



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

SUCCESSION NO. 7 OF 2015

IN THE MATTER OF THE ESTATE OF MIRIAM WAMBUI WABETA deceased)

EUNICE NYAMBURA MUTHUSI.....OBJECTOR/APPLICANT

VERSUS

KENNETH KINYUA WABETA.....PETITIONER/RESPONDENT

RULING

1. The Application for consideration before me is a Summons for Revocation of Grant dated 21.10.15. The Application is expressed to be brought under Sections 47 and 76(a)(b) and (c) of the Law of Succession Act and Rules 44(1) and 73 of the Probate and Administration Rules. The Objector/Applicant seek orders:

- a. Spent.
- b. Spent.
- c. Spent.
- d. That the Grant of Letters of Administration intestate issued in this matter be revoked.
- e. That the Objector/Applicant be declared by this Honourable Court to be the lawful owner and proprietor of Land Parcel No. Kiine/Sagana/30 as a Purchaser and adverse possessor.
- f. That the Petitioner/Respondent be condemned to pay costs of the Application.

2. The Application is founded on the grounds set out on the face of the application and on the facts averred in the Supporting Affidavit of the Objector/Applicant sworn on 21.10.15.

The Objector /Applicant's Case

3. It is the Objector/Applicant's case that the Grant herein was obtained fraudulently by the concealing from the Court of the fact that the Objector/Applicant and her husband had purchased Land Parcel No. Kiine/Sagana/30 in 1962 vide a Sale Agreement annexed to her Supporting Affidavit and have lived there since then thus qualifying to exercise purchaser's interest and lawful rights and interests to the suit land.

4. The Objector/Applicant further claims that the Petitioner/Respondent misled this Court by failing to

disclose that the Objector/Applicant and members of her family have been lawfully residing and developing the suit land since 1962 and are therefore entitled to the same by adverse possession. She further claims that she and her children are directly interested in this succession cause and are also lawfully recognised adverse possessors.

5. It is the Objector/Applicant's case that she filed a citation against Danson Kimani Wabetta one of the sons of the deceased in Kerugoya Succession Cause No. 162 of 2015 and sought leave to file probate without the death certificate of the deceased. That it is only when the said Danson Kimani Wabetta filed a Replying Affidavit in the matter that she became aware of the suit herein.

6. The Objector/Applicant further claims that the filing of the suit herein in Mombasa and not Kerugoya by Kenneth Kinyua Wabeta another son of the deceased and not the said Danson Kimani Wabetta whom she had cited was a deliberate and well-orchestrated endeavour to keep the Objector/Applicant and her family in the dark and to unlawfully deny them their lawful entitlement.

7. Mr. Miano, learned Counsel for the Objector/Applicant in his oral submissions reiterated the contents of the Supporting Affidavit of the Objector/Applicant. He argued that the Petitioner/Respondent being aware of the citation against his brother in Kerugoya Succession Cause No. 162 of 2015 did not disclose to the Court of the citation nor that the Objector/Applicant has resided on the suit land since 1962. He argues further that as an interested party, she ought to have been informed of the filing of the Petition herein. Mr. Miano contends that when the husband of the deceased died, he left the Objector/Applicant on the suit land and that when the suit land devolved to the deceased, she was still on the land.

8. The Objector/Applicant further claims that she and her children are directly interested in this succession cause and are also lawfully recognised adverse possessors.

9. Mr. Miano further submitted that the cause herein may have been filed in Mombasa possibly so that the Objector/Applicant who is elderly may not be aware or able to travel to Mombasa. He argues further that the Objector/Applicant as an interested party is protected by Section 66 of the Law of Succession Act as a creditor.

10. Counsel further submitted that the Petitioner/Respondent conceded in his Replying Affidavit that he is aware that the Objector/Applicant and her family have been residing on the suit land. It is therefore the Objector/Applicant's case that the Grant herein should be revoked by reason of concealment of this material fact.

Petitioner/Respondent's Case

11. The Petitioner/Respondent in his Replying Affidavit has dismissed the Application herein as baseless and a waste of judicial time. He claims that the suit property was initially registered in the name of his deceased father Geoffrey Wabeta Gathitu but is now registered in the name of his mother, the deceased herein.

12. It is the Petitioner/Respondent's case that the claim by the Objector/Applicant having bought the suit land from his parents in 1962 vide the Sale Agreement annexed to the Objector/Applicant's Affidavit herein was canvassed in Nairobi HCCC No. 1481 of 1972 Geoffrey Gathitu Wabeta v Muthusi Muinde. That the Court in its judgement annexed to the Replying Affidavit ordered Muthusi Muinde who is the husband of the Objector/Applicant to vacate the suit land.

13. The Petitioner/Respondent further claims that the Objector/Applicant is not entitled to the orders of injunction as she has no claim on the suit land. He further contends that the claim of adverse possession is not available to the Objector/Applicant as she was staying on the suit property with authority from the Petitioner/Respondent's parents. He further avers that this court does not have jurisdiction to determine matters of adverse possession as the same is a preserve of the Environment and Land Court.

14. On nondisclosure of material facts, the Petitioner/Respondent claims that he disclosed all material

facts to the Court.

15. In his oral submissions before me, Mr. Thiaka, learned counsel for the Petitioner/Respondent reiterated the contents of the Petitioner/Respondent's Replying Affidavit. He submitted that the Objector/Applicant is neither a dependant of the deceased nor a purchaser. She is also not entitled to the suit land as an adverse possessor. He argued that this Court has no jurisdiction to deal with matters of land and that Objector/Applicant's claim should be filed in the Environment and Land Court.

16. Counsel further submitted that his father Geoffrey Wabeta Gathitu won Nairobi HCCC No. 1481 of 1972 against the Objector/Applicant's husband Muthusi Muinde as he had failed to pay the purchase price and he Muthusi Muinde was ordered to vacate the suit land. He argued that the agreement for sale which was the subject of the suit cannot now be brought in the suit herein as the same was decided on.

17. Counsel further challenged the veracity of the claim that the Citation was filed before the suit herein. He submitted that the suit herein was filed on 15.1.15 while the Citation in Kerugoya was filed on 7.4.15 almost 4 months later.

18. It was further submitted on behalf of the Petitioner/Respondent that the Objector/Applicant is not entitled to the estate of the deceased and that the Petitioner/Respondent was therefore under no obligation to inform her of the filing of the cause herein.

19. On filing the cause herein in Mombasa, the Petitioner/Respondent argued that all the children of the deceased reside in Mombasa and that this Court has unlimited jurisdiction under Article 162 of the Constitution. That in any case notices of all petitions filed must go to the central Registry in Nairobi and gazetted.

20. The Petitioner/Respondent prayed that the Application be dismissed.

21. In a rejoinder, Mr. Miano submitted that Mr. Thiaka did not cite any law that ousts the jurisdiction of this Court. According to him, this Court has jurisdiction to entertain the Objector/Applicant's Application under Section 47 of the Law of Succession Act and under Rule 73 of the probate and Administration Rules.

22. On HCCC 1481 of 1972, Mr. Miano submitted that the Objector/Applicant was not a party thereto and that the same was against the Objector/Applicant's husband. As such, she is not bound by the order therein as it was not given against her.

23. On the territorial jurisdiction, Mr. Miano submitted that a Petition is filed where the estate lies and not where the Petitioner resides.

24. He prayed that the Application be allowed.

Determination

25. I have considered the depositions and submissions in support of and in opposition to the Summons for Revocation of Grant. The Application and submissions have in my view raised four issues for determination as follows:

- a. Whether the Petitioner/Respondent obtained the Grant fraudulently by concealing a material fact to the case *to wit* that the Objector/Applicant has an interest in the suit property;
- b. Whether the Objector/Applicant has an interest in the estate of the deceased;
- c. Whether this Court has territorial jurisdiction to entertain the Application;
- d. Whether this Court has jurisdiction to entertain a claim on adverse possession.

26. In order to determine whether the Petitioner/Respondent obtained the Grant fraudulently by concealing a material fact to the case this Court must first determine whether the Objector/Applicant has an interest in the suit property.

27. The Objector/Applicant's claim in the suit property is based on the Agreement dated 2.12.62 between her husband and the husband of the deceased herein both who are now deceased. The fact of the Agreement is not disputed. However the Petitioner/Respondent argues that the said Agreement was the subject of Nairobi HCCC 1481 of 1972 the judgement of which was annexed to the Affidavits of both the Objector/Applicant and the Petitioner/Respondent. A perusal of the judgement indicates in a nutshell that Geoffrey Gathitu Wabetta (Wabetta), the husband of the deceased herein filed a Plaint against the Objector/Applicant's late husband Muthusi Muinde (Muinde) seeking his eviction from the suit property. The parties entered into the said Agreement and Muinde paid Kshs. 1,000/= as part payment and he took possession. The parties however did not obtain the land control board consent for the transaction thus the Agreement became void for want of consent. The Court ruled that the transaction was void notwithstanding that Muinde had been in occupation of the land for more than 30 years and ordered him to forthwith vacate the land.

28. Mr. Miano submitted on behalf of the Objector/Applicant that she was not a party to the said suit and the Court order not being against her was not binding on her. This is a flawed view of the law. If the said Agreement was void, it became void against the parties thereto and all those claiming from or under them. On the flip side, as the Objector/Applicant was not a party to the Agreement she can lay no claim on the suit land on the basis of the same. Even if the Agreement were indeed valid, and it is not, does the Objector/Applicant have the locus standi to bring this claim on the basis of an Agreement between her late husband and Wabetta? The answer is a firm no. She has not produced any grant of representation in her favour in respect of the estate of her deceased husband. This Court therefore finds that the Objector/Applicant has no claim against the suit property and by extension no interest in the estate of the deceased herein.

29. I now turn to the issue as to whether the Petitioner/Respondent obtained the Grant fraudulently by concealing a material fact to the case *to wit* that the Objector/Applicant has an interest in the suit property. Section 76(a)(b) and (c) of the Law of Succession Act under which the Application has been made provides

“ 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;

31. Having determined that the Objector/Applicant has no interest in estate of the deceased herein, the Petitioner/Respondent cannot be said to have obtained the grant fraudulently by making any false statement or concealing any material fact to the case. The claim by the Objector/Applicant of fraud on the part of the Petitioner/Respondent is therefore unfounded.

32. On whether this Court has territorial jurisdiction to entertain the Application, Rule 7(3) of the Probate and Administration Rules provides

“Rule 7(3) The petition MAY (emphasis mine) be filed in the principal registry or a High Court district registry or, in the case of a deceased the gross value of whose estate does not exceed one hundred thousand shillings, in a resident magistrate's registry or, in the case of an application to

the Resident Magistrate’s Court under [section 49](#) of the Act, in a resident magistrate’s registry within the area of that court in which the deceased had his last known place of residence; ...”

This rule is not couched in mandatory terms. Besides, this Court has unlimited original civil jurisdiction donated to it by the Constitution of Kenya 2010 at Article 165(3). In any case even if this Court did lack territorial jurisdiction, that fact alone would not defeat the Grant issued herein. Rather than seek Revocation of the Grant, the Objector/Applicant ought to have applied for transfer of the matter to a High Court within the area in which the deceased had her last known place of residence.

33. The jurisdiction of this Court to entertain a claim of adverse possession has been challenged by the Petitioner/Respondent. He argues that issues of adverse possession are the preserve of the Environment and Land Court and this Court has no jurisdiction. The jurisdiction of this Court is provided for in Article 165 of the Constitution of Kenya 2010.

165(3) Subject to clause (5), the High Court shall have—

a. unlimited original jurisdiction in criminal and civil matters

This jurisdiction is however limited by Article 165(5) which provides as follows

165(5) The High Court shall not have jurisdiction in respect of matters—

(a)...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)

The matters envisaged in Article 162(2) include inter alia ***the environment and the use and occupation of, and title to, land.***

34. The claim of adverse possession has to do with the occupation of, and title to land. This falls squarely within the list of matters over which the High Court shall not have jurisdiction under Article 165(5) of the Constitution. As such, this Court does not have jurisdiction to deal with the claim of adverse possession.

35. The Objector/Applicant has prayed to be declared by this Honourable Court to be the lawful owner and proprietor of Land Parcel No. Kiine/Sagana/30 as a Purchaser and adverse possessor. It is evident from the above provisions that this Court lacks jurisdiction to hear and determine this matter as it relates to the occupation of, and title to the suit property. This being the position, this Court must down its tools and the Objector/Applicant must lay her claim in the correct forum. In coming to this conclusion, this Court is guided by the Court of Appeal in the celebrated case of Motor Vessel “Lillian S” versus Caltex | Oil (Kenya) Ltd (1989) KLR1, wherein Nyarangi, JA, opined as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

36. In the circumstances, I find that the Summons or Revocation of Grant lacks merit and the same is dismissed with costs to the Petitioner/Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of March, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Objector/Applicant**

..... **for the Petitioner/Respondent**

..... **Court Assistant**