



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 10 OF 2017

(FORMERLY SUCCESSION CAUSE 434 OF 2013 AT THE HIGH COURT AT MACHAKOS)

IN THE MATTER OF THE ESTATE OF KONINI OLE KIMANTIRU (DECEASED)

REGINA NJABI &

SIMON GITAU KAHIA (suing as the Administrators

of the Estate of the late KAHIA GIATHI (Deceased).....APPLICANTS

VERSUS

NAIRUGU NEPAKINE LOISHORNA.....RESPONDENT

RULING

Introduction

1. The genesis of this instant matter is the chamber summons application dated 24th January 2017 filed on even date. It was brought under Article 159 2 (d) of the Constitution, Sections 68 and 69 of the Land Registration Act 2012 and Sections 47 and 48 of The Law of Succession Act and all enabling provisions of the law.
2. The Application sought for orders:
 - a. *THAT the matter be certified urgent and proceed exparte.*
 - b. *THAT pending the hearing and determination of this application the Honourable court do issue an order of inhibition inhibiting any dealings such as transfer, charge or conveyance land parcel No. LR Ngong/Ngong/6099 until this application is heard and determined.*
 - c. *THAT the status Quo be maintained being the applicants and members of their extended family continue occupation on the suit land.*
 - d. *THAT the confirmed grant issued by the Honourable court on 9th April 2014 and rectified on 7th October 2014 be canceled in so far as it relates to property Ngong/Ngong/6099.*
 - e. *THAT any transfer, charge, conveyance or certificate of title transacted issued or using the said grant in (d) above be declared null and void.*
 - f. *THAT a declaration be issued that plot Number LR Ngong/Ngong 6099 is not part of the estate **in the Matter of the Estate of Konini Ole Kimantiru (Deceased)**.*
 - g. THAT cost of this application be borne by the Petitioner/Respondent.
3. The Application was supported by the grounds on its face thereof and by an affidavit sworn by Regina Njambi on 24th January 2017.
4. By a Notice of Motion Application dated 31st May 2017 brought under Order 40 Rules 1, 2, and 4 of the Civil Procedure Rules and Sections 63 and 73 of the Probate and Administration Rules, the Applicants herein sought for further orders:

- a. THAT this application be certified urgent and the same be heard exparte in the first instance due to the urgency.
- b. THAT this Honourable Court be pleased to enjoin the applicants as interested parties to this suit.
- c. THAT this Honourable Court be pleased to issue a temporary injunction restraining the Respondent and/ or her children, grandchildren/relatives/servants/ agents or anyone claiming title through her from evicting/threatening to evict /subdividing/selling/trespassing and/or from any dealing whatsoever with all that property described as LR Ngong/Ngong/6099 pending the hearing and determination of this Application.
- d. THAT this Honourable Court be pleased to issue a temporary injunction restraining the Respondent and/ or her children, grandchildren/relatives/servants/ agents or anyone claiming title through her from evicting/threatening to evict/subdividing/selling/trespassing and/or from any dealing whatsoever with all that property described as LR Ngong/Ngong/6099 pending the hearing and determination of this suit.
- e. THAT this Honourable Court be pleased to further rectify/amend the Certificate of Confirmation of Grant issued on 9th April 2014 and Rectified on 7th October 2014 to provide that LR Ngong/Ngong/6099 be transmitted to the Applicants.
- f. THAT in the alternative to (e) above, this Honourable Court be pleased to order the Registrar Kajiado North Lands Registry to sign the necessary transfer forms for LR Ngong/Ngong/6099 in favour of the Applicants herein.
- g. THAT this Honourable Court be pleased to grant any other Orders that may deem just.

5. The Application was supported by grounds on its face as well as the Affidavit of Simon Gitau Kahia sworn on 31st May 2017.
6. The Respondent filed a Replying Affidavit sworn by Nairugu Nepakine Loishorna on the 17th July 2017 for the Application dated 2th January 2017.
7. The two Applications were dispensed with contemporaneously by way of viva voce evidence at the end of which counsel for the respective parties filed their written submissions. This court delivered a ruling on the issues as raised by the Applicants but reserved ruling on the issue of the revocation/rectification of the grant pending the Court file for **Nairobi High Court Succession Cause 189 of 2013 in the matter of the estate of Kahia Giathi (deceased)** being availed before this court.
8. The court will now proceed to determine the matter by first restating the Applicants case as relates to the question of revocation for grant in brief.

Applicant's Case

9. The Applicants are suing as the Administrators of the estate of the late Kahia Giathi (deceased). Their gravamen is that LR Ngong/Ngong/6099 hereinafter the suit property was included in the instant succession matter yet it did not form part of the estate of the Konini ole Kimantiru (deceased) but rather was a part of the estate of the late Kahia Giathi (deceased). They claim that the deceased had a purchaser's interest in the suit property having acquired the same from Konini Ole Kimantiru (deceased) in the year 1978.
10. It is the Applicants case that the suit property was purchased from Konini Ole Kimantiru (deceased) together with others namely Ketikai Ole Konini and Legishon Ole Konini by Kahia Giathi (deceased) for a consideration of Ksh 18,000/- in the year 1983. The parcel land was a subdivision of property Ngong/Ngong 2927 which the vendors subdivided sold to different purchasers. The said vendors and Giathi (deceased) attended the land control board before the then District Officer Ngong and consent to transfer was issued to him however the deceased did not register the transfer and obtain title to his name. It is only upon the death of the deceased in 2009 that the Applicants discovered the unregistered status of the land they had enjoyed quiet possession of for over 30 years.
11. The Applicants further allege that they have lived in quiet possession of the suit property from 1977 until Kahia Giathi's passing in 2013. After the death of the Deceased, the Respondent and her agents have sought to fraudulently disposes the Applicants of their land going as far as obtaining titles to the suit property without following due process.
12. The Respondent instituted petition for grant of letters of Administration in the instant matter without informing the Applicants yet she knew very well they had a vested interest in the matter. It is the Applicants case that the Respondent filed for and obtained Letters of Administration intestate through a deliberate misrepresentation of facts, in secrecy, fraudulently and with material non-disclosure of facts with the sole aim of dispossessing the applicants.
13. It is for this reason that the Applicants sought to have the confirmed grant issued by the Honourable court on 9th April 2014 and rectified on 7th October 2014 cancelled or rectified in so far as it relates to the suit property.

Respondent's case

14. In response to the Applicants averments, the Respondent maintained that L.R. No. Ngong/Ngong/6099 belonged to the Estate of Konini Ole Kimantiru and that the same was never sold and the Applicants had not adduced any evidence of a Sale Agreement relating to the suit property. It was further asserted that the Applicants were grabbers and their claim that they had been in possession of and lived in the suit property was unfounded. The Respondent further averred that she was a stranger to the grant issued by the court in Nairobi High Court Succession cause 189 of 2013 and that the same had been obtained by fraud and concealment of fact as the suit property had been listed as

part of the estate of the deceased in that matter.

15. It is on the basis of the foregoing that the Respondent sought to have the Application dated 24th January 2017 dismissed with costs.

Applicant's submissions

16. Ms. Wambugu Counsel for the Applicants cited section 76 (b) of the Law of Succession Act for the submission that a grant obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case can be revoked. According to Ms. Wambugu, the Respondent herein concealed from the court in Machakos Succession Cause No. 434 of 2013 the fact that the late Konini ole Kimantiru had sold the suit property, Ngong/Ngong/ 6099 to the late Kahia Giathi and as such the suit property herein did not form part of the estate of the late Konini ole Kimantiru.

17. Ms. Wambugu went on to submit that the Respondent had through unexplained and illegal means caused the subdivision of the suit land into two parcel of land the same being NGONG/NGONG/ 61744 and NGONG/NGONG/61743 on 9th October 2013 and transferred the same to Geoffrey Maina Githinji and Lucia Wangui Wamai. It was submitted that this entry had been cancelled together with an entry made on 25th June, 1985 on for the title to be allegedly reissued to Naserian Legishon and Naiguru Nepakine Loishorna, the Respondent, on 28th February, 2014. Ms. Wambugu further submitted that the aforementioned transfers were done illegally and through fraud as a Certificate of Confirmation of Grant of the estate of Konini ole Kimantiru was issued to the Respondent herein on 4th April, 2014 in in Machakos Succession Cause No. 434 of 2013. This, according to Ms. Wambugu, in effect meant that the Respondent started to intermeddle with the estate of the late Konini Ole Kimantiru even before the grant was confirmed.

18. It is upon this basis that Ms. Wambugu submitted that the Respondent's actions were fraudulent and criminal and as such the said grant issued to the Respondent herein ought to be revoked. Counsel sought to rely on the case of **in the Matter of the Estate of Veronica Njoki Wakagoto (deceased) {2013} eKLR**.

Respondent's submissions

19. Mr. Omboga for the Respondent submitted that the Applicants had failed to prove Kahia Giathi (deceased) ownership of the suit property. According to Mr. Omboga, a search at the lands registry revealed that the suit property was registered under the name of Konini ole Kimantiru (deceased). The property had never been transferred to any other owner before the conduct of **Machakos Succession Cause No. 434 of 2013**. The claims that the suit property had been transferred to Kahia Giathi (deceased) were therefore fraudulent.

20. It was Mr. Omboga's submission that the signatures in the documents tendered by the Applicants in support of their claim were uncorroborated and further that the documents purporting to show consent did not relate to the suit property and in any case their validity had been overtaken by time.

21. Mr. Omboga further submitted that the Applicants did not fall under the meaning of Dependents and provided for under Section 29 of the Law of Succession Act. To Mr. Omboga, the Applicants' case was a land ownership dispute which fell under the province of the Environment and Land Court.

Analysis and Determination

22. At its heart, the Applications by the Applicants sought to *inter alia* revoke the grant issued on 9th April 2014 and rectified on 7th October 2014. Further this court be pleased to restrain the respondents from evicting the applicants or dispossess them of any rights to the suit land. Neither Application followed the correct procedure for filing for summons for revocation of grant. However, as the Applications invoked **Article 159 2 (d)** of the Constitution, **Section 73** of the **Probate & Administration Rules** as well as all other enabling provisions of the law, this court will exercise the discretion bestowed upon it by **Section 73** of the **Probate & Administration Rules** in making its determination. My position is buttressed by the decision by Makau J in **Wangari Gichuki v Daniel Wanjigo Muchemi [2014] eKLR** where the Honourable Judge agreed with Hon. Mr. Justice Lenaola in **Re Estate of Isaka Muthembwa Kithome P&A 539 of 2007** where he stated that Forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate.

23. Having stated as above, I now turn to the substantive issue of whether the grant ought to be revoked. The law on revocation of grants is **Section 76** of the Law of Succession Act which provides:

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 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.

It will also be convenient to set out the provisions of section 51(1) of the same Act which provides inter alia that an application for a grant of representation shall be made in such a form as may be prescribed signed by the applicant and witnessed in the prescribed manner. (2) An application shall include information as to, (a) the full names of the deceased (b) the date and place of birth (c) his last known place of residence (d) the relationship if any of the applicant to the deceased (e) whether or not the deceased left a will. (f) the present addresses of any executors appointed by such valid will (g) a full inventory of all the assets and liabilities of the deceased and such other matters as may be prescribed.

24. An examination of the pleadings and submissions reveals that the Applicants bone of contention is that the grant obtained by the Respondent was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. Specifically, it was the Applicants contention that the Respondent not only failed to reveal to the probate court in Machakos Succession Cause 434 of 2013 that the Applicants were interested parties by virtue of their alleged ownership of the suit property but also failed to inform the Applicants that the matter was being conducted in court.

25. On the other hand, the Respondent's position on the matter was that the Applicants were strangers to the estate of the Deceased Konini Ole Kimantiru and therefore not entitled to any part of the estate. If anything, theirs was a land dispute which was not within the purview of this court. According to the evidence in court the respondents allege that the purchaser's rights were not recognized by the law of succession Act. In other words, the respondents claim that the applicants who rely on the sale agreement are not listed as beneficiaries in estate of the deceased. However, a closer look of section 51 (h) of the Act provides a mandatory full inventory of assets and liabilities of the deceased estate. The purchasers in my view where the applicants fit by definition fall in the category of the liabilities of the estate. As such they are rightly among whose rights and interests are protected in so far as the estate of the deceased is concerned.

26. I am faced with the question whether the Applicants had the locus standi to bring forth this matter. I find in the affirmative. From the evidence tendered, it is clear that Kahia Giathi (deceased) had some dealings with regards to the suit property with Konini Ole Kimantiru (deceased). Further to this, I am satisfied that the Applicants demonstrated that they had enjoyed quite possession of the suit property until as recently as 2013. This claim is uncontroverted by the Respondent.

27. By reason of the foregoing, I find that the Applicants fall under the category of an interested party and as such can apply for the revocation of the grant.

28. Coming to the question of whether there was any fraud and concealment of fact on the part of the Respondent, I am similarly obliged to find in the affirmative. Throughout the conduct of Machakos Succession Cause 434 of 2013, the Respondent neglected to mention that the suit property was not in vacant possession. That the suit property was in occupation by the Applicants who had lived there uninterrupted, enjoying quiet possession for nearly 38 years and were in fact purchasers for value. The deceit did not stop there. The Respondent caused the title of the suit property to be registered in her name and that of one to Naserian Legishon on the 28th February 2017 yet the Grant of Letters of Administration were issued on the 4th of April 2017. How did the Respondent manage to accomplish this without the requisite authority? In my view, this in itself is enough evidence of fraud on the part of the Respondent.

29. I align myself with the opinion of Gikonyo J in **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where he stated:

"[13] Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law."

30. The court in **Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002 [2009] eKLR** formed the opinion below faced with a situation similar to the instant case:

"I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would

have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant."

There is evidence from the trial court record that the administrators are guilty of non-disclosure of a material factor to the court on the existence of sale agreement to land between the applicants Father and the deceased.

31. In the premises and for the reasons advanced by the Applicants, I have no doubt that a case against the Respondent has been established under Section 76 of the Succession Act. It is on the basis of this summation that I find justifiable cause for the grant of letters of administration issued to the Respondent on 9th April 2014 and rectified on 7th October 2014 in Machakos High Court Succession Cause No. 434 of 2013 be revoked forthwith

32. On the other hand, this summons for revocation raises a serious question on a point of law as to whether the facts of the claim by the applicants meets the threshold of the doctrine on constructive trust. The law as to the principles to be applied regarding when a court should infer a constructive trust are now well settled. In **Willy Kimtai Kitilit V Michael Kibet 2018 EKL**R the court of appeal reviewing preceding authorities on the same doctrine pronounced itself as follows:

"Thus since the current constitution has by virtue of Article 10 (2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle amongst others, It follows that equitable doctrine of constructive trust and proprietary estoppels are applicable to and supersede the Land control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the land control board. In essence lack of the consent of land control board does not preclude the court from giving effect to equitable principles in particular the doctrine of constructive trust."

See also the holding in the case of **Macharia Mwangi Maina and 87 others V Davidson Kagiri 2014 EKL**R.

33. In addition to the above decision the case of **Fotos Korkontzikas Panagio and Olympia Town Properties V Nick Soulos 1997 2 R.C.S** the court made exposition of the law on constructive trust in the following passage and stated inter alia as follows.;

"under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment constructive trusts may be imposed on either ground. The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed.(1) The defendant must have been under an equitable obligation in relation to the activities giving rise to assets in his hands(2)The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff(3)The plaintiff must show a legitimate reason for seeking a proprietary remedy either personal or related to the need to ensure that others like the defendant remain faithful to their duties.(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case."

34. There is also a decision by **Sir William Deane in Muschinki v Dodd 1985 CLR 160** while dealing with the application on the concept of constructive trust stated as follows. *"Viewed in the modern context, the constructive trust can properly be described as a remedial institution when equity imposes regardless of actual or presumed agreement or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle."*

35. I now revert to the objection proceedings. The land in dispute is referenced as L. R Ngong /Ngong/6099 being a purchase by the late Kahia Giathi from the late konini ole Kimantiru, Ketikai konini and Lekishon konini who were registered owners of the primary title Ngong/Ngong2927.The case for the applicant is that the late father Kahia Giathi having entered into the sale agreement with the above named registered owners way back in 1977 took possession of the suit land including settling his family on the property. According to the applicant in spite the late Kahia having paid the entire purchase price for the three acres of land, the deceased failed to fully transfer the portion of land to him before his demise. It was to emerge that the respondents filed succession cause 434 of 2013 at Machakos High court where LR Ngong/Ngong 6099 was listed as part of the estate of the deceased Konini ole Kimantiru. The affidavit evidence in support deposed that the parcel of land was free property as defined under section 3 of the law of succession Act. It can also be confirmed from the record that the applicant's family have been in occupation of the suit property since 1977 and as the date of the demise of their late father in 1988 the family has enjoyed uninterrupted peaceful and quiet possession.

36. The thrust of the arguments on behalf of the respondents is that the purported sale agreement is void ab initio for lack of consent by the land control board as clearly stipulated under section 6 of the Land Control Act. The testimony of one John Njuguna relate to the same facts where both were given possession of the property save for Kahia who did not obtain his certificate of title to the three acres excised and allocated by the registered proprietors during his lifetime. The administrators who now hold grant of letters of administration to the estate of konini ole Kimantiru remain to be the voice of deceased to recognize existence of such an interest. It doesn't expire by virtue of the death of the deceased who had made his intention known on such a transaction before his death. The uniqueness of the interest created in this case being vacant possession having passed to the applicants since 1977.

37. Going by the words of Lord Denning in the case of **Binnons V Evans 1972 Chancery at 359** *"The court would impose a constructive Trust for the simple reason that it would be utterly inequitable for the respondents to turn the applicants out contrary to the stipulation subject to which they took the property."*

38. I am therefore satisfied that the applicants having been in occupation of the property they hold a reasonable legitimate expectation that they enjoy proprietary rights in suit land in spite of the fact that section 6(2) of the Land Control Act had not been fully complied with by both the purchaser and the seller. As a result, the dictum in the court of appeal decisions in the cases of **Macharia Maina and 87 others V Davidson Mwangi Maina Kagiri, and Willy Kimutai Kitilit** are applicable to the circumstances of this case and do bind this court in declaring that the applicant held the land in question in a fiduciary capacity to warrant this court to make a declaration that a constructive trust has arisen. To rule otherwise would be unconscionable and unjust enrichment on the part of the respondents.

39. Accordingly, the Applications dated 24th January 2017 and 31st May 2017 are allowed and the revocation of grant shall abide by the following terms:

- a. A declaration that the Respondent obtained the grant by intentional and deliberate false statement of facts and concealment of material facts and information from the probate court.*
- b. By virtue of this court finding that a constructive trust has arisen the respondents are hereby stopped from relying on the provisions of section (6) of the Land Control Act to deny the applicants rightful share of the estate.*
- c. The Respondent being the Administrator of the Estate of Konini Ole Kimantiru is directed to surrender and deliver to the Deputy Registrar the Certificate of Confirmed grant issued to her on 9th April 2014 and rectified on 7th October 2014.*
- d. An inhibition be registered in respect of LR NO. Ngong/Ngong/6099 pending the transfer of the whole of the interest and ownership thereof to the applicants.*
- e. That in default of the administrators failing to execute any transfer documents to re-convey the rights of the suit land, the Deputy Registrar of the court has the power donated by this court to sign the necessary instruments to effect such a transfer in favour of the applicants.*
- f. That for avoidance of doubt L.R Ngong/Ngong 6099 is not free property available for distribution to the beneficiaries to the estate of Konini ole Kimantiru.*
- g. Each party shall bear their own costs.*

40. It is so ordered.

Dated, Signed and Delivered at Kajiado this 15th Day of October, 2018.

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R NYAKUNDI

JUDGE

Representation

Mr. Itaya holding brief for Mr. Omboga for the Respondent

Ms. Wambugu though notified did not attend the delivery of the Ruling

The Administrator Nairugu Nepakine Loishorna - present