



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 56 OF 2012

PATRICK KAMWERE.....APPLICANT

VERSUS

LUCY NJURA NJERU.....RESPONDENT

RULING

1. The Applicant filed an application dated 10th April 2012 seeking to revoke and/or annul the grant issued to the Respondent in Runyenjes Succession Cause No. 84/2007 and confirmed on 27th July 2008.
2. The application is based on the grounds that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making of false statements and concealments from the Court of issues material to the case of the applicant. And that the Resident Magistrate's Court lacked jurisdiction to handle the case as the value of the accused's estate exceeded Shs.100,000/=.
3. According to the applicant, the Respondent concealed to the Court the fact that the applicant had purchased land parcel No. Gatari/Nembure/10287 from the deceased and had even paid some consideration. He annexed a copy of the sale agreement to affidavit (PK1). The purchase price is shown as Kshs.80,000/=.
4. A consent to sub-divide the original land parcel No. Gatari/Nembure/4945 into Gatari/Nembure 10287 & 10288 was granted by the Land Control Board. However before the Land could be transferred there arose a boundary dispute between the two new portions. The deceased died before this dispute was resolved. Therefore L.R. No. Gatari/Nembure/10287 was not transferred to the Applicant.
5. Despite having all this information the Respondent proceeded to file the Runyenjes Succession Cause without involving the Applicant or even providing for him.
6. The Respondent in her replying affidavit acknowledged that the deceased had sold land to the applicant which he was not able to transfer before his death. The purchase price was Shs.97,500/= and that the applicant only paid Shs.77,500/=. She further states that there was a dispute on the two portions created from Gatari/Nembure/4945. It was suspected that the Surveyor who did the sub-division had inappropriately awarded No. Gatari/Nembure/10287 which was to go to the Applicant. The surveyor had been sourced by the Applicant.
7. She avers that the only consent was for sub-division of the land and not for transfer of the applicants' portion. And that following the dispute she had tried in vain to refund the Shs.77,500/= to the Applicant. The Applicant instead sued the deceased vide Embu PMCC No. 210/2006 which was dismissed.
8. Both counsels agreed to dispose of the application by written submissions. Ms. Thungu for the applicant urged the Court to annul the grant to enable the applicant ventilate his case. Mr. Ithiga for the Respondent submitted that the agreement of sale became void as there was no consent to transfer obtained. He referred the court to several authorities like:-

(i) *Simiyu Vs Watambala Civil Appeal No. 34/1984 Nairobi*

(ii) *Estate of Gitau deceased Succession Cause No.1968/98 [2002] 2 KLR 430*

(III) *Kahia Vs Nganga eKLR Civil Appeal No. 16/2001 Nairobi.*

His view was that the applicant should have sued the estate for the refund of his money. I have carefully read the submissions and the authorities cited therein.

9. The undisputed facts are:-

- (I) The applicant paid to the deceased a consideration for purchase of Gaturi/Nembure/10287 and the consideration has not been refunded.
- (ii) The deceased died before transferring Gaturi/Nembure/10287 to the applicant following a boundary dispute.
- (iii) The Respondent has obtained a certificate of confirmation in Succession Cause No. 84/2007 wherein L.R. No. Gaturi/Nembure/10287 was distributed to her.

10. The disputed facts are:-

- (i) Whether the Magistrate's Court at Runyenjes had jurisdiction to hear and determine the Runyenjes Succession Cause No.84/2007.
- (ii) The amount paid by the Applicant to the deceased as consideration for the purchase of L.R. No. Gaturi/Nembure/10287.

11. Issues for determination:-

- (i) Whether the Magistrate's Court at Runyenjes had jurisdiction to hear the succession cause.
- (ii) Whether the grant was obtained fraudulently by making false statements and concealments.
- (iii) Whether there was a valid sale agreement between the deceased and the applicant capable of enforcement.
- (iv) What recourse the Applicant is entitled to.

12. ISSUE NO. 1

The applicant in his supporting affidavit has alleged that the value of the estate exceeded the jurisdiction of the said Court. In her submissions the Respondent has stated that no valuation report was annexed to prove that the value of the exceeds the Magistrate's jurisdiction. It is a principle of law that he who alleges a fact must prove it. Section 107 of the Evidence Act provides:-

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) *When a person is bound to prove the existence of any facts it is said that any burden of prove lies on that person.*

In this regard the applicant ought to have provided evidence to show that the value of the estate exceeded the jurisdiction of the Magistrate's Court. In the absence of such proof the Court cannot verify his allegations and as such this ground cannot stand.

ISSUE NO. 2

13. I have perused the affidavit in support of the petition for letters of administration intestate (Form P&A 5) and the affidavit in support of the summons for confirmation of grant filed in the lower Court by the respondent. In these affidavits the respondent has nowhere mentioned that the deceased had any liabilities at the time of his death or specifically that the applicant had paid the deceased Kshs.77,500/= for the purchase of land, as stated in her replying affidavit that she has even tried to refund the money.

14. This in my view is an admission by the respondent that the deceased owed the applicant Kshs.77,500/= for land. It is however clear that the respondent concealed this material fact while obtaining the letters of grant in the lower Court. She did this by failing to disclose that the deceased had a liability towards the applicant. And being a creditor confirms that the applicant was an interested party in the matter of the deceased's estate.

15. The grounds upon which a grant may be annulled are statutory and it is incumbent upon the party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all these grounds under section 76 of the Law of Succession Act a party seeking revocation or annulment of a grant of letters must be an interested party. An interested party is a party who has an interest in an estate.

16. In view of the above I do find that concealment of such material facts by the Respondent in the lower Court forms a ground for the revocation and/or annulment of grant under section 76 of the Law of Succession Act.

17. It is also clear from the facts before me that the Applicant is not interested in being given the grant of administration of the deceased's estate. His interest is in getting the land he bought. It is therefore the mode of distribution that he is attacking since he was left out. Can the grant therefore be revoked/annulled for that reason alone?

18. This brings me to **the 3rd issue for determination**. It is undisputed that the consent for transfer of Gatari/Nembure/10287 had not been obtained from the Land Control Board by the time the deceased died. The Respondents has submitted that the transaction between the Applicant and the deceased became void when the parties failed to obtain consent to transfer before the deceased passed on.

19. In the case of **SIMIYU –VS- WATAMBALA (Supra)**, consent was not obtained as required by the Land Control Act 1967, **HANCOX JA, NYARANGI JA and PLATT Ag JA** (as he then was) held that an agreement for sale of land was a controlled transaction requiring consent under section (1) of the Land Control Act 1967 and that where such consent was not obtained the transaction was void for all purposes and the appellants could only recover the purchase price.

20. And in **RICHARD KAMIRI GACHWE KAHIA –VS- EDWARD KAMAU NG'ANG'A (Surpa)**, the seller died before parties to the sale transaction could appear before the Land Control Board to obtain a consent. **O'kubasu JA, Githinji JA & Onyango Otieno Ag. JA (as he then was)** held that in the absence of the consent from the Land Control Board, the agreement for sale became void for all purposes.

21. What recourse is the applicant entitled to? Section 7 of the Land Control Act provides;

“If any money or other valuable consideration has been paid in the cause of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

22. This was the position held in both the above mentioned cases. In the case of **SIMIYU –VS- WATAMBAMALA** it was held that since the land transaction was void, the appellants could only be entitled to recover the purchase price. A party to a controlled transaction that has become void cannot seek compensation for improvements done on the parcel of land (see **RICHARD KAMIRI G. KAHIA**

case (Supra).

23. The above being the position it follows that the agreement of sale entered into by the deceased and applicant was null and void and all he can get is a refund of the purchase price.

24. From the material before this Court in form of annexures, the applicant paid the deceased a total of shs.77,500/=. In particular is his plaint in Embu SPMCC NO.210/06 (LMM1).

25. In the final analysis I do find that the application for revocation of grant cannot succeed as the only remedy available to the Applicant is the refund of the purchase price (Kshs.77,500).

26. I therefore dismiss the application for revocation/ annulment of grant. I order that the respondent (on behalf of the deceased's estate) refunds to the applicant shs.77,500/= plus interest at Court rates from December 2006 when he filed a claim for the same. Any cautions/restrictions on GATURI/NEMBURE/10287 to be removed forthwith and vacant possession rendered once the purchase price is refunded as ordered above.

27. This matter being what it is, I find it only fair that each party bears his/her own costs.

Right of appeal explained.

DATED, SIGNED AND DELIVERED AT EMBU THIS 2ND DAY OF JULY 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Ithiga for Respondent

Applicant

Respondent

Njue CC