



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 50 OF 2003

IN THE MATTER OF THE ESTATE OF KIURA KATHERI ALIAS KIURA NJAMIU (DECEASED)

NJERU NJAMIU.....1ST APPLICANT

ISIAH MWANIKI.....2ND APPLICANT

NJAGI NJAMIU.....3RD APPLICANT

VERSUS

NJERU NJAMIU.....1ST RESPONDENT

NJUE NJAMIU.....2ND RESPONDENT

JOTHAM KARUKA.....3RD RESPONDENT

J U D G M E N T

A. Introduction

1. The applicants moved court seeks for orders that the court do direct the land registrar to strike out all entries fraudulently entered in the register of land parcel No. Ngandori/Kiriari/67 and transfer the same to the applicants as ordered by court and further stay any further dealings on the suit land.
2. It is the applicants case that the respondents obtained grant in their names only after the deceased's death in breach of Rule 26 of the Probate and Administration Rules which was in breach of natural justice.
3. The applicants state that the court in confirming the grant ordered seven (7) acres to be shared to ten (10) interested parties with each person getting 0.7acres whereas the respondents from the 1st house have 14 acres for only two (2 given during lifetime of deceased and have now inherited another seven (7) acres that ought to go to the applicants thus disinheriting the applicants.
4. The applicants further stated that the respondents fraudulently, without a court order and in the absence and without the knowledge of applicants sold the applicants land and registered themselves as the sole owners of the remaining plots leaving the applicants with nothing.
5. The applicants further state that on the 6/04/2011 Justice Warsame ordered that seven (7) acres be shared equally to ten (10) interested parties (the applicants and respondents) but the respondents fraudulently sold 3 plots of land occupied by the applicants and registered the rest in their names leaving the applicants landless.
6. In rejoinder, the respondents denied the allegations made by the applicants and stated that the grant they implemented was the one referred to by the applicants as ordered and issued on the 13/10/2011 which measured the deceased's estate at 2.96Ha and subsequently divided the same to the 10 beneficiaries after removing the space for the road reserve.
7. The respondent further deposes that some beneficiaries, due to the hostility of the applicants, subsequently sold their portions to third parties who are not parties to this case and are purchasers for value.
8. The respondents further deposed that the instant application is misconceived as the same issues were raised in the applicants' application

for revocation of grant. Further, it is stated that contrary to allegations by the applicants, they are the ones who have been in occupation of the suit land resultant parcels and that is why they are resisting any implementation of grant.

9. It is further stated by the respondents that this court lacks jurisdiction to grant the orders sought as the same falls under the jurisdiction of the Environment and Land Court.

10. The parties filed submissions to dispose of the matter.

B. Applicant's Submissions

11. It is submitted that the respondents from the deceased's 1st house illegally shared the entire estate of 21 acres alone and subsequently illegally sold some plots without authority leaving the applicants landless.

12. It is further submitted that the respondents sold three pieces of land specifically land parcel Nos. Ngandori/Kiriari/ 7189, 7190 and 7191 to strangers without their knowledge and that the remaining seven (7) pieces of land resulting from the suit land are exclusively in the names of the respondents.

C. Respondents' Submissions

13. It is submitted that the respondent submitted that they implemented the amended confirmed grant issued on 13/10/2011. It is submitted that the suit land herein was to be inherited by ten (10) beneficiaries however 0.195Ha was deducted from the suit land as a road reserve and the balance was divided among the ten (10) beneficiaries with each beneficiary getting 0.29Ha.

14. It is further submitted that three (3) beneficiaries subsequently sold their shares to independent parties due to the applicants' hostility towards them so that they go buy land elsewhere. It is thus submitted that the 1st and 2nd respondents who were the administrators of the deceased acted within the law in implementing the grant which has not been set aside or reviewed to date and that the same is still valid.

15. It is submitted that the applicants have been adequately provided in the distribution of the suit land herein which was equal to all the beneficiaries and as such the applicants are misleading the court by submitting that they were not provided for in the distribution.

16. It is further submitted that since the grant and the certificate of confirmed grant issued was implemented, the land subdivided and the resultant title deeds issued, this court is *functus officio* and the orders sought herein falls within the jurisdiction of the Environment and Land Court as provided in section 13 of the Environment and Land Court Act.

17. It is also submitted that the applicants oppose the change of status in the ground as they are the ones who have continued to occupy the land without giving the respondents and their families a chance to enjoy the land.

D. Analysis & Determination

18. I have considered the pleadings and the submissions made herein. The issue for determination herein in light of the pleadings and submissions filed herein is whether this court has jurisdiction to grant the orders sought by the applicants.

19. The applicants seek orders that the court do direct the land registrar to strike out all entries fraudulently entered in the register of land parcel No. Ngandori/Kiriari/67. It is the applicants case that the applicants obtained grant in their names only after the deceased's death in breach of Rule 26 of the Probate and Administration Rules and in breach of natural justice and further that the respondents proceeded to register the suit land in their names and that subsequently sold their land and registered themselves as the sole owners of the remaining plots leaving the applicants with nothing.

20. In rejoinder, the respondents stated that they implemented the confirmed grant as ordered by court and that due to the hostility of the applicants; some of the beneficiaries sold their portions to third parties. The respondents' further state that having exhausted all avenues of appeal the instant application is misconceived as the instant suit is *functus officio* and as such this court lacks jurisdiction to grant the orders sought as the same falls under the jurisdiction of the Environment and Land Court.

21. It is not disputed that the applicants had applied for revocation or annulment of the grant that was confirmed in favour of the 1st and 2nd respondent before this court which application was dismissed. The applicants then moved to the Court of Appeal which agreed with the High Court ruling and proceed to dismiss the appeal. The effect of the dismissals of these proceedings is that the Certificate of Confirmation of Grant confirmed on 31/03/2011 distributing the deceased's estate remain in force. The aforementioned Certificate of Confirmation of Grant provided for all the beneficiaries of the deceased including the applicants herein.

22. The *functus officio* principle was conclusively dealt with by the Court of Appeal in **Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** where Githinji, Karanja & Kiage JJ.A observed thus: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century.”

23. It is trite law that once a court becomes *functus officio*, the only orders it could grant are review orders which are an exception to the *functus officio* doctrine. This was aptly summarized in the case of **Jersey Evening Post Ltd v Al Thani [2002] JLR 542 at 550** which was cited and applied by the Supreme Court in **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** that: -

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

24. In light of the foregoing and having exhausted all their avenues of appeal, the applicants, cannot bring to this court for determination issues that were dealt with in earlier proceedings and where the Court of Appeal has ever pronounced itself.

25. The application seeks for orders that the court do direct the land registrar to strike out all entries fraudulently entered in the register of land parcel no. Ngandori/Kiriari/67 and transfer the same to the applicants as ordered by court and further stay any further dealings on the suit land. It is the respondents’ case that this court lacks jurisdiction to grant the orders sought as the same falls within the mandate of the Environment and Land Court.

26. **Article 162 (2) of the Constitution** provides for establishment of various superior courts with varying jurisdictions. The environment and Land Court (ELC) is mandated to determine disputes relating to the *environment and the use and occupation of, and title to, land*.

27. Parliament enacted an Act namely the **Environment and Land Court Act** where Section 13(1) provides that: -

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2), (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.

Subsection (2) provides that in exercise of its jurisdiction, the court will have powers to hear and determine the following; Disputes;

- a. **“Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- b. **Relating to compulsory acquisition of land;**
- c. **Relating to land administration and management;**
- d. **Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”**

28. The law is therefore clear that disputes primarily concerning ownership of and title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution, and section 13(1) and (2) of the Environmental and Land Court Act.

29. Furthermore, this court conclusively determined the succession dispute and its decision was upheld in the Court of Appeal. The applicant cannot approach this court a second time on the same matters. I agree with the respondents that this court is *functus officio* as far as the succession dispute is concerned.

30. The instant application should not be entertained and it is in my considered view incompetent, misconceived and an abuse of the due process of the court.

31. The application is hereby ordered struck out for being incompetent.

32. Each party to meet their own costs.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

Judgment sent to the parties through their respective emails