



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Rithara Mutunga (Deceased) (Succession Cause
186 of 2009) [2022] KEHC 12540 (KLR) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 186 OF 2009**

EM MURIITHI, J

AUGUST 4, 2022

IN THE MATTER OF THE ESTATE OF RITHARA MUTUNGA (DECEASED)

BETWEEN

CHARLES KIMAITA M'MWITHIMBU APPLICANT

AND

EDWARD MUTUA M'MWITHIGA RESPONDENT

RULING

1. By Notice of Motion 19/11/2021, the applicant, Charles Kimaita M'Mwithimbu, seeks specific Orders that:-
 - a. This Honourable Court be pleased to declare land parcels No. LR Ntima/Ntakira/1864 and L.R. Ntima/Ntakira/1965 form and are part of the deceased Rithara Mutunga.
 - b. This Honourable Court do further amend the confirmation certificate of grant by including the aforesaid two parcel of land all measuring 2 acres.
 - c. Costs of this application.”
2. The principal ground of the application which is set out on the application is that: -

“That the two parcels of land LR. Ntima/Ntakira/1864 and LR Ntima/Ntakira/1965 were part of the deceased’s estate which were excised from the original deceased estate property LR. Ntima/Ntakira/1 by way of fraud and without the knowledge nor consent from the entire deceased family.”

Copies of the Green Card registers on LR Ntima/Ntakira/1; Ntima/Ntakira/ 1864 and Ntima/Ntakira/1965 were attached.



3. The Respondent filed a Replying Affidavit sworn on 11/5/2022 set out his case in paragraphs 5-9 as follows:-
 5. That the deponent of this application is using an institutional detour to attack validity of orders issued by Learned Justice J.A. Makau in the Civil Suit No. 108 of 2010 -Meru by seeking similar remedies from a different forum, rather than through the designated appellate or judicial review route. "Attached herein and marked as "EMM:I." is a copy of the Judgment dated 25/10/2012.'
 6. That in the said judgment, Justice J.A. Makau stated that land parcel number Ntima/Ntakira/1864 and Ntima/Ntakira/1965 was not fraudulently transferred to me as there was no prove and in the premises, the deponent of this application was condemned to pay costs of the suit which remains unpaid to date. Attached hereto and marked as "EMM 2" is a copy of Notice to Show Cause why execution should not issue 29/n./2019.'
 7. That by extension, in E&L Case No. 69 of 2010(OS)-Mem, the court ordered and decreed that I was entitled to one acre of land number Ntima/Ntakira/1966 whereof I await issuance of title. Attached herein and marked as "EMM3la-d}" is a copy of Decree issued 9/9/2020, Application for Consent of Land Control Board, Letter of Consent and, mutation form.'
 8. That the deponent of the application herein has, like the proverbial ostrich buried his head in the sand and refused to abide the outcome of the aforementioned HCC Suit No. 108 of 2010 and E&L Case No. 69 of 2010(OS).
 9. That the Application herein raises issues of fraudulent transfer of land number Ntima/Ntakira/1864 and Ntima/Ntakira/1965 which was raised in Civil Suit NO.108 of 2010 -Meru between the parties herein and it was heard and decided by the High Court."
4. The applicant filed a Reply to the Replying Affidavit which he entitled "Answer Reply to Affidavit of the Respondent dated 11th May 2022" responding, principally, to issues of procedure taken up by the Respondent.
5. The applicant and the Counsel for the respondent orally urged this respective positions on 8/6/22, and ruling was reserved.

Determination

6. On the question before the court, that is, whether the grant herein shall be rectified to include into the estate the parcels of land LR. Ntima/Ntakira/1864 and 1965, the answer depends on the Courts finding as to the ownership of the two parcels of land by the deceased.
7. For the applicant to establish ownership by the deceased, he must show that the parcels of land were registered in the names of the deceased or they have been declared by a competent court to belong to the deceased. In other words, the applicant is seeking a declaration of ownership of the parcels of land by the deceased; it is not a succession issue but an ownership issue.
8. Article 165 (5) (b) of *the Constitution* as read with Article 162 (2) (b) reserves the issue of ownership of land in the Environment and Land Court established by the Environment and Land Court Act of 2011 (2012).



9. Before the Environment and Land Court was operationalized the High Court at Meru had occasion to rule on the question of ownership of the parcels of land and the allegation of fraudulent transfer by the Respondent herein when the Court (per J.A. Makau, J.) held:-

“In the instant suit I am not satisfied that the registration was obtained by fraud but through purchase. The Defendant is and has since 1975 been in possession of the suit after acquiring the land for value consideration. I find the plaintiffs have failed to satisfy the conditions which would have made this court to order rectification of the register or rather order re-transfer of the suit land to the deceased estate or in the alternative order compensation be made to the plaintiffs for the said parcels of land.

The plaintiffs in their evidence did not call any evidence in support of their claim for damages. The plaintiffs did not prove their claim that the defendant had the land fraudulently transferred to him. The plaintiffs did not suffer any damages and are not entitled to any damages.

In the circumstances of the case the plaintiffs’ suit is dismissed with costs to the defendant.

Dated, Signed, and Delivered at Meru this 25th October, 2012.

J.A. Makau

Judge.”

10. The applicant has not demonstrated that the parcels of land No. Ntima/Ntakira/1864 and No. Ntima/Ntakira/1965 which are sought to be declared part of the estate are owned by the deceased. Indeed, the Green Card register on the parcel of land show that the Respondent was registered proprietor of the parcels, on 21/5/1976 and 31/8/1976, respectively.
11. The Respondent was by the Environment and Land Court Case No. 69 of 2010 (O.S.), the decree whereof is attached to the Replying Affidavit of the Respondent, declared the owner of “one acre of the land parcel No. Ntima/Ntakira/1966 by way of adverse possession.” The parcel of land is, however, not subject of the present application.

Orders

12. Accordingly, for the reasons set out above, the court finds that the applicant has not demonstrated that the deceased was at the time of death, the registered proprietor owner of the suit parcels of land. The alleged fraud in the registration of the Respondent as proprietor of two parcels could only be established by a suit in that behalf, which by the Meru High Court Civil Suit No. 108 of 2010, the applicant by the judgment of J.A. Makau, J. of 25/10/2012 failed to do.
13. The applicant’s application by Notice of Motion dated 19/11/2021 for the Court to declare that land Parcels No. LR Ntima/Ntakira/1864 and LR. Ntima/Ntakira/1965 form and are part of the estate of the deceased Rithara Mutunga and for rectification of the Grant herein is, accordingly, declined.
14. Costs in the cause.

DATED AND DELIVERED THIS 4TH DAY OF AUGUST 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:



Applicant Charles Kimaita M'Mwithimbu In Person

Mr. Mwenda Advocate instructed by M/S Maitai Rimita & Co. Advocate for the Respondent.

