



REPUBLIC OF KENYA



In re estate of Harrison Muniu Kungu (Deceased) (Succession Cause 1755 of 2011) [2023] KEHC 22088 (KLR) (Family) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 22088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 1755 OF 2011

EKO OGOLA, J

JUNE 26, 2023

**IN THE MATTER OF THE ESTATE OF HARRISON
MUNIU KUNGU ALIAS HARRISON MUNIU (DECEASED)**

BETWEEN

CHARLES KARIBA MUNIU APPLICANT

AND

DANIEL MUIRURI 1ST RESPONDENT

KIAMBU DISTRICT REGISTRAR 2ND RESPONDENT

RULING

1. The application before the court is dated May 7, 2019. The applicant prays for the following:-
 1. The 2nd respondent herein be compelled to lift the restriction placed on the following properties:-
 - a. Kabete/ Muthumu/T.119;
 - b. Kabete/Muthumu/T.118;
 - c. Githunguri/Githiga/116; and
 - d. Plot No 1 Wangige Market
 2. Costs be borne by the applicant.
2. The background of this application is that the deceased died on November 14, 1978 and he was survived by ten beneficiaries. The applicant Charles Karibaa Muniu being his eldest son petitioned for



- a grant of letters of administration. The 1st respondent Daniel Muiruri Mburu, also a beneficiary to the estate is the deceased grandson.
3. The 1st respondent filed summons dated November 9, 2015 and filed in court on November 10, 2015. He prayed for orders to revoke the grant of letters of administration intestate issued to the applicant and for the court to further issue orders pending the hearing and determination of the application restraining the applicant whether by himself or through his agents and/or servants from altering the boundaries, distributing and/or in any other manner interfere with the estate of the deceased by purporting to sub-divide, transfer, alienate, dispose of or in any other manner interfere with properties known as Kabete/ Kibichiku/357; Kabete/Kibichiku/288; Kabete/Muthumu/T.119; Kabete/Muthumu/T.188; Githunguri/Githiga/116; and Plot No 1 Wangige Market.
 4. The court on November 16, 2015 issued interim orders of injunction restraining the applicant whether by himself or through his agents and/or servants from altering the boundaries, distributing and/or in any other manner interfering with the estate of the deceased by purporting to sub-divide, transfer, alienate, dispose of or in any other manner interfere with the afore-mentioned properties until the hearing and determination of the application.
 5. On July 24, 2017, a consent order was recorded in court stating “that the restriction placed by the Registrar, Kiambu on Title Number Kabete/ Kibichiku/357 and Title Number Kabete/ Kibichiku/288 on December 7, 2015 be and is hereby withdrawn.”
 6. On February 14, 2019, this court proclaimed judgment by dismissing the summons dated November 9, 2015 for lack of merit.
 7. On June 24, 2019 the 1st respondent filed an application for review of the judgment dated February 14, 2019. On April 8, 2020, this court dismissed the application for lack of sufficient reason.
 8. Back to the instant application. it is based on the grounds set therein, the applicant’s supporting affidavit dated May 7, 2019 and supplementary affidavit dated November 30, 2022.
 9. The applicant deposed that the application dated November 9, 2015 caused an interim order to be issued where restrictions were put in six properties aforementioned. He deposed that on July 24, 2017, a consent order was recorded removing restrictions on two of the six properties. The application dated November 9, 2015 was later on dismissed with the judgment dated February 14, 2019. It is for this reason that the instant Application for removal of the restrictions was filed to enable the applicant to fulfil his statutory obligation as an administrator of the estate of the deceased.
 10. In opposition to the Application, the 1st respondent filed a replying affidavit dated November 8, 2022. He deposed that the restriction sought in the Application dated November 9, 2015 was to protect the parcels of land from improper dealings. He added that he was aggrieved by the ruling dated February 14, 2019 and he has consequently filed an appeal. He further deposed that the deceased estate ought to be devolved as provided by the law. He deposed that the Applicant is driven by selfish interest as he intends to subdivide the land with the sole aim of disinheriting him and some beneficiaries.
 11. Counsel were directed to canvass the application by way of written Submissions.
 12. Mr. Kamwami learned counsel for the Applicant cited Section 76 of the *Land Registration Act* and submitted that restrictions should be placed on land for a particular period; until an occurrence of an event; until the making of a further order; and where the power of the proprietor to deal with the parcel is restricted. Counsel added that Section 78(2) of the *Land Registration Act* gives the court powers to remove a restriction placed on a parcel of land.



13. Counsel submitted that the reason why restrictions were placed on the parcels of land was because the 1st Respondent alleged that the Letters of Administration issued to the Applicant were obtained fraudulently, by misrepresentation, and non-disclosure of material fact. These allegations have since been dismissed by the Judgment dated February 14, 2019 therefore, the application should be allowed.
14. Mr Learned counsel for the 1st Respondent submitted that the restrictions placed on the properties are still serving their intended purpose which is to preserve the suit properties pending the finality of this matter which is pending in the Court of Appeal. Counsel further submitted that the Applicant has not disclosed a prima facie case to warrant the orders sought.
15. Counsel submitted that the Applicant did not come to this court with clean hands as his intentions are self-centered. Counsel argued that the Applicant excluded the 1st Respondent as rightful and lawful beneficiaries of the estate. Therefore, it is in the interest of justice to maintain the *status quo* regarding the suit properties. Counsel submitted that the Orders sought in the Application dated November 9, 2015 was to safe guard the properties. However, if the restrictions are removed, the 1st Respondent and other beneficiaries will be at risk of being in a case of misadministration of the suit properties and a possible disinheritance.

Determination

16. I have considered the Application, the Affidavits, and the Submission of counsel.
17. In the Application dated November 9, 2015, the 1st Respondent sought to revoke the grant alleging fraud and non-disclosure of material facts, that the respondent had failed to disclose that there had been another case Cause No 261 of 1981 in respect of the deceased which had not been brought to the attention of the court. The Applicant responded to the said Application admitting that the deceased died testate and that grant of probate had been issued to Kenya Commercial Bank. However, the said grant of probate was revoked by a Discharge and Indemnity dated March 25, 2009. The Applicant in that Replying Affidavit deposed that these facts had been disclosed and the 1st Respondent had even signed a consent to the petition of letters of administration intestate. The Applicant's appointment as the administrator and the mode of distribution of the estate had been agreed upon by all beneficiaries except for the 1st respondent who on several requests refused to sign despite being provided for in the distribution. This Application was dismissed in totality. This would, therefore, mean that any interim orders issued before judgment lapse. The 1st respondent subsequently filed an application for review dated June 24, 2019. The 1st Respondent was not satisfied with the mode of distribution. Consequently, he did not meet the conditions of order 45 Rule 1 and the application was dismissed on April 8, 2020. The court stated in its ruling that if the 1st Respondent was aggrieved with the mode of distribution, then an Appeal would have been lodged instead of seeking orders of review.
18. Nowhere on the record does it show that the Court of Appeal issued stay of these proceedings pending the hearing and determination of the Appeal that the 1st Respondent allegedly filed.
19. The 1st Respondent's main contention is on the interim orders issued on November 16, 2015. These interim orders were to lapse after the determination of the Application dated November 9, 2015. The said interim orders did lapse upon delivery of the judgment dated February 14, 2019. With the delivery of the said judgment that dismissed the Application dated November 9, 2015, the estate would then revert as it were before the filing of that Application.



20. Section 76 of the *Land Registration Act* provides for when a restriction might be placed. It stipulates that:-

“ A restriction may be expressed to endure—

- (a) for a particular period;
- (b) until the occurrence of a particular event; or
- (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.”

21. Section 78(2) of the *Land Registration Act* gives this court jurisdiction to remove a restriction upon the application of a proprietor affected by a restriction and upon notice to the Registrar.

22. The restriction on the four aforementioned properties was issued after the court issued interim orders dated November 16, 2015. Further orders were made on February 14, 2019 which made the interim orders lapse.

23. From the foregoing, I allow the application dated May 7, 2019. The 2nd respondent herein is hereby compelled to lift the Restriction placed on the following properties:- Kabete/ Muthumu/T.119 Kabete/Muthumu/T.118; Githunguri/Githiga/116; and Plot No 1 Wangige Market

24. Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2023

E.K. OGOLA

JUDGE

In the presence of:

N/A for the Administrators

Gisiele Muthoni Court Assistant

