



**Peter v Gatumu (Miscellaneous Application 37 of 2013)
[2024] KEHC 10471 (KLR) (27 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 37 OF 2013
LM NJUGUNA, J
AUGUST 27, 2024
IN THE MATTER OF THE ESTATE OF JOSPHAT
KABIBII ALIAS SOSPETER KABIBI (DECEASED)**

BETWEEN

GIDEON MUGO PETER APPLICANT

AND

JOHN GICHOVI GATUMU RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 04th December 2012 seeking the following orders:
 1. That the name of the respondent be deleted from the register of parcel number Ngandori/ Ngovio/905 and the Land Registrar Embu be ordered to register the applicant and dispense with the production of the old title deed which was issued earlier; and
 2. That costs be in the cause.
2. It is the applicant's case that parcel number Ngandori/Ngovio/905 was transmitted to the respondent following succession proceedings which he filed. That the applicant's mother was dissatisfied with the process and she moved the court for annulment of the grant which the court allowed. That consequently, the applicant obtained a grant and certificate of confirmation issued bequeathing the land to him. He deposed that he has been unable to take the ownership of the land since the same is still registered to the respondent, hence the application herein.
3. The respondent filed a replying affidavit sworn on 15th January 2013 and a further replying affidavit dated 10th March 2023. He stated that he purchased 1 acre of land from John Nyaga Kabibii (deceased) who is the son of the deceased herein on 10th February 1993. That it is the son of the deceased who had obtained a grant in the estate of the deceased and the said grant was confirmed. He stated that



- the applicant is a stranger in the estate of the deceased as he unprocedurally substituted Venasia Gitiri Mbogo (the petitioner) since the application was not served upon him. That the grant was revoked on the motion by Charity Mutitu Kabibii, who is not the applicant's mother since the applicant had already told the court that he is the son of John Nyaga Kabibii (deceased) who is Charity's brother.
4. He stated that it is odd that the applicant, an alleged grandson of the deceased is the sole beneficiary of the deceased's estate yet Charity, daughter of the deceased and Venasia, daughter-in-law, did not get any share. That he has been living on the land since 1995 and that he got it in exchange for parcel number Ngandori/Kiriari/3197 belonging to Venasia, the wife of John Nyaga Kabibii (deceased). That Venasia herself questioned her unprocedural substitution as petitioner by the applicant herein and she moved the court for annulment of the grant issued to the applicant.
 5. He stated that the orders sought through the application should be sought through a substantive originating summons and not through a notice of motion application. That the application is barred under the *Limitation of Actions Act* considering that the title document was issued to him in 1995, more than 17 years ago. That he acquired the land through adverse possession and not through succession, hence the claim should have been made within 12 years. That he settled on the land and he has developed it by planting perennial crops valued at Kshs.5,636,000/=.
 6. He argued that the grant was revoked through a strange twist of events merely 1 year after it had been issued. He stated that it is suspect that it is the applicant's mother who was appointed administrator of the estate of the deceased but the certificate of confirmation was issued to the applicant. That he was not a party to the succession proceedings and as far as he is concerned, he acquired the land through adverse possession and he produced a copy of the title deed showing that it was registered to him in 1995.
 7. The court took *viva voce* evidence.
 8. PW1 was the applicant who stated that the deceased herein is his paternal grandfather and the respondent is a stranger to him. He stated that he did not know that John Gatumu Gichovi filed succession proceedings and that Charity Mutitu Kabibi is his aunt and his guardian/adoptive mother. That Charity is the one who was initially given the land and then she transferred the land to him as his son but when he went to formalize the transfer, he learned that the land was in the name of the respondent. That Charity applied for revocation of the grant that was issued to John Gatumu Gichovi and it was revoked and a new grant was issued to her and she distributed the land giving it to the applicant. That it is following these events that he was given a grant in his name and the same confirmed. That he does not know anyone called Venasia Gitiri Mbogo and that the registration of land in the name of the respondent should be cancelled. On cross-examination, he stated that the children of the deceased are John Nyaga Kabibi who is deceased and Charity Mutitu Kabibi. That when his father died, he was an adult and he buried him on the suit land herein although he does not live on the said land because of this case. That the respondent destroyed all his property on the land but he did not report the matter to the police because the matter was in court. That at some point he learned that the land was registered to a stranger, prompting the application herein.
 9. PW2 was Charity Mutitu Murangi who stated that the deceased is her father and that she raised PW1 who is her nephew and the son of her only sibling John Nyaga Kabibi. That Venasia Gitiri is unknown to her but she filed a case against her and the respondent who had taken the deceased's land. That she had filed succession proceedings before she learned that the respondent had taken the deceased's land through an alleged purchase. That she joined the applicant in the application to ensure that he gets his share of the land as a legitimate beneficiary. On cross-examination, she stated that the deceased died



- after a short illness in 1962. That she is the one who petitioned for letters of administration in the estate of the deceased, knowing (through an official search) that the land belonged to the deceased.
10. DW1 was the respondent who stated that he obtained parcel number Ngandori/Ngovio/905 through succession cause no. 117/2012. That he has been in occupation of the land since 1995 and has not faced any complaints. That before he got the land, it was in the name of John Nyaga Kabibii (deceased) and he has since developed it through planting of perennial cash crops of a high value. He urged the court to allow him to keep the land and also award him costs of the suit.
 11. On cross-examination, he stated that the applicant is not a member of the family of the deceased. That he obtained the title following succession proceedings in which the only beneficiaries were himself and Venasia Gitiri. That Venasia had sought revocation of the grant issued to the applicant but the application was dismissed. Regardless of the contents of his further replying affidavit in which he stated that he had acquired the land through adverse possession, he stated that he bought the land from the son of the deceased and he took possession of it in 1995. That he is still in possession of it because he does not know why the grant was revoked.
 12. The court directed the parties to file written submissions and they both complied.
 13. The applicant submitted that in as much as the respondent denied knowledge of his application, he did move the court to set aside Venasia's application for revocation to enable him participate in the proceedings herein. The said application was dismissed through a ruling of this court delivered on 25th July 2019 where the court noted that since 1996, the respondent knew that the title he holds to the land is in contest and was tainted with illegality. He urged this court to grant the orders sought so as to give effect to its previous ruling. He stated that this court has jurisdiction to grant the orders and he relied on the cases of *Floris & Another v. Giancarlo Felasconi* (2014) eKLR and *In Re Estate of Leah Wanguii Nding'uri (deceased)* (2020) eKLR. He stated that for as long as the grant leading to issuance of the title remains revoked, the registration of title should also be cancelled.
 14. The respondent, in his submission, rehashed his sentiments as stated in the replying affidavit and the further replying affidavit and he noted the ruling of this court dated 25th July 2019. He submitted that the application does not sit well before the court since the orders sought should be sought through a plaint. He relied on Order 3 Rule 1(1) of the *Civil Procedure Rules 2010* and the case of *Hunker Trading Company Limited v. Elf Oil Kenya Limited* (2010) eKLR and stated that even the oxygen principle and Article 159(2)(d) of the *Constitution* cannot remedy a flaw of this nature. He insisted that he has been in open quiet possession of the land since 1995 and that he should be left to possess the land in line with the rules of adverse possession.
 15. The issue for determination herein is whether the orders sought should be granted.
 16. Through his further replying affidavit and submissions, he stated that the land was acquired through adverse possession since he has been living there undisturbed for more than 17 years. Through his replying affidavit and viva voce testimony, he stated that he purchased the land from John Nyaga Kabibi, son of the deceased following succession proceedings. The respondent's argument of adverse possession opens the door for questioning the jurisdiction of this court to cancel his title. If this is the issue, this court should be held to lack jurisdiction to determine acquisition and/or ownership and the matter should be directed to the Environment and Land Court.
 17. However, the issue of cancellation of titles may be determined by a family court where the title was acquired directly through or following succession proceedings. Once this is established, the family court will be held to bear the relevant jurisdiction to order cancellation of registration of the impugned



title. See the case of *Santuzza Bilioti alias Mei Santuzza (Deceased) v Giancarlo Falasconi* [2014] eKLR.

18. A grant of letters of administration was issued to Venasia Gitiri Mbogo on 10th August 1993 and on the same date, the grant was confirmed distributing parcel number Ngandori/Ngovio/905 equally between Venasia Gitiri Mbogo and the respondent. The said grant was later revoked through a ruling by Judge A.G.A. Etyang at the behest of Charity Mutitu Kabibi. Following this revocation, the respondent moved the court to set aside the revocation proceedings claiming that he was not involved in prosecuting the same. He sought that the summons for revocation be heard de novo. The court, through its ruling delivered on 25th July 2019 affirmed that the orders of Judge A.G.A. Etyang remains valid since the same has not been overturned. The court also noted that the respondent's acquisition/ownership of the suit land is tainted with an illegality and the Honourable Judge refused to labour on the issues raised because it would amount to furtherance of an illegality.
19. After revocation of the grant, the applicant moved the court through chamber summons dated 22nd February 2000 seeking to be substituted with Venasia Gitiri Mbogo. Charity Mutitu Kabibi filed summons for confirmation of grant naming the applicant as a survivor of the deceased and herself as a beneficiary. The court issued a certificate of confirmation of grant in the name of the applicant on 29th April 2010, naming him as the sole beneficiary of the whole of parcel number Ngandori/Ngovio/905. On the record, there is a grant of letters of administration issued to the applicant on 14th June 2011.
20. From the foregoing chronology, the issue of the respondent's acquisition of the suit land through adverse possession is unfounded. It is my view that for the purpose of the family matter, the issues raised regarding the suit land herein are determinable by this court sitting as a family court. This is not to say that the respondent cannot lay his claim for adverse possession before the ELC. However, for the avoidance of doubt, and in the absence of an order halting the proceedings herein, this court bears jurisdiction to determine the application herein.
21. The respondent alleged that he purchased the land from John Nyaga Kabibii in 1995. As stated herein earlier, the respondent was named as a beneficiary of the estate of the deceased through the revoked grant. That being the case, the court is well aware of the progression of the applicant being appointed as administrator of the estate and thus becoming the sole beneficiary thereof. Since this position remains thus to date, it is my view that the title document should be unencumbered and made available to the rightful beneficiary according to the valid subsisting grant and certificate of confirmation.
22. Therefore, I find that the application has merit and it is hereby allowed with orders as follows:
 1. The Land Registrar Embu is hereby ordered to cancel registration of parcel number Ngandori/Ngovio/905 in the name of the respondent and effect registration of the same to the name of the applicant herein;
 2. The respondent to pay the applicant costs of this application.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

.....for the Respondent

