



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1239 OF 2010**

**IN THE MATTER OF THE ESTATE OF SIMON NGATUNYI CHABI (DECEASED)**

**ERIC CHEGE KAMAU.....APPLICANT**

**VERSUS**

**ROSE NYAMBURA NGATUNYI.....1<sup>ST</sup> RESPONDENT**

**LILIAN MUTHONI NGATUNYI.....2<sup>ND</sup> RESPONDENT**

**FELIX MUTHURA NGATUNYI.....3<sup>RD</sup> RESPONDENT**

**REAGAN CHABI NGATUNYI.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application by Eric Chege Kamau (the applicant) was filed on 29<sup>th</sup> January 2020 in this succession cause of the estate of deceased Simon Ngatunyi Chabi. The applicant seeks the following orders:-

**“2) the Honourable Court be pleased to enjoin Eric Chege Kamau as an interested party in the proceedings;**

**3) the Honourable Court be pleased to issue an order of stay of execution of the consent orders granted on 20<sup>th</sup> January 2020 pending the hearing and determination of the application;**

**4) this Honourable Court be pleased to vary and/or set aside the consent orders granted on 20<sup>th</sup> January 2020 to the extent that the orders relate to Land Reference Number 2327/72;**

**5) this Honourable Court be pleased to vary and/or set aside the consent orders granted on 14<sup>th</sup> May 2018 to the extent that the orders relate to land reference number 2327/72;**

**6) this Honourable Court be pleased to declare that Land Reference Number 2327/72 and the subsequent sub-divisions of the property more specifically Land Reference Number 2327/357 was not free property belonging to the Deceased at the time of his death and therefore form part of his estate under the law;**

**7) this Honourable Court be pleased to remove Land Reference Number 2327/72 and the subsequent sub-divisions of the property more specifically land reference number 2327/357 from these proceedings;**

**8) the Honourable Court be pleased to issue an order restraining the Administrators and/or beneficiaries of the estate of the deceased, their agents, servants and/or any persons claiming through them from interfering with the applicant’s access and /or quiet possession of the suit property;**

**9) the Honourable Court be pleased to issue such further and/or alternative orders that may be appropriate in the interests of justice; and**

**10) the applicant be awarded costs of this application.”**

2. The deceased died intestate on 6<sup>th</sup> May 2010, leaving a substantial amount of properties. There is a grant of letters of administration jointly issued to his widow Rose Nyambura Ngatunyi (the 1<sup>st</sup> respondent), his daughter Lilian Muthoni Ngatunyi (2<sup>nd</sup> respondent), his son Felix Muthura Ngatunyi (3<sup>rd</sup> respondent) and another son Reagan Chabi Ngatunyi (4<sup>th</sup> respondent). The grant has not been confirmed.

3. The application relates to LR 2327/72 (IR No. 89549) Karen, Nairobi which the respondents pleaded was part of the estate of the deceased. On 14<sup>th</sup> March 2018 the court issued a consent order involving the respondents and other beneficiaries prohibiting the transfer, sale, charging or any other dealing in this and other properties belonging to the deceased. It was claimed that LR No. 2327/72 had been –

**“illegally subdivided”**

into various portions following alleged grabbing by –

**“some strange 3<sup>rd</sup> parties.”**

The order of prohibition extended to those subdivisions. There was a subsequent consent order recorded on 20<sup>th</sup> January 2020 in the following terms:-

**“That the land registry Ministry of Lands, Nairobi County revokes, cancels and/or rescinds any transactions relating to the property known as LR. 2327/39, 40, 41, 42, 43, 44, 45, 46 and 47 and L.R No. 2327/70, 71,72,73,74 and L.R No 2327/20.”**

These were the alleged illegal subdivisions done to LR No. 2327/72.

4. The applicant is not a beneficiary of the estate of the deceased. His case is that he is the registered owner of LR No. 2327/357 which he says is a subdivision of LR No. 2327/72 (IR No. 13995 and not No. 89459) which he states belonged to the deceased. The deceased gifted it to his late son Eric Chabi Ngatunyi who transferred it to one Stanley Kieti Samson. Stanley subdivided it and transferred a portion (LR No. 2327/357) to him. He stated that while in occupation police came calling to enforce the consent orders, saying this was the deceased’s property that had been grabbed. He averred that, in pleading that LR No. 2327/72 (IR No. 89549) belonged to the deceased the respondents not only misled the court but also failed to properly exercise their mandate under **section 83 (b) of the Law of Succession Act (Cap 160)** to identify all the free property of the deceased and include them in the petition.

5. It is for these reasons that the applicant sought to be joined in the cause to protect his interest in LR No. 2327/357 which he said he had title to, and which he said did not belong to the estate of the deceased. He wanted the stay of the execution of the consent orders of 14<sup>th</sup> May 2018 and 20<sup>th</sup> January 2020, the variation and/or setting orders of the consent order of 20<sup>th</sup> January 2020 and the declaration that LR No. 2327/72 and the subdivision LR No. 2327/357 do not belong to the estate of the deceased.

6. The 1<sup>st</sup> respondent filed a replying affidavit to oppose the application. Her case was that they live on this land which the deceased bought from Winfred Laurie Rourke and John Francis Rourke in 1978, and the transfer effected in 2005. The respondents have since then been paying its rates to Nairobi City County. She denied that the deceased ever transferred the parcel to the late Eric Chabi Ngatunyi, or that the parcel was ever owned by Stanley Kieti Samson. It was her averment that the title that applicant holds is a forgery. She denied that the applicant had any valid interest or claim to the parcel, and denied that there was any basis for him to be enjoined in the cause or for him to obtain any orders in regard to consent orders, or in the estate of the deceased.

7. The first issue for determination is whether the applicant has a basis to be enjoined in the cause relating to the estate of the deceased. Has he made a case to be joined in the case as an interested party?

8. The respondents correctly referred the court to the decision in **Trusted Society of Human Rights Alliance –v- Mumo Matemu and 5 Others, Supreme Court Petition No. 12 of 2013** in which the Court held that:-

**“.....an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.....”**

9. In the case of **Francis Kariuki Muruatetu & Another –v- Republic and five others [2016]eKLR**, the Supreme Court laid out the conditions a court should consider when dealing with an application for joinder as an interested party. They are as follows:-

a) the personal interest or stake that the party has in the matter must be set out in the application. The interest, must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral;

b) the prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote;

c) lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will

be making before the court.

10. The business of the Probate and Administration Court is to identify the estate of the deceased and ascertain the beneficiaries. The Court will ascertain the assets that the deceased was free to deal with during his lifetime, identify the creditors and debtors of the estate and share out the net estate to the beneficiaries (**Re Estate of Solomon Mwangi Waweru (Deceased) eKLR**).

11. The applicant states that he is the registered owner of LR No. 2327/357 which is a subdivision of LR No. 2327/72 which he says did not belong to the deceased. The portion he claims is subject of the impugned consents. He has annexed the title documents. The respondents say that he applicant's documents are forged; that the parcels belong to the estate of the deceased. It is evident that, without going to the merits of the rival claims, the applicant has demonstrated that he has an identifiable and proximate interest in the property, which interest has to be interrogated and ascertained.

12. It follows that the prejudice that the applicant will suffer if he is not joined in the proceedings and the consents stayed is that his title will be cancelled and his enjoyment of the property prohibited without him being afforded a hearing.

13. The next question is whether this Probate and Administration Court has jurisdiction to hear and determine the applicant's claim to LR No. 2327/357 as against the claim by the estate whose administrators are the respondents. In my view, the determination whether it is the applicant or the estate of the deceased that owns LR No. 2327/357 will entail a detailed examination of the history of the documents held by the lands registry relating to LR No. 2327/72 and LR No. 2327/357. The Court will hear, most likely orally, the evidence of either side, and allow its cross-examination. As was stated by Justice Musyoka in **In Re. Estate of Mbai Wainaina (Deceased) [2015]eKLR**

**“.....the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for the determination of such issues. A party who wishes to have such matters resolved must file a substantive suit to be determined by the Environment and Land Court”** created under **Articles 162(2) and 165(5)** of the Constitution and **section 13 of the Environment and Land Court Act, No. 19 of 2011.**

14. The consequence of what I am saying is that, either the respondents (as administrators of the estate of the deceased) or the applicant will have to move to the Environment and Land Court to seek the determination of who between them owns LR No. 2327/357, and the determination whether LR No. 2327/72 ever belonged to the deceased. In the meantime, this Court will proceed to hear and determine the matters relating to the distribution of non-contentious properties of the deceased to the ascertained beneficiaries.

15. Ultimately, the orders I issue are as follows:-

(a) the applicant is hereby enjoined in these proceedings as an interested party;

(b) there shall be stay of the orders contained in the consent orders made by this court on 14<sup>th</sup> May 2018 and 20<sup>th</sup> January 2020;

(c) until the Environment and Land Court determines the ownership relating to LR No. 2327/72 and LR No. 2327/357, this Court will not include the same while dealing with the estate of the deceased; and,

(d) in the particular facts of the case, costs will abide the cause.

**DATED and DELIVERED NAIROBI this 15<sup>TH</sup> day of FEBRUARY 2021.**

**A.O. MUCHELULE**

**JUDGE**