



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 62 OF 2012

IN THE MATTER OF THE ESTATE OF MUGO MWONDU (DECEASED)

NJIRU MWONDU.....APPLICANT

VERSUS

NAOMI WAMBETI JOHN.....RESPONDENT

JIM MURIITHI M'NJAUH.....INTERESTED PARTY

R U L I N G

A. Introduction

1. The applicant filed the summons for revocation of grant dated 28th October 2013 in which he sought revocation of the grant of administration issued to the respondent on the grounds that the respondent failed to disclose to court that land parcel no. Kagaari/Kanja/3867(hereinafter referred to as the suit land) belonged to him and he resided in it only that the respondent had not transferred the land to him.
2. It is the applicant's case that the respondent allocated herself the suit property whilst knowing that it belonged to him. In support of his case, the applicant filed a statement by one John Njiru Maru who alleged to come from the same clan as the applicant and the deceased.
3. It was Maru's statement that the deceased was allocated land parcel number Kagaari/Kanja 1140 by the clan to hold on his stead as well as that of the applicant. It is further stated that the deceased later subdivided land parcel number Kagaari/Kanja 1140 into land parcel no. Kagaari/Kanja/3867 measuring one acre and Kagaari/Kanja/3868 measuring two acres.
4. It was further stated that the applicant was to get the suit land herein whereas the deceased retained the portion measuring 2 acres. It is further stated that the applicant is currently in occupation of the suit land herein and has his coffee and tea therein. The applicant further stated that he has buried his own mother on LR. Kagaari/Kanja/3867.
5. In rejoinder, the respondent deposed that the applicant, being his brother in law, is not a beneficiary of the deceased and was aware of the succession proceedings herein. Further, it is the respondent's case that the deceased estate herein consisted of Kagaari/Kanja/3867 and Kagaari/Kanja/3868 and that the applicant had since encroached on the suit land herein.
6. In support of her case, the respondent filed two statements by Emily Kathundo Andrew, a step sister to the applicant and one Njeru Kanake, a neighbour to the deceased herein. The two statements are to the effect that the applicant herein had received land from the Andu Unjuki clan but that he sold the same and squandered the proceeds forcing the deceased to accommodate him on the suit property herein. The applicant then became belligerent towards the deceased and his wife and the 1st respondent and occasionally attacked them. Both witnesses stated that the applicant was not the proprietor of the suit land.
7. The interested party on his part deposed that he entered into a sale agreement with the respondent for the suit property LR. Kagaari/Kanja/3867 on the 21st May 2014 and that the agreement was duly completed and the suit property transferred to him. The interested party denies knowledge of any court proceedings as the respondent informed him the same had been concluded. Being a bona fide purchaser, he prays that his interest be protected under Section 93 of the Law of Succession Act.
8. The parties filed submissions to dispose of the matter.

B. Applicants' Submissions

9. It is submitted that the respondent left out the applicant as a beneficiary of the suit land herein and further concealed to court the fact that the suit land belongs to the applicant and that he has a home on it. It is also submitted that the respondent has not challenged the validity of the evidence presented by the applicant and as such it is only fair that the grant issued to the respondent be revoked to make provision for the applicant.

C. Respondent's Submissions

10. It is submitted that all the legal steps were taken towards the confirmation of grant and that all the proceedings in obtaining the grant and its confirmation were followed and that the applicant had not produced any reasonable evidence to show that the proceedings to obtain the grant were defective in substance.

11. It is further submitted that the allegations that the grant was obtained fraudulently have not been proved against the respondent.

12. It is submitted that at the time of his death, the suit property was in the name of the deceased and as such at the time the respondent petitioned for letters of administration the suit land was still in the name of the deceased and thus having duly obtained the certificate of grant, the land was lawfully transmitted to the interested party.

13. It is also submitted that the applicant is not a beneficiary of the deceased as provided in section 29 (a) of the Law of Succession Act. It is further submitted that the grant has been fully implemented and there is no objection from any of the beneficiaries.

D. Interested Party's Submissions

14. It is submitted that the interested party is an innocent and bonafide purchaser for value who validly acquired the suit land herein after the grant had already been confirmed. The interested party relies on section 93 of the Law of Succession Act and thus his right to property cannot be defeated as was held in the case of **Kennedy Opiche Olela v William Ogida Ochuodho & Another [2014] eKLR.**

E. Analysis & Determination

15. The issue for determination is whether the Applicant meets the threshold for the revocation of a grant within the meaning of **Section 76 of the Law of Succession Act.** That Section states;

“Section 76: 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 has ordered or allowed; 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.

16. The applicant has a duty to prove that any grounds set out in **section 76 of the Law of Succession Act** before the grant issued is revoked. The gravamen of the applicant's case is that the grant was fraudulently obtained to the detriment of himself. He contends that the respondent failed to disclose to court that land parcel no. Kagaari/Kanja/3867 belonged to him and he resided in it only that the deceased had not transferred it to the applicant by the time of his death. In support of his case, one John Njiru Maru who alleged to come from the same clan as the applicant and the deceased stated that the deceased was allocated land parcel number Kagaari/Kanja 1140 by the clan to hold on his stead as well as that of the applicant and upon subdivision of the same land parcel no. Kagaari/Kanja/3867 measuring one acre and Kagaari/Kanja/3868 measuring two acres emerged with land parcel no. Kagaari/Kanja/3867 meant to be for the applicant.

17. On her part, the respondent deposed that the applicant, being his brother in law, was not a beneficiary of the deceased and was thus not entitled to be informed of the succession proceedings despite having knowledge of the same. The respondent further stated that at the time of his death, the suit property was registered in the name of the deceased and thus having duly obtained the certificate of grant, the land was lawfully transmitted to the interested party.

18. The interested party stated that he entered into a sale agreement for the suit property on the 21st May 2014 and that the agreement was duly completed and the suit property transferred to him.

19. I have perused the record herein and I have not detected any defect in the form and procedure followed in the issue and confirmation of the grant. All the beneficiaries were disclosed in the letter dated 1st February 2012 written by the Chief, Kagaari North East Location and in the petition (Form P & A 80) and the affidavit in support (Form P & A 5) of the same. The name of the applicant does not feature in the said documents.

20. **Section 66** of the Law of Succession Act, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section. **Section 66(a)-(d)** provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”

21. In **Nairobi Succession Cause No. 2015 of 2012 In the matter of the Estate of Joshua Orwa Ojode (Deceased)** discussing the issue of who ought to benefit from the estate of a deceased, Musyoka J opined that:

“6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

22. The applicant as a brother is not a person entitled to a grant of letters of administration under the law. Neither is he a beneficiary or a dependant of the deceased in this case. The respondent is the widow of the deceased and ranks high in priority under Section 66 of the Act as opposed to the applicant.

23. **Section 24 of the Land Registration Act 2012** provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

24. It is not disputed that the property in issue was solely registered in the name of the deceased at the time of his death and it was therefore part of the free property of the deceased available for distribution in accordance with intestate succession rules. There was no encumbrance or entry in the register to show that any other party had an interest. As a result of the succession cause, the respondent became the absolute owner and sold it to the interested party. **Section 93** of the **Law of Succession Act** protects the interested party's title to land and the transfer to him cannot be revoked in these circumstances through revocation of the title. **Section 93** of the **Law of Succession Act** provides as follows:

“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchase shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

25. The interest of the applicant is based on customary trust which claim this court has no jurisdiction to determine in these proceedings for revocation. The applicant ought to pursue his claim in the Environment and Land Court (ELC).

26. The upshot of the above is that it is my considered opinion that the applicant has failed to satisfy the requirements of section 76 of the Law of Succession Act to warrant revocation of grant.

27. Accordingly, the summons dated 28th October 2013 is thus dismissed with no orders as to costs.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Lokorio for State/Respondent

Mr. Okwaro for Guantai for 1st Respondent

Mr. Momanyi for Andande for Applicant

Applicant present