



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 3270 OF 2003

IN THE MATTER OF THE ESTATE OF NJOKA WAKIORIAH (DECEASED)

TITUS KIRAGU.....1ST APPLICANT/RESPONDENT

SUSAN KIRAGU.....2ND APPLICANT/RESPONDENT

CATHERINE GATHONI

NJOKA.....3RD APPLICANT/RESPONDENT

KENNEDY KIORIAH NJOKA.....4TH APPLICANT/RESPONDENT

VERSUS

ESTHER WAGIKONDI

NJOKA.....1ST PETITIONER/(DECEASED)

KIORIAH NJOKA.....2ND PETITIONER/APPLICANT

RULING

1. Before this Court for determination is the Notice of Motion application dated **26th March 2021** by which the Applicant seeks the following orders:-

“1. Spent.

2. THAT this honourable court be pleased to order the Land

Registrar to register Titus Kiragu of ID No. 1870098 and Susan Kiragu of ID Number 360568 as joint owners of the fifty acres of LR No. 10317/14 sold to them and more particularly delineated by the surveyor and to issue title documents in their names.

3. That this Honourable court be pleased to direct that the

Deputy Registrar of the court do sign any documents that may be required to facilitate the execution of this honourable court’s order of 18th February 2019.

4. That this Honourable court do give such further direction

and orders in connection with this application to facilitate compliance of its ruling of 28th February 2019.

5. That the Respondent/Administrator do pay the costs of

this application.”

2. The application which was premised upon **sections 1A, 1B, 3 and 3A** of the Civil Procedure Act and all other enabling provisions of the law was supported by the Affidavit of even date sworn by **TITUS KIRAGU**, the 1st Applicant.
3. The Administrator/Respondents opposed the application through the Replying Affidavit dated **26th July 2021** sworn by **KIORIAH NJOKA** (2nd Respondent). The Application was canvassed by way of written submissions. The Applicants filed the written submissions dated **21st October 2021** whilst the Respondents relied upon their written submissions dated **8th October 2021**.

BACKGROUND

4. This succession cause relates to the estate of the late **NJOKA WA KIORIAH** (hereinafter ‘the **Deceased**’) who died intestate on **11th October 2002** leaving behind several beneficiaries whose identities remain in dispute to date. Following the death of the Deceased, his son **Kioriah Njoka** petitioned for Grant of letters of Administration which Grant was issued to him on **14th November 2004**.
5. The 1st and 2nd Applicants are an elderly married couple who state that they purchased **100 acres** from the parcel of land known as **LR No.10317/14** which parcel of land belonged to the Deceased.
6. Vide a Ruling delivered on **28th February 2018** **Hon Lady Justice Ali-Aroni** found and held that **fifty (50)** acres of **LR No. 10317/14** which had been sold to the Applicants **does not** form part of the estate of the Deceased and should be transferred to the Applicants.
7. The parties later recorded a consent dated **15th October 2019** which consent directed that the Applicants commission a surveyor to identify their **50 acres**. The Applicants aver that in compliance with the Ruling of **28th February 2019** and the consent of **15th October 2019** they did commissions a surveyor who identified the **fifty (50)** acres out of **L.R No 10317/14** which belonged to them. That the only thing now remaining is the issuance of title documents in respect of the said **fifty (50)** acres in their favour.
8. The Applicants aver that the Registrar of Lands has indicated that in order to issue Title documents in their favour he requires a specific order from the court directing his office to do so. The Applicants plead that they are both now over **80 years** of age and are desirous to have this issue settled as soon as possible.
9. The Administrator in opposing the application stated that the Ruling and order of the court required that both parties jointly commission the survey of the property. He alleges that the Applicants proceeded to conduct the survey without the participation and/or input of the Administrator. He urges the court to dismiss the application.

ANALYSIS AND DETERMINATION

10. I have carefully considered this application, the Affidavit in reply as well as the written submissions filed by both parties.
11. It is not disputed that the parcel of land known as **LR. No. 10317/14** belonged to the Deceased and now forms part of his estate. It is also not disputed that the Applicants did during the lifetime of the Deceased purchase **fifty (50)** acres of land to be excised out of **LR No 10317/14**
12. The dispute between the Applicants and the Administrator was the subject an application which was heard by **Hon Lady Justice Ali-Aroni** in which the Applicants sought the following orders.

(a) THAT this Honourable court do make a declaration that the fifty acres sold to the 1st and 2nd Applicants do not form part of the net estate of the deceased.

(b) THAT this Honourable court be pleased to order Kioriah Njoka the administrator of the estate of Njoka wa Kioriah to excise and transfer the fifty acres of land form LR No. 10317/14 purchased by the 1st and 2nd Applicants.

(c) THAT the Honourable court if it deems fit, do allow the 1st and 2nd Applicants to be heard on priority basis on their claim due to their advanced age.

(d) Costs.”

13. In a Ruling delivered on **28th February 2019** **Hon Lady Justice Ali-Aroni** found in favour of the Applicants and in so doing the learned Judge held as follows:-

“1. The applicants have waited for over 30 years not of their own fault. Would it be fair and just to continue denying them what they paid for? Justice can only be achieved in the circumstances of this case if the 50 acres purchased and admitted be forthwith handed over to the 1st and 2nd Applicant.”

14. Thereafter on **15th October** the parties entered into consent in the following terms:-

“1. THAT the 1st and 2nd applicants/objectors to commission a surveyor to proceed to LR No. 10317/14 to identify their portion of 50 acres of land in compliance with the sale agreement between them and the deceased dated 3rd October 1989 and thereafter prepare subdivision maps to enable transfer of the 50 acres;

2. THAT the 1st and 2nd applicants/objectors and administrators of the estate to agree on how to deal with the building built on the 1st and 2nd applicants/objectors portion of land on LR No. 10317/14.

3. THAT the commissioning be done within the next 7 days and exercise completed within 30 days.

4. THAT the matter be mentioned on 19th December 2019.”

15. The above consent was duly adopted as an order of the court. In objecting to the present application the Administrator claims that the Applicants failed to include them in the survey of the land to identify the **fifty acres**. The consent dated **15th October 2015** clearly provides that it was the 1st and 2nd Applicants who were to commission the surveyor to identify their **50 acres**. The consent **did not** provide for the participation of the Administrators in the process. If the Administrator felt he ought to have been included in the survey process then he ought to have indicated this in the consent.

16. A consent only adopted by the court acquires power of law and is binding on the parties named therein. The courts will not vary and/or vary a consent except in certain specified circumstances.

17. In **Board of Trustees National Social Security Fund Vs Michael Mwalo, Civil Appeal No. 293 of 2014**, the **Court of Appeal** said:-

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of court”.

18. In this case the Administrator has not shown that the consent was obtained by fraud or by collusion or that the said consent was contrary to the policy of the court, neither has he sought to amend the same.

19. I find that the Applicants are entitled to the fruits of their judgment. This is a very old matter and the Applicants are an elderly couple who understandably wish to see an end to this saga. The Administrator having nothing to lose appears to be intent on dragging out this matter for as long as possible which amounts to an abuse of court process.

20. **Section 73 of the Law of Succession Act** allows a Probate court to make such orders as may be necessary to merit the ends of justice and to prevent abuse of the process of the court. The Applicants are entitled to ownership and possession of the **fifty (50) acres** which they purchased over **thirty (30) years** ago.

21. In situations where one of the parties rejects/declines to sign requisite documentation required to give effect to a valid court order, the court may direct that the Deputy Registrar sign the relevant documents. Finally, I find that the application has merit and the same is allowed. This court makes the following orders:-

(1) THAT the land Registrar is directed to register TITUS KIRAGU of ID Number 1870098 and SUSAN KIRAGU of ID Number 360568 as joint owners of the fifty acres of LR No. 10317/14 sold to them and more particularly as delineated by the surveyor and to issue title documents in the names of the two Applicants.

(2) THAT the Hon Deputy Registrar is directed to sign any documents that may be required to facilitate the execution by the courts orders of 18th February 2019.

(3) THAT the Administrator/Respondent shall pay the costs of this application.

DATED IN NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

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MAUREEN A. ODERO

JUDGE