



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**PROBATE AND ADMINISTRATION**

**SUCCESSION CAUSE NO. 642 OF 2014**

**IN THE ESTATE OF MUTUGI MBUTII.....(DECEASED)**

**BERNARD MUCHIRI MUTUGI.....APPLICANT**

**V E R S U S**

**STEPHEN MUCHIRI.....RESPONDENT**

**JUDGMENT**

This matter arises from Kerugoya Senior Resident Magistrate succession Cause No. 154/2000 in the Estate of Mutugi Mbutii, deceased who died on 17/6/1999. The succession cause was filed on 21/7/2000 by Bernard Muchiri Mutugi, the petitioner(deceased) Temporary Letters of Administration were issued on 9/2/01. The petitioner had listed two properties as comprising the net estate of the deceased that is:

1. Kabare/Nyangati/3274 – 10 Acres.
2. Kabare/Nyangati/3276 - 5 Acres.

Before the grant was confirmed, affidavits of protest were filed. The protest has not been heard on merits nor has the grant been confirmed. The distribution of the estate has not been done as well.

The appellant Jerusha Wanjiru Mutugi who was named in the affidavit in support of petition for Letters of Administration in the estate of Mutugi Mbutii as a beneficiary, a daughter not married as surviving the deceased filed an application dated 2/2/01 against one Boniface Njuki Mutugi, a son of the deceased. In the application Jerusha was seeking orders that Boniface Njuki Mutugi be restrained from evicting her from land parcel Number Kabare/Nyangati/3274 measuring five (5) acres until the Succession Cause was heard and determined. In the affidavit in support of the application Jerusha deponed that the land parcel No. Kabare/Nyangati/3274 was one of the subject matters in the estate of the deceased in the Succession Cause. The court allowed the application in a ruling dated 12/3/2001 and ordered that the status quo be maintained see order dated 3/5/01. Later on 23/8/03 Boniface Njuki Mutugi withdrew from the Succession Cause and informed the court that he had been given his share.

The petitioner then filed an application dated 16/10/06 seeking an order that land parcel No. Kabare/Nyangati/3274 be removed from the assets left by the deceased as the land was now registered in the name of one Jerusha. The protestors opposed the application contending that land parcel No. Kabare/Nyangati/3274 was by the time of filing the Succession Cause was in the name of the deceased. In a ruling dated 9/2/07 the Court declined to allow the application by Jerusha and found that there was intermeddling with the estate of the deceased and that transfer to Jerusha was done in unexplained circumstances while the succession cause was still pending which was highly prejudicial to other beneficiaries and disrespectful to the court. No appeal was filed against this ruling.

Following this ruling, an oral application was made for the Land Registrar to be summoned to shed light on how the registration of Jerusha Wanjiru Mutugi was affected. The land Registrar did appear in court but Jerusha did not attend court. The Registrar, Cyrus M. Kinyua informed the court that in 1997 the land was registered in the name of deceased Mutugi Mbutii who was registered in 1958. That Jerusha Wanjiru Mutugi was registered on 31/12/2004. That there was no record of succession cause in respect of the land parcel before the transfer to Jerusha. That there were no documents to show how land parcel No. Kabare/Nyangati/3274 was transferred to Jerusha Wanjiru Mutugi.

It is then that the protestors who are the respondents in this appeal filed an application dated 22/8/2008 seeking orders for cancellation of the said registration and title deed and the title deed to revert to the estate of the deceased. The appellant filed a preliminary objection to the application. The preliminary objection was dismissed and the application was heard on merits. The court allowed the application in a ruling dated 26/7/2010 and ordered the registration of Jerusha Wanjiru Mutugi be cancelled. It is this ruling which forms the basis of this appeal.

The appellant raises the following grounds:

- That the learned Magistrate erred in fact and law in proceeding with a matter being land of over 30 acres when he had no jurisdiction to hear the case.
- That the Learned Magistrate erred in fact and law in cancelling a title deed of the appellant without hearing oral evidence.
- That the learned Magistrate erred in fact and law in dealing with the property of a person who is alive in a succession case.
- That the learned Magistrate erred in making the order of 26/7/2010.

She prays for orders that the ruling of 26/7/2010 be set aside and she be awarded costs.

Two issues arise in this appeal. These are:

- Jurisdiction.
- Cancellation of title deed.

### **JURISDICTION.**

The appellant is claiming that the land is over 30 acres. That L.R No.Kabare/Nyangati/3274, the value of the subject matter exceeded the jurisdiction of the court as the provisions of law of succession provides that the lower Court jurisdiction in succession cause matter shall relate to property whose value does not exceed Kshs 100,000/-. That given that it is not in dispute that the said parcel of land measures over 30 acres a matter of fact that it is not possible that such a huge amount of acreage would cost below Kshs 100,000/- it is clear that the subordinate court lacked jurisdiction.

For the respondents it is submitted that the submission by the appellant is not true as the land in dispute does not measure 30 acres. That by her own application the appellant had stated that the land measures five acres. In her supporting affidavit at page 16 of the record, the appellant deponed that:

***“That on 17/6/99 our deceased father died and left me utilizing 5.0 acres out of land parcel No. Kabare/Nyangati/3274 which is one of the subject matter on the cause.”***

The respondents further submits that the value of the estate was given as Kshs100,000/- in the year 2000, the issue of jurisdiction was not argued in the application giving rise to the ruling and therefore the ground lacks merits. That the issue of jurisdiction was determined in an application dated 30/4/10 which was not challenged on appeal. That the appellant was aggrieved with the ruling of 26/7/2010 and the issue of jurisdiction did not arise in that ruling. That even if the appeal was against the ruling of 30/4/2010, the same would be incompetent for being filed out of time and without leave.

I have considered the application. The jurisdiction of the subordinate courts in succession matters is provided under **Section 48 of the Law of Succession Act**. Before the amendment effected under **Act No. 26/2015** to bring it in tandem with the pecuniary limits set under **Section 7(1) of the Magistrates’ Courts Act, 2015** the jurisdiction was Kshs 100,000/-.

The section provided:

***“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76, and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.”***

This succession cause was filed in the lower court. The documents filed, P & A 5 the affidavit in support of the application indicates that the estimated value of the assets was Kshs 100,000/=. The appellant had deponed in affidavit sworn on 2/2/2011 that the land measures five acres. The issue of the value of the subject matter was never raised at the time of filing the succession cause. The appellant despite claiming that the value of the land exceeded the jurisdiction of the subordinate court has not tendered any evidence. Where the value of the property is in issue, the party raising it must tender a valuation report to assist the court to determine the issue. This the appellant has not done. It is a principle in the law of evidence that he who alleges must prove. The appellant has not discharged the burden to prove that the value of the land exceeded Kshs 100,000/-.

The appellant has come to court on falsehoods. Having stated on oath that the land is five acres, the submission that the land measures thirty acres is false and aimed at derailing the cause of justice. The appellant has stated that he is appealing from the ruling of the Learned Magistrate delivered on 26/7/2010. I have perused the ruling which is at page 73-73 of the record. This ruling as it has been well submitted by counsel for the respondent, did not deal with the issue of jurisdiction at all. For the appellant to purport to file appeal on the issue of jurisdiction based on the ruling of 26/7/2010 is a mark of bad faith. This cannot be allowed by this court. A party is bound by his pleadings. If the appeal was against that specific ruling, the appellant cannot stray from it and raise matters which were not in the ruling. By raising the issue of jurisdiction, the applicant was using a short cut to appeal against the ruling of 30/4/10 out of time and without leave of the court to appeal out of time. It amounts to an abuse of court process. I am in agreement with the submissions by the counsel for the respondents that the ground on the issue of jurisdiction lacks merits as it was not raised in the submissions by counsel in the application giving rise to the ruling of 26/7/2010.

I am of the view that since the document of Probate and Administration indicated that the value of the subject matter was Kshs 100,000/- which was within the jurisdiction of the Magistrate's Court, without the issue being raised, the Magistrate had no obligation to look further. The submission that the land measures 30 acres is false and extraneous as it was not before the trial court. It should also be noted that this was the value of a five acres piece of land which was given in the year 2001 when the cause was filed. The issue is being raised in the year 2018, seven years later the value must have changed. I take judicial notice that the value of the land in the country has been escalating at a very high rate. However, that notwithstanding, the value which guides the court is the value in the pleading as the subject matter has not changed in any way. In this case the value was indicated as Kshs 100,000/-. There was nothing placed before the Learned Magistrate to show that it was not the value. The trial Magistrate was therefore right in going by the value indicated on the P & A documents. Even as of now there is nothing to show that the value was not Kshs 100,000/-. The appellant herself obtained orders to status quo and she never challenged the jurisdiction of the court. It was not for the court to enquire about the value when it was given in the petition for the letter of administration. The court was therefore entitled to find that the value of the land was Kshs 100,000/- as stated in the documents of P & A. In a persuasive decision on the matter by my brother Hon. Justice Musyoka in Agnes Mutitu Mwaura & 2 others -vs- Jane Njoki Gachoki (2015) eKLR it was stated;

***The applicants however for unknown reasons never raised the issue before the lower court which would have triggered consideration by court and maybe the attendant valuation of the estate. The applicants in their grounds for revocation and supporting affidavit were silent on the issue of monetary jurisdiction .....***

***Can this court be called upon through written submissions of the applicants to make assumptions what the net value of the estate is beyond Kshs 100,000/-? The answer is in the negative as a party who alleges existence of a fact is under an obligation to prove it. This court is inclined to agree with the respondent that the issue is an afterthought because why would a party duly represented not raise the issue in the Senior Resident Magistrate's court or swear an affidavit and place material before court to show that the Senior Resident Magistrate's Court exceeded its monetary jurisdiction?***

The issue of jurisdiction is without merits it is not properly before this court and is raised in flagrant abuse of court process. The appellant has not placed any material before this court to prove that the value exceeds Kshs 100,000/-. The court cannot presume and more so because the allegation is based on falsehoods as to the size of the land. The ground is without merits.

#### **CANCELLATION OF REGISTRATION.**

The appellant is stating that her registration was cancelled when there was no evidence on how she got registered. She contends that she was not given an opportunity to be heard. This is however not true. The record shows that the appellant was summoned together with the Land Registrar to appear and explain how the registration was effected. The appellant refused to appear. Page 52 of the record. At Page 55 the counsel for the respondents informed court that she decided not to attend court. There was no explanation why she failed to attend. The appellant was given an opportunity to explain how she was registered but she failed to do so. It can only be concluded that she had no explanation in view of what the Land Registrar told the court.

The appellant further submits that no evidence was adduced through hearing to prove that the title was acquired illegally. That no provision under the **Law of Succession Act** confers jurisdiction on the court the necessary powers to cancel titles. That it is only the High Court which could cancel title deeds under **Section 159 of the Registered Land Act (Repealed)** However the provision gave jurisdiction to the High court and Resident Magistrate's court depending on the value of the subject matter. The provision relates to Civil suits. What is before this court is a Succession Cause.

He relied on **John Muriithi Waweru -V- Patrick Mbathia, Nyeri H.C.C.A No. 32/2007**. The decision is persuasive. The facts are distinguishable as it was a civil case based on contract. This court is dealing with a succession matter and must consider the **Law of Succession Act** in determining the matter. In any case the court cited **Section 143 of the Registered Land Act (Repealed)** which gives court jurisdiction for rectification of register by directing that any registration be cancelled or amended if it is satisfied that the registration was by mistake or fraud. The provisions gave Magistrate Court jurisdiction where it had pecuniary jurisdiction. I have held above that the court had the pecuniary jurisdiction based on the stated value of the estate. **Section 143 of the Registered Land Act (Repealed)** is stating that rectification may involve cancellation or amendment of the title deed. So even under the Registered Land Act, the Magistrate could cancel the title deed.

The appellant further submits that the sanctity of titles is protected by law and more so by **Article 40 of the Constitution of Kenya.**

For the respondent, it was submitted that the appellant was given several opportunities to explain how she became the registered owner but she failed to do so. I have found this as a fact above. That under **section 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** the court has wide powers to make appropriate orders deemed appropriate in the interest of justice and for preservation of the deceased's estate. That in the ruling of 9/2/07 the court had found that there was intermeddling with the estate of the deceased. The court had held that it was highly prejudicial and disrespectful to the court. That the court had for all intents and purpose to make orders to preserve the estate. He relied on **Mombasa High Court Succession Cause No. 367/2006, Khairu Mohamed -V- Shumi Ali Mustafa** where the court held that, "**the transfer of the property known as Lamu/Block/1/582 Hasuni Alawi Husuni Mohamed be and is hereby revoked. The property is restored to the estate of the deceased**". In the case there was an application to revoke a sale of property that was part of the estate of the deceased which was transferred to a 3<sup>rd</sup> party who had purchased it.

The appellant has not shown how she acquired the title deed to the property of the deceased when it was the subject of a succession cause pending in court and the court had not issued any orders. By her conduct, it is clear that the registration was fraudulent. The appellant had informed court that the land was transferred to her on 24/1/05, page 42 of the record and a title deed issued in her name. This despite the fact that the green card issued on 17/2/02 in the P & A documents shows that the land was in the name of the deceased. However when the Land Registrar was called he testified that Jerusha was registered on 31/12/2004. The application dated 16/10/06 is not on the record of appeal. It is clear that there was intermeddling with the estate and the court had power to issue orders to conserve the estate. **Section 47 of the Law of Succession Act** provides.

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”***

The section donates powers to the High Court as well as the Resident Magistrate’s to make such orders as may be expedient. The court has power to make orders as in this case where there was intermeddling with the estate, make orders to preserve the estate and to restore the estate where it has been sold or transferred fraudulently where the court is seized of the matter. The word expedient must be given a wide interpretation for the court to be able exercise the powers under the section.

Where the court is satisfied that there is intermeddling in the estate, it has discretion to make such orders as maybe expedient depending on the circumstances of the case. The court in this case by summoning the Land Registrar satisfied itself that there was intermeddling which was prejudicial to other beneficiaries and disrespectful to the court and issued an order cancelling the registration and the title. **Section 45 of the Law of Succession Act** outlaws intermeddling with the estate of a deceased person. It provides:

***“Expect as, far as expressed authorized by this Act or by any other written Law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person. Any person who contravenes the provision of this section shall – be guilty of an offence and liable to a fine not exceeding Ten Thousand Shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and***

***-be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration.”***

Further Rule 73 of the Probate and Administration rules provides:

***“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of Justice or to prevent abuse of the process of the court.”***

The subject property Kabare/Nyangati/3274 was a subject matter of the estate of the deceased. The grant had not been confirmed. No transfer could be effected before the grant is confirmed and the shares of the beneficiaries identified.

**In the Matter of the estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR.**

The Court stated:

**The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.**

**SantuzzaBilioti alias Mei santuzza (deceased) –v- Giancarlo Falasconi (2014) eKLR**

The Respondents in this case alleged that a succession court cannot cancel a title deed. The court held:

**This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased’s property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.**

It is not in dispute that at the time of filing the succession cause, the subject property was in the name of the deceased. The registration of the appellant was made in unclear and unexplained circumstances. The court had wide powers to conserve the estate for the benefit of other beneficiaries and for the due process to be followed. It was therefore within the powers of the Learned Magistrate donated under **Section 47 of the Act**(supra) and **Rule 73 of Probate and Administration Rules**, (Supra) as the registration of the appellant amounted to intermeddling with the estate of the deceased before the succession cause was finalized. The registration of the appellant was fraudulent as it was not authorized by the court and was not supported by any documents. My conclusion is that this appeal is without merits. I order that:

- a) The court had jurisdiction to entertain the succession cause.
- b) The Learned Magistrate acted within the powers donated under the Law of Succession Act to cancel the registration of the appellant and the title.
- c) The matter is referred back to the Chief Magistrate’s Court Kerugoya for the hearing and determination of the protest.
- d) The appeal is dismissed with costs to the respondents.

***Dated and delivered at Kerugoya this 3<sup>rd</sup> day of May 2018***

**L. W. GITARI**

**JUDGE**