



REPUBLIC OF KENYA



In re Estate of M'mwithimbu Alaja Mukotho (Deceased) (Succession Cause 480 of 2011) [2022] KEHC 10910 (KLR) (30 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 480 OF 2011**

EM MURIITHI, J

MAY 30, 2022

IN THE MATTER OF THE ESTATE OF M'MWITHIMBU ALAJA MUKOTHO (DECEASED)

BETWEEN

HENRY MWORIA PETITIONER

AND

EUNICE MWARONJA OBJECTOR

RULING

1. By an application through Summons dated 22/7/2019, the petitioner/applicant seeks that “an order of inhibition, caution restriction placed on LR. No. Kiirua/Naari/140 be lifted” citing need to implement the Judgment of the Court dated 12/4/2018, which dismissed the Objector’s application for revocation of grant. In the affidavit supporting the application, the petitioner depones that the Grant of Letter of Administration had been issued to him on 14/2/2013 and confirmed on 29/9/2015, with the consent of the beneficiaries; that the Objector/Respondent had placed a restriction/inhibition on the deceased’s asset Kiirua/Naari/140, the suit property herein; that the Objector’s application for revocation of grant filed on 23/2/2015 had been heard by viva voce evidence and Judgment delivered on 12/4/2018 but the court had not lifted the restriction placed on the parcel of land when delivering the Judgment.
2. The Objector filed a Replying Affidavit dated 31/5/2021 in which, significantly, she confirms that “it is true that the Judgment was delivered on 12th April 2018, however there is a pending case E. L. C. Suit No. 31 of 2020 (O.S).” At paragraphs 2-10 of the Replying Affidavit, the Applicant challenges the Judgment and sets up a repeat attack on the applicant about the sale of a parcel of land Kiirua/Naari/1083 allegedly sold by the applicant to the Objector but never transferred, as follows:

“2. That I have read the respondent's application which is full of falsehoods and misleading before this honourable court.



3. That it is true that the Judgement was delivered on 12th April 2018, however there is a pending case E.L.C.Suit No 31 of 2020 (O.S)
4. That the Applicant in this suit lured the honourable court to believe that he gave the respondent his own land, Kiirua/naari/2961 measuring one acre. (Annexed herein is a copy of the Judgement marked "EM1") otherwise known as Kiirua /Naari 117 as per attached agreement which fact it was ascertained to be false as per the chiefs intervention /deliberation herein attached.
5. That parcel of land Kiirua/naari/2961 belongs to a different person owned by one Marion Mwaregoki. (Annexed herein is a copy of a search marked "EM2") where he lives.
6. That I refuse to lift the caution on L.R No. Kiirua/naari/140 up and until when the Applicant will show me and or transfer to me the parcel of land that he alleged to have given me in this suit.
7. That Kiirua/naari/1083 was sold to me by the applicant and another who have never effected transfer to me to date despite having lived on the said parcel of land for over 15years.
8. That the applicant is a con and a liar who is after denying me what is rightfully mine from our father's land and also a non-existent land that he claims to have given me.
9. That there is a pending case E.L.C. Suit No 31 of 2020 (O.S) which involves a parcel of land Kiirua/Naari/1083 which he was sold to me by the appellant herein and I pray that this application be dis allowed pending the hearing and determination of this suit. (Annexed herein is a copy of the application marked "EM3")
10. That I pray that the applicant's application be dis allowed with costs to the respondent."

This Affidavit is drawn by the Objector's Counsel M/S Otieno C. & Co. Advocates.

3. By a further affidavit entitled "Objector/Respondent's Further Replying Affidavit in Verification" the Objector, now acting in person, sets up another claim of conspiracy to defraud her land and accused her counsel in paragraph 1 thereof "that my advocate appear in Court record replying affidavit is vague for it does not disclose the Petitioner has conspired to defraud my land by calculated plan and abuse of court process in contravention of section 35 of *the Constitution* 2010", before proceedings at paragraphs 2-14 of the further affidavit to re-urge her case for revocation of Grant as follows:

- "2. That L.R. No. KIIRUA/NAARI/140 originated from family inheritance family land.
3. That L.R. No. KIIRUA/NAARI/2961 belonged to Marion Mwaregoki and is where the petitioner/respondent his in occupation.
4. That the petitioner/respondent altered the number of L.R No. KIIRUA/NAARI/2961(annexed photocopy) Marked EXH.I to read L.R No. KIIRUA/NAARI/117 M'Rukaria M'Ikabu (annexed photocopy) Marked



EXH.II to help obstruction Justice and sabotage of Justice contrary to section 35 of *the constitution* 2010.

5. That my deceased father Land L.R. No. KIIRUA/NAARI/140 I have been denied my constitution Right of my share in contravention of section 35 of *the constitution* 2010.
6. That my constitutional Rights has been infringed or/and violated for want of fraud of my fathers estate property and conspiracy to defeat the cause of Justice.
7. That further INTER-ALIA all the estate properties of my deceased father Viz:- M'Mwithimbu Alaja Mukotho were not included in the above succession case herein for want of sabotage of Justice and obstruction of Justice the same to deprive me of the shares of my deceased father estate(Annexed Chief letter) photocopy Marked EXH III.
8. That further the inventory schedule of sharing L.R. No. KIIRUAMAARIJ140 I am excluded in the sharing schedule for want of fraud of my share by calculated plan by contravention of section 35 of *the constitution* 2020 (annexed photocopy) of certificate of confirmation Marked EXH IV.
9. That the certificate of confirmation was produced by fraud collusion or perjury in the matter of laws.
10. That the petitioner/Respondent and 3 others sold the following plots namely:-
 - a. THEGE NO. I5A (annexed photocopy) of County Government of Meru letter. Marked EXH.V
 - b. KIIRUA MARKET N0.38B (annexed photocopy) of Meru County Council letter. EXH. VI
11. That the petitioner/Respondent also excluded L.R. No. KIIRUA NAARI MAITEII 296 (Annexed photocopy) Marked EXI-I.VII
12. That the plots were sold secretly without my knowledge or information by forgeries of one party Stanely Kimathi (annexed photocopy) of transfer letter and their signatures Marked EXH. VIII.
13. That the action taken by petitioner/respondent is motivated by malice and violation of section 35 of constitution 2010.
14. That I make and swear this affidavit the contents being true to the best of my knowledge, information and belief praying the petitioner/respondent application be dismissed for want of contravening section 35 of *the constitution* 2010 to deprive my share by excluding me in the certificate of confirmation of grant.” (Sic)



4. On 5/7/2021, the Petitioner appointed M/S Wambugu & Muriuki Advocates who filed a “Further Supporting Affidavit” sworn by the Petitioner on 26/9/2021 and filed in court on 8/10/2021, urging the Court to lift the inhibition to give effect to the Judgment of the Court of 12/4/2018, as follows:

- “2. That I have read and understood the Respondent’s Replying Affidavit and pursuant to the Leave of the Court I make and swear this Further Supporting Affidavit.
3. That on the onset I wish to state that this honourable court pronounced itself as regards the distribution of the deceased’s estate vide its judgement delivered on 12/04/2018 (a matter of Court’s record).
4. That the Respondent has filed Further Replying Affidavit without leave and the same ought to be struck out.
5. That before this honourable court made its determination viva voce evidence was taken and considered and every party had an opportunity to avail all the relevant information and evidence as the case may be.
6. That the Objector/Respondent is trying to reopen the case that has been already determined without any Application and/ or leave to do so and that amounts to res judicata.
7. That though the Respondent alleges that there is another suit pending in the Environment and Lands Court, I am not a party to the aforesaid suit that Meru E&L Suit No. 31 of 2020(05) (Annexed and marked “HMM1” is a copy of the pleadings in the aforesaid suit that demonstrates that I am not a party to the aforesaid suit).
8. That further to the foregoing clause the honourable court identified the deceased’s herein estate is Land Reference Number Kiirua/Naari/140 which is distinct from Land Reference Number Kiirua/Naari-Maitei/1083, the subject of Meru E&L suit No. 31 of 2020(05) and therefore there is no correlation between that suit and the cause herein.
9. That what I am seeking vide my Application dated 22/09/2019 is to lift inhibition that had been put against the title herein pending the determination of the cause and which has since been determined and no appeal and/ or review has been preferred against the court’s judgement of 12/04/2018 to date.
10. That unless the inhibition is lifted the Certificate of Confirmation of Grant issued pursuant to the aforesaid Judgement will be rendered useless and/ or of no value.
11. That this honourable court is functus officio as regards the estate herein and as such lacks jurisdiction to reopen a matter ~ere all parties had their day to vent out their case.”

5. Finally, the Objector filed a “Further Supplementary Replying Affidavit in Reply” sworn on 25/10/2021 in response to the Petitioner’s of 8/10/2021, as follows:

- “2. That I have read and understood the petitioners/Respondent affidavit dated 8th October 2021.



3. That although this Honourable court pronounced judgement in regards to the mode of distribution of the estate of the deceased, I was not included in the estate despite the court finding that I was one of the deceased beneficially.
4. That in reply to paragraphs 4, 5 and 6 it came to my knowledge and discovered that I was not included in the grant when the same was granted.
5. That in reply to paragraphs 7 and 8, I did mention the suit No.31 of 2020 (OS) because the land L.R. Kiirua/Naari-Maiteii 1083, because the petitioner lied to the Honourable Court that he had bought the said land so not to claim any share from the deceased estate.
6. That it further came to my knowledge that the petitioner most of the deceased properties were unlisted in the whole cause as evidenced by the attached chief's letter dated 18th April 2018.
7. That in the process the petitioner seems not sincere in distributing the deceased estate properly.
8. That further in the process the petitioner has fraudulently deprived me my share out of the deceased vast estate especially L.R. Kiirua/Naari/140.
9. That the grant was confirmed when I was enmeshed with a lot myriad problems in mind and further without as much as a notice to me.
10. That it is my humble request that I be included in the deceased estate as a beneficiary.
11. That I further pray that the properties mentioned as per annexed chief's letter dated 18th April 2018 be included in the grant to form part of the deceased estate herein.
12. That it will be fair in the interest of justice that the inhibition put against title to Land No. L.R. Kiirua/140, be stayed pending determination of my above facts and matters.”

6. At the hearing of the application, the parties agreed to rely on the Affidavits filed on record, and ruling was reserved.

Determination

7. The question before the Court is whether to lift the inhibition placed on the suit property.
8. The Court notes that the issues raised by the Objector in opposition to the application for lifting the inhibition seek to reopen and regurgitate the very question which was before the court on the application for revocation of Grant as set out in paragraph 14 of the Judgment of 12/4/2018 as follows:
 14. “At the close of the case, the parties were ordered to file and serve their written submissions but they did not. This judgment was therefore made without the benefit of the parties submissions. Having considered the record and the testimonies of witnesses, the issues for determination are; whether the objector is a beneficiary of the estate of the deceased; is she entitled to a share in the estate and if so, should the grant be revoked?



9. The court resolved the issue of the Objector's interest in the Estate, upon hearing of the application for revocation of Grant in full by oral evidence of the parties, by its Judgment of 12/4/2018 and held as follows:
15. The evidence on record is overwhelming as to who the beneficiaries of the deceased are. The letter of introduction by the Chief of Naari Location dated 2nd June, 2011, sets out the names of 8 persons as the ones who survived the deceased. These are, Stanley Muriuki, Ann Kiget, Henry Mworira Mwithimbu, Mary Karimi, Rael Karamuta Mwithimbu, Eunice Mwaronja Isaac Kinyua and Andrew Kirimi.
 16. Apart from the foregoing, all the witnesses who testified were in agreement that the objector was a daughter of the deceased. That being the case, I hold that the objector is a beneficiary of the estate of the deceased.
 17. The second issue is whether the objector is entitled to a share in the estate. Her testimony was that she hurriedly signed the consent to distribution when it was brought to her place of work at Muutionhunguri Primary School when she was busy working in class and that the petitioner informed her that other things would be sorted out later. That she did not sign the documents relating to distribution with a clear mind. That on the day she attended court for confirmation, she did not hear the court ask if there was anyone with any objection. She denied that she had been given any land by the petitioner in exchange for her renouncing her right to inherit. She further denied that her application was a revenge against the petitioner for taking away a cow he had given to her family.
 18. On the petitioner's part, he contended that the objector signed the consent to distribution voluntarily. That he had given the objector his half acre adjacent to the estate property to the objector whereby she agreed not to lay any claim to a share in the estate. That all was well until he took away from the objector a cow he had given to her.
 19. One thing that struck this court was that both parties were not candid with the court. The objector stated in her depositions that she was lured to sign the consent to distribution by the promise that the matter would be clarified in court. That the petitioner had obtained the confirmation of grant without the consent of all the beneficiaries of the deceased. One wonders, if what the objector was stating is the truth, why did she not raise the issue of "clarifying the matters" when she attended Court for confirmation? Further, why did she not tell the court on that day that although she had signed the consent to distribution, all the other beneficiaries hadn't?
 20. On the other hand, the petitioner deponed that he had given the Objector and her family, parcel no. kiirua/Naari/2961 measuring 1acre; that he had bought that property from one Nkunja N'Tuerandu and that it is at the time of giving the petitioner that land that it was agreed that the objector will not get anything from the deceased's estate. However, [he] failed to produce a title for that property. He again changed his version and stated that the property he had bought from Nkunja N'Tuerandu was parcel no. Kiirua/Naari/117 and not Kiirua/Naari/2961.
 21. One fact however that remained unchallenged is that, the objector signed both the consent to lodge the Succession Cause as well as distribution volutarily. She was at the forefront in pushing for the Cause to be filed and finalized while the other beneficiaries were dragging their feet. Although she stated that she signed the consent to distribution with an unclear mind she offered no evidence to prove that fact. The consent to distribution was signed on 9th April, 2013. The parties then appeared before Makau J five months later on 29th September, 2014. In



this court's opinion, five months was an adequate period for the mind of the objector to have cleared. She was perfectly entitled to raise the matter before Makau J, but she chose not to.

22. Indeed, before confirming the grant on 29th September, 2014, Makau J had on 16th June, 2014 directed that since not all beneficiaries had signed the consent, they should be served before the grant could be confirmed. This shows that this matter cannot be said to have been rushed through to have not given the objector enough time to reflect on her actions.
23. The objector was personally in attendance at confirmation but raised no objection. Her answer was that she did not hear when the judge called for any objection. She produced a medical report from the Meru Teaching and Referral Hospital to show that she had been treated for an ear problem and was suffering from an ear loss.
24. The letter in question is dated 2nd July, 2015 and the assessment and examination was conducted on 30th June, 2015. That was slightly over five months after the present application had been presented and ten months after the date she appeared in court for confirmation. There is nothing to show that on the date she appeared in court on 29th September, 2014, she had any ear problem. That Medical Report may have been procured purportedly for the present application and is of no use as far as this Court is concerned in relation to what transpired in Court on 29th September, 2014.
25. The evidence of PW2 was preferable. She is a daughter of the deceased, married like the objector. She also was not provided for in the distribution because according to her, the family had agreed that the daughters were to get nothing except Ann Kigetu who is mentally challenged and has children.
26. To my mind, the consent that is signed by the parties for distribution is not for the sake of it. It is a solemn serious act that persuades a court of law to act at the instance of the parties and dispose off property in a particular manner proposed by them. It is binding on the court as it does on the parties. It is not a joke easily reversible at the whims of any party. In my view, unless there is compelling evidence that either the consent was obtained in circumstances that can vitiate a contract or is inherently unfair, the consent is binding and no party is to be allowed to resile from it at will. Lest there be no end to litigation.
27. To my mind, all the other issues regarding there having been another property that was given in exchange for the estate is not a matter for this court. That is an issue of contract to be thrashed out in the realm of civil litigation before a civil court.
28. In the circumstances, I find that the application lacks merit and I dismiss the same. I will not make any order as to costs this being a family matter.

Dated and Delivered at Meru this 12th day of April, 2018.

A. Mabeya

Judge”

10. The final Judgment of the Court on the question of revocation of the Grant herein put to an end the issue of inhibition which was placed pending determination of the dispute. By its judgment this court has become *functus officio* on the question of the issue raised in the application for revocation.
11. For the implementation of the Judgment of the Court the restriction placed on the Title by the inhibition pending hearing and determination of the Cause must be vacated, as a consequential order.



12. It matters not that there is a suit relating to another parcel of land between the applicant and the objector pending before the Environment and Land Court. This Court cannot make orders which affect, direct or supervise the proceedings of the Environment and Land Court which is a court of equal status with the High Court under Article 162 (2) of *the Constitution* 2010, the jurisdiction of the High Court over matters falling within the jurisdiction of such courts being ousted by Article 165 (5) (b) of *the Constitution*.
13. The Objector may, as she may be advised by her legal advisors, seek any relief , interlocutory or final, before the Environment and Land Court now seized of a suit between the parties.
14. Before this Court, the matter is at an end by the determination made by the Judgment of the Court (Mabeya, J) on 12/4/2018, from which no appeal and or stay of execution pending appeal, to the knowledge of this court exists.

Orders

15. Consequently, for the reasons set out above, the Court grants the application dated 22/7/2019 for the lifting of the order for inhibition on suit parcel of land L.R. No. Kiirua/Naari/140, as prayed.
16. Costs in the Cause.
File closed.
Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF MAY, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Wambugu & Muriuki Advocates for the Petitioner/Applicant.
Objector/Respondent in Person.

