



REPUBLIC OF KENYA



**In re Estate of Njeru Mutama (Deceased) (Succession Cause
122 of 2011) [2023] KEHC 19516 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 122 OF 2011
LM NJUGUNA, J
JUNE 27, 2023
IN THE ESTATE OF NJERU MUTAMA (DECEASED)**

BETWEEN

KELLEN WANYAGA NYAGA 1ST APPLICANT

FAITH IRIMBA NGAI 2ND APPLICANT

AND

MWANIKI NJERU RESPONDENT

RULING

1. The matter for determination before the court is an application dated August 20, 2022 wherein the applicant sought for orders that:
 - i. The Deputy Registrar do sign all the documents relating to the sub division and transfer of parcel/number/Kagaari/Kanja/44XX land to the beneficiaries.
 - ii. A prohibition order do issue stopping any dealing with the land until the consent order dated May 27, 2021 is implemented.
 - iii. The cost of this suit be provided for.
2. The application is premised on the grounds on its face and it's supported by the affidavit of Kellen Wanyaga Nyaga. The applicants seek for orders that the Deputy Registrar of this Honourable Court sign all the documents relating to the subdivision and transfer of the suitland to the beneficiaries as agreed in the consent order dated June 15, 2021. Additionally, that a prohibition order do issue stopping any dealing in the suit land until the consent order is implemented.
3. The application is opposed by the administrator via a replying affidavit sworn on February 16, 2023 wherein he deponed that he has never declined to sign the relevant transfer documents but the same



have never been brought to his attention by the applicants. He stated that the consent order issued on June 15, 2021 was neither brought to his attention nor authorized by him. That the land in question is registered in the name of Joseph Fundi who is not a party to either the consent agreement or the proceedings herein. He contended that at no time has he been approached by the applicants with a view of executing transfer documents and failed to do so.

4. Directions were taken that the application be canvassed by way of written submissions.
5. The respondent submitted that he is opposed to the application as the same has been brought in bad faith. That the applicant did not prove that he refused to execute the said documents to warrant the filing of the application herein. It was his case that he was not privy to the said consent being referred to, and further, the consent was recorded by parties who are not the registered owners of the suit land. He therefore urged this court to dismiss the application herein.
6. The applicants on the other hand did not file their submissions.
7. I have perused the application herein, the response thereto and the submissions by the respondent and it's my view that the main issue for determination is whether this court can issue the orders sought herein.
8. As I have already noted, the application seeks to have the deputy registrar execute all the relevant documents on behalf of the applicants to facilitate the full implementation of the consent order issued on June 15, 2021 and an order for the inhibition of the land parcel number Kagaari/Kanja/44XX.
9. It is trite that, the duties of personal representatives are fiduciary in nature [See Section 83 of the [Law of Succession Act](#)] and it provides that the same includes the duty (subject to section 55) to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be [section 83 (f)]; within six months from the date of confirmation of the grant, or such shorter period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration; [section 83 (g)]; and to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration [section 83 (i)].
10. This court notes that the parties herein through their advocates entered a consent dated May 27, 2021 on behalf of their clients thus compromising the applications by the applicants which had sought for revocation of grant issued to the respondent/administrator herein. It is important to note that the said consent originated from the parties themselves and therefore, the argument by the administrator that the land in question is registered in the name of Joseph Fundi who is not a party to either the consent or the proceedings herein does not hold. I say so for the reason that in the case of *Hirani Vs Kassam* (1952), 19 EACA 131, the Court of Appeal with approval quoted the following passage from [Seton on Judgments and Orders](#), 7th Edition, Vol 1 p 124 as follows:

“*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in



misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

11. Further, in the case of *Kenya Commercial Bank Ltd Vs Specialized Engineering Co Ltd* (1982) KLR P 485 it was held that:

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

12. The court in *Re Estate of Wilfred Munene Ngumi (deceased)* [2020] eKLR while allowing the application for the Deputy Registrar of the court to execute completion documents thus held as follows:

"...It is evident from the Applicant's affidavit in support of the application and oral arguments by her Advocate, Mr Kahiga that the Respondents have refused to sign the necessary documents to facilitate execution of the court's judgment/decre. To prevent abuse of the court process, by the above legal provisions, this court has inherent powers to prevent such abuse. I therefore find and hold that the petitioner's summons dated September 23, 2019 and filed on September 25, 2019 to be merited..."

13. Further, this court vide Section 47 and Rule 73 of the *Probate and Administration* makes provision that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of this court. The respondent herein has been difficult and has refused to cooperate to ensure that the consent order is executed.

14. The import of the above is that, this court, in exercise of its inherent power can order rectification of the lands register if for instance the respondent has already registered the contested land in his name. This court is mandated to ensure that the estate is distributed to all the rightful beneficiaries and any attempts to disinherit some of the beneficiaries cannot be entertained. To achieve this, and in the instant case, it is my considered view that a prohibition order should issue stopping any dealing with the said land until the consent order is implemented.

15. Though the court has noted the sentiments by the respondent herein, he has not challenged the consent in any way as it stands now, the consent was adopted as the order of the court and it has not been set aside.

16. I am persuaded by the above provisions of law and it is trite that court orders are never to be made in vain. The *Law of Succession Act* thus places a duty on personal representatives to complete the administration of the estate. Section 83(i) of the *Law of Succession Act* provides;

"To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate....."

17. In the end, I find that the application dated August 20, 2022 has merit and the same is hereby allowed with no order to costs.

18. It is so ordered.



Delivered, dated and signed at Embu this 27th day of June, 2023.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Petitioner/Respondent

