Respondent has not proved any tenancy. He avers that by virtue of having occupied the suit land for continuous period of 18 years he is entitled to benefit from the doctrine of adverse possession and has cited to decision in *Celina Muthoni Kithinji -vs- Safiya Binti Swaleh & Others [2018 eKLR]* to back up his claims.

9. Stella Kaari, the Petitioner/Respondent has opposed this application vide a Replying Affidavit sworn on 2nd July 2018. She contends that she prosecuted *Succession Cause No. Chuka Chief Magistrate's Court Succession Cause No.441/2016* in accordance with the law.

10. The Respondent avers that the deceased never sold any portion of land to the Applicant and denies his claim that he is a *bona fide* purchaser for value insisting that he had burden of proof which was not, in her view discharged.

11. The Applicant further contends that the agreement exhibited by the Applicant is void alleging that Emily Kageni, the drawer of the agreement lacked capacity to do so. She submits that the Plaintiff's claim is based on an illegal agreement. She avers that her deceased husband was a drunkard and that he would have been tricked into a fraudulent deal instead of going to do a lawful transaction before a qualified advocate.

12. It is the Respondent's case that the Applicant's continued occupation of the suitland is illegal and that she did not owe him any duty to involve him in the administration of estate.

13. In her evidence in this court, the Respondent stated that the Applicant only leased a parcel of land (suitland) from the deceased in 2001. She further claimed that the house that the Applicant lives was constructed by the deceased and that the house was meant for his son who was 3 years at the time. She further claimed that the Applicant used to pay rent but stopped doing so after the demise of the deceased.

14. The Respondent conceded under cross-examination by the Applicant's counsel that he cut down coffee trees and bananas in the suitland and that there is a criminal case pending against her for malicious damage to property.

15. In her written submissions the Respondent has faulted the Applicant for bringing a land dispute which in her view falls outside the ambit of **Section 76 of Law of Succession Act**. It is her submission that there is nothing to show that there was any illegality or concealment in *Chuka Chief Magistrate's Court Succession Cause No.441/2016*. She contends that the Applicant has brought up a dispute which should be canvassed at the ELC as it is not a succession claim in her view.

16. The Applicant has pointed out that there is no evidence to prove that there was a sale of land because the agreement exhibited by the Applicant is ineligible and besides that the maker of author of the document was not called.

17. The Respondent has further contended that there was no defect in the succession proceedings in the lower court and has cited the decision in *Matheka & Another -vs- Matheka [2005] KLR page 455* where she states that the court held that there must be evidence that the proceedings were defective in substance or that the grant was obtained by making of an untrue statement of concealment of something material. In her view the Applicant has failed this test. She has further denied the Applicant's claim on adverse possession insisting that the doctrine does not apply and furthermore as a spouse of the deceased she had an overriding interest as per **Section 28 of Land Registration Act, 2012**.

18. This court has considered this application and the response made. I have perused through the submissions ably made by both counsels in this cause. In my view their main issues before me to determine;

- a) Whether the Applicant has proved all or any of the grounds to revoke a grant under Section 76 of Law of Succession Act.
- b) Whether the Applicant's claim falls within the jurisdiction of this court or ELC

19 (a) **Whether the Applicant has established ground(s) under Section 76 to revoke the grant.**

In this application, the main ground relied on by the Applicant is concealment. He is accusing the Respondent, the administratrix of the estate of the late George Gikundi for concealment and not involving him as a purchaser of part of the estate. The Respondent has absolutely denied this.

20. This court has gone through the evidence tendered by the Applicant indicating that he purchased parcel No.MWIMBI/KIRARO/1275

and that the petitioner and other family members were all along aware of the transaction, an allegation also denied by the Respondent. It is a rule of evidence under **Section 107 of Evidence Act Cap 80** Laws of Kenya that whoever alleges must prove. The Applicant here is the person making the allegation of having purchased the suitland. He therefore carries the burden of proof. In civil cases the standard is on a balance of probability.

21. Looking at the evidence laid before me, I agree with the Respondent's counsel that the agreement of sale of suitland is a photocopy and hardly legible. If the Applicant's claim was solely based on that I would have no hesitation in dismissing it. However there are 3 documents tendered by the Applicant that are quite clear/legible that cannot be ignored. The documents are;

a) Acknowledgment receipt dated 26th July 2001 by the deceased acknowledging that he had received a total of Kshs.48,000/- from the Respondent for a parcel of land measuring 0.101 ha and an undertaking that he would transfer the parcel to the Applicant before December 2001.

b) Application for consent of Land Control Board form dated 16th July 2001.

c) Consent from Land Control Board dated 26th July giving consent to the transaction of transfer of parcel No. Mwimbi/Kiraro/1275 from George Gikundi (deceased) to David Kithinji Josphat (Applicant).

22. From the above documents, the intension of parties can clearly be discerned. The deceased clearly sold the suitland to the Applicant and had it formalized through the requisite legal procedures. It is true that spousal consent is now a legal requirement before a married person disposes land as postulated under **Section 28 of Land Registration Act No. 3 of 2012**. However the legal requirement came into force on 2nd May 2012 and the transaction here took place in 2001. Furthermore it is assumed that before that Land Control Board gave consent to the transaction between the deceased and the Applicant herein, some of the factors that must have been considered is the interests of the spouse and the children. But more fundamentally is that the law passed in 2012 requiring spousal consent cannot obviously be applied retrospectively.

23. This court has also considered the uncontested fact that the applicant took possession of suitland immediately after the transaction and has been in occupation ever since which is now over 18 years. While it is debatable whether the doctrine of adverse possession applies, what is certain is the intention of parties to the transaction. From the evidence tendered one can clearly decipher the intention of both the deceased who was the seller and the Applicant who for me was *bona fide* purchaser. The Applicant has given evidence that he paid the total amount in consideration in 2 instalments. The final instalment was Kshs.18,000 as clearly captured by the acknowledgement duly signed by the deceased and witnesses by 4 witnesses. The deceased undertook to transfer banana plants and macadamia trees on the suitland and it is apparent that the Applicant took possession and has extensively developed the parcel. This is not contested. It is also not contested that the deceased met his untimely death through an accident which explains why formal transfer of the suitland to the Applicant never happened. I have considered the fact that the deceased himself subdivided his original parcel No. MWIMBI/KIRARO/1146 into 2 parcels namely parcels No.1275 and 1276 and sought to transfer 1275 (and indeed got consent to transfer) to the Applicant and gave free occupation to the Applicant that in my view shows that the acquisition by the Applicant of the suitland was *bona fide*.

24. I have considered the Respondent's allegation that the Applicant leased the suitland and that the deceased constructed the house, the Applicant now occupies but when questions were put to her by this court on trial, the truth revealed itself. According to her the house in the suitland was put up by her husband for their son Kelvin Murimi. However when this court asked her when the house was constructed she stated;

" The house was constructed in 2000 ".

Asked when her son was born she stated

" He (Kelvin Murimi) was born in 2001. "

When pressed further she retorted **" I knew I was going to have a son in the year 2000 because a scan was done and I was told I was going to have a baby boy. "**

25. Well how someone said to be a drunkard on her own account could think of constructing a house for the unborn is a narrative that can be useful only to fictions or fairy tales but certainly not in real African setting in a rural area. I am not persuaded by the Respondent's account that the deceased put up the house in the suitland for the unborn baby. I am also not persuaded that he was a tenant. The facts or evidence laid before indicates that he is a purchaser for value. That is for me much more important. The contention that the agreement was not validly drawn by a competent person in my view does not hold water because equity and indeed the new constitutional dispensation under **Article 159(d)** of the **Constitution** looks at the substance rather than the form or technicalities. At the end of the day a court of law should always aspire to deliver or administer justice based on substance rather than form or technicalities. This court finds that the Applicant was fully aware of the Applicant's legitimate interests and chose to conceal the same and thought that the best way was to secretly acquire title and then evict or harass the Applicant into abandoning his rights. That certainly was not right or the best way to deal with the issue.

26. It is also important to note that under **Section 3 (1)** of the **Law of Succession Act** the suitland here could not be considered **"free property"** after the deceased sold it to the Applicant and obtained consent to transfer which in my view was the legal seal to legitimize the transaction. The deceased passed on before the transfer was formalized but under **Section 66** of **Law of Succession Act** the Applicant's claim on the estate is a liability which needed to be addressed before the net estate was distributed. This was not done owing to the fact that the trial court was not made aware. It is also apparent that there was a minor at the time the petition was presented and under the provisions of **Section 71 (2A)** of **Law of Succession Act**, the administrators appointed ought to have been more than one. There was inadvertence on the part of the subordinate in that regard because the petition for letter of administration clearly indicated that there was a minor involved.

27. **(b)Whether the Applicant's claim falls within the jurisdiction of this court**

The Respondent through her written submissions has contended that the Applicant's claim is a land dispute which should be referred to ELC pursuant to **Article 162(2)** of the **Constitution** of Kenya 2010. It is true that the Applicant's claim relates to land but most of the succession causes in Kenya actually relates to land. The jurisdiction of this court to deal with properties (including land) belonging to the deceased person is donated under **Section 2(1) & 47 of Law of Succession Act Cap 160**. As I have observed the above the suitland in this cause though comprises properties registered in the name of a deceased person is not considered "**free property**" as defined under **Section 3 (1) of Law of Succession Act** but a liability to the estate. When a creditor to an estate has a claim over the estate of a deceased person particularly where the claim was admitted by the deceased, such a claim can be lodged vide a Succession Cause in this court sitting as a probate court because it has jurisdiction to determine it. It is ofcourse different where the claim was denied by the deceased directly or through his actions. In that case the claim becomes a land dispute that can only be adjudicated by ELC as established by **Article 162(2)** of the **Constitution of Kenya**. In this instance the deceased clearly sold his parcel of land after subdividing it and proceeded to the Land Control Board with the Applicant and obtained the requisite consent to transfer the suitland to the Applicant. Besides that he allowed the Applicant to take free occupation and develop it. That conduct in my view clearly indicates that the deceased gave out his parcel willingly to the Applicant (purchaser) for value .

In the foregoing I find merit in the Summons for Revocation of Grant dated 18th June 2018. The grant issued on 18th April 2017 vide **Chuka Chief Magistrate's Court Succession No.441 of 2016** and confirmed on 6th December 2017 is hereby revoked and/or annulled. Any consequential order is hereby reversed. Both parcels Mwimbi/Kiraro/1275 & 1276 shall revert back to the name of deceased pending the determination of this cause. I at the same time hereby issue a fresh grant to both Stella Kaari (widow) and David Kithinji Josphat (creditor) as joint administratrix and administrator respectively. The two are at liberty to jointly or individually move this court for confirmation of grant before the expiry of 6 months (statutory period) in view of the age of this cause. I make no order as to costs.

Dated, signed and delivered at Chuka this 8th day of October 2019.

R. K. LIMO

JUDGE

8/10/2019

Judgment signed, dated and delivered in the presence of Kirimi for applicant and Mutitu holding brief for Mutani for Respondent.

R.K. LIMO

JUDGE

8/10/2019