



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

PROBATE & ADMINISTRATION CAUSE NO. 517 OF 2013

IN THE MATTER OF THE ESTATE OF MARY NJERI MIGWI (DECEASED)

MORRIS MURIITHI JOSIAH.....APPLICANT/DEFENDANT

AND

BENSON NJOROGE MIGWI.....1ST RESPONDENT/PETITIONER

NICKSON GICHOYA MUGO.....2ND RESPONDENT/PETITIONER

JUDGMENT

1. MORRIS MURIITHI JOSIAH, the applicant herein has brought an application for Summons for Revocation or Annulment of Grant dated 7th July, 2014, against the Respondents herein. In the said application, the Applicant has sought the following reliefs:

i. That the grant of Letters of Administration made to BENSON NJOROGE MIGWI and NICKSON GICHOYA MUGO on 10th September, 2013 in respect to the estate of the above named MARY NJERI MIGWI who died on 31st July, 2002 be annulled and/or revoked.

ii. That this court be pleased to cancel and/or order the cancellation of the title deed issued to NICKSON GICHOYA MUGO on 11th September, 2013.

iii. That the Petitioners and/or their agents be restrained from entering L. R. NO. BARAGWI/RAIMU/1200.

iv. That petitioners do pay costs.

Prayer 1 and 2 are already spent so the remaining prayers for determination are prayers 3, 4, 5 and 6.

2. The Applicant relied on the 3 affidavits in support of the Summons for Revocation of Grant herein. The first was sworn on 4th July, 2014, a further affidavit sworn on 23rd July, 2014 and a second further affidavit sworn but does not indicate when it was sworn. Luckily for the Applicant, this Court gave directions that the matter be disposed of by way of *viva voce* evidence and so the Applicant got the chance to present his case or reasons why he felt that the grant confirmed in this cause should be annulled or revoked.

3. The Applicant in his affidavit in support of the application before Court claimed that he purchased the **L.R. NO. BARAGWI/RAIMU/1200** (hereinafter to be referred to as disputed parcel for ease of reference) from the deceased herein on 5th December, 1995 and claims that the land was formerly transferred to him on 8th January, 1996 when he was issued with a title deed. He however, claims that the disputed parcel was fraudulently transferred back to Mary Njeri Migwi, the deceased herein, on 19th March, 2013 when the deceased was already dead and accused the Respondents for colluding to defraud him of the disputed parcel. He insisted that the grant confirmed herein was obtained fraudulently by concealment from this Court of the fact that the disputed parcel was part of the estate.

4. The Applicant further added that he purchased the disputed parcel from the deceased vide an oral agreement on 5th February, 2005 and that he was issued with a title on 3rd August, 1996 as demonstrated by annexure **MMJ1** in his further affidavit sworn on 23rd July, 2014. He also relied on the copy of the green card marked '**MMJ 2**' which demonstrated entries on the registry to back up his claims that the transfer of the disputed parcel back to the deceased was riddled with fraud.

5. In his oral evidence tendered in this Court, the Applicant testified that he purchased the disputed parcel from the deceased at a total consideration of Kshs.120,000/- and that he later filed a case at Gichugu Law Courts that however, in his view did not determine the ownership of the disputed parcel. The Applicant, however, under cross-examination stated that he actually had an agreement and other documents to support his claim only that the same were surrendered to the Criminal Investigation Department, Kerugoya Police Station and that is why he could not produce any. He insisted that he never lost the case at Gichugu Law Courts despite being shown the judgment from that court showing the contrary position. He however, admitted that he was not related to the deceased in any way and had only brought the application since he was the owner of the disputed parcel having bought it.

6. The Respondents and the Interested Party opposed the application. The Respondents filed a joint affidavit sworn on 2nd November, 2014 to oppose Grant. They deponed that in so far as they are concerned the deceased herein, the late Mary Njeri Migwi was survived by only two children – the Respondents herein and that the Applicant had no blood relationship with either of them. They therefore claimed that the Applicant cannot claim any interest on the land as the same were extinguished and determined in Resident Magistrate's Court at **Gichugu Civil Case No. 23 of 2002**. To support their assertions they annexed copies of the following:

*i. **Plaint marked as "BNM 1"***

*ii. **Defence marked as "BNM 2"***

*iii. **Proceedings and judgment marked as "BNM 3"***

*iv. **Decree marked as "BNM 4"***

7. The Respondents further deponed that the disputed parcel changed hands upon Confirmation of the Grant herein and is now in the hands of Antony Gatimu Gitari, the Interested Party in this cause and that the main purpose of the application according to them is to evict the Respondent from the disputed parcel.

8. The Interested Party on his part also filed a replying affidavit sworn on 19th February, 2015 disputing facts as presented by the Applicant. He supported the representations made by the Respondents stating that he was an innocent purchaser of the disputed parcel for value without notice. He stated that his title is good and has in fact charged the same with a financial institution after following due process in acquiring the same and annexed copies of the title deed, consent from Land Control Board and copy of certificate of official search in his affidavit as **AGG3A-E** to buttress his contention.

9. According to the evidence orally tendered by the Respondents, they have alleged that they petitioned for Letters of Administration and followed all the processes without any objection from anyone. The 1st Respondent told the Court that he was aware of the Civil case over the parcel in dispute in Gichugu Law

Courts where the Applicant herein had sued him and one **NJUGUNA NJOROGE** seeking *inter alia* to stop them from burying their deceased mother in the disputed parcel. He produced the pleadings filed in the Gichugu subordinate court the proceedings and the judgment as D. Exhibits 1, 2, 3, and 4 respectively.

10. The 2nd Respondent testified that they agreed with the 1st Respondent and had the disputed parcel transferred to him, a fact that was indeed confirmed by the 1st Respondent. He told this Court that, he then decided to dispose off the disputed parcel to the Interested Party herein for value. The Interested Party produced a sale agreement, application to Land Control Board and a consent to transfer from the same board that formalized the transaction.

11. The Respondents and the Interested Party in unison asked this Court to dismiss the Applicant's Summons for Revocation of Grant herein arguing that the same lacked merit.

12. This Court has considered the application for revocation or annulment of grant and the evidence tendered *viva voce* by all the parties herein. What is coming out clearly in the application before this Court and the response therein, is that the Applicant's claim on the disputed parcel is based on a chose in action rather than a claim under Law of Succession that would justify invoking the provisions of **Section 76** of the **Law of Succession Act**.

13. The Applicant alleges that he is the registered owner of the disputed parcel after purchasing it from the deceased herein prior to her demise. This is fully denied by the Respondents who have denied knowledge of the same demonstrating that they lawfully acquired the disputed parcel through transmission on the basis of the confirmed grant herein.

14. This explains the Court's finding that the Applicant claim lies on the disputed parcel rather than the succession proceedings. He is not a beneficiary but claims the disputed parcel arguing that the parcel was transferred in a fraudulent manner to the name of deceased herein at a time when she was already dead. The Applicant therefore in my view has a cause of action over the estate and the question that begs determination by this Court is whether this Court as a succession court is seized with the requisite jurisdiction to determine the dispute.

15. This Court as a succession court can only apply the **Law of Succession Act** in accordance with the intention of Parliament when enacting the law on 1st July, 1981. The purpose of the Act is given as follows:

“An Act of Parliament to amend, define and consolidate the law relating to estate and testamentary succession and the administration of estates of deceased persons for purposes connected and incidental thereto.”

16. The provisions of **Section 2** of the Act clearly states that the law applies in the administration of the estate of deceased persons in Kenya. The Applicant herein has no issue with the administration of the estate of the late **MARY NJERI MIGWI**, the deceased herein as his claim is not based on beneficiary interests. He is not claiming as a dependant either. In invoking the provisions of **Section 76** of the **Law of Succession Act**, the Applicant appears to have stretched the operation of the **Law of Succession Act** beyond its legal/statutory limits. The Applicant as I have observed above is claiming ownership of the disputed parcel and has annexed a copy of the title to prove his claim. The Interested Party has for good measure also counter-claimed ownership also annexing a copy of the title to prove his claim meaning that on the face of it, the disputed parcel does have two titles and in that regard this Court obviously cannot be called upon to resolve or determine which title between the two is genuine and which one is not.

17. This is because the mandate or jurisdiction to determine or resolve such disputes is clearly given to specially created court under **Article 162 (2)** of the Constitution and **Section 13 2(1)** of **Environment and Land Act Cap 12A Laws of Kenya**, which is Environment and Land Court. This Court notes that the Applicant has asked this Court to cancel title issued to the Interested Party and issue a permanent injunction to stop the Respondents and their agents from entering or interfering with the disputed parcels.

This Court cannot in the context under which the reliefs have been sought grant the prayers/reliefs for reasons:-

i. Want of jurisdiction.

ii. This Court notes from the evidence tendered that the Applicant had sought similar reliefs in another civil suit in the subordinate court at Gichugu vide **GICHUGU RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 23 OF 2002** and the learned magistrate dismissed the suit. The Applicant did not appeal against the judgment and therefore the claim is rendered *res judicata* and even if he was to appeal against the decision, the forum of appeal as I have said should now be the Environment and Land Court in accordance with **Section 13(4)** of the Act and not in this Court.

18. This Court finds that the Applicant's Summons for Revocation of Grant is hinged on his claim on ownership of the disputed parcel and the same is not by virtue of succession by any stretch but a chose in action. He is not a beneficiary of the estate herein or a dependant to the deceased. The Summons for Revocation of Grant dated 7th July, 2014 plus all the prayers sought are unsustainable in law for the reasons aforesaid. The application is misconceived and must fail. It is dismissed with costs.

Dated and delivered at Kerugoya this 11th day of June, 2015.

R. K. LIMO

JUDGE

11.6.15

Before Hon. Justice R. Limo

Court Assistant: Willy

Twili for Applicant present

Ngigi for Respondent present

COURT: Judgment signed, dated and delivered in the open court in the presence of Twili for Applicant and Ngigi for Respondent.

R. K. LIMO

JUDGE

11.6.15