



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**SUCCESSION CAUSE NO. 33 OF 2012.**

**REHOBOAM MWIIRI MUNA ::::::::::::::::::::::::::::::::::::::: DECEASED.**

**VERSUS**

**LYDIA WANGECHI MACHARIA ::::::::::::::::::::::::::::::::::::::: APPLICANT.**

**R U L I N G.**

The summons dated 30th August, 2012, is for revocation and/annulment of the grant issued to the petitioner/respondent **Lydia Wangechi Macharia**, on the 27th June, 2012 respecting the estate of the late Rehoboam Mwiiri Muna.

**Dorcas Nyambura Njenga** (the applicant), took out the summons in her capacity as the surviving grandchild of the late Mwiiri Muna (deceased) and the late Elizabeth Wangui Mwiiri, on grounds that the grant was obtained fraudulently and by concealment of material facts as well as by means of untrue allegations. That, the grant is useless and inoperative and it would be just and fair in the interest of the parties for this application to be allowed.

In her supporting affidavit dated 30th August, 2012, the applicant states that her biological mother abandoned her and her brother David Mungai when she was only one year and seven months. She was taken in and brought up by her maternal grandparents the deceased herein and the late Elizabeth Wangui Mwiiri whom they depended on. The deceased died on 17th August, 1991 and letters of administration respecting his estate were issued to the late Elizabeth Wangui Mwiiri. Consequently, the estate property land title No. Waitaluk/Kapko Block 9/Gutongoria/34 was transmitted to the said Elizabeth Wangui Mwiiri thereby becoming part of her property and estate. She however, passed away on the 29th March, 2009 and the applicant applied for grant of letters of administration respecting her estate vide Kitale Succession Cause No. 104 of 2011. Upon confirmation of the grant, the aforementioned parcel of land was transmitted to the applicant and a title deed issued accordingly. She (applicant) therefore contends that the parcel of land is not part of the estate of the deceased Rehoboam Mwiiri Muna and ought not be administered by the respondent on the basis of the grant respecting the estate of the deceased Rehoboam Mwiiri Muna issued to her on the 27th June, 2012, and in which the material parcel of land was included.

The applicant further contends that unknown to her, the respondent was her biological mother and her consent and that of other surviving dependants was not sought by the respondent when she applied for the disputed grant. That, the respondent failed to disclose material facts when applying for the grant and in particular that she had been given another parcel of land being title No. Lari/Kijabe 166 by the applicant's grand parents on which she has settled and that a dispute over the material parcel land had been resolved by family members.

Learned Counsel, **Mr. Ingosi**, appearing for the applicant at the hearing of the application/fully relied on the contents of the applicant's supporting affidavit and added that the disputed grant came after

the one granted to the applicant in Succession Cause No. 104 of 2011 which was confirmed on 19th January, 2012. That, the parcel of land subject matter of this cause was transmitted to the applicant and a title deed issued on 17th February, 2012, after which the land was disposed off to Isaac Njenga Kamau who has since obtained a title deed.

Learned counsel, contended that the grant herein cannot be operational and the parcel of land intended to be administered is now in possession of a third party. That the Succession Cause No. 104 of 2011 was never challenged by the respondent.

Learned counsel urged this court to allow the application.

In her replying affidavit dated 15th November, 2012, the respondent stated that she is the only child of the deceased Rehoboam Mwiiri Muna and

Elizabeth Wangui Muna and that the applicant is her daughter. The disputed parcel of land belonged to her late father and that at no time did the late Elizabeth Wangui Mwiiri obtain grant of letter of administration over the estate of her late father neither did she ever become the registered owner of the land. Therefore, the inclusion of the disputed parcel of land in Succession Cause No. 104 of 2011 among the assets of the late Elizabeth Wangui was a fraudulent act on the part of the applicant.

The respondent contended that the property became registered for the first time in the name of the late Elizabeth Wangui and was immediately transferred and registered in the name of the applicant on the same day i.e. the 2nd February, 2012, whereas her (respondent) mother died on the 29th March, 2009 when the applicant had already married the said Isaac Njenga with whom she lives.

The respondent further contended that the applicant was not a dependant of the late Elizabeth Wangui and after transferring the disputed land to her husband, he charged the same to a bank. That, the applicant was not a beneficiary of the estate of the late Rehoboam Mwiiri Muna and therefore her consent was not necessary and that since the disputed land never belonged to the late Elizabeth Wangui, the purported family agreement was of no consequence.

Learned counsel, **Mr. Kiarie**, appearing for the respondent reiterated the contents of the replying affidavit and contended that the applicant having failed to comply with Rule 60 of the Probate and Administration Rules has no **“locus-standi”** in this matter. That, she failed to enter appearance using form 26 prior to filing this application.

In that regard, learned counsel, relied on the decision of the High Court in Nakuru in Succession Cause No. 31 of 2002 **Wilfred Njogu Mbuthia vs. Elizabeth Wairimu Thimba & others (2005) e KLR.**

Learned counsel, submitted that the late Elizabeth Wangui never applied for any grant respecting the estate of her late husband and that the only document annexed to the supporting affidavit to establish the fact was a declaration form without a cause number and which was never filed. Learned counsel contended that the alleged grant is not annexed to this application and the respondent being the daughter of the deceased in this matter applied for the grant subject of the present dispute. That, the deceased had other property apart from the property in dispute and that the respondent is the administrator of his estate.

Learned counsel, submitted that the grant subject of this dispute is pending confirmation yet the disputed parcel of land is in the hands of the applicant who applied to be the administration of the estate of her late grandmother Elizabeth Wangui while the property belonged to her grandfather. That, the applicant transferred the property to her husband who charged it to Equity Bank.

Learned Counsel, contended that the quick change of hands of the property was to ensure that it was taken as far as possible from the estate of the deceased although the appropriate green card showed that it belonged to the deceased before it was transferred to Elizabeth Wangui on 2nd February, 2012 and then to the applicant on the same day. A title was then issued on 17th February, 2012, and thereafter the property was transferred to the applicant's husband and then charged to Equity Bank for a loan of Ksh. 6

million.

Learned counsel further contended that the respondent could not challenge a process without a grant which she was entitled to apply for as a daughter of the deceased and that the applicant has failed to demonstrate any fraud or concealment of material facts on the part of the respondent.

Learned counsel, urged this court to dismiss the application with costs.

All the foregoing having been given due consideration by this court, it does appear that this is a sad case where a mother and daughter are wrangling over property which apparently belonged to their father and grandfather respectively and which was somehow transferred to the applicant and then to her alleged husband, Isaac Njenga Kamau, before being charged to a bank as security from repayment of a loan.

Basically, we are herein not concerned with the grant allegedly obtained by the applicant respecting the estate of her late grandmother, Elizabeth Wangui, mother to the respondent. In any event, that is not the grant in dispute herein although it impacts on the present grant since its certification of confirmation dated 19th January, 2012 identified the material land parcel No. Waitaluk/Kapkoi Block 9/Gutongoria/34 as having belonged to the deceased Elizabeth Wangui Mwiiri and was thus transmitted to the applicant. It is quite intriguing however, that the record from the land registry (green card) annexed herein by the respondent shows that the property was transferred to Elizabeth Wangui Mwiiri on 2nd February, 2012, yet she was already dead and on the same day it was transferred to the applicant, who obtained a title deed on 17th February, 2012 and on the 22nd may, 2012, the property was transferred to Isaac Njenga Kamau who obtained a title deed on the same day and changed the property on the 21st June, 2012.

There was no proof from the applicant that the property ever belonged to the late Elizabeth Wangui, her grandmother and not her late grandfather.

The supersonic manner in which the property transferred to the applicant after she obtained the certificate of confirmation of grant dated 19th January, 2012, and then to her alleged husband was a good cause to raise suspicion and doubt whether there was any grant issued to the applicant respecting the estate of her late grandmother and more so, against the background that the actual grant was not exhibited herein. Only the certificate of confirmation was exhibited meaning that it may also have been obtained in a suspicious manner.

Be that as it may, apart from the word of the applicant, there was no tangible evidence to show that the disputed property actually belonged to her late grandmother for it to be included as part of her estate and be transferred to her.

The green card exhibited herein shows that the applicant's grandmother was first registered as the proprietor of the property on the 2nd February, 2012. this was a false entry as the grandmother is said to have died on 29th March, 2009. she could not have arisen from the dead to come and acknowledge the registration on that date.

So much for the property subject of this matter, coming back to the allegations by the applicant that the present grant was obtained by the respondent in a fraudulent manner and by way of concealing of material facts, no evidence was led to establish the fact.

The respondent was the only child of the deceased Rehoboam Mwiiri Muna and Elizabeth Wangui Muna. She did not have to seek the consent of her daughter, the applicant, to apply for grant of letters of administration respecting her late father.

If indeed the applicant was a dependant of the deceased, nothing prevents her from moving under section 26 of the Law of Succession Act for necessary provision.

The allegations made by the applicant pertaining to the disputed property are completely unsustainable in view of what has already been stated hereinabove.

With regard to the argument by the respondent that the applicant has no “**locus-standi**” in this matter by dint of Rule 60 of the Probate & Administration Rules in failing to complete form 26, the opinion of this court is that such argument borders on procedural technicality and would not therefore serve to invalidate the present application for reasons of “**locus-standi**”.

In any event, the applicant's omission would be curable under Article 159 (2) (d) of the constitution of Kenya.

All in all, this application is devoid of merit and is hereby dismissed with costs to the respondent.

**[Read and signed this 15th day of July, 2014.]**

**J.R. KARANJA.**

**JUDGE.**