



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 97 OF 2010

IN THE MATTER OF THE ESTATE OF NCHEBERE GAUA (DECEASED)

STEPHEN MATUMBI M'CHEBERE.....APPLICANT

VERSUS

TEREGINA MUNGAI M'NTHAKA.....PETITIONER

MUNGATHIA JOHN MUTUMA.....INTERESTED/PARTY

R U L I N G

1. By a Summons dated 18/8/2018 brought under *section 76 of the Law of Succession Act*, the applicant sought the revocation/annulment of the grant issued on 2/5/2010 and confirmed on 19/12/2013.

2. The grounds upon which the Summons were based were set out in the body of the Summons and the supporting affidavit of **Stephen Matumbi** sworn on 18/8/2018. He averred that he is a son of the deceased; that this Cause was secretly and fraudulently filed with the goal of denying him and his siblings their rightful inheritance. That the petitioner has distributed his father's estate to strangers and to people not entitled to any of the deceased estate.

3. The applicant deposed that the deceased had left the following dependents:-

- a) Evangeline Ome (deceased) - Widow
- b) Stephen Matumbi - Son
- c) Rosemary Karambu - Daughter
- d) Stella Kanja - Daughter
- e) Stanely Ntoribi (deceased) - Son
- f) Eunice Nkorogucho - Daughter
- g) George Bundi - Son
- h) Mercy Kanan - Daughter
- i) Lawrence Munene - Son
- j) Cecilia Kathambi - Daughter

4. He further stated that none of the dependents have been provided for, as the petitioner concealed their identities to the court and that the dependents of the deceased were in possession of the suit property.

5. The application was opposed by the petitioner through a preliminary objection dated 4/10/2018. She contended that the petition was

properly lodged and prosecuted. That there had been service and no objection was raised within the required period and that the property had since been transferred to a third party.

6. The application was further opposed vide a replying and supplementary affidavit dated 21/11/2018 and 5/9/2019, respectively by **Mungathia John Mutuma (“the interested party”)**. He stated that he was aware that the petitioner had filed a Citation and served the same upon the applicant and the others. That thereafter, the court allowed the petitioner to file this Cause the citees having declined to do so.

7. The interested party further stated that after confirmation of grant, the petitioner sold him **Nyaki/Thuura/1363** measuring 5 acres. He thereafter purchased another 1 acre from a beneficiary and he is now the registered proprietor of **NYAKI/THUURA/5057, 5155, 5154 and 5055**.

8. Although the Court gave timelines within which to file and serve the respective parties’ submissions, the applicant failed to comply and filed the same way out of time after the interested party had already filed his. For that breach, Counsel for the interested party invited the Court to expunge the applicant’s submissions. However, for the interests of justice, this Court has decided to consider them nevertheless.

9. It was submitted for the applicant, that the deceased’s estate was being managed by a stranger. That upon getting the grant, the petitioner quickly disposed the entire estate to a third party in a bid to cover up her fraudulent tails in grabbing the deceased’s estate. That the third party cannot hide in the immunity of having purchased the land after the confirmation of grant and that he should have asked himself why he would buy land where the occupants resisted their attempts to enter the suit land.

10. It was submitted for the interested party that he purchased the property three years after the confirmation of grant on 12/8/2016. He is an innocent purchaser for value who should be protected under **section 93 of the Law of Succession Act**. The decision of **Nyeri Court of Appeal Civil Appeal No. 108 of 2011 Kaumbuthi Mathiu v. John Mwirigi Mathiu and Another** was cited in support of those submissions.

11. I have considered the affidavits on record and the submissions of learned Counsel. The issue for determination is **whether the grant issued on 2/5/2010 and confirmed on 19/12/2013 should be revoked**.

12. **Section 76 of the Law of Succession Act** sets out the requirements for revocation or annulment of grant. It provides:-

“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.

13. The ground upon which the present application was made was that the petitioner had concealed material fact from the Court and that she was not related to the deceased in any manner.

14. The court has perused the entire record. The record shows that on 5th March, 2010, the petitioner lodged a Citation against the applicant and his 3 other siblings, **Nturubi Nchebere, Lawrence Nchebere and George Nchebere. (“the Citees”)**

15. In the Citation, the petitioner alleged that, her late husband had purchased **LR Nyaki/Thuura/1363 (“the subject property”)** in 1967 from the deceased but had not transferred it to her husband before he passed on. That the deceased had passed on in 2002 but none of the Citees had applied for letters of administration. That she therefore cited the applicant and his siblings so that they could take out letters of administration for the estate of their late father (“the deceased”).

16. There is an affidavit of service on record of **David Mwenda Kanyamu** sworn on 25/9/2010. He deposed that he had served the Citees with the Citation. It would seem that on the strength of that Citation and affidavit of service, the petitioner was allowed to lodge the present Cause which she did on 7/2/2011.

17. In the petition dated 4/2/2011, the petitioner stated in paragraph 2 thereof that, ***“I present this petition in my capacity as the purchaser of the deceased’s estate”***. In the affidavit in support of the petition in paragraph 4, she again stated that she was a purchaser and also set out the names of the applicant and the other 3 Citees as the other survivors of the deceased.

18. In paragraphs 8 and 9 of the affidavit in support of the Summons for revocation, the applicant alleges that the petitioner concealed the identities of the Citees and had not sought their consent to lodge this Cause.

19. The applicant did not deny that they had been served with the Citation. With the service of the Citation, that was adequate notice, in my view, to the Citees. Further, with the disclosure in both the Citation, the petition and the affidavit in support of the petition that the petitioner was a purchaser, I am unable to find that she concealed any material facts from the Court. All these facts were before the Court before the Court issued her with the grant and subsequently confirming the same.

20. Accordingly, I hold that the applicant has not established that there was any concealment of material facts or that he and his siblings were not aware of the present Cause. It is this Court that authorized the petitioner to lodge the same. Further, with the service of the Citation, which was not denied, the applicant and his siblings cannot allege that the cause was lodged secretly without their being notified of the same.

21. As regards the interested party, he contended that he bought the subject property 3 years after the grant was confirmed. He produced a sale agreement dated 12/8/2016 for the purchase of the initial 5 acres. He also produced a sale agreement for the subsequent purchase of 1 acre on 21/3/2018. The total consideration was Kshs.5,900,000/-. Accordingly, there was consideration in respect of the purchase of the total acreage of 6 acres.

22. The grant was issued to the petitioner on 2/5/2012 and was subsequently confirmed on 19/12/2013. It is clear that, the purchase of the subject property was not a hurried event as contended by the applicant. There was a clear lapse of nearly 3 years from the date of confirmation and the date of the sale.

23. **Section 93 of the Act** provides:-

“(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.”

24. In the case relied on by the interested party on **Kaumbuthi Mathiu v. John Mwirigi & Another (supra)**, the Court of Appeal held:-

“During the hearing of this appeal, it was submitted that the suit property had been transferred to the interested party. Section 93 of the Succession Act provides that a transfer of any interest in immovable or movable property made to a purchaser by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant. In the instant case, it is our considered view that the transfer of the suit property to the interested party is valid and protected by Section 93 of the Succession Act and the appellant has no remedy against the interested party and the suit property”.

25. I reiterate the forgoing pronouncement in total in the present case.

26. In the circumstances, I find that the application for revocation has no merit and dismiss the same. In the circumstances of this case, I will make no order as to costs.

DATED and DELIVERED at Meru this 11th day of December, 2019.

A. MABEYA

JUDGE