



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1278 OF 1992

IN THE MATTER OF THE ESTATE OF CHARITY KANYI KINYANJUI(DECEASED)

AGNES NYAMBURA.....1ST APPLICANT

MAINA KINYANJUI.....2ND APPLICANT

MUCHINA KAMAU KINYANJUI.....3RD APPLICANT

VERSUS

FRANCIS KIMANI KINYANJUI.....1ST RESPONDENT

JOSEPH WAIRACHU KINYANJUI.....2ND RESPONDENT

JUDGMENT

1. The deceased herein in respect of whose estate these proceedings relate died intestate on 28th August 1992. She was survived by-

- (a) Mary Waithera Mathara
- (b) Jane Wacuka Kinyanjui
- (c) Ann Mugure
- (d) Faith Wanjiru
- (e) Juliana Wairimu Kamara
- (f) Joseph Wairachu
- (g) Francis D. Kimani Kinyanjui
- (h) Wanjiku Kinyanjui

2. On 7th October 1992 Francis D. Kimani Kinyanjui and Joseph Wairachu Kinyanjui filed a Petition for a Grant of Letters of Administration Intestate. Among the assets listed as comprising the estate are;

- (a) L.R. Loc 4 Kaguthi/532 – Muranga – 2.83ha.
- (b) Parcel Loc 4/Gakarara/401 – Muranga – 5.87ha.
- (c) Parcel Loc. 3/Githumu/568 Muranga – 4.05ha.
- (d) Business Commercial Residential Plot at Kandara

3. A Grant of Letters of Administration was issued to the two Petitioners namely Francis D. Kimani Kinyanjui and Joseph Wairachu Kinyanjui as joint Administrators on 7th January 1993. The said Grant was confirmed on 9th April 2018 and the estate distributed as follows;

(a) Land Parcel No. Loc.3/ Githumu/ 568 (10 acres) to Joseph Wairachu Kinyanjui 7.4 acres, Kinyanjui Wairimu 2.0 acres and Julia Wairimu 0.6 acres.

(b) Land parcel No. Loc.4/Kaguthi 532, (7 acres) to, Faith Wanjiru Kinyanjui 3.0 acres, Ann Mugure Kinyanjui 3.0 acres, Julia Wairimu 4.0 acres and Kelvin Kinyanjui Wanjiku 6.0 acres.

(c) Land Parcel No. Loc.4/Gakarara/401 (14.5 acres) to: Francis Kimani Kinyanjui 9.4 acres, Caroline Njeri Wacuka 3.0 acres and Kelvin Kinyanjui Wanjiku 2.4 acres.

(d) Plot No. 52 (Kandara town) Joseph Warachu Kinyanjui and Francis Kimani Kinyanjui to be registered jointly.

4. It is worth noting that the deceased had predeceased her late husband Fredrick Kinyanjui Kimani who died later on 28th February 1994.

Applicant's Case

5. Vide a Summons for Revocation of Grant dated 28th June 2018 and filed on 2nd July 2018, Muchina Kamau (3rd Applicant) claiming to be in possession of a Power of Attorney donated to him by Agnes Nyambura (1st Applicant) and Maina Kinyanjui (2nd Applicant) sought various orders pursuant to Section 76 of the Law of Succession. Among the orders sought are;

(1) Spent

(2) That a temporary order of injunction be issued restraining the Defendants either by themselves, their agents, servants, and/or employees from transferring, disposing, alienating or in any other manner whatsoever interfering with the parcel of land comprised in title No.Loc.3/Githumu/568, Loc. 4/Gakarara/401, Loc. 4/Kaguthi/532 and Plot No. 52 Kandara Market pending interpartes hearing of this application and/or further orders of this Honourable Court.

(3) That the Grant of Letters of Administration issued to Francis D. Kinyanjui and Joseph Wairachu Kinyanjui on 31st March 1993 and consequently confirmed on 9th April 2018 be revoked.

(4) That costs of this application be provided for.

6. The application is premised upon grounds stated on the face of it and an affidavit sworn on 28th June 2019 by one Muchina Kamau. When the application came up ex parte, the Court certified the same and granted prayer two pending interpartes hearing.

7. According to the Applicants; the Respondents acted in an orchestrated move aimed at disinheriting them from what is rightfully theirs after secretly obtaining the Certificate of Confirmation of Grant in respect of the deceased's estate; that the Applicant who is a co-wife to the Deceased aged 86 years, ailing and senile has lived in Plot No. 52 Kandara Market since time immemorial hence under threat of eviction; that the Grant was obtained fraudulently by the making of a false statement; that the Grant was obtained fraudulently by concealment from the Court of something material to the case and; that the Grant was obtained by untrue allegation of a fact essential in point of law to justify revocation of the grant.

8. For the sake of clarity, the 1st Applicant Agnes Nyambura was the second wife to the late Fredrick D. Kamau and also a co-wife to Charity the deceased herein being the first wife to the said Fredrick D. Kamau. On the other hand, the second Applicant is a son to Nyambura the 1st Applicant while the 3rd Applicant is a villager who claims to have been given a Power of Attorney by the 1st and second Applicants on account of their senility and financial inability to represent them in processing this case on their behalf.

9. It is the Applicant's claim that they came to learn of this case after the Respondents in their capacity as administrators sued them in Kandara law Courts seeking to restrain them from interfering with Land Parcel Nos. Loc 3/Githumu/568, Loc.4/Gakarara/401 and Loc. 4/Kaguthi/532. He attached a ruling delivered on 24th May 2018 by the SRM Kandara (Ex. 4) whereby the Applicants were restrained from trespassing on the four parcels of land pending full trial.

10. It's the Applicant's averment that sometime between 1962 and 1965, or thereabouts, the late Fredrick Kinyanjui Kimani transferred the parcels of land in question to Charity the deceased herein (first wife) so as to avoid auctioning of the said properties by a creditor he owed some money.

11. That in consideration of love and affection, the late Fredrick Kinyanjui Kimani entrusted his 1st wife Charity Kanyi the aforesaid parcels of land on the understanding that the late Charity was to retransfer the same parcels of land back to him after the issue of payment of debts by her husband was settled.

12. He averred that after settling the said debt, Charity refused to surrender the land back thus prompting her husband Fredrick to file **Civil Suit 3115/1982** Sheria House seeking orders to compel her to retransfer the land back. That unfortunately, Fredrick died before conclusion of the said case which nobody took over from him despite a panel of elders to whom the court had referred the case for arbitration making an order in favour of Fredrick Kinyanjui.

13. He further averred that after Fredrick's death, his daughter Waithera filed **Succession Cause No. 291/1998** in respect of his estate but the same hit a snag after Waithera mysteriously died.

14. They stated that due to the 1st and 2nd Applicants' advanced age and financial inability, they engaged the 3rd Applicant to pursue the case for them. They further stated that the 1st Applicant has been staying in Plot No. 52 Kandara Market which has one residential commercial house from which the Respondents are collecting rent as it is registered in the late Charity's name.

15. They contended that the four parcels of land belonged to Fredrick and were transferred to Charity to hold in trust for the entire family and therefore the Applicants ought to have been consulted and given their half share. That the 1st and 2nd Applicants are in priority entitled to take Letters of Administration.

16. During the hearing, the Applicants called four witnesses. PW1 James Maina Kinyanjui (2nd applicant) a son to the 1st Applicant adopted the content contained in his witness statement dated 5th October 2018 in which he reiterated the averments contained in his affidavit in support of the revocation application. He basically emphasized that his mother Agnes being a co-wife to the deceased herein Charity Kanyi was entitled to a half of the estate which was held in trust for their benefit by Charity (Deceased). He beseeched the Court to revoke the Grant and share the four assets herein into two equal shares for each house (wives to Fredrick Kimani).

17. On cross examination, he told the Court that he is staying in a rental property although his mother is staying in Plot No. 52 Kandara registered in Charity's name.

18. PW2 James Samuel Muturi a son in law to Charity also adopted his witness statement dated and filed on 5th October 2018 in which he basically supported the testimony of PW1. He stated that he was one of the witnesses in support of Fredrick Kamau, in the case filed at Sheria House by Fredrick Kimani against his wife Charity in which he was demanding return of his land back. He basically adopted the averments contained in the affidavit in support of the application for revocation. In cross examination, he stated that he did not know the year Fredrick transferred his land to his wife Charity. He also admitted that he divorced with Charity's daughter long time ago although he quickly added that he has no grudge with the in-laws.

19. PW3 Daniel Nyururu also adopted the content contained in his witness statement dated 5th October 2018. He stated that the late Fredrick was his step father, a friend and a close confidant. He basically corroborated the evidence of PW1, PW2 and PW3 stating that Charity was holding the parcels of land in trust for the family of Fredrick. He claimed that Plot No. 52 Kandara Market was bequeathed to Agnes the 1st Applicant before the deceased died. On cross examination, he stated that Nyambura was married in 1962.

20. PW4 Agnes Nyambura (1st applicant) the second wife to the late Fredrick Kamau, also adopted the content contained in her witness statement recorded and filed on 5th October 2018 in which she also reiterated almost word by word the averments contained in the affidavit in support of the application for revocation sworn by Muchina Kamau.

21. She stated that she as the second wife to Fredrick got three children with Fredrick namely; Waithera Kinyanjui, Kimani Kinyanjui and Maina Kinyanjui. That out of the three, it is only Maina Kinyanjui (second Applicant) who is alive. That her two deceased children were buried on her late husband's L.R. No. Loc. 4/Gakarara (401). She claimed that before her husband died, she used to live with him at Kandara Plot 52 which she occupies todate.

22. She further claimed that she used to cultivate L.R. Loc. 4/Gakarara/401 and that she has 1,500 coffee trees thereon until she was served with a Court order from Kandara Law Courts stopping her from cultivating the said land. She insisted that the four parcels of land belonged to her late husband who transferred them to her co-wife Charity for convenience purposes to avoid them being auctioned due to a debt owed to some Indian creditor.

Respondents' Case

23. Upon being served with the application for Revocation, Francis Kimani Kinyanjui filed a replying affidavit sworn on 13th July 2018 claiming that the application is frivolous, misconceived, vexatious and that the grounds of fraud are not particularized. He averred that the 3rd Applicant who purports to have a Power of Attorney to represent the 1st and 2nd Applicants is a person of questionable character who had disinherited the 1st and 2nd Applicants by selling their properties in Gathanga, Nairobi, Kandara and Makuyu. He further averred that the 1st and 2nd Applicants are not senile and that they are knowledgeable and understands every detail about the case.

24. He further stated that the applicants are not direct beneficiaries of the estate hence have no interest in claiming a share of the estate. He contended that the properties in question were simply acquired by Charity and that they were transferred to Charity between 1961-1962 before Agnes Nyambura was married to avoid Agnes Nyambura claiming a share after her marriage to Kinyanjui. He further stated that the 1st and 2nd Applicants have never resided in the parcels of land in question which land they (Respondent and her children) have developed for the last 40 years.

25. He went further to state that there are already adverse orders issued against the Applicants by a Kandara Court in **Civil Case No. 22 of 2018** in which they are claiming ownership of the same parcels of land. He acknowledged that out of the rental income received from Plot No. 453/980 Thika and Kandara Plot No. 401 Kandara, the same is shared out equally between the two houses. He further claimed that these proceedings have been instigated by the 3rd Applicant to serve his own personal interest.

26. He denied the claim that his father had a credit facility with an Indian thus forcing him to transfer the property to Charity. Instead, Francis argued that, the only loan the father had was with Barclays Bank after charging L.R. Loc 4/Gakarara/401 was Kshs. 7,900/- which money he (Fredrick) paid. As proof of that charge, he attached a copy of the green card marked FKK-2.

27. In their rejoinder to the replying affidavit, Muchina Kamau swore a further affidavit on 27th September 2018 asserting that he was properly appointed as a donee. He claimed that he was neither a beneficiary nor a survivor of the deceased nor an interested party in the suit but an agent of the 1st and 2nd Applicants.

28. He went further to state that the 2nd Applicant is a dependant to the deceased under the Law of Succession. He asserted that the deceased was a house wife to the late Fredrick who was then working with the Military and that Charity had no means of acquiring property as claimed.

29. In response to the further replying affidavit, Francis Kimani Kinyanjui filed an undated further replying affidavit filed on 21st September 2018 stating that the 3rd Applicant is an influential person who manipulated Kandara Police to enter into Loc. 3/Githimu/568 and cut down trees valued at over 6 million which is sold for his own benefit.

30. In his testimony, Francis Kimani (DW1) adopted the content in his witness statement dated 15th November 2018 in which he also reiterated the averments contained in the replying affidavit to the application for revocation of grant.

31. He acknowledged that the 1st Applicant was the second wife to his father Fredrick. That Agnes left his father's home in 1968 with her two children Waithera Kinyanjui and Kimani Kinyanjui. That Agnes returned to his father two weeks before he (father) died. He contended that the properties in question were already registered in his mother's name even before the 1st Applicant Agnes got married to his father Fredrick. That out of the four properties, only Plot No. 52 Kandara market and Loc. 3/Githimu/568 were gifted to his mother Charity by the father.

32. He stated that at some point his father filed a Civil Suit against his mother seeking return of Plot 52 Kandara and L.R. Loc. 3/Githimu/568. He contended that the 2nd Applicant is a well-known broker in the village who has no interest in the suit herein. He stated that save for Plot No. 52 Kandara which was given to his mother in 1962, the rest of the properties were allocated to his mother in 1957 during demarcation and registered in 1961 long before Agnes' marriage in 1963.

33. DW2 Joseph Wairachu the 2nd Respondent corroborated the testimony of DW1 after adopting his witness statement dated 15th October 2018. He stated that his father left a plot in Thika and Kandara from which they collect rent and share equally between the two houses.

34. DW3 Hannah Mugure a daughter to the late Charity, also adopted the contents contained in her witness statement recorded on 15th November 2018. She corroborated the evidence of her brothers (DW1 and DW2). She however stated that, they can give their step mother Agnes one or two acres.

35. After closing their case on 11th June 2019, parties agreed to file their submission within 30 days. Mention was fixed for 23rd July 2019. For some reason, submissions could not be filed in time and the file kept appearing before the DR till 19th October 2020 when it was mentioned before me for fixing a date for highlighting.

Submissions

Applicant's Submissions

36. Through the firm of Ndegwa and Associates, the Applicants filed their submissions on 22nd July 2019. Counsel submitted that the parcels of land in question were registered in Charity's names under customary law as an overriding interest under Section 28 of the Land Registration Act 2012. Counsel opined that the late Fredrick's interest as husband to Charity did not need to be registered in the land register.

37. Counsel submitted that besides spousal rights which Fredrick had on land held by Charity, there was customary trust as canvassed in the case of **Wanjiku Ng'ang'a vs Njenga Nganga Civil Case No. 3084/1992 (2015)eKLR** in which Osiemo J stated that:-

“I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intentions of the parties that there would be such a trust under the Kikuyu Customary Law in common. Registration of Titles are a creation of law and one must take into consideration factors surrounding the registration of the titles to determine as to whether a trust was envisaged.”

38. In further support of the proposition that Charity (Deceased) held the properties in question in trust for Fredrick's family, Counsel referred to the holding in the case of **Jason Gitimu Wangara and Martin Munene Wangara and Others (2013)eKLR** in **ELC Case No. 278 of 2013** where the Court found that the Plaintiff was holding the suit property in trust for the family and that registration did not relieve him of his duties as a trustee.

39. According to the learned Counsel, the long period of occupation in the Loc. 4 (Gakarara /401) over 70 years uninterrupted implies that Charity was a mere trustee.

Respondent's Submissions

40. Through the firm of Gitonga Muriuki and Co. Advocates, the Defendants filed their submissions on 6th August 2019 basically reiterating in every detail the averments contained in the affidavit in reply to the application for revocation.

41. Counsel submitted that under Section 8 of the Matrimonial Property Act, any property acquired between a first wife and a spouse before the second wife belongs exclusively to the husband and the first wife to the exclusion of the first marriage.

42. According to learned counsel, the properties in question were acquired and registered in the deceased's name before Agnes got married to Fredrick hence the issue of trust does not arise. Mr. Muriuki submitted that for a trust to arise salient ingredients must be present inter alia; intent to create a trust; existence of a valid trust which must have a specific purpose and may not further illegal activity and trust must carry some form of property.

43. In Mr. Muriuki's view, there was no trust created between Charity and Fredrick. Touching on dependency, Mr. Muriuki submitted that neither Mr. Fredrick Kimani nor the Applicants were dependants to the deceased as envisaged under Section 29 of the Law of Succession. Regarding transfer of the said property, learned Counsel submitted that there was no proof that the properties were at one time registered in Fredrick Kimani name before any alleged transfer to Charity.

44. Mr. Muriuki submitted that he who alleges must prove. In support of this submission, Counsel relied on the holding in the case of **Kipkebe Limited Vs. Peterson Ondieki Tai (2016)eKLR**.

Determination

45. I have considered the application herein, responses thereto, testimonies by the respective parties and rival submissions by both Counsel. Issues that arise for determination are;

- (1) Whether the Applicants have met the criteria for revocation of a grant under Section 76 of the Law of Succession.**
- (2) If the answer to the above is in the affirmative, whether the Applicants are entitled to be enjoined as co-administrators.**
- (3) Whether the 1st and 2nd Applicants are entitled to a share of the estate.**

46. For convenience purposes, I will deal with issues No. 1 and 2 together considering that they are intertwined. The 1st and 2nd Applicants are seeking revocation of the Grant herein on grounds that it was obtained through fraudulent means and with concealment of material information or facts. According to the Applicants, the Respondents did not seek their consent nor consult them as interested parties to the estate on account of customary trust.

47. It is trite law that a party seeking to revoke a grant must prove the ingredients contained under Section 76 of the Law of Succession which provides;

“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;**
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or**
 - (ii) to proceed diligently with the administration of the estate; or**
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**
- (e) that the grant has become useless and inoperative through subsequent circumstances.”**

48. Proof of one or more of the above ingredients is critical before a Court could exercise its discretion to revoke the Grant. See **Matheka and Another Vs. Matheka (2005)IEA 251**.

49. It is however worth noting that to revoke or not to revoke a grant is a matter of discretion exercised by the Presiding Court taking into account that the end result must meet the attainment of substantive justice. In emphasizing the role of the Court in revocation of grant proceedings, the Court in the case of **Nyaga Cottolengo Francis Vs. Pius Mwaniki Karani (2017)eKLR** held as follows:-

“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.”

50. The Applicants are claiming that the grant was obtained fraudulently. Unfortunately, the claim of fraud was made without proof. It was incumbent upon the Applicants to prove the nature of the alleged fraud with full particulars. The law is settled that he who alleges must prove. See Kipkebe Limited Vs. Peterson Ondieki Tai (supra).

51. Having held that the Applicants have not proved the ingredients of fraud that ground fails. Were the proceedings defective in nature? No illegality or defect was cited in instituting these proceedings. That ground is not also proven.

52. From the pleadings, evidence and submissions of the Applicants, their major contestation is that they were not consulted nor was there disclosure that they were beneficiaries entitled to a share of the estate on account of trust hence the claim of concealment and non-disclosure of material information.

53. The question which then begs an answer is whether, the Applicants were supposed to be consulted? There is no dispute that the 1st Applicant was a co-wife to the deceased. It is also not in dispute that the 2nd Applicant was a step son to the deceased. Equally, it is admitted that the 3rd Applicant has no interest in the estate as he is not at all related with the deceased. Ideally and for all purposes and intents, the 3rd applicant is a stranger in these proceedings.

54. Under Section 66 of the Law of Succession, the law is very clear as to who is supposed to take out a grant of representation in order of priority. For avoidance of doubt, Section 66 of the Law of Succession provides;

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors.”

55. Under Part V referred by Section 66 falls Section 38(a) which provides that where the intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be any one, or equally divided among the surviving children.

56. Section 39 goes further to provide that, where there is no spouse, child or children, the intestacy estate shall devolve upon the kindred of intestate as to;

(a) father; if dead

(b) mother; if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity

57. From the above cited provisions, step children or co-wives are not mentioned. To that extent, the Respondents legally had no duty to seek consent from any of the Applicants as they are not direct beneficiaries to the estate nor survivors of the deceased. The best that would have happened was for the deceased’s husband one Fredrick to institute probate proceedings in respect of his deceased wife’s estate which he did not. The claim that he attempted but he was denied the burial permit of his wife is now water under the bridge as he later died before exercising his right to inherit his wife’s estate.

58. In the case of In the Matter of the Estate of Joshua Orwa Ojode (Deceased) (2014)eKLR the Court was categorical on who is to take out a grant of representation in order of preference in an intestate estate as follows;

“Going by the above provision, where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no

surviving spouse or child.”

59. In view of the above holding, it was not necessary for the Respondents to consult the Applicants hence no concealment of material facts or information on that ground. Were the Respondents supposed to disclose that there were other interested parties in the estate? Basically, they had no good reason because, the properties in question were all registered in the name of their mother as the absolute owner.

60. As submitted by Mr. Muriuki, there was no proof that the properties in question were at any one time registered in the name of the deceased's husband and then later transferred to the deceased (Charity). They had no reason to disclose that there were interested parties considering that all the properties were registered in the name of the deceased (first-wife) way back between 1959-62 before the 1st Applicant was married. I do not think they had a duty to disclose to the Court that there were 3rd parties interested in the estate.

61. Regarding the claim that the late Fredrick was a dependant to the deceased Charity, it is contradicting as the Applicants claimed in their evidence that Charity was a house wife who depended on her husband who was working with the Armed Forces. In any event, the Applicants have not proved that they themselves were dependants to the deceased herein.

62. For the above reasons stated, the ground of non-disclosure of material facts or information does not apply.

63. Regarding the 3rd issue on whether the Applicants are entitled to a share of the estate on account of customary trust, the Court will have to examine its jurisdiction in determining this issue. The Applicants are clearly relying on customary law trust to claim that the deceased held the property in trust of the late Fredrick and by extension to themselves. Can this probate Court determine land disputes based on trust? **In Re Estate of Solomon Mwangi Waweru (Deceased) (2018)eKLR** the Court had this to say:-

“Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court.”

64. The Court went further to state that;

“It is my opinion that the fact that the Applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of that property stayed by the succession cause. The Applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land Court. The law provides an avenue for the Objector to access conservatory orders at the Environment and Land Court. The Succession Court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of such a suit.”

65. Similar position was held in the case of **In the matter of the Estate of Peter Igamba Njoroge Nakuru Succession Cause No. 432 of 2009** and **Succession Cause No. 864 of 1966 (2015)eKLR** in which the Court stated that:-

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

66. It's clear from the pleadings and testimony of all witnesses that there is a suit pending before Kandara Court where the issue of ownership dispute is pending. In that case the Respondents have an injunction against the Applicants restraining them from interfering with the four portions of land. There is also a counter claim by the Applicants claiming a right of ownership. With these proceedings in place pending determination, this Court cannot encroach by making a determination on trust issues. To do so will be tantamount to encroaching to another Court's mandate hence prejudicing the outcome in that other Civil Suit.

67. In any event, where a party is claiming ownership on account of trust touching on land already registered on the deceased's name, it is prudent for the claimant to file a substantive suit before the Environment and Land Court to exhaustively determine land ownership dispute. In this case, I do not think this Probate Court is properly seized of this matter. Since there is a suit pending over the same subject property, it is prudent to let the full process in that case take its course. We cannot hold parallel proceedings over the same subject. What will happen to the Kandara Court case if I were to go on and determine this matter?

68. In my view, the Applicants should pursue a Civil Suit to determine the issue of customary trust. It is after they obtain that determination in that case that they can seek review of their orders of confirmation in this case.

69. For the above reasons stated, I am satisfied that the Applicants have not met the threshold for revocation of the grant. I will however direct that further execution of the Confirmed Grant is hereby stayed pending the outcome of **Kandara SRM's Court Civil Case No. 22 of 2018** which should be fast tracked or any other ELC case which if not filed Should be instituted within 90 days in default execution of this grant to proceed.

70. Since the properties in question are already enjoined under **Kandara Civil Suit No. 22 of 2018** and considering that this Court has stayed further execution of the Confirmed Grant by way of effecting any transfer to any other person pending the outcome of the pending suit or any suit to be filed within 90 (ninety) days, the interim orders issued on 2nd July 2018 are hereby lifted.

71. Concerning costs, this is a family matter hence each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF JANUARY, 2021.

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J. N. ONYIEGO

JUDGE