



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 343 OF 2008

IN THE MATTER OF ESTATE OF GATUMU MUTUGI (DECEASED)

RICHARD CHOMBA.....APPLICANT

VERSUS

MARY WANJIRA GATUMU.....RESPONDENT

RULING

1. Vide an application dated 20.07.2020, the applicant herein moved this court seeking an order directing the deputy registrar of this Honourable Court to execute all transfer documents pertaining to land reference number Ngariama/ Merichi/ 466 in place of the administrator and that the costs of the application be provided for.
2. The application is supported by the grounds on its face and the affidavit sworn by the applicant. In a nutshell, it is his case that as a purchaser, he was given 0.4Ha as per the grant herein confirmed on 21.04.2015 but the administrator has refused and/ or neglected to execute the necessary documents to enable the transfer of the said portion to the applicant. Further that the administrator has started selling portions of the above-mentioned land parcel and that the applicant is apprehensive that his portion may be sold off and thus lose the same if this court does not intervene. He deposed that he has been in occupation of the said portion and has extensively developed the same.
3. The respondent herein opposed the application by way of a replying affidavit sworn on 6.11.2020 and wherein she deposed that the applicant was not a purchaser of the land from the deceased nor was he a beneficiary and that the estate has been wholly administered hence no documents for the deputy registrar to sign. That the suit land was transferred to the beneficiaries on 25.10.2010 and then partitioned on 25.06.2020 giving rise to new titles being Ngariama/Merichi/ 2236-2247 and each of the beneficiaries given his/her title. As such Ngariama/Merichi/466 does not exist.
4. The applicant filed a further affidavit wherein he deposed that as a purchaser he was provided for in the amended grant. Further that any transmission ought to conform with the amended grant and which amendments were sought by the administrator herein and which has never been revoked. That any distribution which does not conform to the amended grant is not legal as the grant is the basis of distribution.
5. The application was canvassed by way of written submissions wherein each party reiterated their rival positions as captured in the pleadings.
6. I have considered the application herein, the response thereto and the further affidavit by the applicant. I have further considered the rival submissions filed herein.
7. The applicant's case is that he was given 0.4Ha in the grant confirmed on 21.04.2015 but the respondent herein has refused to sign the transmission documents. I have perused the record herein and I note that a grant of letters of administration intestate was made to one Mary Wanjira Gatumu (the respondent herein) and Samuel Njagi Gatumu on 20.11.2008. The said grant was confirmed on 4.03.2010 and wherein the said Samuel Njagi Gatumu was to get 1.75 acres out of the suit land herein. In the replying affidavit filed in opposition to the application for revocation of grant dated 8.09.2016 and which was filed by Emily Wawira Gatumu and Catherine Wanjiru Gatumu, the applicant herein deposed having bought his portion from one Samuel Njagi Gatimu a beneficiary of the estate and developed the land.
8. The record further indicates that there was an application filed by the respondent and wherein she deposed that the co-administrator Samuel Njagi Gatumu was deceased and that he passed on before his share was transferred to him. The respondent deposed that the deceased beneficiary's share ought to be transferred to other persons. The beneficiaries named in the affidavit in support of the said application are Edward Njuki Muchiri to get ¼ acres, Richard Chomba Njigigua to get 1 acre and Eliud Otieno Okwaro and Emily Wawira Gatimu to get ½ acre jointly. This application was allowed by this court on 21.04.2015. As such the mode of distribution which ought to have been effected is that indicated in the certificate of confirmation of grant dated 21.04.2015 as it amended the earlier one.
9. As such, the applicant herein having been provided for in the said certificate of confirmation of grant ought to get his share out of the

estate.

10. The respondent deposed that in the certificate of confirmation of grant issued on 4.03.2010, the applicant was not a purchaser or a beneficiary of the estate of the deceased and further that the land was transmitted to the beneficiaries on 25.10.2010 but partitioned on 25.06.2020. The respondent referred to a copy of green card annexed to her replying affidavit. I have perused through the said copy of the green card and I note that entry number 4 therein indicates the true position as at the time when the original grant was confirmed. However, despite the court having rectified the grant, the respondent herein did not register the said amendment with the lands registry. There ought to have been an entry between entry number 4 and entry number 5 which reflects the new mode of distribution and wherein the applicant herein is indicated as a beneficiary.

11. It is my view, therefore, that the respondent's position that the applicant is not a beneficiary of the estate is neither here nor there. She acknowledged his beneficial interests when she rectified the certificate of confirmation of grant and provided for him. The respondent ought to have registered the new mode of sub-division with the land registrar just the way the entry number 5 was registered. As such, it is clear that the applicant is a beneficiary of the estate of the deceased as evidenced by the certificate of confirmation of grant and which the respondent herein failed to have registered. He ought to have been provided for in the sub-divisions.

12. I note that the respondent deposed that the estate has already been administered and the land sub-divided as per entry number 6 of 25.06.2020 and each of the beneficiaries given his title deed. However, the applicant deposed that he has not gotten his title deed and that the respondent has declined to execute the relevant documents. Entry number six (6) indicates that the land was partitioned into 7 new titles. However, in the amended certificate of confirmation of grant dated 21.04.2015, the beneficiaries ought to be nine (9).

13. It is clear that the estate herein was not sub-divided as per the certificate of confirmation of grant issued on 21.04.2015. If the respondent implemented the grant as it is, there ought to be at least nine (9) titles or rather there ought to be an entry showing consolidation of any of the said sub-divisions (if at all there was any). Further, there being no entry on the amended certificate of confirmation of grant on the green card, it is clear that the respondent herein, in causing the sub-division of the estate, used the certificate of confirmation of grant earlier issued by this court. It is the said certificate which had 6 titles.

14. It is my view that the said sub-division was illegal as it was based on the wrong grant and the same cannot be allowed to stand. The respondent ought to have distributed the estate herein as per the amended certificate of confirmation of grant as per the final orders of the court. As such, the distribution of the estate as was deposed by the respondent cannot be allowed to stand. If the court were to uphold the said distribution, it would be tantamount to aiding an illegality on the part of the respondent.

15. The question therefore is what remedy is available in the circumstances? It is clear that the land register in relation to L.R. Ngariam/Merichi/466 does not reflect the true position in relation to all the transactions pertaining thereto. The entry in relation to the certificate of confirmation of grant issued on 21.04.2015 is conspicuously missing.

16. Section 80 of the Land Registration Act, 2012, No 3 of 2010 allows for rectification of register by order of court *by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. However, the said register should not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.*

17. It has been held by this court and the superior courts that this court has jurisdiction to order for rectification of the land register in a similar way as the Environment and Land Court. This is in exercise of the inherent powers as provided for under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides that; -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient; provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Rule 73 of the Probate & Administration Rules also provides that;

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

18. The import of the above is that this court, in exercise of its inherent power can order rectification of the lands register if for instance some of the beneficiaries in the certificate of confirmation of grant are left out in the actual sub-division or their land parcels upon sub-division are not indicated in the register. The register can be rectified where like in this case, the administrator of the estate fails to register a certificate of confirmation of grant with the land registrar (for whatever reasons) but proceeds to register new titles pursuant to an earlier confirmation of grant which is overtaken by events.

19. Leaving such a register to stand as it is, would amount to abrogation of this court's duty which is 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 and further to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

20. This court is mandated to ensure that the estate is distributed to all the rightful beneficiaries and any attempts to disinherit some of the beneficiaries cannot be entertained. To achieve this, and in the instant case, it is my considered view that the register in relation to the suit land herein should be rectified and the entries aligned with the certificate of confirmation of grant issued on 21.04.2015. Further, entry number six should be struck out as the same was made pursuant to material non-disclosure on the part of the respondent herein on the

existence of an amended certificate of confirmation of grant issued on 21.04.2015. The new titles are hereby revoked.

21. The administrator should proceed to sub-divide the suit land as per the amended certificate of confirmation of grant and making sure that all the beneficiaries are provided for. Failure to do so within ninety (90) days from the date hereof, any aggrieved party shall be at liberty to move the court for further orders.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JUNE, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent