



**Kamau v Wanyoike & another (Civil Appeal
181 of 2008) [2012] KECA 27 (KLR) (6 February 2012)**

JECINTA WANJA KAMAU V ROSEMARY WANJIRU WANYOIKE & ANOTHER [2012] KECA 27 (KLR)

Neutral citation: [2012] KECA 27 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 181 OF 2008
EM GITHINJI, RN NAMBUYE & MK KOOME, JJA
FEBRUARY 6, 2012**

BETWEEN

JECINTA WANJA KAMAU APPELLANT

AND

ROSEMARY WANJIRU WANYOIKE 1ST RESPONDENT

JOHN MWANGI WANYOIKE 2ND RESPONDENT

*(An appeal from the judgment of the High court of Kenya at Embu
(Khaminwa, J.) dated 6th May, 2008 in H.C.C.A. NO. 30 OF 2007)*

1. This is an appeal from the judgment of the High Court (Khaminwa, J.) whereby the High Court dismissed the appeal filed by Jecinta Wanja Kamau (the appellant herein). The appeal to the High Court was against the Ruling of the Resident Magistrate's court allowing an application for review made by the two respondents herein.
2. The dispute relates to a parcel of land measuring 1.2 acres awarded to the appellant from the estate of Magondu Karuga who died on 1st January, 1988.
3. The dispute has a long history beginning with the filing of a Succession Cause No. 315 of 1995 in the Senior Resident Magistrate's court at Murang'a. The petition for Letters of Administration intestate in respect of the estate of Magondu Karuga is shown to have been made by Beatrice Njeri Magondu as a widow of the deceased.
4. There is a finger print against her name. The affidavit in support of the petition indicated that the estate comprised of Land Title No. Loc. 6/Gikarangu/2639 and that the deceased was survived by the said Beatrice Njeri Magondu and a son, Samuel Wanyoike Magondu.



5. A consent by Samuel Wanyoike Magondu to the grant being given to Beatrice Njeri Magondu was filed. It seems that the grant was given on 27th February, 1996 although the record does not contain a copy thereof.
6. Thereafter an application for confirmation of the grant before the expiry of the period of six months stipulated by the law (Section 71 Law of Succession of Act) was filed on 21st March, 1996. The affidavit in support of the application for confirmation of the Grant is shown to have been sworn by Beatrice Njeri Magondu. There is a finger print at the end of the affidavit. She deposed in the affidavit that the land comprising the estate was to be shared by Samuel wanyoike Magondu and Jecinta Wanja Kamau each getting 1 acre and 1.2 acres respectively.
7. There is a certificate of confirmation of grant dated 21st March, 1996 showing that the grant was confirmed on the same day. However, the copy of the typed proceedings on the record does not show that an application for confirmation of the grant was made or that the grant was indeed confirmed. A copy of certificate of official search dated 14th December, 1998 shows that Samuel Wanyoike Magondu and Jecinta Wanja Kamau were ultimately registered as proprietors of Land Title No. Loc.6/Gigakarangu/2639 each owning 1 acre and 1.2 acres respectively. However, Samuel Wanyoike Magondu died on 15th September, 1996 before the partition of the land. He was survived by his wife. Rose Mary Wanjiru Wanyoike and his son John Mwangi Wanyoike.
8. Sometime in 1999 Beatrice Njeri Magondu filed High Court Succession Cause No. 2730 of 1999 at Nairobi through a firm of advocates seeking revocation of the grant given in Murang'a Succession Cause No. 315 of 1995 on the ground that the grant was obtained fraudulently by impersonating her. She deposed in the supporting affidavit that she had not petitioned for a grant; that she had not authorised anybody to apply for a grant, that Jecinta Wanja Kamau was unlawfully named as a beneficiary and has no interest in the estate; that she was 85 years old and that sometime in 1995 her son Samuel Wanyoike took her to Murang'a town and asked her to sign some documents which she ignorantly did.
9. The appellant Jecinta Wanja Kamau filed a replying affidavit deposing among other things, that she had bought 1.2 acres. She deposed in paragraphs 14 and 15 thus:
 14. That the applicant in appreciation of the whole transaction requested to be paid by the respondent shs.1000 and a bed sheet which articles were given to her in the presence of her son Karuga Magondu.
 15. That in return the applicant made a Kikuyu basket for respondent and handed it over to the respondent in the presence of her family.”
10. The application for the revocation of the grant was not prosecuted as Beatrice Njeri Magondu died on 23rd January, 2001 aged 95 years. According to the respondents in this appeal, the application was marked withdrawn on 26th July, 2004, on the application of Rosemary Wanyoike but, according to the appellant the application for revocation of the grant was dismissed on 17th May, 2006.
11. By a notice of motion dated 4th April, 2003, brought mainly under Order XLIV Rule 1 Civil Procedure Rules [now Order 45] [CPR], the respondents herein made an application in the Murang'a succession cause seeking review of the order of 21st March, 1996, confirming the grant to the extent that 1.2 acres was awarded to the appellant. The respondent averred that the grant to the extent that it gave 1.2 acres to the appellant was not confirmed in accordance with the [Law of Succession Act](#) [Act] and the Probate and Administration Rules [P&A Rules], in that, Jacinta Wanja Kamau was not a beneficiary and that



- Samuel Wanyoike Magondu did not consent to the confirmation. The application was opposed on various grounds by the appellant who filed a lengthy replying affidavit and a supplementary affidavit.
12. On 3rd April, 2007, the trial magistrate after hearing full arguments allowed the review application in essence setting aside the order granting 1.2 acres to the appellant and cancelling the registration of the appellant as a co-owner. The trial magistrate found inter alia that Samuel Wanyoike Magondu had not given consent to the confirmation of the grant; that the appellant did not adduce evidence to prove that she was a purchaser; that respondents had locus standi to file the review application as beneficiaries and that the application for revocation of grant filed by Beatrice Njeri Magondu in the High Court at Nairobi was withdrawn and not dismissed. An appeal by Jacinta Wanja Kamau to the High Court was dismissed triggering the present appeal.
 13. Mr Gacheru, learned counsel for the appellant argued the twelve [12] grounds of appeal together. The grounds raise five broad issues, namely, locus standi of the respondents to make an application for review, competence of the application for review, jurisdiction of the Resident Magistrate, merits of the application for review and the protection of a purchaser for value under Section 93 of the Act.
 14. Mr Gacheru who appeared for the appellant in the subordinate court, High Court and in this Court has consistently contended that the respondents had no locus standi to make an application for review. He submitted that, as the respondents were not parties in the succession cause they should have applied for grant in respect of the estate of Samuel Wanyoike Magondu and Beatrice Njeri Magondu before they could make the application for revocation of the grant. The trial magistrate ruled that although the respondents were not legal representatives, they nevertheless had locus standi to bring the application as beneficiaries. The High Court also held that the respondents had locus standi because as descendants of the deceased and as persons entitled to inherit the land, they had a direct interest.
 15. As already stated, the review application was made under the former Order XLIV Rule 1 CPR. By Rule 1(1), an application for review could be made by any person considering himself aggrieved by a decree or order. That phraseology is wide enough to cover the respondents. Furthermore, if the application for review is treated as an application for revocation of the grant as the appellant, in essence contends, both under Section 76 of the Act and Rule 44 (1) P&A Rules, an application for revocation or annulment of a grant could be made by any person interested in the estate. From the foregoing, we have no doubt that the respondents had capacity to bring the review application.
 16. It is contended that the subordinate court erred in law in invoking Order XLIV without meeting the conditions laid in Rule 63 of P&A Rules and that the High Court erred in law in ignoring that error. Rule 63 (1) of P&A Rules specifically stipulates that Order XLIV of CPR amongst others, apply so far as relevant and subject to any order of the court to proceedings under P&A Rules. It is clear therefore, that by virtue of Rule 63(1) review jurisdiction exists in probate and administration matters and the subordinate court which had granted the impugned order had jurisdiction to entertain a review application.
 17. The question is whether the application of that review jurisdiction was appropriate in the circumstances. Mr Gacheru contended that the subordinate court did not give any reasons why it applied the review jurisdiction. Mr Gacheru further contended that the subordinate court had no jurisdiction to review the order and that it is only the High Court which has jurisdiction to revoke a grant.
 18. It is true that the jurisdiction of the subordinate courts to determine disputes under the *Law of Succession Act* is limited (see Section 48 of the Act). However, it is not disputed that a Resident Magistrate had jurisdiction to give a grant and to confirm it. The value of the estate was shown to be Kshs.80,000/= which is within the monetary jurisdiction of the Resident Magistrate under Section



44 of the Act. However, by Section 48(1) and Rule 44 (1) P&A Rules and, as correctly submitted by Mr Gacheru, a subordinate court has no jurisdiction to entertain an application for revocation or annulment of grant under Section 76 of the Act. Nevertheless, where a subordinate court has jurisdiction under Section 48 it has also jurisdiction to entertain an application for review in the same cause.

19. The issue whether or not the application which was made in the subordinate court was an application for review or revocation of the grant necessarily arises. The procedure for making an application for revocation or annulment of grant is prescribed by Rule 44 of P & A Rules. The application had to be made by summons in the prescribed form supported by an affidavit in the prescribed form. In contrast, an application for review under Order XLIV as read with Order L has to be made by motion.
20. The notice of motion made by the respondent sought the following orders:-
 1. That the Honourable court be pleased to review and consequently set aside the orders dated 21st day of March, 1996 confirming the grant herein to the extent that 1.2 acres of land parcel No. 202/Gikarangu/283 was awarded to one Jecinta Wanja Kamau.
 2. That a consequential order be issued cancelling the registration of Jecinta Wanja Kamau as co-owner of the land parcel No. 202/Gikarangu/2639.”
21. The application was supported by two grounds namely, first, that Jecinta Wanja Kamau who was awarded 1.2 acres was not a beneficiary of the estate nor related to the deceased, and, second, that Samuel Wanyoike Magondu did not consent to the confirmation.
22. The application for revocation of grant had been made by Beatrice Njeri Magondu in High Court Nairobi Succession Case No. 2730 of 1999. Upon the death of Beatrice Njeri Magondu the cause was terminated. The appellant claimed that the cause was dismissed by Rawal J [as she then was], and produced an order given on 17th May, 2006. The respondents however, claimed that the cause was withdrawn on application of the respondent and produced an order to that effect given by Kamau, Jon 26th April, 2004. Both the subordinate and the High Court made a finding that the cause was withdrawn, a fact now appreciated by Mr Gacheru. The order withdrawing the cause preceded the order dismissing the cause. It is apparent that the dismissal order was made in ignorance of the previous order. The correct position is that the application for revocation of grant was withdrawn on the application of the first respondent.
23. The application made by the respondents in the subordinate court was not in substance and in form an application for revocation or the annulment of the grant. It did not even seek to set aside the distribution of the estate entirely. It was only confined to the share given to the appellant. Moreover, the respondent did not rely on any of the grounds for revocation specified in Section 76.
24. The application for review was based on the ground of apparent error on the face of the record. The respondents averred in the application that in view of the two grounds, stated therein, there was an apparent error on the face of the record which resulted in a complete stranger being awarded a portion of the deceased's land to which she was not entitled.
25. It was apparent on the face of the petition for grant made by Beatrice Njeri Magondu and on the face of the supporting affidavit that the appellant was not shown either as a creditor or beneficiary of the estate. It is also apparent on the face of the affidavit to support the application for confirmation of the grant that no justification was given for allocating the appellant 1.2 acres from the estate. As already stated, the appellant in a subsequent affidavit claimed to be a purchaser and that she gave Beatrice Njeri



Magondu KShs.1,000 and a blanket. The two courts below, quite correctly in our view, made a finding that there was no evidence of purchase.

26. Lastly, it is apparent from the face of the application for confirmation of the grant that the consent of Samuel Wanyoike Magondu – a beneficiary of the estate was not obtained as stipulated by rule 40(8) P&A Rules. In the absence of such consent, the grant could not have been confirmed. The application could only have been set down for hearing as stipulated by rule 40(8).
27. Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.
28. From the foregoing we are satisfied that the respondents had locus standi to make the application for review; that the application for review was competent and meritorious; that the subordinate court had jurisdiction to entertain the application and that the appeal has no merit.
29. By Rule 6 of Order XLIV CPR [now order 45 rule 5,] when an application for review is granted an order for rehearing is made. It follows therefore that the application for confirmation of the grant made by Beatrice Njeri Magondu should be heard on the merits. However it is practically impossible to rehear the application as the petitioner is deceased and as the respondents have not taken over the proceedings. It is sufficient in the circumstances, to clarify that the fact that the review application was allowed does not take away the appellant's right to take any appropriate action to pursue her claim to the land.
30. In the result, the appeal is dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2012.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this a true copy of the original

DEPUTY REGISTRAR

