



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 760 OF 1993

IN THE MATTER OF THE ESTATE OF KIRUTHO KIIRU (DECEASED)

RULING

1. The deceased herein Kirutho Kiiru whose estate these proceedings relate died intestate on 8th February 1972 leaving behind the following survivors:

- (1) Rahab Wambui – brother’s wife**
- (2) Mary Njeri Muiruri – brother’s wife**
- (3) Bernard Gatui Kirutho – son**
- (4) Albert Munui Kirutho – son**
- (5) Francis Kamau Kirutho – son**
- (6) Margaret Mweru Kirutho – widow**

According to Form P & A 5, the only asset comprising the estate is L.R. Loc.9/Kanyenyaini/T.709. On account of liability, funeral expenses of Kshs.200,000 was reflected.

2. On 7th June 1993, Bernard Gatui Kirutho petitioned for a grant of letters of administration intestate and the same was made on 24th August 1993. Consequently, the grant was confirmed on 14th March 1997 and later rectified on 15th August 1997 leading to the distribution of the estate as hereunder:

- (1) Mrs. Rahab Wambui Wokabi – 1.4 acres**
- (2) Mrs. Rosemary Njeri Muiruri – 1.4 acres**
- (3) Bernard Gatui Kirutho – 2.9 acres**
- (4) Grace Wacuka Kamau (widow of Francis Kamau) – 1.4 acres**
- (5) Albert Muniu Kirutho – 2.9 acres**

3. Pursuant to Section 76 of the Law of Succession Act and rule 40(1) of the Probate and administration rules, Mr. Mwangi Ngobia filed a summons dated 12th November 2002 but filed on 19th November 2002 seeking orders as follows:

- (a) That the grant of letters of administration issued to Bernard Gatui Kirutho on 24th August 1993 and subsequently confirmed on 14th March 1997 be revoked and or annulled.**
- (b) That in the alternative, orders be made wherein Mwangi Ngobia shall be made the administrator of the deceased’s estate.**
- (c) That costs of this application be borne by the respondents.**

4. The application herein which is the subject of determination before me is predicated upon grounds set out on the face of it and an affidavit

in support deposed on 5th November 2002 by Mwangi Ngobia the applicant herein. Basically, the application is hinged on the grounds that:

(1) The grant was obtained fraudulently by making of false statements and or concealment from the court of material facts vital to the making of the grant.

(2) The grant was obtained by means of untrue allegation of fact essential in point of law.

(3) The person to whom the grant was made is not fit and proper to administer the estate of the deceased as his sole interest was to displace the objector from land parcel No. Loc.9/Kanyenyaini/T.709 which had legally passed hands for consideration in the life time of the deceased.

5. According to the applicant, he is the legal owner of the land in issue on the basis that he bought the entire parcel of land from the deceased during his life time. He attached copies of various sale agreements dated 14th June 1963, 12th December 1970, 14th January 1971, and 17th January 1971 written in Kikuyu language but translated in English as evidence and or proof of the payments made in instalments to the deceased as the purchase price (see Annexure MG-II).

6. That following the said sale, the applicant moved into the said land and took vacant and quiet possession to date. He contended that as the legal owner of the said land, he was the right person in order of priority entitled to obtain the grant and administer the estate. He asserted that he was shocked to hear of the succession cause herein having been filed and fraudulent acquisition of the grant leading to illegal sub-division of his land without notice or his knowledge hence the prayer for revocation or annulment of grant and distribution of the estate entirely into his name.

7. In response to the application, Bernard Gatui Kirutho filed a replying affidavit on 11th December 2003 denying the allegation that the applicant (Mwangi Ngobia) bought the land from the deceased. He contended that to his knowledge, the applicant who is their relative was left to take care of the suit land in the early sixties as the deceased was working and living in Limuru. He further averred that although there may have been some intention to sell the suit land, the sale was not concluded by 1972 when the deceased died.

8. The respondent further stated that the sale if any which is denied, was subject to Land Control Board Act to which no consent was granted hence null and void. He asserted that the only recourse available is refund of the purchase price. In support of his claim that the applicant had not purchased the said property from the deceased, he annexed an agreement between him and the applicant made on 18th October 1991 in which the applicant pleaded with the respondent and his family on priority to offer the land for sale to him as he had taken care of it for a long time (see Annexure BGK-II).

9. That due to the applicant's inability to raise the purchase price, he was ordered to leave the land but instead rushed to court to file Nairobi HCCC No. 470/1998 which he later withdrew and filed Nairobi HCCC No. 748/1998 which has never been determined but is a subject of withdrawal as well. That as a consequence, he and his siblings also filed Nairobi HCCC No. 2051/1998 seeking eviction orders against the objector but the suit was dismissed for want of prosecution. In a nutshell, the respondent maintains that the applicant has no locus standi to lay a claim over his father's estate.

10. Prior to the filing of the application for revocation herein which is the subject of this ruling, one Peter Kamau a step-brother to the administrator had filed also an application for revocation of the grant and confirmation thereof urging that his mother Naomi Nyambura Kirutho and his step-sisters (siblings) Rosemary Njeri Mburi and Josephine Wangui Kirutho had been left out and therefore sought division of the estate into two equal shares each to the benefit of the two houses.

11. After hearing the said application, Justice Rawal as she then was on 24th

July 2007 found that the deceased having died in 1972 before the enactment of the Succession Act had left two houses as his heirs hence Kikuyu Customary Law was applicable and ordered distribution of the estate between the two houses in equal share and a fresh certificate of confirmation of grant issued accordingly. The same certificate of confirmation of grant was further rectified on 21st February 2011 after a consent agreement that Bernard Gathui Kirutho (1st administrator) representing the first house and Peter Kamau Kirutho representing the 2nd house were to be joint administrators and each to hold half share of the estate in trust for the family members of their respective houses.

12. Consequently, the two joint administrators filed an application dated 24th March 2015 but filed on 25th March 2015 seeking orders directing the Land Registrar Murang'a to remove and or lift a caution registered against the land in question by Mwangi Ngobia the objector and that an eviction order to issue against the objector under the supervision of the OCS Kangema Police Station. In reply, John Wageche Mwangi swore a replying affidavit deposed on 29th May 2015 on his own behalf and that of his brother James Mwangi Wangonya being administrators of the estate of Mwangi Ngobia (objector) who had passed on. They stated that the impugned caution was lawfully lodged by Mwangi Ngobia the legal owner of the land in controversy.

13. On 21st March 2017 when the matter came up for hearing of the application for revocation herein, the petitioners/administrators and their counsel were absent despite having taken the hearing date by consent. The matter therefore proceeded ex parte. In his testimony, PW1 Simon Kiiru a brother to Mwangi Ngobia (objector) and also a nephew to the late Kirutho Kiiru (deceased), adopted as his evidence his written statement dated 16th July 2015 contending that the land in question was sold by the deceased to the late Mwangi Ngobia. That in 1973, Mwangi Ngobia's family moved into and settled in the land he had bought.

14. PW2 John Wageche Mwangi a son to Mwangi Ngobia also claimed that the land in issue was bought by his father. He referred to various payments made by his father in fulfillment of the sale agreement (MG-II). He adopted the affidavit in support of the application for confirmation as his evidence. Upon closing their case, the matter was reserved for filing parties' submissions. On 28th April 2017, the firm

of Muigai Kemei for the petitioners filed one paragraph kind of submissions stating that the objectors were not children to the deceased hence have no right in administering the estate of Kirutho Kiiru whose sons (administrators) have properly and regularly acquired the grant.

15. On the other hand, the firm of S.W. Ndegwa Advocates representing the objector/applicant filed lengthy, insightful and illuminating submissions arguing that the objector had lawfully bought the land in question sometime in 1963 and that before the deceased died, he had already given the objector (Mwangi Ngobia) the original title deed to process the transfer. Counsel made reference to the sale agreement and acknowledgements for payment of various sums as exhibited in paragraph two of the supporting affidavit to the application for revocation. That on purchaser's interest, the land should devolve to the purchaser.

16. In the alternative, learned counsel submitted that, the objector/applicant having stayed on the land in question for an uninterrupted period exceeding 12 years since 1974, he was under the doctrine of adverse possession the owner of the land. Reference was made to Section 7 of the Limitations Act Cap 22 and the case of Wambugu v Njuguna (1983) KLR PP-179 and Hosea vs Njiru & Others (1974), EA 526 where the court held that;

“once payment of the last instalment of the purchase price had been effected, the purchaser's possession becomes adverse to the vendor and that he henceforth by occupation for twelve years, was entitled to become registered as proprietors of it”.

17. While the ruling was pending delivery, this court discovered that there were three civil cases before Civil Division touching on the same land whereby their status was not clear. The court deferred delivery of the ruling pending confirmation of their status. On 9th April 2018, both counsels confirmed that HCCC No. 2051/1998 was dismissed for want of prosecution on 27th February 2015 and HCC No. 470/1998 withdrawn. However, Civil Case No.748/1998 had its file missing but the plaintiff/objector herein has sought reconstruction of the same for purposes of withdrawal.

18. I have considered the application herein, supporting affidavit and reply thereto, testimony by the objector and submissions by both counsels. Issues for determination are:

- (a) Was the grant herein obtained fraudulently by making of false statements and concealment of material facts;**
- (b) Was the grant obtained by means of untrue allegation of facts essential in point of law;**
- (c) Is the administrator/s fit to administer the estate.**

19. Revocation of a grant of letters of administration and or certificate of confirmation of grant is anchored under Section 76 of the Succession Act and rule 44 of the Probate and Administration rules. Section 76 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 fact material 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)

(ii)

(iii)

- (e) that the grant has become useless and inoperative through subsequent circumstances.**

20. There is no dispute that the objector is not in any way related to the deceased save for the creditor's interest being the alleged purchaser of the land in question. There is no dispute either that the petitioner Bernard Gatui Kirutho is a son to the deceased. It is also admitted that by the time the deceased died, the property in dispute was registered in his name. In compliance with Part V (Section 39) and Section 66 of the law of Succession Act, the petitioner in order of preference and priority comes first against the objector hence entitled to petition for a grant of letters of administration.

21. Under Section 66 of the succession Act, the order of priority in petitioning for a grant of representation runs from the spouse or spouses, children, parents, brothers, sisters etc. In the order of ranking, the creditor comes last. To that extent, the petitioner properly and regularly petitioned for a grant of letters of administration. The applicant (objector) had no right to petition for grant of representation unless those in

order of priority failed to petition and only subject to lodging a citation to that effect.

22. In the case of **Kennedy Opiche Olela vs William Ogida Ochuodho and Another (2014) eKLR Homabay Succession Cause No. 19/14**, Justice Majanja held as follows:

“The applicant, as a purchaser is not a person entitled to a grant of letters of administration under Section 66 of the Laws of Succession”.

It is therefore inconceivable that the applicant (objector) who is claiming purchaser’s beneficial interest over an estate (land) that has not been transferred to him can claim superior rights in order of preference in petitioning for a grant of representation in respect of whose estate a spouse and even children are alive, willing to petition and in fact taken out a grant of representation. To that extent, the claim by the objector that he was the right person to seek for a grant is misconceived and a misapprehension of the law of succession.

23. Was the grant obtained fraudulently or through concealment of material facts? According to the objector (applicant), the petitioner/administrator (Bernard Kirutho) was aware that the deceased had sold the land in question. The petitioner denied any knowledge over the existence of any sale agreement between his late father and the objector now deceased also. There was no proof tendered by the objectors to establish that the petitioner had knowledge that the objector had bought the land in question and therefore failed to include him as a beneficiary or a creditor. In his replying affidavit in response to the application for revocation sworn on 10th December 2003, Bernard Kirutho attached some form of agreement dated 18th October 1997 in which the objector allegedly occupying the land in question as a caretaker to the deceased requested to be given first priority in buying the land then offered for sale before any 3rd party (annexure BJK1). At Paragraph 4 the agreement read as follows:

“That Mr. Mwangi has convened (arranged) for a meeting to discuss purchase price of the above land in a meeting to be held on a Tuesday the 25th November 1997”.

At paragraph 3 it was also stated that:

“That Mr. Mwangi Ngobia has expressed his interest in buying the above”.

24. From the wording of this agreement which was allegedly signed by Kirutho Bernard, Francis Kiraka Ngobia (son of Mwangi), Symon Kiiru and Albert Muniu, it is clear that the purchaser was not dealing or aware of the alleged sale agreement between the objector and the father.

25. This agreement has not specifically been controverted or its contents challenged. As to whether there was a meeting held subsequently and cash payment made to the children of the deceased is not clear. The allegation by the objector that he continued paying the balance of the purchase price to one of the sons of the deceased one Wokabi now deceased is not tenable because Wokabi could not sell or receive any cash payment on account of an estate whose grant is not confirmed hence amounting to intermeddling with the estate.

26. However, the petitioner/respondent argued that even if there was any sale agreement which is denied, no Land Control Board consent was obtained. Assuming that the deceased had sold the land in question and received part payment of the purchase price, was the Land Control Board Consent obtained in fulfillment of the transaction? According to the objector, he did not finish paying the purchase price despite the deceased having given him the original title deed. It is the objector’s admission that consent from the Land Control Board had not been obtained by the time the deceased died. Section 6 of the Land Control Act provides that any sale transaction affecting agricultural land is null and void if consent is not obtained. Section 7 goes further to state that, any consideration made in such transaction shall be recoverable as a civil debt (See Court of appeal decision in the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 others (2014) eKLR**).

27. Can recovery of the purchase price be made under this file? It is not in dispute that matters concerning land transactions touching on both succession and civil procedure law have been a subject of endless debate and conflicting decisions by superior courts made. Some courts have held the view that depending on the facts of each case, a succession cause or ELC court can entertain such dispute.

28. In the case of **Nyaga v Karani Ngari and another Embu HC Succession No. 68/2007 (2010) EKL**, it was held that:

“A buyer or purchaser cannot cause an otherwise valid grant to be revoked for the very reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing the whoever sold the property to him and if such person is dead, then he can only sue the administrator of the deceased’s estate”.

29. To fortify this position, the court of appeal in the case of **Dr. Leonard Kimeu Mwanthi v Rukaria m’twerandu M’iriungi (2013)eKLR held that:**

“the litigation in this matter has seen parties litigate for the same subject matter both under the Civil Procedure and the Law of Succession. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example of succession of a deceased’s estate becomes protracted and parties keep hovering from the civil court to the succession cause. The Law of Succession Act was envisaged as a complete regime of law if there is any claim of civil nature against a deceased’s estate, a claimant is supposed to file a civil suit against administrator’s estate. Involvement of claimants of civil obligations or others in matters of administration of a deceased’s estate causes delays and difficulties in resolving them within the regime of the law of succession”.

30. As stated herein above, the discretion to apply civil law in a succession cause purely lies with the presiding Judge if circumstances are such that substantive justice will be discharged by such application or reliance. On a large degree and from the holding of the court of appeal in the case of **Dr. Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iriungi (Supra)**, it is savor when land disputes over ownership are resolved in accordance with the civil laws in this case before ELC rather in a succession cause.

31. It is my finding that the dispute herein regarding the purchase of the land in question and the element of adverse possession would have been properly dealt with in ELC court. Unfortunately, both suits collapsed either by way of withdrawal or dismissal for want of prosecution. The applicant/objector have not convinced this court that the petitioner was aware of the sale of land by his late father to the objector and that he deliberately failed to indicate the objector as a creditor. There is no proof of any fraud, non-disclosure or concealment of material facts or information to the Court. If there is any claim over land based on any sale agreement between the deceased and the objector, then, the same can be pursued before the ELC court.

32. For the above reasons stated, the application for revocation herein dated 12th November 2002 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

N/A..... Counsel for the applicant

M/S Oporat H/B for M/S Muigai..... Counsel for the respondent

Edwin.....Court Assistant