



REPUBLIC OF KENYA



In re Estate of Mutunga Maara alias M'mutunga M'mara (Deceased) (Succession Cause 200 of 2012) [2023] KEHC 19097 (KLR) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 200 OF 2012
EM MURIITHI, J
JUNE 26, 2023**

BETWEEN

EDWARD MARETE M'MUTUNGA APPLICANT

AND

NEWTON KINYUA MARETE PETITIONER

AND

CECILIA KANYONI RESPONDENT

AND

HELLEN KANANA MBOROKI APPLICANT

AND

MWITI MORRIS MUTUMA INTERESTED PARTY

AND

SAMUEL MUTUMA M'MURITHI INTENDED INTERESTED PARTY

RULING

1. By a Notice of Motion under certificate of urgency dated March 10, 2020, pursuant to Rule 73 of the Probate and Administration Rules, Hellen Kanana Mboroki, the applicant herein seeks that, "The Honorable court be pleased to order for the cancellation of the sub-division of LR No Nyaki/Nkabune/872 and reverse all the transfers to the original names of the deceased."
2. The grounds upon which the application is premised are set out in the body of the application and her supporting affidavit sworn on even date. She avers that LR No Nyaki/Nkabune/872 had been sub-divided into 3 portions by the petitioner before the grant was revoked. The grant cannot be



implemented unless the sub-divisions are cancelled and the land returned to the original owner who is the deceased herein.

The 2nd Application

3. By chamber summons under certificate of urgency dated February 14, 2022 pursuant to section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, Mwititi Morris Mutuma, the interested party herein seeks that, “2. The Honorable Court be pleased to review and set aside the ruling made and delivered on March 20, 2018 and the order of May 22, 2019 and all subsequent orders and direct that this matter be heard de-novo. 3. An order of status quo do issue to the effect that Mwititi Morris Mutuma do continue to use, occupy and enjoy LR No Nyaki/Nkabune/1083 until the hearing and determination of the cause.”
4. The application is premised on the grounds that the interested party acquired title to LR No Nyaki/Nkabune/1083 on June 14, 2017 after purchasing it from Basilio Mutethia Thurania for Ksh 1,000,000 on May 6, 2017. He has been in possession of the said land since May 6, 2017 when he purchased it and he has extensively developed it by planting coffee trees thereon. Despite knowing of his occupation and user of the land, Newton Kinyua Marete and Cecilia Kanyonyi never bothered to serve him with the application for revocation of the grant and the subsequent application for the confirmation of the grant, to enable him protect his interests. In his supporting affidavit sworn on even date, the interested party accuses the petitioner and the respondent of concealing from the court the existence of other properties belonging to the deceased to wit LR No Nyaki/Nkabune/871 and 874. He is astonished how the respondent obtained registration of LR No Nyaki/Nkabune/873 on October 8, 2021, when the said land was in the name of the deceased since 2002. He therefore believes that he was condemned unheard and that it is only fair to have the orders herein set aside to allow him to be heard.

The 3rd Application

5. By summons under certificate of urgency dated April 1, 2022, pursuant to Order 45 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the *Civil Procedure Act*, section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, Samuel Mutuma M’Murithi, the intended interested party herein seeks that, “b) This Honorable Court be pleased to enjoin the applicant herein as the interested party. c) This Honorable Court be pleased to review and set aside the ruling made and delivered on the March 20, 2018 and the order of May 22, 2019 and all the subsequent orders and direct that this matter be heard de-novo. d) This Honorable Court be pleased to order that status quo be maintained to the effect that one Samuel Mutuma M’Murithi to continue to use, live on, occupy and enjoy LR No Nyaki/Nkabune/1081 and Nyaki/Nkabune/1083 where he has constructed his home until the hearing and determination of the cause.”
6. The application is premised on the grounds on the face of it and his supporting affidavit sworn on even date. He avers that he is the legal and the registered owner of parcel Nos. Nyaki/Nkabune/1081 and 1082 having bought them in 2016, and has been enjoying peaceful possession thereof without any interference whatsoever and he has built his house there where he lives with his wife and children. He learnt of the existence of the application from his neighbour, the interested party herein, who has also bought the parcels adjacent to his. He will suffer loss and damage if he is not heard and joined to this matter, because he purchased the parcels through a mortgage.
7. The applicant, Hellen Kanana Mboroki has opposed the application vide her replying affidavit sworn on June 8, 2022. She avers that the intended interested party is a stranger to her and he has no right to occupy her land. From the record, the intended interested party bought from Eric Muriira Mutai who is also a stranger to the estate. In 2016 when the intended interested party alleges to have bought



the land, this matter was very active in court and therefore he should have had the knowledge of the same. She has never sold the said land to anyone as it was awarded to her and her son Newton Kinyua Marete. In praying for the dismissal of the applications dated February 14, 2022 and April 1, 2022, she avers that the purchasers who bought their land from her husband Edward Marete were duped as he had no land to sell because the grant had been revoked.

8. In her supplementary affidavit sworn on 23/8/2022 in support of the application dated April 1, 2022, the respondent avers that Edward Marete M'Mutunga is her biological brother and their father subdivided LR No Nyaki/Nkabune/152 in 2002 into Nyaki/Nkabune/871, 872, 873 and 874. When the subdivision was being done, the applicant and her son Newton Kinyua were no longer living with Edward Marete, because they had separated and the applicant had remarried elsewhere in Chaaria. The deceased then transferred to her LR No Nyaki/Nkabune/873 which she owns to date. Nyaki/Nkabune/872 was supposed to be transferred to her brother Edward Marete M'Mutunga but he was unable to pay the transfer cost, and therefore the transfer was not effected. After their father died, the said Edward Marete filed this cause and acquired registration to his parcel which he has since sold. His brother Edward Marete has other children from other wives namely Judith Makena, Doreen Mukiri, Murega and Felicity Mwendwa and thus there is no way that her father would give one of his grandchildren their father's inheritance. She inherited LR No Nyaki/Nkabune/874 for taking care of the deceased.

Submissions

9. The petitioner urges that the grant which led to the interested parties' acquisition of title deeds to the deceased estate was revoked and as of now those title deeds do not exist. He urges that the 2 applications by the interested parties are non-starter and an abuse of the due process of law. He submits that the interested parties are neither dependants of the deceased nor beneficiaries, and the person who sold them their respective portions of land was not entitled to them, because they belonged him and the applicant. He urges that since the orders of the court have become functus officio and there was no appeal thereto, it is only fair that the application dated March 10, 2020 is allowed. He urges that the interested parties are misguided because they were not entitled to service as they were not parties to the cause. He urges that the interested parties have no locus standi to be in the cause and their only option is to pursue the person who sold them the land through ELC Court. He urges the court to allow the application of March 10, 2020 and dismiss those of February 14, 2022 and April 1, 2022 with costs.
10. The interested party submits that the right to property is protected under Article 40 of *the Constitution* and the certificate of title is conclusive evidence that the person named therein is the absolute and indefeasible owner thereof. He urges that since he had title in his name as early as 2017, the dispute herein ought to have been filed in the ELC Court pursuant to section 13 (2) of the *Environment and Land Court Act*. He urges that he was never accorded a hearing or issued with summons for revocation of grant or directions into the hearing of the same, and cites *Pastoli v Kabale District Government Council and Others* (2008) 2 EA 300, *Republic v The Honorable Chief Justice of Kenya and others Ex-Parte Moiso Mataiwa Ole Keiwua* (2004) eKLR, *Re Estate of Livingstone M'mungania (Deceased)* (2018) eLKR and *Re Estate of Oliokampai Sarapae Sanguti (Deceased)* (2019) eKLR. He submits that since he was not called upon to demonstrate how he acquired ownership of the land, the orders of March 20, 2018 and May 22, 72019 ought to be set aside and the matter directed to start de-novo. He persuades the court to find that his right to a fair hearing was violated because he needs to be heard before his title is revoked.
11. The intended interested party urges that he ought to have been joined in this matter as an interested party since he is the registered owner of the suit land, and cites *Trusted Society of Human Rights Alliance*



v Mumo Matemu & 5 Others (2014) eKLR and *Meme v Republic* (2004) 1 EA 124. He urges that there is sufficient ground for review because he has demonstrated he was not notified and/or served with the proceedings for revocation even when the applicants knew that he was in actual possession and occupation of the suit land. He urges the court to dismiss the application dated March 10, 2020 with costs and allow his application dated April 1, 2022.

Analysis and determination

12. The issue for determination is whether the orders sought in the applications should be granted.

Joinder and Review

13. Samuel Mutuma M’Murithi seeks to be joined into these proceedings on the basis of being the proprietor of Nyaki/Nkabune/1081 and 1082, having purchased them from Eric Muriira Mutai in 2016. Those parcels are the resultant subdivisions of Nyaki/Nkabune/872. The court is convinced that the joinder of the intended interested party, Samuel Mutuma M’Murithi into these proceedings will enable the court settle all questions involved in the matter. The intended interested party is thus joined into these proceedings as an interested party.
14. The 3 main grounds for review are stipulated under Order 45 of the *Civil Procedure Rules* as follows:
- “i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or ii. That there was a mistake or error apparent on the face of the record; or iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
15. Mwiti Morris Mutuma and Samuel Mutuma M’Murithi seek the setting aside and/or review of the orders of March 20, 2018 and May 22, 2019 and the matter to start de-novo. They urge that they were not heard when the grant was being revoked despite being the proprietors of portions of the estate properties. On March 20, 2018, the court rendered thus, “The threshold in Section 76 of the *Law of Succession Act* cap 160 of the laws of Kenya has been met. Accordingly, this grant is a perfect candidate for revocation. And, without much ado, I hereby revoke the grant issued herein to the petitioner on May 6, 2013.”
16. In revoking the grant, the court noted from the evidence adduced that the deceased had subdivided his land being Nyaki/Nkabune/152 into Nyaki/Nkabune/872, 873 and 874 during his lifetime. The deceased gave Nyaki/Nkabune/872 to his grandson, Newton Kinyua Marete, Nyaki/Nkabune/873 to Cecilia Kanyoni and Nyaki/Nkabune/874 to Edward Marete.
17. Following the revocation of the grant issued to the petitioner on May 6, 2013, a fresh application for confirmation of grant was then filed by Hellen Kanana Mboroki. The court on May 22, 2019 directed that, “Hellen and Edward are present. They have filed affidavit of service dated May 17, 2019. In the circumstances, I confirm grant as per paragraph 4 of the affidavit in support.”
18. Those are the orders that the interested parties are asking the court to review on the basis of their respective purchases of the resultant subdivisions of Nyaki/Nkabune/872.



19. The import of reviewing the orders of March 20, 2018 and May 22, 72019 would essentially alter the mode of distribution as ordered by the court. That is not within the purview of review as envisaged by the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1997]eKLR, that,

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

20. This court finds that, Mwiti Morris Mutuma and Samuel Mutuma M’Murithi have not made out a case for review of the orders of March 20, 2018 and May 22, 72019, to warrant grant of the orders sought in their applications dated February 14, 2022 and April 1, 2022.

21. Turning now to the application dated March 10, 2020 by Hellen Kanana Mboroki for the cancellation of the resultant subdivisions of LR No Nyaki/Nkabune/872, this court is satisfied that the same is justified in view of the court orders of May 22, 72019 directing that the said land be registered jointly in the names of Newton Kinyua Marete and Hellen Kanana Mboroki. That can only be done if the resultant subdivisions of LR No Nyaki/Nkabune/872 being Nyaki/Nkabune/1081, 1082 and 1083 are cancelled.

Orders

22. Accordingly, for the reasons set out above, the court finds that the interested parties’ applications dated February 14, 2022 and April 1, 2022 are without merit and they are dismissed.

23. The application dated March 10, 2020 by Hellen Kanana Mboroki, the applicant herein has merit and it is allowed.

24. The Court does not make any order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Mukaria Muriungi Advocate for the Applicant.

M/S. Mutegi Advocate for Mr. Karanja for Interested Party.

