



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Polycarp Erick Wambi Ating'a (Deceased) (Succession Cause 27 of 2018) [2022] KEHC 12462 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 27 OF 2018
RPV WENDOH, J
JUNE 23, 2022**

BETWEEN

HILDA LINET ACHIENG OBJECTOR

AND

JANET AKINYI ATING'A 1ST RESPONDENT

JAPHET ANG'ILA ATING'A 2ND RESPONDENT

LAND REGISTRAR, MIGORI COUNTY 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling is in respect to the objector's summons for preservation dated 2/3/2022. The applicant seeks the following orders: -
 - 1) Spent.
 - 2) Spent.
 - 3) That this court be pleased to issue a temporary order preserving the estate of the deceased and temporarily allow the objector to remain in her occupancy the of estate land title no. Kamagambo/Kabuoro/9975 pending hearing and determination of summons for revocation herein.
 - 4) Costs be provided for.
2. The grounds in support thereof are on the face of the application and the supporting affidavit of Hilda Linet Achieng' the objector / applicant. The objector deponed that she is the surviving widow of the deceased herein; that the grant was obtained without her involvement and she subsequently filed for summons for revocation of the grant dated 12/9/2017 which is still pending before this court;



that she is currently living and in occupation of land title number Kamagambo/Kabuoro/9975 (suit land); that vide a ruling dated 29/3/2021 delivered on 25/6/2021, this court dealt with the issue of intermeddling and restored the suit land back to the estate of the deceased; that the said ruling did not dispose the summons for revocation of grant, as it was directed that the same can be pursued; that the petitioner is threatening to evict her before determination of the summons for revocation. It was further deponed that unless the summons for revocation of grant is heard and determined, the suit land remains property of the estate whose matters of inheritance must be determined first.

3. In response, Prof. John E. Oluoch Ating'a who has the power of attorney to act on behalf of the executor, swore a replying affidavit dated 8/3/2022. He deponed that the executor was appointed through a grant of probate with will dated 24/2/2016 and confirmed on 13/2/2017; that the objector was not the wife, but a live-in personal caregiver of the deceased; that after obtaining the certificate of confirmation of grant, the executor discovered that the objector had illegally taken possession of, subdivided and transferred one of the deceased's assets namely Kamagambo/Kabuoro/2971 and in exercise of the executor's mandate to protect the estate of the deceased, the executor instituted the now Rongo SRM ELC Case No. 24 of 2019; that the said land was always unoccupied during the lifetime of the deceased but the objector commenced construction of a permanent dwelling house; that following this court's ruling on 30/6/2021 which cancelled the title numbers Kamagambo/Kabuoro/9975 and Kamagambo/Kabuoro/9976, the executor made an application for summary judgement in the Rongo case since the issues for determination in that suit had directly been determined through this court's ruling and by a ruling dated 3/3/2022 in the lower court, the court directed that the objector do remove all the illegal structures from the land.
4. Further, the issues in the instant application are a replica of the issues raised in the objector's reply to the executor's application before the lower court dated 1/12/2021; that entertaining the present application would be tantamount to rehearing the application before the lower court or sitting on appeal from the lower court's ruling and orders a position not supported by law; that the objector willfully failed to disclose to this court that the lower court had scheduled a ruling the following day touching on the same issues which the objector has brought to this court; that if the objector had done that, then this court would not have issued the ex-parte orders of 2/3/2022; that the objector has never taken steps to set down the summons for revocation for hearing despite being prompted to do so in the ruling of 30/6/2021 and she is using the pendency thereof as a means to maintain and perpetrate her acts of intermeddling. The executor asked this court to dismiss the objector's summons for revocation with costs.
5. The application was canvassed by way of written submissions' I have duly considered them together with the application of the objector and the replying affidavit on behalf of the executor.
6. The sole issue for determination is the interpretation and the import of the ruling dated and delivered on 30/6/2021.
7. The objector submitted that the respondents are threatening to evict her from the suit land which is still the subject of active litigation of her objection proceedings. It was her further submission that the respondents seem to have misconstrued the ruling dated 30/6/2021 which only dealt with the issue of intermeddling.
8. The respondents' position is that in the ruling dated 30/6/2021, this court found that the objector together with the deceased's elder brother were guilty of intermeddling by fraudulently subdividing and transferring land title number Kamagambo/Kabuoro/2971 to themselves. This court ordered for cancellation of the titles and restoration of the aforesaid property to the deceased's estate. The respondents submitted that the land registrar has not obeyed the said orders.



9. The respondents further submitted that it was based on the ruling of this court of 30/6/2021, that the executor filed for a summary judgement in Rongo SRM ELC Case No. 24 of 2019 on the basis that the ruling of this court had invariably determined the issues in the lower court's case and by a ruling delivered on 3/3/2022, the lower court allowed the executor's application to evict the objector.
10. The orders issued by this court in its ruling of 30/6/2021, specific to the titles of the estate of the deceased were: -
 - a.
 - b. That the Land Registrar to cancel the Title Deeds of the parcels of land known as Kamagambo/Kabuoro/9975 and 9976.
 - c. That the Land Registrar is hereby ordered to rectify the register to revert ownership of land known as Kamagambo/Kabuoro/9975 and 9976 to Polycarp Erick Wambi Ating'a.
 - d. That the parties are at liberty to pursue the revocation of Grant of Probate dated 24/2/2016 as well as the ownership of Kamagambo/Kabuoro/2971.
11. The instant application seeks that the applicant be allowed to continue being in occupation of Kamagambo/Kabuoro/9975 which forms part of the estate of the deceased.
12. The application filed by the executor in Rongo SRM ELC No. 23 of 2019, sought orders that the applicant be evicted from land title numbers Kamagambo/Kabuoro9975 and 9976 based on the ruling and orders issued by this court on 30/6/2021. In his ruling of 3/3/2022, the Learned Magistrate observed in paragraph 13, that since the High Court had dealt with the issue of the fraudulent transfer of the titles of the suit properties and the same were nullified, the respondents have no title upon which they are occupying the suit property. The trial Magistrate further held that the subsistence of the summons for revocation of grant application, does not oust the jurisdiction or operate as stay of the proceedings before it. Moreover, the High Court in its ruling held that the substratum of the suit in the lower court was a replica of what was being contested before it. Based on the foregone reasoning, the Magistrate issued orders of eviction in favour of the executor.
13. From the pleadings filed in the lower court suit, the claim was for among others, cancellation of the title Kamagambo/Kabuoro/2971 which had been sold and subdivided to become Kamagambo/Kabuoro/9975 and 9976.
14. The ruling delivered on 30/6/2021 was at the behest of the executor who sought orders among others being cancellation of the titles Kamagambo/Kabuoro9975, 9976 which were the resultant titles after the subdivision of Kamagambo/Kabuoro/2971 which formed part of the deceased's estate.
15. On the issue whether the application by the executor dated 18/11/2019 before this court, is an exact replica of the suit in Rongo ELC Case No. 24 of 2019, Mrima J in paragraphs 37 to 39 of his ruling, observed that the issues that were being raised in the lower court were in respect to a counter claim in Kamagambo/Kanyangwa/300,299,298 and 297. He further held that the instant application before him was not for a counter claim. The counterclaim itself made reference to a different subject matter which was a counterclaim in respect to the estate of the 2nd respondent's father and not the deceased herein. The Judge held that the estate from which the applicant's laid claim is different from the one the 2nd respondent is claiming as a beneficiary and as such the issues in the application before him were not sub judice the lower court case.
16. My understanding of the above reasoning by the Judge, is that the ruling of 30/6/2021 did not effectively compromise the suit filed in the trial court. The suit in the trial court as observed by Mrima J



had a counterclaim. The defendants in the lower court suit had not been heard on their counterclaim. It was therefore not proper, respectfully I must say, for the trial Magistrate to conclude that the ruling of this court dealt with the issues before him. In particular, paragraph 39 of this court's ruling was:

"It therefore follows, taking guidance of the Supreme Court decision that the estate from which the Applicants herein lay claim on is different from the one that the 2nd Respondent is claiming as a beneficiary. As such the issues in the instant Application are not sub judice the lower Court case."

17. The summons for revocation of grant is dated 12/9/2017 and filed in court on 18/9/2017. Mrima J in his ruling at paragraphs 41 to 45 observed that the summons for revocation of grant had never taken off since this matter was first part heard in Nairobi but it was to be heard de novo on 24th and 25th July 2019. Before the hearing, the respondents filed another application dated 18/11/2019 which was the subject of this court's ruling delivered on 30/6/2021. It was further agreed by both parties that the respondent's application would be heard first before the summons for revocation could be heard.
18. I therefore cannot fault the objector for failing to set down her application for summons for revocation for hearing. In any event, the order was not particular that the objector had the burden of setting down the application for hearing, but was directed at all parties.
19. In the interest of justice and to expedite this cause, I hereby direct that the objector does within 14 days of this ruling, fix a hearing date of the summons for revocation dated 12/9/2017 on a priority basis.
20. The respondents submitted that the land registrar did not comply with the order of cancellation of the titles. The court has no idea whether the court's order was served on the land Registrar. I hereby direct once again that the land registrar be served and do comply with to the order issued to them on 30/6/2021.
21. Accordingly, I allow the application and the following orders do issue: -
 - a) A Temporary Order is hereby issued preserving the Estate of the Deceased and I hereby temporarily allow the Objector/Applicant to remain in her occupancy of Estate Land Title No. Kamagambo/Kabuoro/9975 pending the hearing and determination of Summons for Revocation of Grant dated 12/9/2017;
 - b) The Objector/Applicant is prohibited from further dealing with the suit parcel of land she is in occupation in any adverse manner and this includes further construction if any;
 - c) The Objector/Applicant is hereby directed to extract and serve the Land Registrar Migori County with the orders issued by this court on 30/6/2021 to rectify the register to revert ownership of Land known as Kamagambo/Kabuoro/9975 and 9976 to Polycarp Erick Wambi Ating'a within 7 days of this ruling and file an affidavit of service to that effect;
 - d) The Objector/Applicant is also ordered to extract and serve a copy of this order and ruling to the Land Registrar Migori County within 7 days of this ruling and file an affidavit of service to that effect;
 - e) The Land Registrar Migori County is hereby directed to rectify the register of the aforementioned titles within 30 days of being served with the orders and file a report thereof;
 - f) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 23RD DAY OF JUNE, 2022

R. WENDOH



JUDGE

Ruling delivered in the presence of

Mr. Kisera for the Objector/Applicant

Mr. Akelo for the Executor/1st, 2nd, 3rd, & 4th Respondent

Evelyn Nyauke Court Assistant.

