



**REPUBLIC OF KENYA**

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

**MISC. SUCC. NO. 152 OF 2013**

**IN THE MATTER OF THE ESTATE OF NYAGA KARURIRI (DECEASED)**

**KANAMBIU M' NYAMU.....APPLICANT**

**VERSUS**

**CONSOLATA RUNJI NYAGA.....RESPONDENT**

**RULING**

1. In his Amended summons for revocation/annulment of the land dated 24/6/2014 the applicant seeks for revocation of the grant issued to Consolata Runji Nyaga by Principal Magistrate Runyenjes and confirmed on the 9/6/2005 relying on the following grounds:-

(a) that the grant was obtained fraudulently by making a false statement or by concealment from the court of material to the case.

(b) that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

2. The application is grounded on the affidavit of Kanambiu M' Nyamu sworn on the 24/6/2015. It is deponed that the applicant bought a portion of a land measuring 0.45 Ha. out of LR No. Kagaari/Kigaa/51 at a consideration of Kshs.4,500/- from the deceased. In his statement the applicant states that he paid a total of Kshs.4,170/- leaving a balance of Kshs.330/- which was payable after obtaining the Land Board Consent. The transfer was executed by the parties but was not processed due to lack of funds by the applicant.

3. After the death of the deceased, the respondent who is the widow promised to include the applicant as an interested party in the succession cause. It is claimed that the applicant was included in the P&A5 form as "the other occupier". However the respondent proceeded to distribute the estate to the beneficiaries without involving the applicant. For this reason the respondent is guilty of non-disclosure to the court of the applicant's interest.

4. The respondent pleads ignorance of the transaction between the deceased and the applicant which is contradicted by the evidence of the applicant's witnesses to which the applicant contends that it amounts to making a false statement.

5. The application was opposed on grounds that the respondent was not aware of any transaction for sale of land between her late husband and the applicant. She states that she felt the succession cause and distributed the estate to herself and her children. Her share was one acre of land which after subdivision was numbered LR Kagaari/Kigaa/7121. During the lifetime of the deceased, the applicant who is her

neighbour leased part of the land for his own use. He was not a beneficiary so as to be included in the succession proceedings and neither was he a creditor to the estate.

6. It is argued by the respondent that if the applicant had any interest in the estate he ought to have filed objection proceedings during the pendency of the succession proceedings. The applicant has filed Civil case No. 55 of 2013 at Runyenjes claiming land parcel No. Kagaari/Kigaa/7121 which case he has neglected to prosecute because it is statutorily barred by the law.

7. Both parties filed written submissions in support of the arguments. The applicant was represented by J.K.N. Kamunyori & Co. Advocates while Njeru Ithiga represented the respondent.

8. The parties in their witness statements and in their submissions have dealt at length with the issue of the existence or otherwise of the alleged land sale transaction. Several documents, including an agreement, executed transfer, receipts for payment of various fees among other documents were annexed. The bulk of the submissions especially those of the applicant involve the subject of the validity of the alleged sale of 0.45 Ha. out of deceased's land LR Kagaari/Kigaa/51. With due respect to the learned counsels I do not find these matters relevant to this application.

9. This is a summons for revocation of grant brought under Section 76 of the Law of Succession Act which provides:-

*“A grant of representation, whether or not confirmed, may be revoked or annulled at any time if the court decides, either on application by any interested party or of its own motion ...”*

10. The only issue for determination, therefore is whether the applicant has satisfied any or more of the grounds listed under Section 76 of the Act.

11. The applicant's evidence is that he had bought 0.45 Ha. from the deceased to be excised from his parcel LR. Kagaari/Kigaa/51 in 1976. The deceased allowed him to settle on the land where he put up a house and planted crops. At the time the deceased died, the transaction had not been completed.

12. The respondent agreed to recognize the applicant as a purchaser and even received Kshs. 10,000/- from him to facilitate the succession process. The applicant was to later learn that the respondent had distributed the land to the beneficiaries including the one acre the applicant had bought which she renumbered Kagaari/Kigaa/7121 from the earlier number 2621 adopted after sub-division by the deceased.

13. The applicant accused the respondent of making a false statement of evidence that she did not know of the alleged sale of land by the deceased to the applicant, and for non-disclosure of material facts to the succession court that the respondent was a purchaser who had paid consideration. It is also claimed that the Runyenjes Magistrate court which issued and confirmed the grant had not pecuniary jurisdiction rendering the grant a nullity. The respondent on the other hand denied knowledge of the land sale agreement between her late husband and the applicant. She further denies having recognized the applicant's transaction in the succession proceedings. It is stated that since the applicant was not a beneficiary of the estate, the respondent had no reason to include him in the list of beneficiaries. She denies making any false statement or failing to disclose the interest of the applicant as alleged.

14. It was submitted that the Runyenjes court had jurisdiction to issue the grant and to confirm the same. The respondent argues that lack of jurisdiction was not a ground in the summons for revocation.

15. I have perused the Amended summons for revocation dated 24/6/2015 and I confirm the respondent's contention that lack of jurisdiction was not pleaded as a ground. It is also not a ground for revocation of grant under Section 76 of the Act.

16. However, since jurisdiction is a point of law and very crucial in the hearing and determination of any matter, I will deal with it before the main issue for determination.

17. The jurisdiction of the court is regulated by Sections 44(1), 47,48 and 49 of the Act. The relevant provisions are as follows:-

*44. (1) The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in section 32.*

*47. 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.*

*48. (1) 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 may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:*

*Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.*

*49. The resident magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:*

18. Before the amendment of the Magistrates Jurisdiction Act, the Law based on the provisions of Section 47 required that every magistrate who deals with succession matters must be duly gazetted after being appointed by the Chief Justice for a particular area. Every time a magistrate moved on transfer, a new Kenya Gazette notice was given to confer jurisdiction in the new area. A gazetted magistrate was a representative of the High Court on condition that there is no High court in that station.

19. It was held in the **Matter of the Estate of Kuria Wairagu (Deceased) Nairobi High Court Succession Cause No. 905 of 2002** where the issue of jurisdiction arose that a resident magistrate who had determined a matter for an estate valued at Kshs.1,200,000/- had the same pecuniary jurisdiction as the High Court under Section 47 of the Act.

20. The letters of administration were issued by D.O. Onyango and the grant confirmed by J.P. Nandi also a resident magistrate. Runyenjes is a station where there is no High Court and the magistrates represented the High Court under Section 47 of the Act. The magistrates represented the High Court under Section 47 of the Act. The magistrates were as a practice in the judiciary duly gazette unless evidence to the contrary is availed.

21. Of importance to note is no valuation report of the estate at the material time was produced in evidence. I find that the two magistrates were possessed of the requisite pecuniary jurisdiction under the law at the time they dealt with this case.

22. In an application of this nature, the applicant must establish that the respondent failed to disclose facts material to the case or obtained the grant by fraudulent means. The applicant alleges that the respondent made a "false statement". This was in reference to her evidence in this case where the applicant argues that she "stood alone" for her claim of lack of knowledge of the sale agreement was contradicted by the evidence of three witnesses. If the false statement is to be considered as material, it has to be made before the court or in the proceedings where the grant was issued and confirmed. The applicant's counsel was trying to mislead the court in referring to evidence in this application. This part of his submission was not in support of the applicant's case.

23. In his evidence, the applicant has not proved that the respondent was aware of the applicant's sale agreement. Even assuming that she was aware, there is no material presented in this application to satisfy this court as to non-disclosure of facts material to the case.

24. The respondent is the widow of the deceased and together with her children were the rightful heirs of the estate and this renders the proceedings and the confirmed grant as fully compliant with the law.

25. The succession cause was filed in the year 2002 and the grant confirmed in 2008 with letters of administration intestate having been issued in 2005. If the applicant was aware of the proceedings he would not have neglected his interest but would have filed an objection or a protest against confirmation. The time taken to file this application casts doubt on whether the applicant was aware of the filing of the cause and whether he contributed to the filing fees and other costs as he claimed.

26. I have carefully considered the evidential material and the submissions in this application, and I find that the applicant has failed to satisfy this court that the respondent failed to disclose any facts material to the case. He has not established any of the grounds listed under 76 of the Act to justify revocation/annulment of the grant.

27. The application has no merit and it is hereby dismissed with no order as to costs.

28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF MARCH, 2017.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Muriuki for Ithiga for Respondent**

**Applicant present in person**