



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1138 OF 2007

IN THE MATTER OF THE ESTATE OF SAMUEL MUNYAO NGUKU

(DECEASED)

FRANCIS KIMANI KARIUKIAPPLICANT/RESPONDENT

VERSUS

KASOLE MAKAU.....1ST RESPONDENT/ APPLICANT

MONICA MUTONO.....2ND RESPONDENT/ APPLICANT

JUDGMENT

PLEADINGS

APPLICANT'S CASE

Samuel Munyao Nguku (deceased) died on 19th May 1995 as evidenced by the death certificate of Serial No. 301429.

Kasole Makau the 1st Respondent/Applicant on 10th April 1997 petitioned for Grant of Letters of Administration Intestate of the Estate of the Deceased vide **Succession Cause No. 290 of 1997**. The Petition was made in his capacity as the Deceased's cousin since he did not leave behind any surviving spouse or child. Those who were listed as having survived the Deceased were;

I. Monica Mutono – Buyer

II. Kasole Makau – Cousin

The Asset listed as having been left by the Deceased was;

I. Property title no. Kakuzi/Block11/Gituamba/177; whose estimated value then was Ksh. 150,000.

The Grant of Letters of Administration Intestate were issued to the 1st Respondent on 2nd December 1997 and the grant was confirmed on 13th August 1999. The mode of distribution was that Francis Kimani Kariuki Applicant was entitled to 1 (one) acre of **Kakuzi/Block11/Gituamba/177** and Monica Mutono 2nd Respondent was entitled to the remaining portion of suit property.

Francis Kimani Kariuki the Applicant/Respondent herein, thereafter applied for revocation of Grant of the Letters of Administration issued to the 1st Respondent/ Applicant. He argued that he had purchased the entire suit property from the deceased, prior to his death. The said land was divided into 2 parts being **Kakuzi/Block11/Gituamba/ 341 & 342** of 0.81 & 0.80 HA respectively as evidenced by the mutation form dated 16th July 1994.

There being no appearance by the other parties, the High Court, on 10th March 2011, granted *ex parte* orders which provided *inter alia* that the certificate of confirmation of Grant issued on 13th August 1999 to the 1st Respondent/Applicant was revoked and the Court appointed the Applicant as the Administrator of the estate of the deceased. Secondly, the orders of the Subordinate Court were substituted with the High Court Judgment that the Applicant was entitled to 2 acres specifically Kakuzi/Gituamba Block 2/342. The 2nd Respondent is also entitled to 2 acres.

2ND RESPONDENT/APPLICANT'S CASE

The 2nd Respondent/Applicant Monica Mutono, filed an Application by way of Chamber Summons and an Affidavit in Support on 14th February 2015 under Certificate of Urgency. The Application sought to revoke the grant issued on 10th March 2011 and orders of 4th October 2011 pursuant to **Section 76 of the Law of Succession Act, Cap 160**.

In her application, she prayed for orders that; the Applicant/Respondent or his agents be restrained from disposing or otherwise dealing with parcel number **Kakuzi/Gituamba/Block 2/432** pending the hearing and determination of this Application, that the grant issued to the Applicant/Respondent on 10th November 2011 be revoked, the apportionment of the Estate of the Deceased be set aside, that Grant of Letters of Administration be issued to the 1st Respondent/Applicant and that the Court orders given on 8th February 2012 and all consequential orders be stayed pending the determination of the Application.

Grounds that were adduced in support of this Application were that:

- I. The proceedings to revoke the grant that had already been issued to the 1st Respondent/ Applicant were defective in substance.**
- II. The orders made by the Court were obtained by false statements and concealment of material facts.**
- III. The Grant was obtained by means of untrue allegations of facts**
- IV. The Grant had already become inoperative since the property in question has passed to the Applicant and Respondent in their respective capacities as purchasers.**
- V. The dispute herein is founded on the Law of Contract and not Succession since the Respondent and the Applicant were purchasers (creditors) and not heirs.**
- VI. The Applicant/Respondent and the 2nd Respondent/Applicant are the registered proprietors of L.R No. Kakuzi/Gituamba/Block 2/431 and Kakuzi/Gituamba/Block 2/432 respectively.**
- VII. The Respondent's Application to revoke the Grant was actuated by malice and bad faith calculated to harass the Applicant and;**
- VIII. That the Respondent's Applications are an abuse of the process of the Court.**

In her Affidavit in Support of this Application, the 2nd Respondent/Applicant deposed that she bought a portion of the suit property **Land Parcel No. Kakuzi/Gituamba/Block11/177** from the 1st

Respondent/Applicant for a consideration of Ksh. 80,000 as evidenced by a sale agreement dated 15th August 1999 which land was then transferred to her and the Applicant/Respondent as joint owners/proprietors. This was evidenced by a copy of the title deed dated 2nd August 2000.

The said land was then partitioned into two portions of 0.41ha and 1.21ha following the Consent given by the Land control Board on 13th September 2000. According to the 1st Respondent/Applicant, the said land was divided into **Kakuzi/Gituamba/Block 2/431 and 432** and she then acquired a title for her portion which was **Kakuzi/Gituamba/Block 2/432**. This was evidenced by a copy of her title deed dated 5th July 2001. According to an official search done on 8th May 2012, the registered proprietor of **Kakuzi/Gituamba/Block2/431** was Francis Kimani Kariuki the Applicant/Respondent herein.

She further deponed that the Applicant/Respondent filed an Application to this court which sought *inter alia* for revocation of Grant of Letters of Administration issued to the 1st Respondent/Applicant, his appointment as Administrator of the Estate of the Deceased and a declaration that he be declared the sole beneficiary of that Estate which is the suit property.

Accordingly, the Application proceeded *ex-parte* and the Court on 10th March 2011 granted orders for revocation of the Grant of Letters of Administration granted in favor of the 1st Respondent/Application, appointment of the Applicant/Respondent as the Administrator and ordered that the Applicant/Respondent and the 2nd Respondent/Applicant are to own approximately 2 acres each of the parcel of land.

She argued that the Orders were obtained through concealment of facts and by defrauding the court into believing the suit property was divided in to **Kakuzi/Gitauamba/Block 2/341 and 342**.

The 2nd Respondent/Applicant further stated that the Applicant/Respondent, on 15th December 2011, sought orders that she be compelled to surrender the title deeds for **Block 2/431 and 432** allegedly issued to her and that she be evicted from that land. Further orders were granted directing the Thika Land Registrar to issue title deeds **L.R No. 341 and 342** in respect to the suit property.

It was further stated that on 18th July 2006 the Applicant/Respondent and one Anna Wambui Kimani entered into an agreement for the sale of one and a half acres from parcel no. **Kakuzi/Gituamba/Block2/431** and that the Applicant/Respondent has threatened to evict her from the Land and that her eviction will cause her irreparable harm.

HEARING

On 2nd March 2016, Francis Kimani Kariuki reiterated the content of the pleadings that he bought from Samuel Muniyao Nguku (Deceased) in 1984 1.566 hectares all the suit property **Kakuzi/Block11/Gituamba/177** at Ksh 160,000/=. This was in the presence of his late wife Lydia Njeri Nthenya. They went to Makueni Land Consent Board and thereafter when the surveyor divided the land into **Kakuzi Gituamba/ Block 341 & 342** and both were registered in his name.

When the Applicant pursued the issuance of title documents at Muranga Land Registry after the deceased signed the transfer forms, he was informed that the files were transferred from Muranga to Thika Land Registry. He pursued the issuance of title documents in Thika Land Registry and was unsuccessful.

In 2000, he saw the 2nd Respondent on the land who also claimed the whole suit property as a buyer. He lodged a caveat over the land and they pursued the matter at the Chief and D.O.'s office who confirmed that the land belonged to him.

The Respondents lodged the matter in Court Thika Law Courts **Succession Cause 290 of 1997**. The 1st Respondent obtained the grant and it was confirmed that the Applicant was entitled to 1 acre and the 2nd Respondent to 3 acres. The Applicant filed the instant matter and obtained judgment from Hon Justice L.

Kimaru on 10th March 2011.

In cross examination by Respondent's Counsel, he confirmed sale of the land by the deceased. He stated the documents, agreement for sale and other relevant documents were stolen from him by 1st Respondent and he reported the matter to the Police Station.

He stated that he did not obtain title of the land, the title shown to him in Court is not his and is a forgery. He had transferred to him by the deceased the suit property which he subdivided into 2 portions of **341** and **342** intending to take a loan against one portion and leave the other portion intact. The transfer forms were presented before Hon. Justice L .Kimaru.

PW 2 Kasule Makau in his testimony outlined content of pleadings filed. He stated that he is related to the deceased as his nephew; in that the deceased was a brother to his mother. He confirmed there is a dispute between the Applicant PW1 and 2nd Respondent PW3 over the suit property **Kakuzi/Gituamba/Block 2/177**. PW1 bought 1 acre of the land from the deceased and he sold the 2nd Respondent the balance of the land 3 acres as evidenced by Sale Agreement of 5th August 1991 produced as Exhibit 1. There were witnesses as listed in the Agreement. He got authority to sell this land from the deceased who wrote him a letter before he died. Shortly thereafter he died and was buried. The deceased was not survived by spouse or children.

He filed **Succession 290 of 1997** in Thika Law Courts and he obtained grant and confirmed grant to distribute the suit property between the Applicant 1 acre and the 2nd Respondent 3 acres. The 2nd Respondent paid him Ksh 80,000/- for the 3 acres as documented in the Agreement.

In cross -examination by the Applicant , he confirmed that the Applicant was sold 1 acre only and he was the one who took care of the deceased and only saw the Applicant after he bought the portion of land from the deceased.

PW3 Monicah Mutoro Mulli stated that in 1999 she bought the suit property **Kakuzi/Gituamba/Block 2/177** 3 acres from PW2. The agreement for sale is Exhibit 1 produced by PW2. The purchase price was Ksh 80,000/= the 1st and 2nd Respondents went to Land Control Board and obtained consents produced as Defense Exhibit 2. They processed 2 title documents and the 2nd Respondent retained **Kakuzi/Gituamba/Block 432** produced as Defense Exhibit 4. The 2nd Respondent developed her portion and has built 4 houses and 3 houses for her children and has grown lemons, mangoes and avocados. She has also put up houses for rent. The 2nd Respondent stated that the Applicant and herself are both purchasers and instead of evicting him, he should stay on the portion he bought **Kakuzi/ Gituamba/Block 431** and she retains the 3 acres she bought.

DETERMINATION

The court considered the evidence on record vide pleadings and testimony of the witnesses and finds the issue for determination is what is the Applicant and the 2nd Respondent entitled to in the suit property **Kakuzi/ Gituamba/ Block 2 No 1777** that belonged to the deceased herein.

From the Court record the 1st Respondent nephew to the deceased claimed that the deceased wrote to him informing him that he sold Applicant 1 acre of the suit property and he could sell the rest of the land. That letter was not produced in Court.

Instead through **Succession Cause 290 of 1997** the 1st Respondent obtained grant and confirmed grant and transferred 1 acre to the Applicant and 3 acres he sold to 2nd Respondent the remaining portion of the suit property.

The Applicant filed the present Succession Cause in the High court challenging the decision of the Trial Court and by the Judgment delivered by Hon Justice L. Kimaru on 10th March 2011 the Court set aside the grant issued in **Succession cause 290 of 1997** and appointed the Applicant administrator of the estate and the suit property was to be subdivided into 2 equal parts; 2 acres each for the Applicant and 2 acres

for the 2nd Respondent.

The Applicant sought eviction of the 2nd Respondent and the District Land Registrar to issue title in line with the orders of Hon Justice L. Kimaru before Hon Justice L. Njagi who on 19th July 2012 dismissed the application and did not grant stay of the orders by Hon. Justice L. Kimaru.

The 2nd Respondent preferred an appeal of the said orders and later withdrew the same on 24th January 2013.

The purpose of outlining all the proceedings held with regard to this matter is that there is no application to review of the orders by the 2 judges Hon. L. Kimaru and Hon J. L. Njagi. To ask this Court to set aside, vary or review the application, the same ought to be presented within the relevant facts. In the instant application this Court cannot proceed to do so in the absence of relevant grounds, facts and provisions. Instead is an application to revoke the grant issued by Hon. L. Kimaru.

In that regard, from the evidence adduced; the application is brought under **Section 76 of Law of Succession Act Cap 160** that the grant issued to the Applicant by Hon Justice L. Kimaru should be revoked as it was not in pursuance to the provisions of the Section 76. The 2nd Respondent alluded to the ground that the grant was obtained through concealment of material facts and by defrauding the Court into believing that the suit property was divided into **Kakuzi/Gituamba/Block 2/341 and 342**.

I did not find any defect in substance in the application and proceedings before Hon.L Kimaru. The Respondents were duly served directly and through Counsel who represented them in the Trial Court. They did not file the necessary documents in opposition to the Applicant's application. They did not attend Court.

The Court proceeded *ex parte* and from the evidence of the Applicant, the Court found that the Land Board Consent for sale of the suit property by the deceased to the Applicant was not produced as evidence. Instead what was annexed was mutation form which confirmed the deceased subdivided the suit property into 2 equal parts of 2 acres each and the portion sold to the Applicant was **Kakuzi/Gituamba/Block 2/342** and that is what granted him as his property and 2 acres was for the 2nd Respondent who was not in court during the hearing. From the evidence on record outlined, the Applicant did not conceal the fact of the subdivision, but the evidence confirmed subdivision by the deceased into 2 parts and **Kakuzi/Gituamba/Block 2/342** is what the Applicant bought.

The grant is revoked under the requirements of **Section 76 of Law of Succession Act**; either the proceedings were defective in substance, which I have not found, or that the grant was obtained fraudulently by concealment of material facts. This has not been proved to Court. The only issue is that the Applicant did not present sale agreement and Land Board Consents. The Applicant did not produce the relevant Sale Agreement but had produced mutation form and transfer form signed by the deceased before Hon. Justice L. Kimaru. He explained the relevant documents were stolen.

The circumstances do not disclose fraud or concealment of material facts. This Court no grounds to revoke the grant. The Applicant is a purchaser and can be appointed administrator under **Section 66 of Law of Succession Act** as Creditor, as the estate of the deceased owes him the portion he bought from the deceased which is part of the suit property.

The main problem lies in the fact that the Applicant did not participate in the proceedings in **Succession cause 290 of 1997** and after the Respondents obtained the confirmed grant they pursued subdivision of the suit property and issuance of titles Title Deeds **431 and 432** for both portions without knowledge and consent from the Applicant.

The Applicant filed the present Cause and the Respondents did not attend or participate in the proceedings that culminated to the judgment of 10th March 2011.

The Applicant was entitled to **Kakuzi/Gituamba/Block 2/342** which is contested by the 2nd Respondent

as what was sold and allocated to her and she has developed over the years and resides on the said portion.

Since it clear from the record that both Applicant and 2nd Respondent bought land the issue of who bought what and should reside where should be as per the judgment of 10th March 2011 unless and until reviewed and /or appealed against.

However, since the 2nd Respondent resides and has developed her portion of the suit property, since she will not be compensated for the developments on the land, she shall not be evicted or moved. What is practical and reasonable to have a new joint survey/proposed subdivision of the suit property into 2 equal parts to the Applicant and 2nd Respondent without moving, evicting, restricting the 2nd Respondent in light of the permanent structures. Both parties shall have access to the land and each may cede some land if required for public utilities e.g. roads.

DISPOSITION

- 1. The Application for revocation of grant is dismissed.**
- 2. The judgment of Hon. Justice L Kimaru of 10th March 2011 remains in force each party is entitled to 2 acres each of suit property Kakuzi/Block/11/Gituamba/177.**
- 3. The parties may consult surveyor and share costs to apportion the 2 acres for each purchaser Applicant and 2nd Respondent without the permanent structures by the 2nd Respondent being interfered with at all.**
- 4. Thereafter, the parties to surrender titles and each to process issuance of new title in line with agreed subdivision.**
- 5. The 1st Respondent to refund purchase price for 1 acre.**
- 6. Each party to bear own cost.**
- 7. The parties are at liberty to pursue review or appeal of the said judgment.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 3RD APRIL 2017.

M. W. MUIGAI

JUDGE