



REPUBLIC OF KENYA



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Nderitu (suing representative of the Estate of George Ndungu Kamunge (Deceased) v Kihara & 3 others (being sued as legal representatives of the Estate of Kihara Muthiora Kinyungu alias Kihara Muthiora) (Succession Cause 443 of 2014) [2022] KEHC 324 (KLR) (Family) (1 April 2022) (Ruling)

Neutral citation: [2022] KEHC 324 (KLR)

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

FAMILY

SUCCESSION CAUSE 443 OF 2014

MA ODERO, J

APRIL 1, 2022

**IN THE MATTER OF THE ESTATE OF KIHARA MUTHIORA
KINYUNGU ALIAS KIHARA MUTHIORA (DECEASED)**

BETWEEN

**MARY NJERI NDERITU (SUING REPRESENTATIVE OF THE ESTATE OF
GEORGE NDUNGU KAMUNGE (DECEASED)) APPLICANT**

AND

MARY NJOKI KIHARA 1ST RESPONDENT

JAMES MWAI KIHARA 2ND RESPONDENT

JACKSON MUTURI KIHARA 3RD RESPONDENT

NANCY GATHONI KIHARA 4TH RESPONDENT

**BEING SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF KIHARA
MUTHIORA KINYUNGU ALIAS KIHARA MUTHIORA**



RULING

1. The Applicant herein Mary Njeri Nderitu (suing as the legal representative of the estate of George Ndungu Kamunge) filed in this Succession Cause a summons for Review and Annulment of grant dated 30th November 2020 in which she sought the following orders:-
 - “ 1. That the Honourable court be pleased to review the certificate of confirmation of grant issued on the 19th May 2015 to strike out property known as Laikipia/Kalalu/35 from the schedule of properties.
 2. That paragraph 6 of the Certificate of confirmation of grant dated 19th May 2015 distributing property known as Laikipia/Kalalu/35 to the 1st to the 4th Respondent be set aside and or vacated.
 3. That the Honourable court be pleased to annul the vesting of property known as Laikipia/Kalalu/35 in the 1st to the 4th Respondent.
 4. That costs of this application be provided for”.
2. The Application which was premised upon Rule 49, 63 (1) and 73 of the *Probate and Administration Rules*, and order 45 Rule 1 of the *Civil Procedure Rules 2010* was supported by the Affidavit of even date sworn by the Applicant and was based on the following grounds:-
 - “ a. That property known as Laikipia/Kalalu/35 has at all material times relevant to this suit been registered in the name of George Ndungu Kamunge (Deceased).
 - b. That the Respondents herein obtained the certificate of confirmation grant by making a false statement to the court that property known as Laikipia/Kalalu/35 was the free property of the estate of Kihara Muthiora Kinyungu.
 - c. That property known as Laikipia/Kalalu/35 does not form part of the estate of Kihara Muthiora Kinyungu as the deceased had during his lifetime sold his interests in the land to one George Ndungu Kamunge(Deceased) and the property transferred”.

Background

3. This Succession Cause relates to the estate of Kihara Muthiora Kinyungu (hereinafter ‘the Deceased’) who died intestate at the Nairobi Hospital on 17th December 1999. Following the demise of the Deceased Grant of letters of Administration Intestate was on 8th September 2014 made to the four (4) Respondents as joint Administrators of the estate. The Grant so issued was duly confirmed to the Respondents on 19th May 2015.
4. The Applicant appears in these proceedings as the legal representative of the estate of the late George Ndungu Kamunge, and holds letters of Administration Intestate issued to her by the High Court in Kiambu on 3rd September 2018. The Applicant avers that the parcel of land known as Laikipia/Kalalu/35 (hereinafter the ‘suit land’) was fraudulently and/or erroneously listed as one of the properties comprising the estate of the Deceased.



5. The position of the Applicant is that the suit land was sold by the Deceased to her late husband George Ndungu Kamunge on 29th January 1999 during the lifetime of the Deceased. That following the sale the suit land was transferred to her late husband and that on 16th September 2003 title in the suit land was issued in the name of ‘George Ndungu Kamunge’
6. The summons filed by the Applicant was to be heard by way of viva voce evidence and the hearing did in fact commence on 9th September 2021. In the course of her evidence, the Applicant revealed that there is a suit related to this Succession Cause which is currently ongoing before the Environment and Land Court in Nanyuki. The Applicant revealed that a suit has been filed by the Respondents herein in the ELC Nanyuki challenging the legality of the title issued in the name of her Deceased husband.
7. In the circumstances the court invited both parties to file submissions regarding the propriety of this Probate court continuing to hear the summons for revocation of Grant in light of the ongoing suit before the ELC. The Applicant filed the written submissions dated 26th October 2021 whilst the Respondent relied on their submissions dated 30th November 2021.

Analysis and determination

8. I have considered the summons for revocation of Grant filed by the Applicant, the Reply dated 24th June 2021 filed by the Respondents as well as the written submissions filed by both parties.
9. At the centre of the dispute between the parties is the parcel of land known as Laikipia/Kalalu/35 (hereinafter, the suit Land). The Respondents contend that the suit land belonged to the Deceased and forms part of his estate. However, the Applicant insists that the suit land forms part of the estate of her late husband, having been sold and transferred to him by the Deceased prior to his demise.
10. The Respondents allege that Title to the suit land was fraudulently issued in the name of the late George Ndungu Kamunge. Thus the Respondent did file before the ELC Nanyuki suit No. 73 of 2019, dated 18th September 2019 seeking the following orders:-
 - “a) Declaration that the deceased George Ndungu Kamunge (Deceased) registration as proprietor of title No. Laikipia/Kalalu/35 was fraudulent, illegal, unlawful and unprocedural and that registration should be nullified.
 - b) An order of rectification of the register in respect to parcel Title No. Laikipia/Kalalu/35 through cancellation of deceased name George Ndungu Kamunge (Deceased) in the register.
 - c) Costs of the suit and interest”.
11. The Applicant who is sued as the Defendant in Nanyuki ELC No 73 of 2019 filed a defence and counterclaim dated 25th October 2019 in which she sought the following:-
 - “a) A declaration that the deceased Geroge Ndungu Kamunge registration as the owner of the property known as Laikipia/Kalalu/35 was lawful and therefore he acquired a valid or good title over the said property.
 - b) An order directing Samuel Muthiora Kihara and James Mwai Kihara to withdraw the caution they lodged over Title No. Laikipia/Kalalu/35.
 - c) Costs of the counterclaim and interest thereon at court rates”.



12. Both parties confirm that the suit filed in the ELC is still live and is yet to be determined. It is manifest that the dispute between the parties revolves around the question of ownership of the parcel of land known as Laikipia/Kalalu/35. The question which then emerges is whether this court sitting as a 'probate court' is vested with the jurisdiction to make a determination on the question of 'ownership' of the suit Land. It is trite law that without requisite jurisdiction, a court must down its tools immediately.
13. In *Owners of Motor Vessel Lillian S' v Caltex Oil (K) Ltd* [1989] KLR it was held as follows:-

“Jurisdiction is everything without it a court of law has no power to make one more step. Where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.” (own emphasis)
14. It is correct that this court is sitting as a Probate Court with the jurisdiction to oversee the distribution of the estate of the Deceased to the genuine heirs and beneficiaries. In *Re Estate of GKK (Deceased)* [2017] eKLR it was held that -

“The primary function of a probate court is distribution of the estate of the dead person.”
15. Matters relating to the ownership use and occupation of land have now under Article 162 of the *Constitution of Kenya 2010* been mandated to be determined by a specialized court being the Environment and Land Court ('ELC').
16. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes——
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
 - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or



fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.

- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.(Own emphasis)

17. Therefore, the correct and proper forum before which the Applicant ought to ventilate her claim to the suit land is the ELC. The Grant herein was confirmed way back in May 2015. Distribution is already under way. This a very old matter. It would be counterproductive and a waste of judicial time to proceed with the summons for revocation of Grant without evidence of any order/Decree from the ELC legitimizing the claim of the Applicant to the suit land.

18. In *Re Estate of Stone Kathubi Muinde (Deceased)* [2016] eKLR Hon Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)

19. The dispute between the parties is a dispute relating to ownership of land in question. This court sitting as a Probate Court does not have jurisdiction to determine disputes relating to ownership of land. The Respondents have already filed a suit in the ELC where they will be at liberty to ventilate the claim of the estate to have to the suit land.



20. For the above reasons, the summons for revocation of Grant is a non-starter. The Applicant is not a survivor of the Deceased nor is she a beneficiary to his estate. Despite her claim to the suit land, the Applicant would have no recourse in a succession cause. Her remedy lies in the ELC.
21. Moreover, I find that this question of ownership of the suit land is sub judice as the same issue is currently pending determination before a competent court of concurrent jurisdiction with this court. It would be superfluous for this court in the circumstances to proceed to hear the summons for revocation of Grant dated 30th November 2020.
22. The parties should pursue the suit in the ELC court to its conclusion. The party who is successful in the ELC matter would be at liberty to present that decree before this Probate Court for implementation.
23. In conclusion I find that this court has no jurisdiction to determine the ownership of Laikipia/Kalalu/35. The summons for revocation of Grant dated 30th November 2020 is hereby struck out with no orders on costs.

DATED IN NAIROBI THIS 1ST DAY OF APRIL, 2022.

MAUREEN A. ODERO

JUDGE

