



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. E116 OF 2021

HUMPHREY HENRY NDURI.....PLAINTIFF

VERSUS

MARY ADHIAMBO NDURI.....1ST DEFENDANT

MARTIN OKOTH NDURI.....2ND DEFENDANT

KENETH KENEDY NDURI.....3RD DEFENDANT

SAMUEL OKETCH OMER.....4TH DEFENDANT

RULING

The Plaintiff filed his plaint dated 10th September, 2020 together with a chamber summons application of the same date seeking the following orders:-

a) The Defendants be prohibited from Survey of the Testators land or making any new boundaries, other than the way it was left by the Testator, until this matter is finalised.

b) Costs be provided for.

The application is supported by the plaintiff's affidavit sworn on 10th September 2020. The plaintiff filed another application which is not dated but is supported by an affidavit sworn by him on 21st September, 2020. The second application seeks the following orders:-

1. That this application be and is hereby certified as urgent.

2. That this Honorable court be pleased to order that this application be heard *ex parte* in the first instance due to reasons of its urgency.

3. That the 1st, 2nd, 3rd, and 4th defendants, their servants, agents and all those claiming under them (households) be and hereby restraining by an order of temporary injunction from interfering with households on orders left by the testator, occupying, erecting structures thereon, transferring, disposing, wasting, carrying on any activities in or in any other way dealing with ALL PROPERTIES OF PATROBA NDURI MBAI (DECEASED) hereinafter referred to as the suit property until the application herein is heard inter parties and determined.

4. That the 1st, 2nd, 3rd and 4th defendants, their servants, agents and all those claiming under them be restrained by an order of temporary injunction from interfering, occupying, erecting structures thereon, transferring, disposing, wasting carrying on any activities in or in any other way dealing with the suit property until the hearing and determination of this suit.

5. That the cost of this application be provided for.

On their part the defendants filed a notice of motion dated 14th December, 2020 that was later withdrawn and replaced with another application dated 20th May, 2020. The defendants' application seeks the following orders:-

1. THAT this Honourable Court be pleased to strike out the pleadings and dismiss the entire suit filed by Humphrey Henry Nduri, the Plaintiff herein.

2. THAT this Honourable Court do expunge from its record the following all registered and filed in this Court on 15th September, 2020 by the Plaintiff herein:

(1) Chamber Summons Application together with an affidavit both dated 10th September 2020;

(2) An undated Notice of Motion together with a supporting affidavit dated 21st September 2021; and

(3) A Plaint dated 10th September 2020 together with an affidavit of even date.

3. THAT this Honourable Court do expunge from the records of the Court, the strange documents titled "DISPUTES MUST BE DEFINED BEFORE IT IS CONTESTED THE LIST OF ISSUES RAISED FOR THAT ARE: (sic) PROPER INTERPRETATION OF FACTS (sic) and THERE MUST BE RESOLUTION OF THESE ISSUES BEFORE CONSIDERATION OF YOUR COST (sic)" registered and filed by the Plaintiff herein; and

4. THAT costs of this application be provided for.

The defendants' application is supported by the affidavit of Martin Okoth Nduvi, 2nd defendant sworn on 20th May, 2021. Directions were given that the application be heard together.

The plaintiff informed the court that the problem in the matter is the definition of "dispute". If the dispute is defined properly then the matter would not be in court. It is his position that his father gave his children places to build their houses. The 2nd defendant was given his place and has built his house. No one is complaining. However, he is not prepared to allow the other parties to inherit. Boundaries are in place. No one was given a residential plot outside their respective households. The boundaries placed by the deceased must be respected. The plaintiff is only seeking to stop the sub-division of the estate until the matter is heard. The deceased had demarcated his land even before he died. Representatives of different houses were present and represented their houses. The estate should not be sub-divided until the case is finalised. This is a different matter which should not be confused with the Succession Cause that was done in Homa Bay.

Counsel for the defendants submitted that the dispute arises from Succession cause number 2274 of 2012 which was filed in Nairobi but later transferred to Homa Bay and became Succession Cause number 20 of 2017. Before the case was transferred to Homa Bay, the plaintiff filed several applications. One application dated 26/9/2014 is similar to the current one and was dismissed. Two other applications dated 8th October 2015 and 23rd November 2016 sought similar orders and were equally dismissed. Justice Karanja made a ruling on 21st November 2019 which makes reference to the applications by the plaintiff. The issues are *res judicata* and the plaintiff is a vexatious litigant. The plaintiff is seeking orders which are not identified. Counsel further argued that the Succession Cause was completed, the land was sub-divided and titles issued to the beneficiaries including the plaintiff.

Analysis and Determination

The plaintiff's plaint dated 10th September, 2020 seeks the following:-

"REASONS WHEREFORE: the plaintiff prays for determination of legal position, with reference to divided portions of the estate of each household position of testator legally is intestate or testate, as he had divided his land to the household and others.

a) Cost of the suit.

b) Any other benefits that this Honorable Court may deem fit."

Paragraphs 6,7,8 and 10 of the plaint states as follows:-

1. The Plaintiff and Defendants participated in a Succession Cause in which the parties and the courts misunderstood the implications and that is the issues for determination by the Court.

2. It was clear the testator had divided the land to households represented by the defendants before herein passing on, and this has implications of interpretations.

3. Court gave consent Order on the 15th July 2014, where two parties agreed and one party objected and court gave consent order where there is no consent.

4. There were unexplained issues of proceedings for judges not being prepared for review of their judgments even when a conflicting decisions (s) exist in them (judgment) A attempts to resolve the issues by other way have failed and bench of two or three judges can make it look reasonable judgment on evidence, the plaintiff was denied review of the judgment without

reasonable cause, even after stating the same to the Hon. Chief justice (C.J.).

The affidavit sworn by the plaintiff on 10th September, 2020 gives details of the succession cause. The plaintiff's position is that his late father created or established boundaries for his four houses and this was clearly stated in succession cause number 2274 at Nairobi. In his second affidavit of 21st September, 2020, the plaintiff seeks to restrain the defendants from entering and carrying on activities on the suit property until the hearing and determination of the suit.

I have read the ruling of Justice J.R. Karanja of 21st November, 2019 and paragraphs 2, 3 and 7 reads as follows:-

1. In that previous application, the court cited the said Henry Humphrey Nduri, described therein as the applicant/objector as the person responsible for the unnecessary delay in the expeditious disposal of this matter. It was noted that he was one of those who petitioned for the necessary grant of letters of administration intestate and could not therefore be heard to claim that this was a testate succession rather than intestate succession. It was also noted that he was in essence, a party to the consent order made on 15th July 2014 which compromised the summons for confirmation of grant dated 5th June 2014, in terms of distribution of the estate property in favour of all the four houses of the deceased who was a polygamist with four (4) wives.

The import of the consent order was the distribution of the deceased's four parcels of land equally among his four houses upon valuation of the same. The parcels were then to be held in trust by the deceased's four widows for the children of the deceased with the second house taking care of the interested party and protestor's interest in the estate.

2. In as much as the consent order was never invalidated and/or set aside by any court, it remained valid and remains valid today. It was against that background that this court stated in its ruling of the 25th October 2018, that:-

"If the objector is so aggrieved by the consent order, he had more than enough time and opportunity to have it set aside even after the dismissal of his initial application for setting aside orders. He cannot use the consent order as a reason for the delay in this matter, neither can he use the narrative that this is a testate succession.

His conduct in this matter if not changed would definitely cause further delay much to the disadvantage of the entire estate of the deceased and its beneficiaries including himself. The court would in the circumstances be tempted to label him (objector) a "vexatious litigant" and would not sit back and watch the delay progress as it would use its powers under Section 76 of the Succession Act to revoke the grant and let the parties go back to the drawing board".

3. Indeed, this court's consideration of the present application on the basis of the supporting grounds, the parties rival submissions and the history of the matter, compels it to make a definite finding that the purported protest to the subject summons for confirmation of grant is devoid of merit and made in bad faith such that it amounts to nothing short of a gross abuse of the court process and contemptuous treatment of the consent order entered herein on 15th July 2014 at the family division of the High Court in Nairobi.

In the premises, the protest must and is hereby dismissed and/or overruled with the ultimate result that the summons for confirmation of grant dated 10th July 2019, be and is hereby allowed to the extent that the impugned grant dated 26th April 2013, is confirmed forthwith in terms of the proposed mode of distribution set out in paragraph six (6) of the supporting affidavit dated 10th July 2019 which clearly accords with the material consent order."

From the plaint and the plaintiff's application, it is clear to me that the plaintiff is re-litigating the succession cause. His argument that the problem in the matter has been the definition of the dispute can simply be answered that the dispute involves the inheritance of the late PATROBA NDURI MBAI. There is no other dispute apart from the distribution of the deceased's estate. Whereas the plaintiff still believes that the deceased's estate is yet to be distributed and that the deceased had demarcated his land amongst his four wives, the record shows that the deceased's estate has long been distributed through Homa Bay Succession cause No. 20 of 2017 which initially originated from Nairobi. All along the plaintiff participated in the succession cause and is fully aware of the final outcome. Filing a new case in Nairobi or anywhere else in the country will not assist the plaintiff. His only recourse is to go back to Homa bay High Court and challenge the confirmed grant.

Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya states as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The issues in dispute in this matter have already been determined in Homa bay succession cause No. 20 of 2017. This court lacks jurisdiction to re-open the matter. Further, the plaint only seeks costs and any other benefits that this court deem fit to award. The plaintiff seems not to have any specific prayers in his claim. The prayers in the application are at variance with the prayers in the plaint. It is the plaint which is the cornerstone of the case. The court cannot simply hear a dispute for purposes of awarding costs.

The upshot is that the plaintiff's claim is a nonstarter. The plaint and the two applications by the plaintiff are hereby struck out. The 2nd defendant's application dated 20th May, 2020 is granted as prayed. The plaintiff shall meet the 2nd defendant's costs herein.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE