



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 123 OF 2014

IN THE MATTER OF THE ESTATE OF MUCHUNGU THURUI (DECEASED)

AND

SUSAN WANGITHI MUCHUNGU

PENINA WAMARWA MBOGO

ELIAS GICHIRA MUCUNGU

FLORENCE WAMBUI KIBUTI APPLICANTS

IRENE WANJIRU MURIUKI

FAITH WANJIKU KITHAKA

BETH WAMBERE KARIUKI

VERSUS

JAMES THURUI MUCUNGU..... RESPONDENT

AND

AMOS GITAU NJAU..... INTERESTED PARTY

RULING

1. **SUSAN WANGITHI MUCHUNGU, PENINAH WAMARWA MBOGO, ELIAS GICHIRA MUCUNGU, FLORENCE WAMBUI KIBUTI, IRENE WANJIRU MURIUKI, FAITH WANJIKU KITHAKA AND BETH WAMBERE KARIUKI** (hereinafter to be referred to as applicants) are applicants herein who have taken out Summons for Revocation of Grant dated 29th July, 2009 under *Section 76* of the *Law of Succession Act* and *rule 44* of *Probate and Administration Rules*. The Applicants have sought the following orders in the said summons:

- i. *That the grant of letters of administration issued to the respondent herein James Thurui Muchungu on the 26th August, 2003 and confirmed on the 9th June, 2004 by the Senior Resident magistrate Kerugoya in Kerugoya S.R.M. Succession Cause No. 40 of 2003 be*

revoked.

ii. *That the costs of this application be given to the applicants.*

2. The application is based on the grounds listed on the said application which are as follows:

- a. *That the grant was obtained fraudulently by making of a false statement that the petitioner/respondent herein was the only beneficiary of the deceased.*
- b. *That the grant was obtained fraudulently by making of a false statement that the petitioner/respondent herein was the only beneficiary of the deceased.*
- c. *That the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made inadvertently in that a chief had written a letter to court dated 26th April, 2002 detailing the beneficiaries and their shares. The Applicants contend that the court inadvertently failed to take the contents of the letter into account.*

3. The application is further supported by the affidavit of **ELIAS GICHIRA MUCUNGU**, one of the applicants, sworn on 23rd July, 2003 and a supplementary affidavit sworn on 1st August, 2011. The deponent has deposed that he is a son to the deceased and that the grant was obtained fraudulently by the petitioner, who is his brother, who concealed the fact that their mother was alive at the time of issuing of the grant and that there were other beneficiaries who are the applicants herein. This material fact was undisclosed as a result of which the court inadvertently treated the petitioner as a sole beneficiary.

4. The Applicants have further deposed through Elias Gichira Mucungu that the respondent upon obtaining confirmation of grant sold the parcel of land forming the estate to one **AMOS GITAU** – the interested party herein who thereafter attempted to evict the Applicants through a criminal process.

5. The Applicants have filed written submissions through their learned counsel **Morris Njage** in support of their Summons for Revocation of Grant and has submitted that the Petitioner in this cause is guilty of concealment of material facts when he brought the petition for letters of administration in this cause. They have pointed out instances of concealment as follows:

- i. *That Forms (Probate and Administration Forms) that was filed on 28th February, 2003 indicated that the deceased in this cause was survived by only one child – James Thurui Mucungu – the respondent herein.*
- ii. *That vide and affidavit sworn by the respondent on 11th May, 2004 in support of confirmation of grant, the respondent falsely presented himself as the only child to the deceased.*
- iii. *That when the respondent attended court for confirmation, he lied to court that he was the only child to the deceased and on the basis of that the court confirmed the grant.*

6. It is further submitted that the respondent has admitted and conceded that he did wrong by committing fraud, misrepresentation and concealment with a view to disinheriting his siblings – (the Applicants) including his own mother – the 1st applicant. The Applicants faulted the Interested Party's contention that he is a purchaser for value without notice contending that the Respondent could not possibly pass good title because he had none. They further faulted the validity of the transfer contending there was lack of consent from Land Control Board rendering the transaction a nullity in view of the provisions of **Section 6 of Land Control Act**.

7. The Interested Party's conduct in the transaction is further faulted by the Applicants who contend that he knew that the parcel in question was occupied by other people other than the Respondent. It is submitted that the Interested Party used criminal proceedings vide **Baricho Senior Resident Magistrate's Criminal Case No. 3165 of 2007** to try and evict them from the estate. The Applicants have submitted that if the Interested Party was a bona fide purchaser he ought to have carried out further investigation before committing his money in consideration. They have relied on the authority in the case of **NDUNGU KIMANYI –VS- R (1979) KLR** to buttress their contention that the Interested Party

behaved in a suspicious manner in the transaction showing that he was not trustworthy and should not be believed by this Court.

8. The Applicants have submitted that they have made a proper case for revocation of grant and cancellation of the title so that the title can revert back to the deceased for purposes of proper administration and distribution.

9. The Respondent on his part has admitted that he wrongly omitted the names of the applicants but claims in his Affidavit sworn on 15th February, 2010 that Interested Party misled him. He claims that he took him to his advocate's office to draw the papers that were filed in court. He further claims that he was made to sign papers whose purport was beyond his understanding. He has therefore conceded to the Summons for Revocation of Grant deponing that the Interested Party descended on his homestead and destroyed everything without any notice to him. This to him was in bad faith.

10. **Amos Gitau Njau**, the Interested Party on his part has sworn an affidavit dated 6th July, 2011 opposing the Summons for Revocation of Grant now before Court. He has dismissed the Respondent's allegations terming them as an afterthought arguing that he was a purchaser for value having purchased the property forming the estate from the Respondent as the administrator in the estate.

11. The Interested Party has contended that he entered into a sale agreement with the respondent where he purchased the property forming the estate, **L.R. MUTIRA/KIAGA/702** at an agreed price of Kshs.570,000/-. He has deposed that the agreement was drawn by the firm of Magee Wa Magee Advocates on 23rd December, 2004 and exhibited the copy of the agreement as "A.G. 1" in his affidavit.

12. The Interested Party has also contended that he was not a party to the succession proceedings and that he only came into the picture after the proceedings had been finalized. It is argued that since he was not a party to the proceedings he should not be made to suffer from any misdeeds by any party in the proceedings.

13. In his written submissions through learned counsel Wanjiru and Wambugu Advocate, the Interested Party has pointed out that he is protected under **Section 93 (1)** of the **Law of Succession Act** because he is a purchaser for value having dealt with an appointed administrator. It is argued that the grant in this cause was confirmed on 9th June, 2004 while the agreement for sale was entered on 23rd December, 2004 and that transfer to the 3rd party was effected on 30th December, 2004. The Interested Party has contended that he had no notice of any alleged fraud during the time of the said transaction.

14. The Interested Party has also faulted the Respondent accusing him of pretences arguing that he ought to have taken action against him earlier if he discovered that fraud had been committed against him by either filing a suit or reporting him to the Police. According to the Interested Party neither the Applicants nor the Respondent has proved the allegations of fraud as against the Interested Party and therefore he is protected by **Section 93 (1)** of **the Law of Succession Act Cap. 160**.

15. This Court has considered the application, the grounds upon which it is made, the affidavits and submissions made. I have also considered both responses by the respondent and the Interested Party by way of affidavits and written submissions. The issues for determination in this application are fairly simple and straight forward. They are as follows:

- i. ***Whether the Applicants have satisfied the conditions set under Section 76 of Law of Succession Act Cap. 160 Laws of Kenya to have the grant revoked or annulled.***
- ii. ***Whether the Interested Party's purchaser's interests is protected under Section 93 (1) of the Law of Succession Act Cap. 160 Laws of Kenya.***

16. On the first question of whether there is sufficient basis to revoke the grant in this cause, it is perhaps important to look at the said provisions with a view to determining whether the facts as presented calls for revocation of grant herein. **Section 76** provides as follows:

“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 motion.....”

- a. ***That the proceedings to obtain the grant were defective in substance.***
- b. ***That the grant was obtained fraudulently by 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 untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.....”*** (Emphasis added).

Looking at the above provisions this Court finds that the Applicants herein have made out a strong case of concealment and false representation made by the Respondent herein. This Court has perused through the undated petition for letters of administration and the affidavit in form Probate and Administration 5 which also does not indicate on the jurat when it was sworn or commissioned. And what is quite apparent is that the Applicants are right to feel aggrieved by the actions of the respondent herein. In the said petition for letters of administration, he clearly falsely indicated that he was a sole son to the deceased and that there were no other dependants. That alone even assuming that this Court overlooks the defects of the petition aforementioned above, made the Respondent/Petitioner guilty of concealment and misrepresentation.

17. This Court further finds on its own motion that the value of the estate was misrepresented to be Kshs.60,000/= while in the actual fact as seen from the exhibits annexed by the Interested Party in his affidavit the value of the estate exceeded Kshs.100,000/= which was then the monetary ceiling given to the jurisdiction of subordinate courts. I find that under Section 49 (Before the current amendments) the subordinate court presided by Principal Magistrate’s Court at Kerugoya lacked jurisdiction to entertain the petition and issue the grant. There was an inadvertent mistake on the part of the court to issue the grant which the above provisions 76 (c) clearly provides for annulment of a grant issued under such circumstances.

18. This Court has also gone through the proceedings in the subordinate court and finds that the Respondent attended court on 4th June, 2004 for confirmation and clearly lied to court that he was “the only beneficiary” while knowing that his mother and his siblings were at home unaware of what was going on. This Court finds this brazen action by the Respondent mean and in bad taste especially when taken in the light of his replying affidavit. He clearly intended to defraud his siblings from inheritance. I find this ground valid to annul the grant herein.

19. On the question of the interests of the Interested Party which was submitted to be purchaser’s interests for value without notice, this Court finds that the transaction between the Respondent and Interested Party itself were riddled with irregularities and nullities. The Interested Party has submitted that the transaction took place on 23rd December, 2004 when the Respondent – then the vendor was paid the purchase price and that the transfer in favour of the Interested Party was effected on 30th December, 2004. However, the annexures to his affidavit show that payments were scattered and if the drawn agreement is a true reflection of the transaction, the vendor by the time transfer was effected had only been paid Kshs.390,000/= meaning the transfer was effected before full purchase price had been made. Again there is no explanation given why the Respondent was paid Ksh.200,000/= on 17th June, 2005 and later Kshs.12,500/= on 22nd June, 2005 reflecting an overpayment of Kshs.32,500/=. The Respondent deposed that he did not go to Land Control Board for consent to transfer the property to the Interested Party and the Interested Party though he submits that there was such consent, no copy was annexed to his affidavit to demonstrate that the transaction was valid. This Court finds that though the issue of validity of the transaction between the Respondent and the 3rd party is not properly before this Court, I nevertheless find that the question posed by the Respondent in so far as **Section 6 of Land Control Act** is concerned, is legitimate. This Court finds that the applicants have on their part successfully challenged the manner in which the Respondent obtained title in the first place. It was fraudulent from the beginning to the end.

20. This Court further finds that the Interested Party either knew of the existence of other beneficiaries of

the property or did not exercise due diligence as expected of a person who was investing Kshs.570,000/= to buy a piece of land. Due diligence required that he should have visited the land in question in order to satisfy himself that he was getting value for his money. It is quite unlikely for one to buy land without paying a visit to view it. The Interested Party was silent on this aspect and this Court agrees with the Applicants that his conduct in the transaction was suspicious. This Court finds that he was either complicit or complacent of the Respondent's wrong doing.

21. This Court finds that the title obtained by the Respondent was void for the reasons given and the transaction between the Respondent and the Interested Party could not be valid due to aforesaid reasons. The question that begs answers is whether a void title and invalid transaction can be protected under **Section 93 (1) of Law of Succession Act**. The answer is simple. What is void is void. It is of no legal effect and null. If the title of the Respondent was void *ab initio* surely the transaction that gave rise to the title of the Interested Party has no legal effect or consequences. The law cannot protect what is not there. The Interested Party strictly speaking has nothing in law to protect because what he is now holding is void and invalid. **Section 93 (1) of Law of Succession Act** cannot be invoked in such circumstances.

In conclusion this Court finds merit in the Summons for Revocation of Grant dated 29th July, 2009. The same is allowed with costs to the Applicants. All transactions done in respect to the grant issued on 26th August, 2003 and confirmed on 9th June, 2004 are hereby nullified and reversed. The County Lands Registrar is directed to act accordingly and revert the property to the name of the deceased for purposes of proper administration of the estate as provided by the law. It is so ordered.

Dated and delivered at Kerugoya this 11th day of February, 2016.

R. K. LIMO

JUDGE

11.2.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Njage for applicant present

Wangechi holding brief for Kareithi for respondent

Munene holding brief for Wanjiru for the Interested Party

COURT: Ruling dated, signed and delivered in the open court in the presence of Njage for Applicant, Wangechi holding brief for Kareithi for respondent and Munene for Wanjiru for Interested Party.

R. K. LIMO

JUDGE