



REPUBLIC OF KENYA



**In re Estate of Loyd Kimathi Miriti (Succession Cause 371 of 2015)
[2022] KEHC 14875 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 371 OF 2015**

LW GITARI, J

OCTOBER 19, 2022

RULING

1. This ruling is in respect of the Applicant's summons application brought under a certificate of urgency that is dated 28th July 2022 and was filed on 2nd August 2022. The application is expressed to have been brought under the provisions of Rules 49 and 73 of the *Probate and Administration Rules*.
2. The application seeks for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable court be pleased to issue an order directing the district land surveyor Tharaka Nithi County to proceed and point out and/or reestablish the original beacons of land parcel number Mwimbi/Mugumango/1743.
 - d. That Land Registrar Meru South/Maara District be directed to dispense with production of the title deed of land parcel number Mwimbi/Mugumango/1743, to enable implementation of the distribution of estate of the deceased as per Certificate of Confirmation of Grant issued 11th May 2017.
 - e. That the order issued be served upon OCS Ntumu Police Station to ensure this orders compliance.
 - f. Cost of this suit.
 - g. Any other or further relief as the court may deem fit.
3. The application is based on the grounds on the face of it and is supported by the affidavit sworn by the Applicant on 28th July 2022. It is further supported by the Applicant's supplementary affidavit that oddly was sworn on 8th July 2022. The Applicant deposes that a temporary grant of letters of administration in respect of the subject estate was issued to him on 19th March 2015 and the same was confirmed on 11th May 2017. That the confirmed grant authorized the applicant to administer the



parcel of land listed in the grant. That the Respondent has refused to surrender the title deed to the said land which allegedly in his possession and has further proceeded to interfere with the beacons that were placed therein. That the respondents have further started planting on the said land parcel with an intention of frustrating the Applicant's plans to administer the estate. The Applicant thus prayed for the present application to be allowed as prayed.

4. In response to the application, the 1st Respondent filed a Replying Affidavit on 4th August 2022 that he swore on even date. He further relied on his Supplementary Affidavit filed on 10th August 2022 and which he swore on 8th August 2022. The 1st Respondent deposed that the Applicant and the Respondents are all brothers whose father was the late Edwin Kenneth Miriti Muriianki alias Bore Muriianki. That the 1st Respondent applied and was issued with the letters of administration in respect of the estate of their late father in Chuka Senior Principal Magistrate's Court Succession Cause No. 143 of 2010, which grant was confirmed on 24th July 2012. That the estate of their late father was composed of the land parcel no. L.R. No. Mwimbi/Mugumango/405. As such, the 1st Respondent contends that the grant of representation that was issued to the Applicant in this cause is inoperative and useless as it relates to the same land parcel no. L.R. No. Mwimbi/Mugumango/405. He further contends that the land parcel no. L.R. Mwimbi/North Mugumango/1743, in respect of which the prayers in the present application are based, was never registered in the name of the deceased. The 1st Respondent thus urged the court to dismiss the application arguing that the same is based on false allegations.

Issue for determination

5. From the grounds set out in the application dated 28th July 2022, the respective affidavits in support and opposition of the application, and the submissions of the parties, the main issue for determination by this court is whether the this court can issue the orders sought in the said application.

Analysis

6. This instant cause relates to the estate of Lloyd Kimathi Miriti (deceased), who died on 18th September 2012 aged 42 years old. The Applicant herein was appointed the administrator of the deceased's estate in his capacity as the deceased's brother. In his petition for grant of letters of administration, the Applicant expressed that he survived the deceased together with his sisters namely Annet Muthoni, Kellen Kanini, and Rosebeth Kageni.
7. From the record, the grant issued and confirmed to the Applicant was in respect of the land parcel known as L.R. No. Mwimbi/Mugumango/405. As per the Certificate of Confirmation of Grant dated 11th May 2017, L.R. No. Mwimbi/Mugumango/405 was to be held by the Applicant for his benefit and in trust for:
 - a. Annet Muthoni Edwin,
 - b. Kelleni Kanini Miriti and
 - c. Rosebeth Kageni Miriti.
8. To the contrary, the 1st Respondent has relied on a copy of the Certificate of Confirmation of Grant dated 24th July 2012 that was issued him in Chuka Senior Principal Magistrate's Court Succession Cause No. 143 of 2010. The said certificate confirms that the estate of the late Edwin Kenneth Miriti Muriianki alias Bore Muriianki comprised of the said L.R. No. Mwimbi/Mugumango/405 (hereinafter the "original land parcel") and was distributed to the beneficiaries as follows:
 - a. Timothy Kirimi Miriti – 0.35 Acres



- b. Victor Bundi Miriti – 0.35 Acres
 - c. Solomon Mugo Miriti – 0.35 Acres
 - d. Moffat Nyaga Edwin – 0.35 Acres
 - e. Kimathi Miriti - 0.35 Acres
 - f. Annet Muthoni Endwin – 0.22 Acres
 - g. Kellen Kanini Miriti – 0.22 Acres
9. In his supplementary affidavit, the 1st Respondent acknowledged that he was the administrator in respect of his father’s estate and that after the confirmation of the grant issued to him, he subdivided the original land parcel into 7 portions to each of the beneficiaries. The copy of the Mutation Form dated 3rd December 2012 confirms this. The original suit land was subdivided into land parcels no. L.R. Mwimbi/North Mugumango/1740-1746 with L.R. Mwimbi/North Mugumango/1741 and 1742 measuring 0.089 Ha each while the rest land parcels measuring 0.142 Ha each. However, there is no evidence to show which sub-division of the original land parcel was distributed to which specific beneficiary of the late Edwin Kenneth Miriti Muriianki alias Bore Muriianki.
10. It is therefore not in dispute that the suit land herein is a sub-division of the original land parcel. The 1st Respondent however disputes that the deceased herein was the registered owner of the suit land. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
11. The Applicant herein has not produced any evidence to show that the deceased herein was the proprietor of L.R. Mwimbi/North Mugumango/1743.

In deed the grant which he obtained in the estate of the deceased Loyd Kimathi in this Succession Cause was obtained fraudulently by concealing from this court matters which were relevant and material to the case for the following reasons:-

- 1. The applicant did not annex any document to prove that the deceased owned any land. Form P&A 5 which is the affidavit in support of Petition for letters of Administration indicated that his estate is 0.35 out of Land Parcel No. Mwimbi/Mugumango/405. The Succession Cause was filed on 12/3/2013. As can be deduced from the certificate of confirmation of grant in Succession Cause No.143/2010 in Senior Resident Magistrate’s Court at Chuka, the grant had long been confirmed on 24/7/2012 and Land Parcel No. Mwimbi/Mugumango/405 distributed to the beneficiaries. The survey was done and Mutation Forms were issued on 6/11/2012. Title deeds were issued on 10/12/2012.

It follows that at the time the applicant was filing the Succession Cause, Land Parcel No. Mwimbi/Mugumango/405 was none existent.



The *Law of Succession Act* (Cap 160 Laws of Kenya defines estate at Section 3 as follows; “means the free property of a deceased person.” Free property on other hand is defined as follows:

“In relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death;”

This means that at the time of his death, the deceased must have owned the property with all the rights that appertains to a registered proprietor of the land. The applicant knew very well that at the time of filing this Petition Land Parcel No.405 Mwimbi/Mugumango was none existent and did not form the estate of the deceased as the land was registered in the name of their father.

2. The deceased in this case did not at any time during his lifetime own Land Parcel No. Mwimbi/Mugumango/1743. The certificate of official search dated 4/8/2022 shows that Land Parcel No. Mwimbi/N. Mugumango/1743 is registered in the name of Timothy Kiri Miriti.

The applicant seeks injunction over Land Parcel No. Mwimbi/Mugumango/1743. The annexed official search is for Land Parcel No. Mwimbi/N.Mugumango/1743. My reading of the two shows they are different and the applicant has not offered any explanation. The applicant seeks an injunction restraining the respondent from interfering with Land Parcel No. Mwimbi/Mugumango/1743. In the case of *Giella –v- Cassman Brown* (1973) E.A 358 the principles for granting of an injunction were well laid down and continue to guide the courts when dealing with the issue of granting of injunctions. The requirements are that the applicant must demonstrate that he has a prima facie case with probability of success, whether the applicant shall suffer irreparable injury which cannot be compensated by an award of damages, and if the court is in doubt, then it can decide the case on a balance of convenience.

In *Mrao Limited –v- First Amerian Bank of Kenya Ltd & 2 Others* Civil Appeal No.39/2002 the court described prima facie case as follows:-

“In Civil Cases, it is a case in which on the material presented to the court, a tribunal property directing itself, will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the letter.”

Injunctions are issued under Order 40 rule 1&2 of the Civil Procedure Rules. It provides:

1. Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or



after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

The applicant alleges that the respondents have trespassed on the said land and has refused to surrender the title deed. He further alleges that the respondents have started planting on the land and frustrated his effort to put up a structure. As the matters stand the respondent is the registered proprietor of the Land Parcel in dispute. The fact that the respondent is the registered proprietor is prima facie evidence that he owns the land. A registered owner cannot be restrained from using his own land. Be that as it may, the applicant has not demonstrated that the respondents have committed acts of waste on the said land. It is also a fact that the grant which the applicant seeks to enforce is only good for being revoked for not disclosing matters which were relevant and there being no prove that there existed any free estate of the deceased in this cause at the time of filing the Succession Cause. The applicant has no prima facie case with chances of success. In the circumstances, the orders the applicant is seeking cannot be granted. The applicant is attempting to open the Succession Cause No.143/2010 which was heard and determined and the grant effected. This court has no jurisdiction to arbitrate on that matter.

12. The estate in this succession cause is separate and distinct from the estate of the deceased’s father. As such, in the interest of justice and having considered the circumstance of this case, this Court has sufficient reason to invoke the provisions of Section 76 of the *Law of Succession Act*, Rule 73 of the Probate and Administration Rules to revoke, of its motion, the grant issued in this cause to the Applicant herein in respect of the original land parcel, that is, L.R. Mwimbi/North Mugumango/405.

Section 76 of the *Law of Succession Act* provides:

76. Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion- (a) that the proceedings to obtain the grant were defective in substance; (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

This is buttressed by Rule 73 of the *Probate and Administration Rules* which gives court power to make orders to meet the ends of Justice.

It provides:

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of court process.”

Section 47 of the *Law of Succession Act* gives this court jurisdiction to..... “pronounce such decrees and make such orders therein as may be expedient.”

Conclusion

For the reasons I have stated above, I find that this application lacks merits. I order that the grant issued in this matter is revoked and the proceedings are terminated. This file be closed.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 19TH DAY OF OCTOBER 2022.

L.W. GITARI

JUDGE

