



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 3 OF 1978

**IN THE MATTER OF ESTATE OF MARETE KIUNGA ALIAS MARETE S/O KIUNGA
(DECEASED)**

JUDITH KAROKI MARETE.....1ST APPLICANT/ADMINISTRATOR

GLADYS CHECE KATHURIMA.....2ND APPLICANT

VERSUS

JULIUS MUTHURI MARETE.....RESPONDENT/2ND ADMINISTRATOR

RULING

1. By Summons dated 27/7/2020 brought under Rule 73 of the probate and administration Rules, Section 70(d) of the Land Registration Act, 2012, the applicant seeks the vacation/lifting of order of inhibition against **L.R. No. Abothuguchi/Kithirune/2907**; the Deputy Registrar of this court be directed to sign all documents to effect transfer of **L.R No. Abothuguchi/Kithirune/177** or its subdivision **L.R No. Abothuguchi/Kithirune/2907** into the names of the beneficiaries in place of the respondent herein; the OCS Githongo Police Station be directed to provide security to the surveyor during the subdivision thereof into the respective portions; the Land Registrar be directed to dispense with the production of the original title deeds for **L.R No. Abothuguchi/Kithirune/ 177 and 2907** (hereinafter referred to as the suit land)

2. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Judith Karoki Marete, the 1st applicant, sworn on 27.07.2020. That affidavit asserts that the inhibition was placed over the title to preserve the subject property from alienation during the pendency of the dispute which has since been resolved and the property shared out but the 2nd administrator has become uncooperative declaring unwillingness to sign the transmission documents while his children have vowed to resist the subdivision of the property. On the basis of such resistance and the need to effect sub-division the deponent says that it is desirable to get the assistance of the police to provide security when the surveyor visits to survey the land for purposes of subdivision. The court is urged to allow the application in order to give effect to the certificate of confirmation of grant.

3. The application was opposed by the replying affidavit of Julius Muthuri Marete, the respondent herein, sworn on 17.08.2020. He deponed that the applicants are his sisters and they have their homes away from the suit land. He further asserts that no prejudice is being suffered by the applicants since they have never lived on the suit land. That being aggrieved by the decision of the court in its judgement delivered on 12.02.2019, the respondent herein intends to file an appeal to the Court of Appeal which process has been delayed by the failure to be supplied with certified copies of the proceedings herein. The Notice of Appeal, it is contended, was lodged on 25.02.2019 and therefore, the applicants' application seeks to

defeat the intended appeal and it is fair that the suit land be preserved by maintaining the inhibition order as registered against the title.

4. The application was directed to be canvassed by way of written submissions. In their submissions, the applicants make the point that the pendency of the appeal cannot be a reason to defeat the application as there is yet to be filed memorandum of appeal just as there has never been filed an application for stay of execution of the judgement delivered on 12.02.19 by the respondent. The applicants asserted that the pretext of an intention to lodge an appeal is insufficient to derail the execution of the judgement especially where no formal application for stay has been made. For the above reasons, it was urged that it is only fair, just and time conscious that the said application be allowed to ensure the beneficiaries receive their respective shares.

5. The respondent in his submissions implores the court to preserve the suit land by maintaining the status quo pending the hearing and determination of his appeal. The respondent relied on **Re Estate of the late Wambui Njeru (deceased) (2018) eKLR, Keibukwo Investments v Daniel Kimutai Chuma(2020)eKLR**, in support his submissions that land being an emotive subject to Kenyans, where the subject of appeal is land, the same should be preserved to avoid the difficulty of an irreversible transfer.

Analysis

6. The record here shows that the deceased herein left two assets **Abothuguchi/Kithirune/177** and **Abothuguchi/Kithirune/1207**. The respondent, after certificate of succession was issued on 11.04.1978 subdivided **Abothuguchi/Kithirune/177** into **Abothuguchi/Kithirune/2906** and **2907**. He subsequently sold **Abothuguchi/Kithirune/1207** and **2906** without the applicants' knowledge and/or consent when it is not disputed that the applicants and the respondent are siblings. When the applicants herein learnt of the resultant subdivision of **Abothuguchi/Kithirune/177** and the sale of **2906**, they registered an inhibition on **Abothuguchi/Kithirune/2907** pursuant to the court's order dated 12/10/2015. An attempt by the respondent to lift the inhibition was dismissed by the court. In determining the applicants' application dated 16/09/2015, the court ordered that;

(i) The register in respect to registration in Abothuguchi/Kithirune/2907 which is a subdivision Abothuguchi/Kithirune/177 be cancelled and the land to revert back into the name of the deceased herein Marete s/o Kiunga .

(ii) Since the deceased died intestate, the said property to be divided equally among the beneficiaries of the estate in line with Section 38 of the Law of Succession Act.

7. Pursuant to that decision, a certificate of confirmation of grant was issued on 12.03.2019 listing the beneficiaries as **Judith Karoki Marete, Gladys Nchece Kathurima, Julius Muthuri Marete** and the **Estate of Charity Regeria (deceased)** to whom the court ordered that the estate property, **Abothuguch/kithirune/177**, as rectified in the register, be shared equally. That decision by the court as crystallised in the certificate of confirmation of grant is said to be at a standstill due to the inhibition registered against it and what the applicant call lack of cooperation by the respondent as the co-administrator in signing the transmission documents and hostility by the respondent's family members.

8. The prayer in the instant application seeking order for the lifting of an inhibition against **Abothuguchi/Kithirune/2907** must be viewed in the light of the need to effectuate the court order dated 12.02.2019 rectifying the register. By that order of rectification of the register, title number **Abothuguchi/Kithirune/2907** ceased to exist and that is the reason the certificate of confirmation of grant was issued in respect to **Abothuguchi/Kithirune/177**. Accordingly, it would be an action in vain to order the lifting of an entry over a title that has been cancelled pursuant to a court order.

9. The second reason I consider the request for lifting of the inhibition to be unnecessary is the effect of Section 70 of the Land Registration Act, 2012. That enactment stipulates as follows:

70. The registration of an inhibition shall not be cancelled except in the following cases—

(a) on the expiration of the time stated in the inhibition;

(b) on proof to the satisfaction of the Registrar of the occurrence of an event stated in the inhibition;

(c) on the land, lease or charge being sold by a charge, unless such sale is itself inhibited; or

(d) by a consequent order of the court.

10. In this matter, the inhibition order made on the 12.10.2015 was to subsist pending determination of the application dated the 16.09.2015. It is the determination of the subject application that would cancel the necessity of the inhibition to continue subsisting against the title. Once there was the determination dated 12.02.2019, it needed only the decision or a decree extracted upon the judgment to be presented to the registrar and the inhibition would be cancelled. Once again to seek a court order for such an obvious matter would be to employ the judicial time in an inefficient manner. I hesitate to follow that route and find that that request is unmerited for grant.

11. That determination leaves the court with the issues of whether the transmission documents ought to be signed by the Deputy registrar on the assertion that the co-administrator is uncooperative and unwilling to execute same. I find this prayer to be merely facilitative toward closure of this otherwise long-drawn matter. In fact, the respondent does not deny the accusation that he is uncooperative and unwilling to sign the transmission documents. The lack of cooperation is confirmed by his averments in the Replying Affidavit which grandstands that he cannot sign the instruments because the matter will be heard by the court of appeal. To him, the pendency of the appeal entitles him to an automatic stay. That has never been the position of the law in Kenya and to accede to such a position would be untenable or the court. The other revealed ground for lack of cooperation is the contention that the sisters are married and live in their matrimonial homes and will not be prejudiced by failure to enforce the court order. That is a position the court cannot countenance because there is a determination as to entitlement by the applicants to the property. To continue keeping them away would not fall too far from arbitrary deprivation of property contrary to the constitutional dictate.

12. The position taken by the applicant is the kind his counsel is beholden to advice against. **Article 27(3) of the Constitution of Kenya, 2010 outlaw all forms of discrimination and specifically decrees that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'. That position applies in all spheres of our lives and applied to inheritance even before the new constitution. The Court of Appeal in the case of Stephen Gitonga M'murithi Vs. Faith Ngira murithi [2015] eKLR held that: -**

"Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried..."

13. Section 29 (a) of the Law of Succession Act in recognizing children does not classify them on the basis of gender or marital status. Makhandia, J. (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR** rendered himself inter alia thus:

'The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters

should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

14. I find those decisions to capture the indubitable position of the law which the legal profession need to educate the society upon. It would matter not that a custom or some traditional practice dictated otherwise. If such exists, it must be confined to the category of practices that qualify as repugnant to justice and morality. Such brazen unequal treatment ought not find any space in this society we live in today. Even the alleged failure to get proceedings cannot persuade the court otherwise because a perusal of this file reveals that the proceedings have been typed and corrected. One may wonder the efficacy of a notice of appeal filed some two years ago, when regard is given to the deeming provisions of Rule 83 of the Court of Appeal Rules.

15. I do find that a merited case has been established for an order that the Deputy Registrar shall sign all documents as shall be necessary to transmit that property known as **Abothuguchi/Kithirune/177** to the beneficiaries in terms of the judgment delivered in this matter and dated 12.02.2019.

16. It is appreciated that the said title ceased to exist and it register closed upon subdivision and the rectification ordered may not have been effected hence there would be no document of title to be surrendered for destruction in terms of the provisions of section 31, Land Registration Act. That would be a clear case for the land registrar to dispense with production of a deed that does not exist. On that account, I issue an order that the need for production of the certificate of title shall be dispensed with.

17. For the avoidance of doubt, now that the court ordered rectification and closure of title **No Abothuguchi/Kithirune/2907**, to facilitate the restoration of Title **No Abothuguchi/Kithirune/177** the certificate of that title, if not surrendered for destruction as yet, and if the rectification has not been affected, let the same be done forthwith and in any event within 7 days after this order shall have been served upon the Registrar of the concerned Registry.

18. In addition, an order is issued that the **OCS, Githongo Police Station**, be present, upon sufficient notice, to provide security and ensure public order is not disturbed, when the surveyor visits the land for purposed of survey with a view to creating titles in furtherance of the orders on distribution of the estate

19. The upshot of the foregoing findings is that the application dated 27.07.2020 is allowed in terms of prayers 3,4 & 5

20. On costs, this being a family dispute and in order that the relations be fostered, each party shall bear own costs of the proceedings but all costs of survey and related expenses including registration fees shall be shares equally among the beneficiaries.

Dated, signed and delivered at Meru this 15th day of February 2021

Patrick J O Otieno

Judge