



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U)

CIVIL SUIT NO. 11 OF 2017

WILFRED AYIECHA NYANG'AU.....APPLICANT

VERSUS

JANE SIGARA NYAMARI.....RESPONDENTS

JAMES OGETO ONKUNDI

RULING

1. The application before this court is dated 3rd March 2020 and is expressed to be brought under Section 3A, 34 and 63 (E) of the Civil Procedure Act and all other enabling provisions of the law. It is supported by an affidavit sworn by the applicant on 3rd March 2020 and the grounds set out in the application. The following orders are sought in the application:

- 1) **THAT** Jane Sigara Nyamari & James Ogeto Onkundi be compelled to transfer to the applicant a portion of land measuring 4.9 acres as per the decree dated 18th December 2018;
- 2) **THAT** in default, the Deputy Registrar of this court be mandated to sign and execute all the necessary forms for the transfer of a portion of land out of LR. No. Isoge/Kineni Block 1/586 measuring 4.9 acres on behalf of Jane Sigara Nyamari & James Ogeto Onkundi the respondents herein;
- 3) **THAT** upon prayer 1 & 2 above being granted, the Land Registrar- Nyamira do issue a Title Deed in favour of the applicants; and
- 4) **THAT** this court be pleased to make any other relief just and fit to the applicant.

2. The applicant averred that this court ordered the respondents to transfer a portion out of LR No. Isoge/Kineni Block 1/586 measuring 4.9 acres into his name in its judgement delivered on 18th December 2018. Despite making several follow ups with the respondents, they had not complied with the court's orders. The applicant claimed that other parties had complied with the judgment save for the respondents who had been dragging their feet and it would be in the interest of justice for this court to issue orders compelling them to execute all the necessary transfer forms to him or in default the Deputy Registrar be directed to sign them.

3. No response was filed in opposition to the application although the respondent's learned counsel filed written submissions.

4. The applicant's learned counsel also filed his written submissions in support of the application. He urged that under Section 34 of the Civil Procedure Act, this court is empowered to make a determination of any issue that was not determined at the time of the pronouncement of the decree. That in the decree, it was not determined how the transfer of 4.9 acres in favour of the applicant was to be effected, hence the application before this court.

5. On the other hand, the respondent's learned counsel argued that this court lacks jurisdiction to order the Deputy Registrar to sign transfer documents related to the estate even if the administrator has refused or failed to execute transfer. To support his argument, counsel cited the case of *In re Estate of Reuben Mugesani Bulimu (Deceased) Succession Cause No. 847 of 2013 [2020] eKLR* where Musyoka J. held:

7. After a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission, of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. That would involve, where the property has to be shared amongst many persons, the subdivision of the property, before the resultant subtitles

are registered in the names of the beneficiaries. Transmission is not provided for under the Law of Succession Act, nor under the Probate and Administration Rules. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation. The principal legislation is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.

6. He urged that the respondents in this case are not the administrators of the estate and this court cannot direct them to perform duties reserved for administrators under the law. Counsel submitted that the court with the requisite jurisdiction to handle the matter was the Environment and Land Court and that this court lacked jurisdiction to grant the reliefs sought.

7. The decree which is the subject of this application was given on 18th December 2018, pursuant to an Originating Summons dated 13th October 2014, which had been filed by the applicant and other beneficiaries of the estate of Onkundi Ogeto, contesting the distribution of the deceased's estate. The applicants in those Summons had learnt that the respondents and other beneficiaries of the estate had subdivided the deceased's Land Parcel No. Isoge Kineni Settlement Scheme Block I/61 and transferred portions of the land to themselves.

8. It was agreed that the Originating Summons dated 13th October 2014 be referred to arbitration by the Borabu Sub-County Commissioner. Based on the award made by the Sub-County Commissioner, the parties negotiated a settlement and the matter was marked as settled in terms of the parties' consent. Of concern in this application, are the following two paragraphs of the decree:

3. *Land parcel number Isoge Settlement Scheme/Block I/586 belongs to the second house of the late Onkundi Ogeto and their mother is the late Drusila Kwamboka Onkundi. The beneficiaries of this parcel of land are James Ogeto Onkundi and Jane Sigara Nyamari and they are in possession of their house's share of land and they are satisfied with it. The administrator do transfer this land to them;*

4. *The third applicant Wilfred Ayiecha Nyangau had come to live with his aunt the late Drusila Kwamboka Onkundi. The children of the late Drusila Kwamboka being James Ogeto Onkundi and Jane Sigara Nyamari have accepted to give him a share of land in their land known as Isoge Kineni Settlement Scheme/Block I/586 where Wilfred Ayiecha Nyangau is staying and the land has demarcations."*

9. My understanding of the orders reproduced above, is that the administrator of the estate of the deceased was required to transfer Land parcel number Isoge Settlement Scheme/Block I/586 to the respondents and they would in turn excise the portion of Land parcel number Isoge Settlement Scheme/Block I/586 where the applicant had been residing and transfer it to him.

10. The application before this court is for enforcement of paragraph 4 of the consent decree dated 18th December 2018. The respondent's learned counsel has argued that this court lacks jurisdiction to determine the application for the reason that transmission of property is in the purview of the Environment and Land Court. I have perused the case of *In re Estate of Reuben Mugesani Bulimu (Deceased)* which the applicants relied on in support of this position. At paragraph 10 of that decision, Musyoka J. held as follows:

10. *It would appear, as the record is silent on what the administratrix might have done, in an effort to effect transmission, that the matter moved to that stage, and the administratrix ran into some difficulties with the process, ostensibly caused by beneficiaries who did not cooperate with her. She came back to court vide a Motion dated 25th September 2019, to ask the court to direct the Deputy Registrar of the court to sign necessary forms to facilitate transmission as Ronald Odali Mugesani, Brenda M'mbone Bulimu and Ruth Iminza, who were said to have had failed to cooperate by signing the documents. The Motion came up first on 8th May 2019, but I put it off as there was no evidence that the same had been served on the three individuals. It came up again on 24th September 2019. The applicant, Ruth Iminza was in attendance, she confirmed that she had been served, and said that she had not refused to sign the relevant papers. I granted the application.*

11. The above excerpt shows that the learned judge issued orders that were necessary to facilitate the transmission of the property by directing the Deputy Registrar of the court to sign the necessary forms due to the parties' reluctance to do so.

12. Similarly, in *Tabitha Wangithi Muriuki v Wathiba Kimoo SUCCESSION CAUSE NO. 372 OF 2012 [2020] eKLR* the court held:

"By ordering the Deputy Registrar to sign, the court will only be ensuring that the judgment is complied with and will not be descending into the arena of conflict. The orders are necessary for the ends of justice and to ensure that a party reaps the fruits of judgment and prevent abuse of the court process. I therefore find that the application has merits."

13. Although the applicant erroneously imported the provisions of the Civil Procedure Code into this matter, I find the error would not be sufficient ground to dismiss an otherwise meritorious application and is curable under Article 159 (2) (d) of the Constitution. The Law of Succession Act is a self-sufficient piece of legislation with its own substantive law and rules of procedure. (See *Josephine Wambui Wanyoike v Margaret Wanjira Kamau & another Civil Appeal No. 279 of 2003 [2013] eKLR*)

14. Under **Section 47 of the Law of Succession Act**, this court is empowered to entertain any application and determine any dispute and make such orders therein as may be expedient. **Rule 73 of the Probate and Administration Rules** also provides that this court has inherent powers to make orders as would be necessary for the ends of justice.

15. The application before this court is intended to finalize the distribution of the estate of the deceased which is a matter within the jurisdiction of this court.

16. The respondents have not refuted the applicant's assertion that all other parties have complied with the above mentioned decree of the

court and I would surmise that the administrator has already undertaken her duty to transfer Land parcel number Isoge Settlement Scheme/Block I/586 to the respondents. There is no contestation to the fact that the respondents have not transferred a portion of Land parcel number Isoge Settlement Scheme/Block I/586 to the applicant as directed by the court.

17. Since the subject decree of the court has not been altered or appealed against, the respondents are required to comply with the orders of the court as set out in that decree. The applicant has asked this court to remind the respondents of their obligation under the decree. His assertion that he has been in occupation of 4.9 acres of Land parcel number Isoge Settlement Scheme/Block I/586 has not been challenged. According to the decree, that portion is already demarcated on the ground.

18. I find that the orders sought would move this matter towards closure and will serve the interest of justice.

19. Consequently, the application dated 3rd March 2020 is allowed in terms of prayers 1, 2 and 3.

20. The parties shall bear their own costs.

Dated, signed and delivered at Kisii this 24th day of February, 2021.

A. K. NDUNG'U

JUDGE