



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 22 OF 2019

IN THE MATTER OF THE ESTATE OF MOSES KIRIMI MBOGORI (DECEASED)

TABITHA GACHERI KIRIMI.....PETITIONER

VERSUS

PAULINE MUTHONI LABAN.....OBJECTOR

RULING

1. By summons dated 10/09/2020 brought under Rule 41 of the Probate and Administration Rules, the objector seeks the exclusion of Land Reference No. 23980/57 from these proceedings and the property therein abide the outcome of Meru Magistrate's court ELC No. 6 of 2018.
2. The grounds upon which the application is founded are set out in the supporting affidavit of the objector, **Pauline Muthoni Laban**, sworn on 10/09/2020. That affidavit asserts that **Land Reference No. 23980/57** (hereinafter referred to as the suit property) has been wrongly included as part of the deceased estate because the objector is the registered owner thereof. She avers that there are pending MCELC No.6/2018, CMCR 452/2018 and ECL Appeal No.9/2019 touching on title and ownership of the suit property between the objector and the deceased. She further avers that Rule 41 of the probate and Administration Rules allows exclusion of such a property from the succession proceedings and abide the outcome of court proceedings.
3. In her further affidavit sworn on 2/02/2021, it is averred that the court on 27/01/2021 delivered its judgement in Meru CMC CR. case No.452/2018 declaring the objector as being legally and rightly in possession of the suit property.
4. The application was opposed by the replying affidavit of Tabitha Gacheri Kirimi, the petitioner herein, sworn on 05/11/2020. She deponed that the application is littered with falsehoods and innuendos and is only aimed at hoodwinking the court. She further contended that the deceased had during his lifetime vehemently denied the objector as his spouse and as such the objector's allegation that she was the deceased wife is unfounded and far-fetched. In admitting the pendency of several suits in different courts involving the applicant and the deceased estate over the suit property, she asserted that the ownership of the suit property cannot be pegged on the outcome of a single subordinate case Meru ELC No.6/2018 whereas there was an ELC Appeal case No. 9/2018 and a criminal case No.452/2018 where the objector is charged with fraudulent transfer. The court was urged to dismiss the application since the objector had failed to attach any evidence whatsoever of her ownership of the suit property and issue orders of inhibition restraining registration and any dealings on the suit property.
5. During the hearing of the application, the court heard oral rival submissions made by Mr. Anyoka for the objector and Mr. Munene for the petitioner. The objector maintains that suit property belongs to her and that the criminal case No.452/2018 was terminated in her favour. It is further asserted that in all pending cases in regard to the suit property, only ELC No.6/2018 touched on title.
6. The petitioner maintains that the objector is not a wife to the deceased and further contends that the criminal case did not address the claim of forgery and that the decision by the criminal court did not determine ownership of the property. I choose not to comment on the relation between the deceased and the objector at this juncture in order that I do not preempt the hearing of that issue when time comes.
7. I have carefully read the contents of the judgement in CMCR No.452/2018 delivered on 27/01/2021 and entertain no doubt that it did not and could not determine the issue of ownership of the suit property as wrongly alluded to by the objector. Its effect was purely the termination of the criminal charges against the objector and concerning whether or not she had procured registration in her favour by making a false document, namely title **No. LR 5541, PLOT No. KRE/57** and for uttering the same document knowing it was a false document. The decision did not decide who between the deceased and the objector is the rightful owner of the suit property. That must be appreciated from the jurisdictional position of the law that questions as to title to and ownership of land do not fall within the jurisdiction of a criminal court but a preserve of the Environment and Land Court.
8. The primary duty of a succession court is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased estate to the rightful beneficiaries. The court is assisted in that mandate by the parties who provide evidence as to who is a beneficiary and which are the assets and liabilities of the estate. On that obligation parties are enjoined to be forthright and candid with the court and a breach of that

duty attracts criminal sanction under section 52 of the Act.

9. On the basis of such duty it is expected that a petitioner presents to the court evidence of ownership of the assets of the estate. Such come by way of documents of title or verification thereof. For example, title to land would be evidenced by a recent certificate of search. At that juncture, before a dispute arises to be resolved by evidence tendered at trial, the court relies on prima facie evidence provided.

10. In this matter, even though the applicant did not avail a search over the property, both counsel agree that the subject property is registered in the applicant's name. That concession establishes, prima facie, that the property as of today, does not form part of the deceased's estate but belongs to the applicant. What does not evidently belong to the deceased ought not to be included as his asset. Such inclusion does nothing but to unduly delay the conclusion of the matter and thus distort the court's mandate and obligation to dispense justice in a prompt and expeditious manner.

11. In coming to this determination, I have not closed my eyes and mind to the provisions of the Act and Rules which demand of a succession court to determine the property of the estate. I do give regard to those provisions while appreciative that a succession court deals with what the Act call free property of the estate.^[1] I hold that the subject property was not a free property the deceased could have freely disposed during his life. For this reason, I hold and find that the property, **LR 23980/57, KENYA RE ESTATE, MERU**, did not belong to the deceased at the time of his death and does not therefore belong to the estate and ought not to have been included in the list of assets in this cause. Being not part of the estate I do order that it be excluded.

12. This decision does not in itself compromise the proceeding pending before the ELC for it must be remembered that the jurisdiction of this court as a succession court must be confined to the dictates of the constitution and does not extend to the power to determine how the land left the deceased name during his lifetime. That is a jurisdiction reserved for the Environment and Land Court. Accordingly, if that court shall adjudge the land to belong to the deceased, nothing would, at that time, bar the petitioner from having the same included in the list of assets.

13. In coming to this determination, I have been persuaded by the decision in **re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** in which **W Musyoka J**, held: -

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

(emphasis provided)

14. The upshot is that I accede to the objector's request in the application dated 10/09/2020 and direct that the property be excluded from this cause subject to the determination of the dispute before the ELC

DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19TH DAY OF MARCH, 2021

Patrick J O Otieno

Judge

^[1] Section 3, Law of Succession Act

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;