



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 737 OF 1992

IN THE MATTER OF THE ESTATE OF KIRUTHU KIMITI (DECEASED)

PETER NGINGA KIGUTA.....APPLICANT

VERSUS

JANE WAITITU NJOROGE.....1ST RESPONDENT

JEAN VERA WAMBUI.....2ND RESPONDENT

CATHERINE NJERI NG'ANG'A.....3RD RESPONDENT

RULING

The Application

Peter Nginga Kiguta, the Applicant, has filed a Notice of Motion dated 16th October 2020 under Sections 1A, 1B, 1C of the Civil Procedure Act, Order 1 Rule 10, Order 40 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. He seeks the following orders:

1. That this Honourable Court be pleased to enjoin him as interested party to this suit.
2. That the Applicant be granted an interim order of injunction restraining the Respondents from trespassing into, interfering , dealing and/or wasting L.R. Ngenda/Githunguchu/1 in any manner prejudicial to the Applicant's interest.
3. That the 3rd Respondent transfer one acre to the Applicant after transmission of all the piece of land known as Ngenda/Githunguchu/2815.
4. That costs of this application be provided for.

The Notice of Motion is supported by grounds found on the face of the application and in the Supporting Affidavit sworn by the Applicant on 16th October 2020. He bases his claim on the grounds that he purchased one acre of land Title No. L.R. Ngenda/Githunguchu/2815 from the 3rd Respondent's husband on or about 4th January 2012; that the 3rd Respondent has attempted to evict him from the said piece of land and has filed an application seeking to have the administrators of the Estate compelled to sign all the requisite transmission documents so as to have all the land transferred to him; that the presence of the Applicant in this suit shall enable the court to effectively and completely adjudicate upon and settle all the issues in conflict and that none of the parties to the suit will be prejudiced by the Applicant being enjoined in the suit.

Affidavits

In his Supporting Affidavit sworn on 16th October 2020, the Applicant states that the 1st and 2nd Respondents are administrators of the Estate of Kiruthu Kimiti (deceased) while the 3rd Respondent is a beneficiary of the said estate by virtue of being the wife of the late Joel Ng'ang'a Kamau, a son of the deceased. He states that he entered into a sale agreement with the late Joel Ng'ang'a Kamau on or about 4th January 2012 with the full knowledge and consent of the 3rd Respondent to purchase 3 acres out of parcel of land Title No. Ngenda/Githunguchu/2815 which Joel Kamau inherited from the estate of the deceased in this cause. He states that the purchase price for the agreement was one million one hundred and ten thousand Kenya shillings (Kshs 1, 110,000). The Applicant states that after learning that the

land in question had been cautioned by a third party he abandoned the idea of buying 3 acres after having paid the purchase price; that he agreed to pay an extra four hundred and ninety thousand shillings (Kshs 490,000) for the purchase of one acre instead of 3 acres; that they signed an agreement dated 30th April 2016 to that effect with the 3rd Respondent witnessing the signing; that subsequently he went to the land with the surveyor ready to demarcate the same but the vendor refused to allow him to do so claiming that the land had not been sold.

The Applicant further states that he filed a case at the Environment and Land Court Nairobi being ELC Case No. 708 of 2016 which was subsequently transferred to ELC Gatundu and became Gatundu ELC Case No. 27 of 2019; that following the death of the vendor Joel Ng'ang'a Kamau before the determination of the Gatundu ELC case, the 3rd Respondent was substituted in his place and the Certificate of Confirmation of the Grant in respect of the Estate of Kiruthu Kimiti, deceased, was rectified to that effect; that he was summoned to appear for arbitration at the Ngenda Division ACC Office on 16th January 2020 with regard to land dispute on subdivision of L.R Ngenda/Githunguchu/2815; that the 1st and 2nd Respondents stated that they had refused to sign transfer documents because the 3rd Respondent wanted to frustrate the Applicant and other purchasers by refusing to include them as beneficiaries of the 3rd Respondent's late husband and that the 3rd Respondent aims to deprive the Applicant the portion of land that he had purchased.

The 1st and 2nd Respondents have filed their Replying Affidavit sworn on 20th November 2020 to this Notice of Motion. From my understanding of their Replying Affidavit, the 1st and 2nd Respondents are not opposed to the Notice of Motion by the Applicant. They agree with him that they are the administrators to the estate of Kiruthu Kimiti and that the 3rd Respondent is a beneficiary of the estate by virtue of being the wife of the late Joel Ng'ang'a Kamau a son of the deceased. They agree that the late Joel Ng'ang'a Kamau sold a piece of land, initially 3 acres which was subsequently reduced to one acre, out of his parcel of land L. R No. Ngenda/Githunguchu/2815 excised from L.R No. Ngenda/Githunguchu/1 to the Applicant and that the 3rd Respondent was aware of the sale agreement. They agree with the Applicant that after refusal by the late Joel Ng'ang'a Kamau to transfer the land to the Applicant, the Applicant sued him in ELC Case No. 708 of 2016 which became Gatundu ELC Case No. 27 of 2019. They confirm that the 3rd Respondent substituted her late husband following rectification of the confirmed grant. They agree with the Applicant in all his averments and support the prayers he is seeking in the Notice of Motion.

In her Replying Affidavit sworn on 3rd November 2020, the 3rd Respondent opposes the Notice of Motion and states that the application is an abuse of court process and vexatious. She deposes that the application is misguided and a strange pleading; that the Applicant is clearly in the wrong court because the matters and complaints he is alluding to belong to the estate of the late Joel Ng'ang'a Kamau and not the estate subject of this cause; that the Applicant has failed to demonstrate how he is a beneficiary of the estate of Kiruthu Kimiti, deceased; that the orders being sought are an exclusive preserve of the Environment and Land Court (ELC) and not this court and that the Applicant should approach the ELC for reliefs against the estate of the late Joel Ng'ang'a Kamau and not the deceased herein.

The 3rd Respondent further states that the Applicant is seeking to have the estate herein redistributed by seeking to be sneaked in as a beneficiary and he is being supported by the 1st and 2nd Respondents; that she is a stranger to the allegations by the Applicant and in any event the Applicant can pursue the estate of Joel Ng'ang'a Kamau; that there is no dispute of any nature pending in this cause except the 1st and 2nd Respondents' failure to undertake their duties as administrators of the estate at the behest of the Applicant; that the orders sought are speculative and are hinged on anticipatory outcomes of an alleged suit at Gatundu Law Courts and that this court has powers to ensure that parties do not engage in mischievous activities that only end up wasting court's time.

The 3rd Respondent asks this court to decline the Application dated 16th October 2020 and dismiss the same in the interest of justice.

In response to the Replying Affidavit by the 3rd Respondent, the Applicant has filed a further affidavit dated 4th December 2020 in which he reiterates his earlier averments in the Supporting Affidavit that he bought one acre from the late Joel Ng'ang'a and the 3rd Respondent and attached a copy of what he purports to be a sale agreement. He further confirms that he bought that piece of land after the confirmation of the grant in this estate when Joel Ng'ang'a was still alive.

Submissions

This court directed that this application be disposed of by way of written submissions. All the parties have filed their submissions. In his written submissions, the Applicant identifies two issues for determination by this court, namely:

(a) Whether this Honourable Court should enjoin the Applicant as an interested party in the suit?

On this issue, the Applicant argues that he ought to be enjoined as an interested party in this matter because he bought one acre of land Title No. L. R. Ngenda/Githunguchu/2815 which is an excise of land Title No. L. R. Ngenda/Githunguchu/1 from the late Joel Ng'ang'a Kamau which sale agreement was witnessed by the 3rd Respondent on 4th January 2012 and 30th April 2016. The Applicant cited **Johnson Muine Ngunza & Another v. Michael Gitau Kiarie & 2 Others [2017] eKLR** to emphasize the point that this court has inherent powers to make necessary orders for ends of justice to be met or to prevent abuse of the court process. He argues that there is compelling evidence that money was exchanged for the purchase of one acre of Ngenda/Githunguchu/2815 and that this was witnessed by the 3rd Respondent. He also cites the case of **Purity Wanjiku Muriuki v. Susan Muthoni Muriuki (Succession Cause No. 489 of 2014)** where the court cited with approval **Re Estate of Joseph Mutua Mutnguti (deceased) [2018] eKLR** in which the court took into account the agreements entered into between the deceased and creditors.

(b) Whether this Honourable Court has jurisdiction to hear, entertain and determine this matter?

The Applicant cites Rule 73 of the Probate and Administration Rules on the inherent power of the court to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of the court. He argues that his only interest in this matter is his part of share of one acre on Ngenda/Githunguchu/2815 that is being transmitted to the 3rd Respondent. He argues that it will be prejudicial to

him if the whole of 19.3 acres is transferred to the 3rd Respondent without orders of this court directed at the 3rd Respondent to transfer one acre to him after transmission of the piece of land known as Ngenda/Githunguchu/2815.

The Applicant invokes Article 159 of the Constitution of Kenya 2010 to the effect that “Justice shall be administered without undue regard to procedural technicalities” and concludes by stating that his application is meritorious and prays that this court allows the Notice of Motion with costs.

The 1st and 2nd Respondents filed their written submissions dated 17th December 2020. It is clear, without repeating everything the 1st and 2nd Respondents are saying that they support the Applicant word for word and have identified the same two issues for determination to wit: whether this Honourable Court should enjoin the Applicant as an interested party in the suit to which they submit in the positive and secondly, whether this court has jurisdiction to determine this matter, to which they agree. They argue that there exists agreements for sale to which the 3rd Respondent is aware of and had witnessed. They argue that money exchanged hands in respect of sale of land, initially 3 acres and subsequently one acre. They cite the Supreme Court decision of **Francis Karioko Muruatetu & another v. Republic [2017] eKLR** on the applicable principles upon which a party may be enjoined as an interested party. They argue that the interest of the Applicant has been clearly set out and that the 3rd Respondent ought to be ordered to transfer to the Applicant one acre of land out of Ngenda/Githunguchu/2815 after 19.3 acres have been transmitted to her.

On whether this court has jurisdiction, the 1st and 2nd Respondents argue that this court has jurisdiction to determine this matter donated to it by Rule 73 of the Probate and Administration Rules. They also cite **Floris Pierro v. Giancarlo Falasconi Civil Appeal No. 145 of 2012 (UR)** where the court invoked the inherent powers under Rule 73 of the Probate and Administration Rules.

In her submissions dated 16th December 2020, the 3rd Respondent states that the Law of Succession Act and the Rules made thereunder are exclusively for use in this honourable court and any Rules from the Civil Procedure Act incorporated must be done so under Rule 63 of the Probate and Administration Rules; that by bringing this application under Order 1 Rule 10, Order 40 and Order 51 of the Civil Procedure Rules without importing those Orders into the Probate and Administration Rules under Rule 63 means the application has no legs to support the application and the same must be dismissed. The 3rd Respondent cites **In re Estate of Sarastino M’chabari M’ukabi (deceased) [2019] eKLR** where the court while dealing with this issue cited with approval the decision of the Court of Appeal in **Josephine Wambui Wanyoike v Margaret Wanjiru Kamau & another [2013] eKLR** where the Court said:

“We hasten to add that the Law of Succession Act is self-sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same had been identified, some specific rules have been directly imported into the Act through its Rule 63 (1).”

On this point the 3rd Respondent is asking this court to dismiss the application forthwith.

The 3rd Respondent has proceeded to oppose the application by submitting that the prayer to enjoin the Applicant as a party in this cause is untenable because succession matters involve specific questions in respect to the free property of the deceased, identification of beneficiaries of the deceased and distribution of the assets of the deceased. She makes reference to the case of **In re Estate of Kamunge Kagithi Deceased [2019] eKLR** where the court cited with approval **Re: Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** and urged this court to be guided by these authorities in making its determination.

The 3rd Respondent submits further that the Applicant is neither a beneficiary of the estate herein nor entitled to any share from the assets of the deceased herein and that the Applicant is seeking similar orders in this court as he is in Gatundu SPMCC ELC No. 27 of 2019 which is an abuse of the court process. She submits that the Applicant is claiming against the estate of Joel Ng’ang’a which is a separate estate from the present estate and if the prayers the Applicant is seeking were to be granted this would wreak havoc in the administration of estates where beneficiaries have sought to dispose of their legacies.

On the prayer for interim orders of injunction, the 3rd Respondent submits that this prayer is misplaced and untenable because this court does not have jurisdiction to handle matters touching on title to land or occupation and use of land, a preserve of the Environment and Land Court; that the Applicant is seeking an order of injunction against Ngenda/Githunguchu/1 which is untenable because this parcel of land no longer exists as it was subdivided to various beneficiaries; that an order cannot be issued in a vacuum and that it seeks to overturn the entire confirmation of the grant.

On the prayer to transfer one acre in Ngenda/Githunguchu/2815 to the Applicant, it was submitted that the Applicant is not a beneficiary of the estate herein and therefore cannot purport to get any legacy by way of transmission from the estate herein and it would amount to amending the certificate of confirmation of the grant. The 3rd Respondent submits that the prayers sought in the application are not tenable and asks the court to dismiss the Notice of Motion with costs to her.

Determination

In determining this matter I want to narrow the issues for determination to two because in my considered opinion, in handling these two issues, this court will have determined all the issues arising from this application. I have identified these two issues thus:

- (i) Jurisdiction of this court.
- (ii) Merits of the Notice of Motion.

I have considered all the pleadings and submissions of the parties. It is clear to me and there is no dispute that land parcel No. Ngenda/Githunguchu/1 was an asset forming the estate of the deceased Kiruthu Kimiti. From the pleadings there is no dispute that the claim by the Applicant is not on this parcel of land but on Parcel No. Ngenda/Githunguchu/2815. It is my understanding that this parcel No. Ngenda/Githunguchu/1 was subdivided to beneficiaries following confirmation of grant and issuance of a certificate to that effect. Parcel No. Ngenda/Githunguchu/2815 was excised from the former parcel of land. It belongs to the estate of the late Joel Ng'ang'a Kamau, a son of the deceased in this cause and husband to the 3rd Respondent. It is obvious therefore the claim by the Applicant is not against the estate of the deceased in this cause but against the parcel of land that became the late Joel Ng'ang'a's legacy. Through the rectification of the grant the 3rd Respondent was substituted for her husband in respect of beneficiaries in this cause.

The Applicant claims purchaser's interest not beneficiary's interest. He alleges to have paid some amount of money for one acre of land out of parcel No. Ngenda/Githunguchu/2815. This is not the parcel of land in respect of the estate of the deceased in this cause. By his own admission, he states that he bought this one acre parcel of land after confirmation of the grant in respect of the estate herein. The certificate of confirmation shows that Joel Ng'ang'a Kamau or after the substitution the 3rd Respondent was entitled to 19.3 acres. Without belabouring the point, I will proceed and make a finding that this court, while sitting as a probate court, does not possess the jurisdiction to handle the purchaser's interest claimed by the Applicant. In so finding, I am persuaded by the decision of **Re: Estate of Alice Mumbua Mutua (Deceased) [2017]** cited with approval **In re Estate of Kamunge Kagithi (Deceased) [2019]**. The relevant paragraphs reads as follows:

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of the survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

*. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. **Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most case be functus officio so far as the property in question is concerned.**” (emphasis mine).*

I need not say more. It is clear to me that the dispute between the Applicant and the late Joel Ng'ang'a Kamau and by extension the 3rd Respondent arose after the grant was confirmed. This court does not have jurisdiction to entertain this dispute. The Applicant has already moved the ELC. He ought to be patient and wait for the wheels of justice in that court to turn to the conclusion in respect of his case. To entertain his application in this cause is to encumber the estate of the deceased with unnecessary burden on matters of no concern to that estate.

Where a court lacks jurisdiction, it has no business proceeding with the matter and ought to down its tools. Before I do so however, I need to address the second issue in this matter. On this issue I agree with the 3rd Respondent that the Applicant failed to bring this application under the provisions of the Civil Procedure Rules that are acceptable under Rule 63 of the Probate and Administration Rules. Save for Order 40 of the Civil Procedure Rules, the rest of the provisions of the Civil Procedure Rules cited by the Applicant do not form part of Rule 63 of the Probate and Administration Rules thereby making this application untenable. Secondly, as stated above the Applicant is wrongly before this court. He ought to pursue his claim in the ELC where the matter is still pending.

In conclusion therefore, after considering all the application and all the affidavits in support and the Replying Affidavits as well as written submissions and authorities relied on by all the parties, it is my finding, and I so hold, that this court cannot entertain this application. It would be stretching the law too far to rely on the inherent powers donated to this court by virtue of Rule 73 to vest jurisdiction on itself on a matter that fits squarely in the ELC. I need to mention here that I am surprised by the 1st and 2nd Respondents for supporting the Applicant in his application. In my view they have involved themselves in a matter that lies outside their responsibility as administrators of the estate of Kiruthu Kimiti, deceased. They ought to have remained neutral and leave the Applicant to prosecute his application against the 3rd Respondent without siding with him if they did not think that the 3rd Respondent was worthy of their support.

The Notice of Motion dated 16th October 2020 is hereby dismissed in its entirety with costs payable by the Applicant to the 3rd Respondent. Orders shall issue accordingly.

Dated, signed and delivered on this 18th day of January 2021.

S. N. MUTUKU

JUDGE