



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

MISC. SUCCESSION CAUSE NO. 4 OF 2019

IN THE MATTER OF THE ESTATE OF SIMON NJOGU GICHENI (DECEASED)

LUCY NJERI NJOGU 1ST APPLICANT

GEORGE GATONYE NJOGU.....2ND APPLICANT

VERSUS

JOHN NJENGA NJOGU.....RESPONDENT

AND

IMANI MAAI MAHIU SELF HELP GROUP.....1ST INTERESTED PARTY

LAND REGISTRAR NAIVASHA SUB COUNTY.....2ND INTERESTED PARTY

RULING

Facts of the case

1. The 1st and 2nd Interested Parties filed an application by way of summons dated 30th July, 2019 seeking cancellation of the registration of title to the 1st Interested Party herein in respect of Longonot /Kijabe Block 4/5 (“the Land”). It is shown from an official search that the title deed to the Land was issued on 29th May, 2014. The search shows that the Land measures 5.720 hectares.

2. In summary, the grounds and basis for the application are that the Land parcel was the subject of succession in the estate of the Deceased, Simon Njogu Gicheni. The proceedings were in PMCC Succ No.31 of 2013, Engineer Law Courts, wherein a grant of letters of administration was issued on 6th September, 2013 solely to the respondent. The grant was confirmed and a certificate of confirmation was issued on 2nd May, 2014, showing distribution of the whole share of the Land to the respondent.

3. After the applicants became aware of the transfer of the said land, the 1st applicant lodged a caution against the title on 17th October, 2014. Claiming a beneficiary’s interest. The search certificate shows the caution. By a certificate of urgency, the applicants then challenged the grant and sought revocation in the High Court in Lucy Njeri Njogu v John Njenga Njogu HC Succ No 55 of 2014. The search certificate annexed to the application shows that a court order was registered against the Land title on 25/11/2014 prohibiting dealings with the parcel of Land. On 13th February 2015, another Court Order was registered against the Land title to the effect:

“No dealing until HC Succ No 55 of 2014 at High Court Naivasha is heard and determined”

4. Also annexed to the application is a ruling of the High Court Naivasha (HC Succ No 55 of 2014), in which Meoli, J, concludes:

“In the circumstances, the grant issued to the Petitioner cannot stand and which is hereby revoked. I direct that a new grant does issue in the names of the objecting widow, her eldest son George Gatonye Njogu and the Respondent herein, John Njenga Njogu. The same will be confirmed in the usual way after the lapse of six months of the date of issue”

5. Following the application for cancellation of title, the 1st Respondent and 1st Interested Party filed a preliminary objection on 2nd October asserting that this court lacks jurisdiction to grant the orders sought by the applicants. Parties filed written submissions thereon.

6. The respondent and 1st interested party submit that the 1st interested party was registered as proprietor of the Land on 29th May, 2014 under the Land Registration Act; that the Land Registrar and the Environment and Land Court (ELC) under section 150 of the Land Act is vested with exclusive jurisdiction to hear and determine disputes over land.

7. The applicants submit that once the grant was revoked, the land parcel falls within the purview of the succession court. They argue that the transfer was effected with record speed since the sale agreement was signed on 2nd May, 2014 and the transfer registered barely 27 days later, on 29th May, 2014. They assert that the Land Registration Act and the Land Act are only applicable to land parcels which are not affected by any succession disputes.

8. The applicants also cite **Isaac Kinyua & 3 Others v Hellen Kaigongi [2018] eKLR** where Mbugua, J, held:

“...Succession matters do not fall under the ambit of the jurisdiction of the ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction.”

9. In that same case, the ELC adopted the decision in **Pricilla Ndubi and Zipporah Mutiga v Gerishon Gatobu, Meru Succession Cause No. 720 of 2013** where it was held:

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on ownership of the property in the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.” (Emphasis added)

10. So clearly, the critical consideration to take into account is this: if the substantive matter sought to be resolved by the applicant is essentially a succession matter it ought to be handled by a probate court, but if it is substantively a land matter, it ought to be handled by the ELC Court.

Preliminary Objection

11. What is the substance of the preliminary objection? It is worded as follows:

“Take notice that the Respondent and the Interested Party will raise a Preliminary Objection that this honourable court lacks jurisdiction to grant the orders sought by the applicants as the said orders can be granted by the Environment and Land Court”

12. What are the orders sought by the applicants? They are:

“1. That this honourable court be pleased to order cancellation of the registration of Imani Maai Mahiu Self Help Group as the registered proprietor of the land parcel number Longonot /Kijabe Block 4/5

2. That the Land Registrar Naivasha Sub County (the 2nd Interested Party) be ordered to effect the cancellation and ownership of the above land parcel do revert to the name of the deceased Simon Njogu Gicheni to facilitate distribution of the estate among the respective beneficiaries” (Emphasis added)

13. The objection is not merely by a third party claiming without notice of the nature of title in issue. It is by both the interested party and the respondent who, from the pleadings and material on record, is the stated perpetrator of the fraud leading to the issuance of the confirmed grant used for the disposal to the 1st Interested party. The effect of this is that the actions of both parties are under inquiry in this preliminary objection.

14. Does the preliminary objection meet the threshold of such an objection? In the *locus classicus* case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696**, the court stated on preliminary objections:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...” (Emphasis added)

15. This position was further elaborated in **John Musakali v Speaker County of Bungoma & 4 Others (2015) eKLR** where the court stated:

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

16. Similarly, in the case of **Oraro v Mbaja (2005) KLR 141**, Ojwang J. (as he then was) quoted the **Mukisa Biscuit Case (Supra)** and expressed himself thus:

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which *must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.* Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...

17. The clear position appears to be that for a preliminary objection to meet the threshold as such objection, it must be: a point of law pleaded or arising from the pleadings; and must be founded on an understanding that the facts are agreed or undisputed; and that it *must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.*

18. In the present case, the objection is that the orders sought can only be granted by the ELC Court. However, order 2 sought by the applicants, is an order of a probate nature. It seeks that the Land Registrar Naivasha Sub County (the 2nd Interested Party):

“be ordered to effect the cancellation and ownership of the above land parcel do revert to the name of the deceased Simon Njogu Gicheni to facilitate distribution of the estate among the respective beneficiaries”

This is not an order which can be properly granted by the ELC Court as it involves distribution of the estate.

19. The nature of the order sought by the applicants presumes that there is an exercise of distribution to be undertaken by an administrator or administrators to beneficiaries necessitated, by implication, by the revocation of the first grant and issuance of the fresh grant. This involves questions of fact, including settling the issue of beneficiaries. As such the preliminary point does not meet the threshold under the **Mukisa Biscuit case**. I so find and hold.

20. In the event that I am wrong on that point, a further question that arises in my mind on jurisdiction in this case is: when a party has relied on a confirmed grant and disposed and transferred property using that grant, does this court has jurisdiction to entertain a claim challenging that transaction on the basis of a fault in the grant?

21. I think the answer must depend on the circumstances, and on a case by case basis. I find support for this view in the case of **Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC (2013) eKLR** where it was held;

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of the Constitution and the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.” (Emphasis added).

22. The Law of Succession Act at section 47 provides for jurisdiction of High Court in respect of matters falling under that Act as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to 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

The jurisdiction of the High Court includes the power under section 76 of the Law of Succession Act to revoke or annul a grant:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a. that the proceedings to obtain the grant were defective in substance;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e) that the grant has become useless and inoperative through subsequent circumstances”

23. In this case, there is a ruling of Meoli, J, in the probate matter which has not been appealed against to my knowledge. The ruling found that:

“The Respondent (John Njenga Njogu) is clearly aware of the relationship between his deceased father and the applicant (Lucy Njeri Njogu) though he claims it did not amount to marriage under any known custom or law.....

[I am persuaded that] the Respondent devised a fraudulent scheme to exclude the applicant and her children from the administration of the estate of the deceased” (paragraphs 6 and 7 of Ruling)

24. So here, there is the element of fraud having been found in the probate matter, and it remains unchallenged. It is trite that fraud goes to the root of the title that was disposed. I also note that the respondent did not challenge – as lacking jurisdiction – the court orders staying any dealings with the Land that were registered on 25/11/14 and 13/2/15. The respondent’s objection is based on a literalistic interpretation and merely technical appreciation of section 150 of the Land Act, which he has not supported by any authority or substantive submissions.

25. There is a further complication that arises in this matter. If this court has no jurisdiction to make the orders sought in the application, would the ELC Court have jurisdiction to remove, void or invalidate the restrictive orders of 25/11/2014 and 13/2/2015 placed against the Land title by this court? Finally, there is the question: what is the effect of the re-issued grant on the property of the deceased? All these are questions deeply intertwined with the question of succession.

Disposition

26. Taking all the foregoing matters into consideration, I am of the firm view that this court has jurisdiction to deal with the application before it, as the application is inextricably intertwined with the succession issues relating to the Land.

27. Accordingly, the preliminary objection fails and is hereby dismissed with costs.

Administrative directions

28. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Ruling has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this Ruling shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

29. A printout of the parties’ written consent to the delivery of this Ruling shall be retained as part of the record of the Court.

30. Orders accordingly.

Dated and Delivered at Nairobi this 30th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Delivered via Zoom Video-conference in the presence of:

1. GM Njuguna for the 1st and 2nd Applicants
2. GM Njuguna h/b for Mwaura Shairi for the Respondent & 1st Interested Party
3. No Representation for the 2nd Interested Party

4. Court Clerk - Quinter Ogutu