



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
SUCCESSION CAUSE NO 31 OF 2017
IN THE MATTER OF THE ESTATE OF MBUGUA
MAGIRI ALIAS KIARIE MAGIRI (DECEASED)

1. ALICE WAHU KURIA
2. LUCY WAITHERA MBUGUA.....APPLICANTS/INTERESTED PARTIES
3. GEORGE GITAU WARUHARI

AND

1. MICHAEL NGUGI MBUGUA
2. TERESA WAMITE MGONGO
3. JANE NJAMBI NGETHE
4. CATHERINE WANJIRU MBUGUA
5. PETER KAMAU MBUGUA.....BENEFICIARIES/RESPONDENTS
6. JACK MBUGUA MAGIRI
7. ROSEMARY WAMBUI MBUGUA
8. JOYCE NYARIARA MBUGUA
9. JAMES NJORO MAGIRI

R U L I N G

1. Before the court are two sets of applications. The first was filed on 18th July, 2017 by **Alice Wahu Kuria** described as an Interested Party, against **Michael Ngugi Mbugua** and **Teresa Wamite Mgongo** being the 1st and 2nd Administrators of the estate of **Mbugua Magiri**. It seeks an extension of the time stipulated in the court's order of 3rd February 2017. The substantive prayer seeks the revocation of the confirmed grant in favour of the Administrators, and in the alternative, the rectification of the confirmed grant to exclude from the schedule of the estate assets, the land parcel LR No. **Kiambaa/Muchatha/T.387**, (the 1st suit property) and that proceedings herein be stayed pending the hearing and determination of Environment and Land Court Suit No.444 of 2015.

2. The grounds on the face of the summons and elaborated in the supporting affidavit are *inter alia* that the first suit property had been sold by the 1st Administrator to a 3rd party who later sold and transferred it to the Applicant's husband, and later to the Applicant, and therefore ceased to be part of his estate, a fact not disclosed by the Administrators; that the Applicant's title was cancelled by the Land Registrar without the Applicant being heard; that the suit property is the subject of litigation in **ELC Suit No.444 of 2015**.

3. The gist of the 2nd Administrator's affidavit in reply is that the sale of the suit property by the 1st Administrator was fraudulent and based

on succession proceedings conducted without the involvement of the beneficiaries of the estate of the deceased; and was therefore based on a grant that was fraudulently obtained in **Kiambu Succ. Case No. 546 of 1996** by the 1st Administrator; and that the Applicant ought to pursue the ELC cause.

4. The second application filed on 20/9/17 brought in fresh applicants, namely **Lucy Waithera Mbugua** and **George Gitau Waruhari**, described as the 1st and 2nd Interested Parties. They seek a declaration that the parcel **No. Kiambu/Thimbigua/3156** (a subdivision of the second suit property) is non-existent and that land parcels known as **Kiambu/Thimbigua/4978, 4979, 4981 and 4982** are not available for distribution among the beneficiaries of the estate of the deceased. They seek an eviction order against the named six beneficiaries of the estate of the deceased from the property and an injunction to restrain the said beneficiaries. They also seek an order that the beneficiaries exhume bodies buried in the said land parcels.

5. In her affidavit on behalf of herself and her co-Applicant, **Lucy Waithera Mbugua** depones that land parcel **No. Kiambu/Thimbigua/3156** ceased to exist upon sub division into 7 parcels, four of which were sold by **Michael Ngugi Mbugua** to the Applicants in 2008, a fact concealed by the six Respondents who remain on the properties, and refusing to give vacant possession to the Applicants while continuing to bury their dead on the suit land.

6. In opposition to the second Motion the 2nd Administrator swore an affidavit in reply deponing that the grant to the 1st Administrator was revoked by **Rawal, J** in 2008; that the 1st Administrator had no capacity to sell the suit property; that the beneficiaries are entitled thereto and that the Applicants failed to file an objection in good time as ordered by the court on 3rd February 2017. I take it that the so-called response to Notice of Motion dated 18th September 2018 filed by the 6th to 9th Respondents said to be beneficiaries, represents grounds in opposition thereto. The grounds echo, in substance, the contents of the replying affidavit by the 2nd Administrator. The Applicants to the said application are described in the grounds as strangers to the estate of the deceased herein and the purported sale to them a fraudulent transaction.

7. The court directed that the two applications be canvassed by way of written submissions. For purposes of this ruling, the Applicant **Alice Wahu Kuria** in the application filed on 18th July 2017 will be referred to as the 1st Interested Party and her summons as the first summons/application. **Lucy Waithera Mbugua** and **George Gitau Wamuhari**, the applicants in the summons filed on 20th September, 2017 will be referred to as the 2nd and 3rd Interested Parties, their application as the second summons.

8. In her submissions in support of the first summons, the 1st Interested Party restates much of the contents in her supporting affidavit, asserting that the Applicant had no notice of the delivery date of the court's ruling on 3rd February 2017 hence her late action pursuant to the orders of that date. Regarding the cancellation of the title of the 1st Interested Party to the first suit property, it is submitted that the 2nd Interested Party was an innocent purchaser for value. That, the 1st and 2nd Interested Parties were not involved in the proceedings leading to the revocation of the grant to the 1st Administrator upon which he acquired title to the property he subsequently sold to the third party, from whom the 1st Interested Party and her husband obtained the property through a sale. More so as the 1st Administrator was aware that he had already sold his interest in the first suit property.

9. The 1st Interested party argues that she ought to have been heard before the revocation of the initial grant to the 1st Administrator. That she is the victim of an injustice occasioned by the 1st Administrator's calculated action of concealing her interest in the 1st suit property which at the material time was registered in her name. She relies on several decisions including **Succession Cause No.435 of 1999. In the matter of the Estate of Nyachana Mwai alias Nyachana w/o Mwai and David Oloo Onyango v Attorney General Civil Appeal No.152 of 1986**. For that reason, it is submitted that the orders of **Rawal J** (as she then was) issued on 14th July 2008 and by Musyoka J on 9th March 2015 ought to be vacated.

10. Relying on Section 93 of the Law of Succession Act the 1st Interested Party states that the interest in the first suit property having vested on her could not be extinguished by the subsequent revocation of the initial grant to the 1st Administrator. She relies on the case of **Jacinta Wangu Kamau v Rosemary Wanjiru Wanyoike & Another – Civil Appeal No. 181 of 2008**. Thus it is her view, that the first suit property had ceased to be part of the estate of the deceased. The Interested Party urged the court to review the order of 9th March 2015 cancelling the 1st Interested Party's title in the 1st suit property which adversely affected her interests and occasioned her injustice.

11. On behalf of the Administrators, it is submitted that the court should not extend the time granted to the 1st Interested Party to apply, as she had notice of the ruling culminating in the order granting her time to apply. That she had approached the court five months since the order. They assert that it was her duty to follow up on her case and she had not demonstrated diligence. Regarding the prayer for the revocation or rectification of the subsisting confirmed grant, the Administrators argue that the sale of the 1st suit property was based on a faulty and fraudulent grant and the Interested Party cannot seek protection under section 93 Law of Succession Act. The decision of Nagillah J (as he then was) in **Monica Adhiambo v Maurice Odero Koko [2016] e KLR** is called to aid

12. The Administrators contend that pursuant to the revocation of the initial grant, the 1st suit property reverted to the estate of the Deceased and hence the cancellation of the 1st Interested Party's title therein. The Administrators therefore oppose the revocation of the current confirmed grant. They further call for the separate dealing of this suit and the ELC cause as they raise separate causes of action.

13. I do not see any submissions filed in support of the Summons filed by the 2nd and 3rd Interested Parties on 20th September 2017. However, there are submissions in opposition filed by Administrators and the 6th to 9th beneficiary Respondents. The Administrators term the sale agreement between the 2nd and 3rd Interested Parties and the 1st and Administrator in respect of the second suit property under the initial confirmed grant, as tainted with fraud. That the 2nd suit property with all related subdivisions reverted back to the estate of the Deceased once the grant was revoked. They take issue with the prayer for their eviction from the property.

14. The submissions by the 6th to 9th beneficiary Respondents, the children of the late former co-Administrator under the old grant (John Mbugua Magiri) take the same view as the 1st and 2nd Administrators:- the sale to the 2nd and 3rd Interested Parties resulted from the fraudulent actions of the 1st Administrator, which include the subdivision of the original parcel **Kiambu/Thimbigua/320** into several parcels such as **No. 3156** and the further subdivision producing parcels numbers **4978, 4979, 4981 and 4982**. They claim to have been absent when the orders of 3rd February, 2017 were issued and seek that they be set aside .

15. Their position is that the correct beneficiary to the land parcel No. **Kiambu/Thimbigua/320** is their late father **John Mbugua Magiri**. They oppose the prayers in the 2nd summons. I have to state that the poor language employed in the submissions makes it difficult to follow the arguments or contentions therein. The constant refrain is the complaint that the house of **John Mbugua Magiri** is not included in the distributions.

16. The background to the two applications before me is as stated in the ruling of **Musyoka J**, delivered on 3rd February, 2017. It suffices to quote from the said ruling as hereunder:-

“7. I have taken time to peruse the court file herein in order to understand background to the dispute. I must confess that the file is in deplorable condition, as it appears that there are proceedings and pleadings that are missing.

8. The deceased died on 5th April 1976. Representation to his estate was sought by Michael Ngugi Mbugua in Kiambu SRMCS No. 546 of 1996. A grant of letters of administration intestate was made to the petitioner by the lower court on 24th January 1997. The said grant was accordingly confirmed on 13th February 1997, wherein the two assets of the estate, that is to say Kiambaa/Thimbigua/320 and Kiambaa/Muchatha/T. 382, devolved absolutely upon the Administrator, Muchael Ngugi Mbugua.

9. On 2nd May 1997, a summons, dated 28th April 1997, was lodged in this cause for the revocation of the grant made and confirmed in Kiambu SRMCS No. 546 of 1996. The said summons was at the instance of John Magiri Mbugua, who alleged that the grant in Kiambu SRMCS No.546 of 1996 was obtained without his consent and that his other brother who was then based abroad. He complained that the grant was confirmed in a hurry and that he only came to learn that there had been succession proceedings going on when surveyors came to the land to subdivide it.

10. The application dated 28th April 1997 was resolved on 14th July 2008 when the court delivered a ruling in the following terms –

“I have seen the facts of the case. It is obvious that the one of the Administrators who is the present and the other Administrators. Being deceased I revoke the grant of representation as well as certificate of confirmation dated 13th February 1997 and granted only to Michael Ngugi Mbugua who concedes that there are other children of the Deceased.

I direct that a fresh grant be issued in the names of John Kagiri Mbugua and Michael Ngugi Mbugua.

The new Administrators to file summons for confirmation within 21 days from the date of issuance of the fresh grant. On failure to get consent of all the parties’ one of the Administrators to file the said summons and the other to file protest.”

17. At the heart of the dispute are two assets, namely **Kiambaa Muchatha/T.387** (and/or subsequent subdivisions) and **Kiambu/Thimbigua/320** (or its subdivisions including **NO.3156** and or subsequent subdivisions). The Deceased died possessed of these properties. The first Interested Party claims to have purchased the first suit property with her husband, in 1997 and obtained title in her name in February, 2006. The couple apparently purchased the land parcel from one James Kangere Kimani who had in turn purchased the land from the 1st Administrator earlier on. The 2nd and 3rd Interested Parties assert that they purchased the four subdivisions of the land parcel No. **KIAMBU/THIMBIGUA 3156** (whose mother title is **Kiambu/Thimbigua/320**) namely **No. 4978, 4979, 4981 and 4982** in June 2008 and obtained titles in February and March 2009.

18. The two properties are the subject of the grant confirmed in the names of the two Administrators on 7th October 2014 by **Musyoka, J**. The subsequent order of 9th March 2015 was to the effect that:

“THAT the Land Registrar for Kiambu County be and is hereby directed to rectify the register in relation to KIAMBAA/THIMBIGUA/320 by cancelling the subdivisions thereof and restoring the same in the name of the deceased KIARIE MAGIRI together with KIAMBAA/MUCHATHA/T. 387”.

19. Upon the confirmation of the grant to the 1st and 2nd Administrators on 7th October, 2014, the estate was distributed as follows:

KIAMBAA/THIMBIGUA/320

Teresia Wamite Mgongo	-	2.0 acre
Michael Ngugi Mbugua	-	0.5 acre
Jane Njambi Ngethe	-	0.5 acre

Catherine Wangui Mbugua - 0.5 acre
Peter Kamau Magiri - 0.5 acre
Jack Mbugua Magiri - 0.5 acre
KIAMBAA/MUCHATHA/T.387
Teresiah Mgongo - Whole

20. The Interested parties rely on section 93(1) of the Law of Succession of Act which states:

“All transfers 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”.

21. The court has considered the substance of the two summons without giving undue attention to the lateness of the motions, on which the Interested Parties expended much energy in submissions. The court considers the substance of the summons more important than mere formal compliance, the objective being to give every party a hearing.

22. There is no dispute that the 1st Administrator had surreptitiously conducted succession proceedings which resulted in the grant and subsequent vesting of the two suit properties in his name, excluding his siblings. That was the reason for the revocation of the grant by **Rawal J**, (as she then was) in 2008. Section 93(1) of the Law of Succession Act cannot be interpreted as sanctioning deliberate acts of an administrator that result in the disinheriting of *bona fide* beneficiaries of an estate. More so where Administrator has acted fraudulently.

23. A perusal of the rather tattered file before me reveals that upon the initial grant being confirmed, the 1st Administrator proceeded to transfer the estate assets to his name before selling them to different parties. These actions were contrary to the schedule in the confirmed grant of the time which listed the shares of the various beneficiaries to the estate, including John Mbugua Magiri, the father of the 6th to 9th Respondents. The new grant issued and confirmed on 7th October, 2014 by **Musyoka J** contained a new schedule of distribution in respect of the estate which means that by the revocation order of **Rawal J**, the assets of the estate had reverted back to the estate of the Deceased.

24. What the Interested Parties have canvassed before this court does not justify the revocation of the grant confirmed by Musyoka J or the setting aside of the subsequent order of 9th March, 2015. Given the admitted history of this matter, I take the position that the 1st Administrator could not have passed a good title to the Interested Parties or the vendors from whom they may have bought the property. Because, the 1st Administrator obtained registration of the properties and sold them to the parties on the basis of a grant obtained by concealing from the initial court, the existence of his siblings and subsequently dealing with the estate assets contrary to the schedule of distribution.

25. The Court of Appeal dealt with a similar issue in **Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & Another [2008] e KLR**. In that case one party, had fraudulently obtained a grant in a succession cause and proceeded to alienate by sale the assets of the estate. The Court of Appeal expressed itself as follows

“We think with respect. That there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act ... The Section would only be applicable where firstly there is a transfer of any interest in immovable or moveable property. Katibau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.” (emphasis added)

26. The Interested Parties are not without a remedy. They can pursue the 1st Administrator in court proceedings. It would however be a travesty of justice for this court to allow them to keep the suit properties to the detriment and prejudice of the *bona fide* beneficiaries of the estate of the deceased.

27. For these reasons, I agree with Nagillah J’s judgment in **Monica Adhiambo v Odera Koko**, where he stated in part that:

“With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status in the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser.” (emphasis added)

28. Further, at the time the grant was confirmed on 7th October, 2014, the record herein was replete with summons and affidavits setting out the history of the dispute, including circumstances leading to the revocation of the initial grant arising from the fraudulent actions of the 1st Administrator. Thus, it is disingenuous for the 1st Interested Party to assert in her grounds that at the confirmation of the grant there was material non-disclosure of the sale of the first suit property to the 1st Interested Party. That matter is well documented on the record of the file and required no further act of disclosure by the Administrators or any party.

29. Secondly, the court would have handed a pyrrhic victory to the beneficiaries who successfully applied for the revocation of the initial grant and further issuance of a new grant if the 2nd suit property which had been severed through subdivision was not reconsolidated by the cancellation of new titles. The court could not allow the confirmed grant to be rendered ineffective. These are the obvious reasons behind the order granted on 9th March 2015.

30. I would add that some of the prayers in the second summons seeking *inter alia* a declaration that the property **LR No.Kiambu/Thimbigua/3156** is “non-existent” or an order for exhumation of bodies buried in the subdivisions thereof, or the eviction of the Respondent/beneficiaries appear ill-suited to a motion which does not even seek the revocation of the confirmed grant. In my view, none of the prayers sought in the second summons seeking rather drastic orders can stand on their own, unaccompanied as they are by a prayer for the revocation of the current grant in respect of the estate. All in all, the prayers do not appear tenable. For all the foregoing reasons the court has found no merit in the two summons which are accordingly dismissed with costs.

31. In closing, I have noted that the 6th to 9th beneficiary/Respondents are stated to be the children of **John Mbugua Magiri** a son of the deceased herein who died during the course of litigation. The current confirmed grant includes the share to **Jack Mbugua Magiri** who on the face of it is the 6th beneficiary/Respondent. The confirmed grant does not indicate that the share in his name is the portion due to his late father’s estate.

32. In the interest of justice, and to avoid further litigation on that matter, I would, on my own motion direct that the certificate of confirmed grant be rectified to indicate that the share in the schedule that is reflected to be in favour of **Jack Mbugua Magiri** is for the benefit of the estate of **John Mbugua Magiri**. The rectification is necessary because on the face of it **Jack Mbugua Magiri** was not the only child of his late father. The 7th, 8th and 9th beneficiary Respondents are described as siblings of **Jack Mbugua Magiri**. To that extent only, the certificate of confirmed grant is to be rectified.

DELIVERED, DATED AND SIGNED AT KIAMBU THIS 5TH DAY OF OCTOBER, 2018

C. MEOLI

JUDGE

In the Presence of:

Applicants – No appearance

Respondents – No appearance

Court Clerk - Nancy