



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 151 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE JOHN NTHIW'A NZIOKA(DECEASED)

MARYANNAH NDUNGE NTHIWA.....1ST ADMINISTRATOR/APPLICANT

VERSUS

SERENADE PROPERTIES LIMITED.....INTERESTED PARTY/RESPONDENT

GEOFFREY MUOKI NTHIWA.....2ND ADMINISTRATOR/RESPONDENT

MERIAN MUKUI NTHIW'A.....3RD ADMINISTRATOR/RESPONDENT

RULING

1. By a Summons dated 19th February, 2020, the 1st administrator/applicant herein seeks the following orders:

- 1) That all the properties of the deceased which were unlawfully transmitted, subdivided or transferred on the basis of a forged Certificate of Confirmation of Grant” purported to have been issued by this Honourable Court in May 2015 be reverted back to the deceased.
- 2) That land title numbers Donyo Sabuk/Komarock Block 1/67744, 67745, 1/68576, 68577, 68577, 68579, 68580, 68581, 68582 and 68583, which are illegal subdivisions of the deceased’s land parcel no. Donyo Sabuk/Komarock Block 1/584, be cancelled, and the said 10 parcels of land be reverted back to the deceased as land parcel no. Donyo Sabuk/Komarock Block 1/584 measuring approximately 41.39 hectares (100 acres).
- 3) That titles to the deceased’s land parcel nos. Athi River/Athi River Block 1/647, Kangundo/Mbilini/1463, Kangundo/Isinga/441 and Kangundo/Isinga/443 issued in the name of Annastacia Mbinya Nthiwa be cancelled, and the said four parcels of land be reverted back to the deceased, John Nthiwa Nzioka.
- 4) That all the beneficiaries of the deceased’s estate and directors of the interested party herein, Serenade Properties Ltd, do attend court and give evidence on the forged confirmed grant dated May 2015 as ordered by this Honourable Court on 6/2/2027.
- 5) That costs of this application be provided for.

2. According to the applicant, a daughter of the deceased herein and one of the administrators of the estate, they were appointed on 7/2/2018 following the death of the initial administrator, the widow of the deceased herein. According to her the petition was filed on 3/4/2014 by the initial administrator, **Anastacia Mbinya Nthiwa** (hereinafter referred to as “the Petitioner”), the widow of the deceased, and the mother of the applicant, from whom they took over.

3. According to the applicant the said petition listed the deceased properties and was filed with the chief’s letter listing all the beneficiaries of the estate of the deceased. On 30/4/2014 this Court issued Grant of Letters of Administration Intestate and the same was duly collected from the registry. On 7/9/2015 summons for confirmation of grant dated 27/2/2015 was filed but there is no indication that the same was disposed of. Despite that the deceased’s parcels of land are shown to have been mysteriously transmitted to the Petitioner who was illiterate one of which was Donyo Sabuk/Komarock Block 1/584 measuring approximately 41.39 hectares (100 acres) which was subsequently subdivided into Donyo Sabuk/Komarock/ 1/67744, and 67745. The former was transferred to the 1st interested party, Serenade Properties Limited while the latter remained in the petitioner’s name and was subdivided into 8 parcels being Donyo Sabuk/Komarock Block 1/68576,

68577, 68577, 68579, 68580, 68581, 68582 and 68583. The said transfer and subdivision is shown to have been done on the basis of the confirmed grant issued herein.

4. Apart from that the deceased's land parcel nos. Athi River/Athi River Block 1/647, Kangundo/Mbilini/1463, Kangundo/Isinga/441 and Kangundo/Isinga/443 are also shown to have been transmitted to the petitioner, who has since died, on the basis of "a confirmed grant" issued by this Court.

5. It was deposed that although this Court never confirmed the grant issued herein there appears to have been placed on record a purported "Certificate of Confirmation of Grant" purported to have been issued by this Court in May, 2015 giving all properties of the estate to the Petitioner. The Applicant insisted that the said purported "Certificate of Confirmation of Grant" was a forgery as no grant has ever been confirmed in this cause as this court found on 6/2/17 when it ordered that all parties in this matter attend court and give evidence as regards the purported confirmation. Accordingly, the applicant urged this Court to take that evidence and proceed to make appropriate orders as the confirmation of the grant cannot be sought until all the properties of the deceased's estate revert to the deceased as there is nothing to distribute till that is done.

6. The application was opposed by an affidavit sworn on 24th November, 2020 by **Faith Wanjiru Muthui**, a director of the 1st Respondent.

7. According to her, the Chamber Summons Application dated 19/02/2020 in so far as it touches on ownership of property Donyo Sabuk/Komarock Block 1/67744 is *res subjudice* Machakos ELC No. 5 of 2020 was filed on the 18/02/2020 and served on the same day, 2 days before the present chamber summons as both the suit and the present application seek to determine a question on ownership of Donyo Sabuk/Komarock Block 1/67744. According to her, this application was presented to court as an afterthought in response to the filing of Machakos ELC No. 5 of 2020 with full knowledge that the probate court does not have jurisdiction to deal with ownership of property by virtue of Article 162(2)(3) of the Constitution and the numerous court decisions that have upheld the interpretation herein. It was her position that the Respondent's interest in property **Donyo Sabuk/Komarock Block 1/67744** does not arise from the proceedings in this suit but after the late **Annastacia Mbinya Nthiwa**, the administratrix then transmitted the said property to herself and sold in her capacity as the registered owner of the property.

8. It was disclosed that the Environment and Land Court Machakos issued orders maintaining status quo by forbidding dealings in the suit property until the hearing of the Applicants preliminary objection dated 25/02/2020, which preliminary objection is yet to be heard making the Application dated 19/02/2020 an abuse of the process of court.

9. To the deponent, the Applicants averments feigning ignorance of the Respondents interest in property Donyo Sabuk/Komarock Block 1/67744 is fallacious with the intent of impeding and perverting the course of justice since she is a signatory to the distribution of the deceased property in a meeting that was presided by the area Chief **Bethwell M. King'ele** and which meeting allocated the property to the Respondent. Not being a beneficiary of the deceased estate, it was averred that the 1st Respondent is stranger to the averments in the Applicants Supporting Affidavit.

10. The deponent accused the Applicant of being guilty of material non-disclosure for making averments in her Affidavit in Support of the Chamber Summons dated 19/02/2020 since by the time she was attending the meeting held on 31/10/2016 the property LR. No. Donyo Sabuk/Komarock Block 1/584 listed in the Petition for letters of administration and is now *estopped* in law from challenging the Respondents title when all along during the lifetime of the late **Annastacia Mbinya Nthiwa** she never raised any objection as a beneficiary to the deceased estate. It was averred that the Respondent without notice of any irregularities in title acquired property Donyo Sabuk/Komarock Block 1/67744 by paying the sum of Kshs. 46,270,000/- and with the knowledge and approval of the 1st, 2nd and 3rd Administrators herein. According to her, the acts and omissions of the late **Annastacia Mbinya Nthiwa** was done with the knowledge, blessings and approval of the present administrators of the deceased estate who are all attendees to the meeting held on 31/10/2016 and they duly acknowledged their approval in writing by signing the agreement dated 31/10/2016.

11. Based on legal advice, it was deposed that the property Donyo Sabuk/Komarock Block 1/67744 having left the deceased estate to the deceased administratrix, the transfer thereafter to the Respondent unclothed the Court with jurisdiction since the same is reserved for the Environment and Land Court by virtue of the **Environment and Land Court Act, 2011**. It was contended that the Respondent's Replying Affidavit sworn on the 26/01/2017 and filed on the 27/01/2017 contains detailed comprehensive averments on how the Respondent acquired property Donyo Sabuk/Komarock Block 1/67744.

12. She however agreed that the inquiry into the alleged irregular grant to which the Respondent was not a party to has not been done as directed by **Nyamweya, J** is yet to be done. However, the court can proceed with confirmation of the deceased estate save for the property Donyo Sabuk/Komarock Block 1/67744 which should await the outcome of Machakos ELC No. 5 of 2020. It was noted that the silence by the 2nd and 3rd Administrators is quite telling in a matter where they are directly involved, and the court was urged to take adverse inference over their silence.

13. On behalf of the Applicant, it was submitted that All the dealings with the deceased's immovable properties before confirmation of grant, including transmission thereof to other parties/the petitioner, sub-division, purported sale and transfer thereof based on a forged (purported) court document are invalid, null and void.

14. According to the Applicant, the illegalities committed in this court regarding this estate of a deceased person which this court is handling, cannot be decided by another court (the ELC) since section 47 of the **Law of Succession Act** vests jurisdiction regarding estates of deceased persons in this Court and not the Environment and Land Court.

15. It was submitted that this Court's hands CANNOT be tied by any party herein through filing of suits in the ELC regarding a purported title illegally acquired on the basis of documents purported to have been issued by this court, but which are, indeed, forged as admitted by the interested party herein.

16. According to the Applicant since section 82 (b) (ii) of the **Law of Succession Act** provides that “no immovable property shall be sold before confirmation of the grant”, the purported sale and transfer of land belonging to an estate of a deceased person before confirmation of grant, therefore, amounts to intermeddling with the estate of that deceased person, which is a punishable offence under Section 45 of the **Law of Succession Act**.

17. In view of all the foregoing, it was submitted that the application herein is merited, and ought to be allowed, as all the transactions touching on the deceased’s estate herein were illegal, null and void and any title purported to have been transmitted and/or acquired through such illegalities is void and invalid.

18. It was submitted that KANTAFU (Kenya African National Traders & Farmers Union (KANTAFU) have NO business in these succession proceedings in view of this Court’s Ruling dated 21/2/2018 and the Notice of Appeal filed by them herein on 2/3/2018.

19. On the other hand, it was submitted on behalf of the 1st Respondent that it is now accepted that Article 162(2)b creates the Environment and Land Court with the jurisdiction to determine occupation and title to land and reliance was placed on **In re Estate of Beth Muthei Mulili (Deceased) [2019] eKLR, Raphael Muriithi Ngugi vs. Paul Thuo Kimani [2017] eKLR, Re the Estate of Kipyego Chepsiror Kolil [2007] eKLR and Charity Mworira M’iwathuku vs. Charity Kairigo & 2 Others [2017] eKLR.**

20. In view of the prevailing circumstances, it was submitted that the Succession Court does not have jurisdiction to grant the Chamber Summons dated 19/02/2020.

21. According to the 1st Respondent, if the first question is in the affirmative, the Applicants motion should be defeated on account of estoppel since the Interested Party herein never participated in the forgery alleged in the Applicants Application while the record shows that the deceased administrator was the signatory to the processes that transmitted the property Donyo Sabuk/Komarock Block 1/67744 to the Interested Party. They are in law estopped from challenging the said ownership. In support of this position the 1st Respondent relied on **Chase International Investment Corporation and Another vs. Laxman Keshra and 3 Others [1978] eKLR and M N M vs. D N M K & 13 Others [2017] eKLR.**

22. In this case, it was submitted that the doctrine of following and tracing which is in essence the import of the Administrators Application is not absolute as there are instances when the Court would not prejudice and innocent purchaser and support for this proposition was sought from the case of **Re Estate of Nelson Wambua Masila (Deceased) [2018] eKLR** and it was submitted that there being no evidence of fraud against the Interested Party, it would be unjust to revert the Interested Party’s title to the estate of the deceased. According to the 1st Respondent, good conscience would not allow the deceased estate to keep the money and the property.

23. In the 1st Respondent’s view, the circumstances for this case call for the staying of the issues of ownership of property **Donyo Sabuk/Komarock Block 1/67744** pending the outcome of ELC No. 5 of 2020 whereupon the issue of ownership can be determined on merits and it relied on the decision of **Musyoka J. in In re estate of P N N (Deceased) [2017] eKLR.**

24. It was submitted that the same is applicable to the present circumstances and the court should be guided by the above finding.

Determination

25. I have considered the foregoing. It is clear that the instant application is based on the allegation that the Certificate of Confirmation of Grant through which certain transactions were undertaken in respect of the deceased’s estate herein including the acquisition of the 1st Respondent’s interests in the subject property was a forgery as it was never issued by this Court. Just like **Nyamweya, J** noted in her ruling of 6th February, 2017, I have perused the record of these proceedings and I am unable to find any order confirming the grant herein.

26. It is however not contested that there are pending proceedings before the ELC being Machakos ELC No. 5 of 2020 revolving around the acquisition of the land forming part of the estate of the deceased herein by the 1st Respondent. In that case, orders were issued maintaining the status quo in respect of that parcel of land being land parcel no. Donyo Sabuk/Komarock/ 1/67744. That Court is clothed with the jurisdiction pursuant to the provisions of the **Environment and Land Court Act** to deal with matters revolving around interest in land.

27. I agree with the holding in the case of **Munyasya Mulili & 3 Others vs. Sammy Muteti Mulili [2017] eKLR,** that:

“...no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased’s properties before confirmation of grant whether by way registration of title, or sale is thus liable to revocation pursuant to the powers granted to this Court by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.”

28. However, in this case, there is already in existence legal proceedings before the ELC touching on the same parcel of land. That court is a superior court just like this one and this court cannot just ignore the fact that proceedings are pending before it touching on the same subject matter as in this case.

29. **In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR,** it was held that:

“.....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 survivors and beneficiaries, and distribution of the assets.”

30. However, section 3 of the *Law of Succession Act*, “estate” means “the free property of a deceased person” while “free property”, 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.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated. For this Court to nullify the titles in question it must therefore as a condition precedent find that the said titles were the free property of the deceased and therefore formed part of his estate. That determination, if made herein would have the effect of removing the substratum of the matter pending before the ELC.

31. In my view, the issues regarding the manner in which the 1st Respondent acquired interest in the said property ought to properly be dealt with and as the issue is pending before the ELC let that court deal with the matter for the purposes of tidiness of legal proceedings. In determining what order to make I am guided by the position adopted in **In re estate of P N N (Deceased) [2017] eKLR**, where it was held that:

“According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”

32. Consequently, I disallow the application herein in so far as land parcel no. Donyo Sabuk/Komarock Block 1/67744 is concerned. There is nothing stopping the Administrators herein from proceeding with the confirmation of the rest of the properties forming the estate of the deceased herein. In other words, save for land parcel no. Donyo Sabuk/Komarock Block 1/67744, the application otherwise succeeds and I hereby issued the following orders:

(1) That land title numbers Donyo Sabuk/Komarock Block 1/67745, 1/68576, 68577, 68578, 68579, 68580, 68581, 68582 and 68583, be cancelled, and the said parcels of land be reverted to the deceased.

(2) That titles to the deceased’s land parcel nos. Athi River/Athi River Block 1/647, Kangundo/Mbilini/1463, Kangundo/Isinga/441 and Kangundo/Isinga/443 issued in the name of Annastacia Mbinya Nthiwa be cancelled, and the said four parcels of land be reverted back to the deceased, John Nthiwa Nzioka.

33. As the dispute is yet to be fully settled, there will be no order as to costs.

34. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukula for Mrs Nzei for the Petitioner/Applicant

CA Geoffrey