



REPUBLIC OF KENYA



**In re estate of Nthakanio M'Ngungu (Deceased) (Succession Cause
288 of 2013) [2022] KEHC 463 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 288 OF 2013
LM NJUGUNA, J
APRIL 26, 2022**

BETWEEN

KITHAKA NTHAKANIO APPLICANT

AND

MARY ROSE NAMU 1ST RESPONDENT

ELIZABETH CIUNGU 2ND RESPONDENT

JUDGMENT

1. The applicant herein has moved this court by way of Summons General dated the August 21, 2020 in which he has sought the following orders;
 - i. Spent
 - ii. That this honourable court be pleased to stay implementation of the orders issued on 22nd July 2020 and all consequential orders.
 - iii. That the honourable court be pleased to review or set aside the orders issued on 22nd July 2020 and all consequential orders.
 - iv. That costs of this application be borne by the respondents.
2. The grounds in support of the summons are that the court gave the orders of 22nd July 2020 on the basis that the applicant herein was registered as the proprietor of the deceased's land parcel Kagaari/Weru/505 on the June 16, 2017 which act of transmission the honourable court termed as illegal and criminal.
3. That the honourable court mistakenly noted that the applicant was registered as the proprietor of land parcel No. Kagaari/ Weru/505 on 16th June 2017 whereas the correct fact is that at no time was the applicant registered as the proprietor of the said parcel of land but he registered Form RL. 19 on the



June 16, 2017 which entry was that of an administrator and not as proprietor of the land as found by the honourable court.

4. That from the green card for Kagaari/Weru/10294, it is clear that, on the November 20, 2019 the applicant registered form RL.7 and a title deed was issued on the February 20, 2020. Further that the orders issued by the court have the effect of canceling the registration of land parcel No. Kagaari/Weru/10294 and 10295 which will occasion great loss and damage to the applicant and the beneficiaries of land parcel Kagaari/ Weru/10294 who have incurred the sub-division costs and registration fees of their title deed while the respondents herein have been frustrating the whole implementation process as evidenced by the many applications filed in this cause.
5. That the implementation of the grant issued by the court to the applicant was made possible by the orders issued by this honourable court and the orders that were issued on the 22nd July 2020 will water down the efforts by the court to have the implementation of the grant completed.
6. The application is supported by the annexed affidavit sworn by the applicant on even date.
7. The respondents opposed the summons vide a replying affidavit sworn by the 1st respondent on the 6th November, 2020 in which she deposes that, the act of sub-dividing Kagaari/Weru/505; into two parcels was a fraudulent act as the grant confirmed on the February 28, 2017 was the final order of the court on the distribution of the deceased's estate, which was arrived at by consent.
8. That the applicant had without any colour of right carried out the sub-division and given his mother's house a bigger portion of the suit property which was against the law and violated the trust granted to an administrator and therefore, irrespective of whether he was duly registered as proprietor of the suit properly as per form RL.19 or whether he had transferred the title to the beneficiaries under the 2nd house as per form RL.7, he was in contempt of the court orders issued on February 21, 2017 as he has gone contrary to the provisions of the certificate of confirmation of the grant issued on the February 28, 2017.
9. The 1st respondent avers that the applicant never involved them in any of his dealings regarding the suit property despite their attempts to make known their wishes as the 1st house. That among other things, they were not aware that a surveyor had visited the suit property and sub-divided the land into portions and when they reported the matter to the Assistant County Commissioner who requested the chief to arbitrate following which the chief summoned them for a meeting, the applicant did not attend the said meeting.
10. It is their case that any financial loss befalling the applicant was occasioned by his own ego and greed for his failure to administer the estate strictly as per the certificate of the confirmation of the grant but not due to any malice or their part.
11. Further that whilst it is true that the implementation of the certificate of confirmation of the grant dated February 28, 2017 by the applicant was made possible by the orders issued by this court, the applicant acted in contempt of the provisions of the same and as such, abused the trust that was accorded to him as the administrator by going against what the grant provided and going ahead to sub-divide the property into two portions.
12. By way of rejoinder, the applicant filed a further affidavit which is stamped the October 29, 2020 which must have been an error as it was sworn on the February 23, 2021. He averred that the grant was confirmed by consent of all the beneficiaries which is dated the January 16, 2017 and from the wording of the said consent and from the appearance of the certificate of confirmation of the grant, it is clear that the beneficiaries intended to have the estate distributed between the two houses equally but since



- the first house was not united at the time of the consent, it was agreed that each of the beneficiaries from the said house to have his or her own share separate from the other the net effect being that the total of their share is equal to the total of the share of the 2nd house.
13. It is his case that he has not given his mother's house a bigger share but the land is divided in equal shares save that Robert Thati who is his brother and a member of the 2nd house delinked himself with the rest of the members of the 2nd house and he was given three (3) acres separately from the rest of the beneficiaries who were to hold their share jointly.
 14. He further contended that the respondents herein sat and without involving the 2nd house agreed to share the estate of the deceased in a manner which is inequitable and unfair and for that reason he proceeded to sub-divide the land into two portions which is most equitable as both families will have access to the both the river and the road which is not the case with the mode of distribution proposed by the respondents.
 15. The application was disposed off by way of written submissions but only the applicant complied with the directions on filing of the submissions.
 16. The court has considered the application, the affidavits both in support and in opposition to the same and the submissions by the applicant. The applicant has moved the court under Rule 73 of the *Probate and Administration Rules* seeking review and setting aside of the orders that were issued on the July 22, 2020 and all consequential orders. In addition, he has sought orders to stay implementation of the orders issued on the July 22, 2020 and the costs of the application.
 17. The remedy of review is provided for under Order 45 Rule 1 of the *Civil Procedure Rules* which states;
“ Any person considering himself aggrieved;
 - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order, without reasonable delay”.
 18. The grounds for review are;
 - a. Discovery of new and important matter of evidence which was not within the knowledge of the applicant.
 - b. An error apparent on the face of the record.
 - c. Any sufficient cause.
 19. The application herein is premised on an error apparent on the face of the record on the part of the court when it issued the orders made on the 22nd July, 2020. The applicant contends that the position taken by the court in granting the said orders was not the correct position in that, on the June 16, 2017



he registered form RL.19 as the administrator of the estate and not as proprietor of the land as was found by the honourable court.

20. The court has keenly perused the application dated the 7th February, 2020 that lead to the ruling dated July 22, 2021. The applicants in that application and who are the respondents herein complained that the applicant herein in sub-dividing parcel No. Kagaari/Weru/505 acted in contravention of the certificate of confirmation of the grant issued on the February 28, 2017 and thus failed to act in the interest of the beneficiaries in that, he caused the land to be sub-divided into two parcels and in doing so, he did not consult the beneficiaries.
21. On hearing the application, the court found merit in the application and granted the orders sought therein.
22. The court has perused the further affidavit filed in the application, the subject of this ruling. The applicant though not directly, has admitted he has not administered the estate strictly as per the certificate of confirmation of the grant and has instead tried to justify his failure to do so. It is true that the grant was confirmed by consent of all the beneficiaries vide a consent dated January 6, 2017. The certificate of confirmation of the grant mirrors the terms of that consent and it is not subject to any interpretation by the applicant or any other party for that matter. It is clear from the applicant's own further affidavit that in sub-dividing the land in issue, he did so as per his own interpretation of the consent, and the subsequent certificate of confirmation of the grant and sub-divided the land into two portions in accordance with the houses being Kagaari/Weru/10294 and Kagaari/Weru/10295. That mode of distribution is definitely not what is provided in the grant.
23. It is clear and there is no doubt that the applicant went against the grant whilst he was supposed to sub-divide the land strictly as per the grant. It is not within his mandate to interpret the grant. It speaks for itself and his only duty as the administrator was to implement it as it is.
24. In view of the foregoing, I find that the court did not make an error in granting the orders of July 22, 2021 and there is no error apparent on the face of therecord as alleged by the applicant.
25. In the end, I find that the summons is devoid of merits and the same is hereby dismissed.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

for the Applicant

for the Respondents

