



REPUBLIC OF KENYA



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In re Estate of Twarugoji Kirimunya (Deceased) (Succession Cause 351 of 2002) [2023] KEHC 18346 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 351 OF 2002
EM MURIITHI, J
MAY 30, 2023**

IN THE MATTER OF THE ESTATE OF TWARUGOJI KIRIMUNYA (DECEASED)

BETWEEN

JEREMIAH M’NJOGU M’TWARUGOJI APPLICANT

AND

MARTHA NAITORE M’MURITHI RESPONDENT

RULING

1. This is a ruling on two counter-applications by the parties herein directed respectively at revocation of certificate of Confirmed Grant herein and the implementation thereof as follows.

1st Application

2. By Notice of Motion dated 7/7/2022 under Rule 7 (i) of the *Probate and Administration Rules* and section 34 (1) of the *Civil Procedure Act*, the applicant seeks that:

“The certificate of confirmation of a grant issued to Martha Naitore M’murithi on December 8, 2021 be revoked as the grant is issued on an illegal entity created through fraudulent malpractices and anomalies.”

3. In his supporting affidavit sworn on even date, the applicant contends that there exists 2 Court of Appeal Orders of 17/5/1988 and 17/5/1991 and any of the parties defying implementation of the Court of Appeal is contemptuous of the said orders. He avers that the sub-division of the suit land No. Ntima/Ntakira/685 into Ntima/Ntakira/2488 and Ntima/Ntakira/2489 contravenes the Court of Appeal order of 17/5/1991. Parcel No. Ntima/Ntakira/2489 is therefore not a legal entity for this court to legally preside over for it has no lawful construe in any of the Court of Appeal Orders or the recent Court of Appeal ruling as it was created by fraudulent malpractices and anomalies. There have been cases before this court from 1991 seeking compliance with the Court of Appeal order amidst the



respondent's opposition. From the ruling of this court of 25/1/2018, he moved to the Court of Appeal in Civil Appeal No. 16/2018 seeking redress from this Court's ruling which subsisted this court's ruling of 26/9/1990. The respondent did not oppose enforcement of the Court of Appeal order at the Court of Appeal as she is doing before this court. The Court of Appeal vide its decision of 19/3/2021 ruled that enforcement of its order should be done in Meru High Court. On 11/2/2021, he filed civil application No. E008 of 2021 in the Court of Appeal seeking extension of time to file and serve the record of appeal out of time against the order of this court of 23/11/2020. He avers that there pends an appeal in the Court of Appeal at Nyeri against revocation of the grant issued to the respondent. There is appeal No. 58/2018 in the Court of Appeal at Nyeri seeking enforcement of the consent order of 17/5/1991. The issuance of the certificate of confirmation of grant to the respondent by this court is complicating the court process, and it should be revoked to give way to the implementation of the Court of Appeal order, and/or for the settlement of disputes before the Court of Appeal. In view of the Court of Appeal ruling of 19/3/2021, he applied to this court for enforcement of the Court of Appeal order of 17/5/1991, and this court will grant the prayers which prayers do not prejudice the respondent in any way.

4. The respondent swore a replying affidavit on 30/9/2022 in opposition to the application. She avers that the certificate of confirmation of grant which had been initially issued to the applicant on 14/10/2009 was revoked by this court on 23/11/2020. With the subdivision of L.R No. Ntima/Ntakira/685 to L.R No. Ntima/Ntakira/2488 and 2489, parcel No. Ntima/Ntakira/685 no longer exists, and as the administrator of the estate, she has commenced subdivision of L.R No. Ntima/Ntakira/2489. She has not committed any illegalities and intends to administer the estate in accordance with the law so that every beneficiary has closure in this matter. If the application is granted, the administration and subdivision of the property No. 2489 shall be delayed further.

Submissions

5. The applicant urges that the certification of confirmation of grant issued to the respondent is of no need because there is a Court of Appeal consent order which shares land parcel No. Ntima/Ntakira/685 among the respondent's late husband and others. He seeks revocation of the grant issued to the respondent in relation to implementation of the ruling of 26/9/1990 for contravening the Court of Appeal consent order which settled Civil Appeal No. 21/1990. He submits that the respondent is not a party to Meru Civil Appeal No. 21/1990 and she cannot surmise to execute a decree in which she is not party. He urges that there is an application in Civil Appeal No. 21/1990 seeking to consolidate parcels Nos. Ntima/Ntakira/2488 and 2489 and he is confident that the court will reinstate parcel No. Ntima/Ntakira/685 to enable execution of the Court of Appeal order of 17/5/1991. After consolidation of parcel Nos. Ntima/Ntakira/2488 and Ntima/Ntakira/2489, parcel No. Ntima/Ntakira/2489 upon which the grant is issued will not exist and the grant will be null and void. Land parcel No. Ntima/Ntakira/2489 upon which the grant is issued is not a legal entity because it is a result of illegal subdivision of Ntima/Ntakira/685. The department of lands is set to implement the Court of Appeal consent order dated 17/5/1991.

2nd Application

6. By Summons dated 18/10/2022 under section 24 of the [National Police Service Act](#) and Rule 49 of the [Probate and Administration Rules](#), the respondent seeks orders:

“Directing the Officer Commanding Meru Police Station to accompany the County Surveyor Meru and/or his agents, the Meru Land Registrar and/or his agents and the Respondent and/or her Representatives for purposes of keeping peace, maintenance of law



and order and to witness the execution of the Order of 9/12/2021 i.e subdivision of L.R No. Ntima/Ntakira/2489.”

7. In her supporting affidavit sworn on even date, the respondent and the administrator of the estate of the deceased avers that in executing the order of the court of 9/12/2021 to have L.R No. Ntima/Ntakira/2489 subdivided into 2 portions, she will require the assistance of the police due to the protracted nature of this matter.
8. The applicant responded to the application by an amended preliminary objection and a counter claim. He contends that this court’s ruling of 19/3/1991 validated parcel No. Ntima/Ntakira/685 for implementation of the Court of Appeal Order. He contends that there pends an application before this court and an appeal before the Court of Appeal for the combination of parcel Nos. Ntima/Ntakira/2488 and 2489. Further, there is an application before this court seeking revocation of the order that the respondent intends to execute, therefore the application is an abuse of the court process and it should not be allowed until all the pending cases before this court and the Court of Appeal are finalized.
9. The applicant swore a supplementary affidavit filed on 1/3/2023 in support of his application dated 7/7/2022. He also filed submissions on 14/11/2022 in further support of his application. He submitted that since his amended preliminary objection is based on matters settled by the Court of Appeal, this court should allow the preliminary objection and the counter claim with costs. He submitted that he was not prepared to continue with the application dated 18/10/2022 until the Court of Appeal matters are concluded. He submitted that the certificate of confirmation of grant issued to the respondent in reference to this court’s ruling of 26/9/1990 is illegal, untenable and it should be nullified by this court. He submitted that he has filed Meru E.L.C Judicial Review No. 31/2013 and Civil Appeal No. 175/2022 at the Court of Appeal seeking re-instatement of the suit land No. Ntima/Ntakira/685 to enable execution of the Court of Appeal order of 17/5/1991 and the respondent is the 1st defendant in the Court of Appeal matter.
10. The respondent submitted that L.R No. 685 was subdivided into Nos. 2488 and 2489 in 1991, in accordance with the court orders. She urged that the grant issued to her was obtained legally in line with the provisions of section 76 of the *Law of Succession Act*, and cited the Court of Appeal case of *Matheka and Matheka v Matheka* (2005) 2 KLR 455. She urged the court to dismiss the applicant’s application with costs and allow the application dated 18/10/2022.
11. On the amended preliminary objection, the respondent submitted that the court lacks jurisdiction to entertain any of the grounds raised therein, and cited *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 and *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR.

Analysis and Determination

12. In considering whether the amended Preliminary Objection dated 23/2/2023 raised by the applicant is merited, this court had to look at what properly constitutes a preliminary objection as defined in the *locus classicus* case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



13. In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. From the grounds raised in the amended preliminary objection, this court finds that the same are not pure points of law, because the court would be required look at the evidence and interrogate factual issues. The amended preliminary objection dated 23/2/2023 must therefore fail.
14. The next issue is whether the grant issued to the respondent on 8/12/2021 should be revoked, to enable the finalization of Civil Appeal No. 58 of 2018 which is pending before the Court of Appeal.
15. In revoking the grant which had been issued to the applicant herein on 14/10/2009 with all subsequent rectification thereto, the court (F. Gikonyo J) on 23/11/2020 observed that, “I have perused the record and I do note that parcel No. Ntima/ntakira/685 was not listed as one of the assets of the deceased. It was introduced much later through rectification of grant. I am aware of the claims by Jeremiah Njogu on Ntima/ntakira/685 and that he has challenged the subdivision. Except, it is now clear that the wrangles around this issues- as evidenced by the many legal battles on that parcel of land- seem to have been injected into these proceedings, and as a result, have caused delay and confusion in these proceedings. An administrator ought to act diligently and complete administration of the estate within reasonable period. Doubtless, administration of this estate has taken long to complete; it is yet to complete and closure is not even in sight. I do not think that introduction of Ntima/ntakira/685 into these proceedings before the status of that property had been ascertained was a diligent act by the administrator; the act only helps in obscuring the estate property as well as impeding completion of administration of the estate. This runs contrary to his duties as an administrator of the estate. It bears repeating that, the delay herein portrays not a diligent administrator. Accordingly, I should think the best interest of all beneficiaries lies in revocation of the grant. This way the estate property will be determined and due distribution be done by the court to the beneficiaries.”
16. On 8/12/2021, the court (Patrick J.O Otieno J.) directed that -

“On the basis of the Ruling dated 24.11.2020 and the Affidavit of service by Ms Kayugira sworn and filed in court on the 7.12.2021 showing that the Petitioner was duly served, I do assess and determine that for the administration of the remainder of the estate, being Lr Ntima/ntakira/2489 to be concluded, grant be issued to Martha Naitore and limited to the administration of the property only. The administration shall involve the subdivision of the property measuring approximately 3.5 acres into two portions as follows:

Martha Naitore M’murithi – 1.5 acres

Jeremia M’njogu M’twarugoji – 2 acres

Mention on 10.5.2021 to report on progress made.”
17. Section 76 of the *Law of Succession Act* sets out the requirements for revocation or annulment of grant as follows:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;



- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or (e) that the grant has become useless and inoperative through subsequent circumstances.”

18. The court finds that the applicant has not met the threshold set out in section 76 of the *Law of Succession Act* to warrant revocation of the grant issued to the respondent. Besides, the existence and pendency of similar matters in other courts being the Court of Appeal and the Environment and Land Court is not in itself a ground for revocation of the grant herein. The revocation sought by the applicant is a back door attempt to have this court review its decision of 23/11/2020, which this court must frown upon for want of jurisdiction. Since the applicant has already moved to the Court of Appeal, he cannot now come back to this court under the guise of seeking revocation of the grant under the very grounds the court addressed its mind to when it delivered the decision sought to be appealed against. If an applicant contends that the court’s decision was based on the wrong conclusion of law and or fact, the proper course is to appeal the decision, and not to file a repeat application on the same grounds earlier disposed.
19. Having declined the revocation sought by the applicant, this court must accede to the respondent’s application dated 18/10/2022 to move this otherwise long and protracted matter towards closure.

ORDERS

20. Accordingly, for the reasons set out above, the court makes the following orders:
1. The applicant’s application dated 7/7/2022 is hereby dismissed.
 2. The amended Preliminary Objection dated 23/2/2023 is struck out.
 3. The respondent’s application dated 18/10/2022 is allowed as prayed.
21. The court does not make any order as to costs.
22. Order accordingly.



DATED AND DELIVERED THIS 30TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Jeremiah Njogu Applicant in person.

M/S. Munyau-Kayugira & Co. Advocates

