



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 127 OF 2007

In the matter of the Estate of SIMON NDIRANGU NGUGI (Deceased)

JANE NJERI NDIRANGU.....PETITIONER/APPLICANT

VERSUS

RUTH WACHEKE KABUGI.....PROTESTER/RESPONDENT

RULING

1. This is a ruling on the application dated 3/10/2012 seeking that the grant issued on 8/7/2010 be revoked on the grounds that it has become useless and inoperative and that one of the beneficiaries by the name Ruth Waceke Kabugi should be removed. The application is supported by the affidavit of Jane Njeri Ndirangu in which she depones that the deceased was her husband and that she petitioned for letters of administration in this cause. The Certificate of confirmation of grant was issued on 8/7/2010.

2. The estate comprised of only one asset Gaturi/Weru/1270 measuring 1.62 ha. The land was distributed among the beneficiaries including Ruth Waceke Kabugi who was erroneously indicated as a beneficiary instead of a creditor of the estate. The respondent had advanced the applicant Kshs.179,000/= which was payable by the estate and the applicant is now willing to refund the money. The applicant is a lay person and did not know that the respondent had been included as a beneficiary. The grant has become useless and inoperative as the administrator has been unable to fully administer the portion of 0.20 ha. out of Gaturi/Weru/1270 inherited by the creditor.

3. In the replying affidavit, the respondent stated that she entered into a sale agreement with the petitioner/ applicant for sale of 0.5 acres out of Gaturi/Weru/1270. The land was registered in the names of the deceased and the applicant was selling the portion to raise money to finance the filing of the succession cause. The agreement was witnessed by the applicant's son and daughter. It was a term of the agreement that the respondent's name would be included as a beneficiary.

4. The respondent states that she paid Kshs.160,000/= on the date of the agreement and the balance of Kshs.19,000/= to the surveyor as instructed by the applicant. The applicant did not object to the respondent being allocated 0.5 acres during the confirmation proceedings. The respondent does not wish to get a refund of Kshs.179,000/= ten years after the money was paid. It is argued that the respondent will not be able to get an equivalent size of the land for a similar amount.

5. PW1 was the petitioner/applicant and testified that the respondent gave her money to facilitate the succession proceedings. At the end of the case the applicant was to sell to the respondent land measuring ½ acre for Kshs.260,000/=. They entered into a sale agreement and the name of the respondent was supposed to appear in the succession cause as that of a creditor. The respondent paid a deposit of Kshs.190,000/=. The application for confirmation of grant was prepared by someone else and the applicant did not realize that the respondent was included as a beneficiary. He prayer is that the court removes the respondent's name from the grant.

6. DW1 the respondent told the court that she entered into a sale agreement with the applicant for sale of 0.5 acres of land. The portion was to be excised out of Gaturi/Weru/1270 and was part the applicant's share in her deceased husband's estate. DW1 paid Kshs.160,000/= and was to pay the balance upon transfer. She financed the succession cause from the beginning to the end just for the applicant to later refuse to give her a share of the land as agreed. The respondent stats that the proposal to refund the money paid plus 50% is not acceptable as land prices have appreciated over the years and that ½ an acre will currently cost around Kshs.500,000/=. She has always been willing to pay the purchase price as agreed by the parties.

7. Both parties filed written submissions in support of their arguments.

8. The applicant submitted that she is a lay person and that the succession papers were also prepared by an unqualified person. The sale agreement contravened the provisions of Section 82 (b)(ii) of the Law of Succession Act which provides that that no immovable property shall be sold before confirmation of grant and is therefore *void ab initio* respondent cannot ask for specific performance and cannot rely on the sale agreement because it is time barred. The applicant cited the case of **MUSA NYARIBARI GEKONE & 2 OTHERS VS PETER MIYIENDA & ANOTHER [2015] eKLR** where it was held that without consent of the land control board a transaction involving

agricultural land is void for all purposes.

9. The respondent submitted that the applicant has not established a case to warrant the revocation of grant as she is the one who applied to have it confirmed in the terms that the court did. The court confirmed the grant on the terms of the applicant's proposal. On the issue of transfer of land, when land is being transferred through a succession cause no land board consent is required. Furthermore the land is situated in Embu Municipality and nothing was produced to prove that it is agricultural land.

10. This application raises three pertinent issues:-

(a) *Whether the grant should be revoked under Section 76 of the Law of Succession Act.*

(b) *Whether the agreement dated 4/01/2005 between the parties is enforceable.*

(c) *Whether transmission of land by virtue of a grant in succession cause requires to be sanctioned by the Land Control Board at the stage of the agreement.*

11. The grant was issued in favour of the applicant Jane Njeri Ndirangu upon her petition for letters of administration intestate. It was confirmed on the application of the applicant on 8/07/2010. The estate of the deceased was distributed to four beneficiaries who are the applicant (widow), her two children and the respondent.

12. The respondent was given half an acre (0.20 ha.) out of L.R. Gaturi/Weru/1270 which the applicant herein offered her in the summons for confirmation of grant. The other two beneficiaries are children of the deceased who witnessed the agreement and did not object to the summons for confirmation of grant. Neither are they complaining or supporting this application by their mother.

13. There is evidence from the parties that they had entered into a land sale agreement before the respondent was slotted in as one of the persons to be bequeathed a portion of the land. This was between the year 2005 when the case was filed and 2010 when the grant was confirmed. It appears the applicant later changed her mind and now wants to take away the share she gave the respondent alleging that she did not know what she was doing.

14. The main grounds supporting the application for revocation are that the applicant erroneously included the respondent as a beneficiary in the deceased's estate and that the grant has become inoperative because the portion allocated to the respondent will benefit a creditor and not a beneficiary of the estate.

15. The application is opposed on the grounds that there was an agreement between the parties for purchase of the portion and that Kshs.179,000/= was paid. The parties had also agreed that the respondent's name be included as a beneficiary to ensure she was bequeathed her portion.

16. The issue of the validity of the agreement and whether it is enforceable is not a subject of this court to determine. This is a matter for determination by the Environment and Land Court (ELC). If the parties wish to pursue these petitions, they are at liberty to approach the court with jurisdiction. This court will only deal with the subject of revocation of grant as stipulated under Section 76 of the Act.

It provides:-

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;*

(d) *that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

(i) *to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

(ii) *to proceed diligently with the administration of the estate; or*

(iii) *to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

(e) *that the grant has become useless and inoperative through subsequent circumstances.*

17. The grounds for revocation relied on by the applicant is that the proceedings were defective in substance and that the grant has become useless and inoperative.

18. The circumstances of the inclusion of the respondent's name in the distribution list has been explained by both parties who were together in the process from the beginning to the end. The applicant approached the respondent to provide funds for facilitation of the succession cause. The parties mutually agreed that the respondent would be treated as a beneficiary to get the agreed portion equivalent to the value of the money she gave the applicant.

19. The issue is whether this inclusion renders the proceedings defective. During confirmation, there was no objection by the children of the deceased. It appears that application was motivated by a change of mind by the applicant which could have been influenced by various factors and most probably the appreciating value of land over the years.

20. In my considered opinion, the inclusion of the name of the respondent to benefit from a share in the estate in the prevailing circumstances does not render the succession proceedings defective.

21. The applicant filed the application for confirmation of the grant by herself and prosecuted it in court. She did not demonstrate that anyone misled her as to the contents of the application except the claim that is she is a lay person and ought to have treated the respondent as a creditor. Has the grant become inoperative for the reasons given by the applicant?

22. A creditor is defined in the Black Law Dictionary 9th Edition as:-

One to whom a debt is owed; one who gives a credit for money or goods.

23. In a succession cause a creditor is someone who had acquired interest in the estate of the deceased during his lifetime by way of advancing money or supplying goods. The respondent in this application never dealt with the deceased during his lifetime. She dealt with the applicant after the death of the deceased for her own benefit. For this reason, the respondent cannot be slotted in the succession proceedings as a creditor of the estate. She was never a creditor to the estate as claimed by the applicant.

24. Section 76 (e) provides that a grant may be revoked where it “*has become useless and inoperative through subsequent circumstances*”. In the scenario before me, the applicant is the administrator of the estate and she is the very person who has failed to execute the grant out of her own choice. The reason the applicant advances is that she does not want to give the 0.5 acre portion to the respondent. The word “inoperative” in Black Law Dictionary 9th Edition is defined as “*having no force or effect*”.

25. This meaning does not apply to the grant in this case. The grant is still valid and capable of being executed. It is the applicant who has neglected her duty to implement the grant. I am not convinced that the grant has no force or effect.

26. The applicant's ground for seeking revocation is that the grant has become inoperative. In the case of **JULIA MITUNE M'MBOROKI VS JOHN MUGAMBI M'MBOROKI & 3 OTHERS [2016] eKLR** the court held that the Law of Succession Act does not define what constitutes the grant becoming inoperative through subsequent circumstances. The court was of the opinion that the death of an administrator would be a sufficient reason for revoking a grant under this ground.

27. Under Section 76(e) of the Act, the applicant must demonstrate that there are “subsequent circumstances” which have rendered the grant inoperative and useless. In her affidavit, the applicant has not demonstrated existence of any subsequent circumstances. I have already stated that the grant is not useless or inoperative in the first place.

28. The applicant is the widow of the deceased. She is still alive and is not saying that she wants another person to be appointed administrator upon the revocation that she seeks. Under the Act, the applicant is still the person who ranks in first priority in the estate of the deceased to be appointed administrator. None of her two children has shown any interest in taking over from the applicant. This is a case filed in 2005 which the applicant wants to reverse back to square one without giving an alternative.

29. I find that the applicant has not satisfied the court that the grant should be revoked. The application has no merit and is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF OCTOBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Kathungu for respondent

Mr. Andande for Wanjiku for Applicant/petitioner