



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO. 64 OF 2016

THE ESTATE OF IDDI MALEMBU HASSAN (DECEASED)

YUSSUF SHAABAN LEPOSO1ST APPLICANT

SHABAAN LEPOSO HASSAN.....2ND APPLICANT

MOHAMED KONDIRE HASSAN3RD APPLICANT

HASSAN SHAABANI LEPOSO4TH APPLICANT

OMAR HASSAN5TH APPLICANT

LESLEY LENGESA LEPOSO6TH APPLICANT

MAJOR SHAABAN LEPOSO7TH APPLICANT

VERSUS

DR. ALI KOLELA MONTET.....1ST RESPONDENT

HASSAN IDDI MALAMBU.....2ND RESPONDENT

AND

GULF ENERGY LIMITED INTERESTED PARTY

RULING

1. By Notice of motion dated 17th March, 2019, the applicants sought an order to set aside or review of the ruling made on 19th March, 2018 (**Nyakundi, J**) and revoke the confirmed grant made to Hassan Iddi Malambu and Major Shaban Leposo.

2. In the alternative, the applicants seek an order setting aside parcel Nos. Ngong/Ngong/54508, Ngong/Ngong/44330, Ngong/Ngong/52094, Ngong/Ngong/54809 and Ngong/Ngong/44327, pending the hearing and determination of the question of ownership of the said parcels of land.

3. The application is based on the grounds on the face of the motion and on the affidavit of the applicants. According to the applicants, the administrators did not disclose to the court that there were interested purchasers who purchased the properties for value without notice; that the administrators did not disclose to the court that the purchase price was utilized towards the administration of the estate; that they did not disclose that one of the administrators, Hassan Iddi Malambu, was a direct beneficiary of the sale proceeds; that the interested parties were not informed of the proceedings and as such the grant was annulled and their titles cancelled without notice to them.

4. They argued that the court ought to set aside the titles claimed by the applicants pending the determination of the issue of ownership of the properties; that they did not know that the court had issued the ruling until the administrators sent demand letters asking one of the interested party to vacate and that there is a real danger that the interested parties will suffer irreparable loss and damage.

5. The applicants state that in its ruling, the court appreciated the fact that there were parcels of land that had been sold and the court directed the purchasers to deal with the administrators.
6. In the supporting affidavit, Betty Baluti Mointet deposed that on a direction of the 1st interested party she is aware that the company purchased Ngong/Ngong/44330 from the deceased's estate at a time the estate was being administered by Dr. Ali Kolela Montet and Hassan Iddi Malambu and the 1st interested party took possession of the property. She stated that they were not aware of the proceedings to annul the grant and that they were moving the ELC on the issue of ownership.
7. Shaaban Edi Leposo filed a replying affidavit sworn on 15th July, 2019 in opposition to the motion. He deposed that the application is frivolous, vexatious and a sham; that the court is functus officio and the orders sought cannot be granted. He stated that upon the partial grant being issued on 1st November, 2018, the subject parcels of land were transferred to individual beneficiaries.
8. The deponent further stated that on 10th May, 2019 a consent order was recorded confirming beneficial interest of the subject parcels of land to other persons not parties to the present application. He stated that the purported interested parties have no locus standi to bring the present application and that no leave of court was granted to allow them to come on board as interested parties. He contended that the interested parties are guilty of laches and inordinate delay since the decision they seek to impugn was given on 19th March, 2018 over fifteen months ago and no explanation has been given for the delay.
9. According to the deponent, the issue of ownership of the properties was canvassed before **Nyakundi, J.** who made a determination that there was no proper sale; that no leave of court was sought or obtained before the alleged transfers to the interested parties and that Dr. Kolela Montet is a co-director of Jabe investments Ltd.
10. The deponent argued that the properties having devolved to specific beneficiaries and other parties of the consent recorded on 10th May, 2019, the only recourse available for the interested parties is to pursue their cases pending before the ELC. He stated that the orders sought in the application, are the same orders sought in the ELC.
11. Yusuf Shaaban Leposo also filed a replying affidavit sworn on 6th August, 2019 opposing the application. He deposed that the application has been overtaken by events since the estate has already been distributed; that if the applicants have any property rights over the parcels of land, the same was obtained fraudulently, and that the applicants are seeking to sanitize a criminal offender. He contended that the issues raised in the application, were raised and considered by the court before the impugned decision was made hence there is no new evidence for purposes of reviewing that decision.
12. Shaaban Edi leposo swore a further affidavit on 16th February, 2020 stating that the applicants were aware of the succession proceedings and that the applicants did not purchase the properties in good faith as alleged.
13. During the hearing of the application Mr. Maina, learned counsel for the applicants moved the application highlighting their written submissions. According to counsel, the applicants invoked sanctions 93 and 76 (b) and (c) of the law of Succession Act and rule 41(3) of the Rules as well as the inherent powers of the court under section 73.
14. He submitted that in the ruling delivered on 19th March, 2018, the court cancelled titles mentioned in the application. The titles, counsel argued, were owned by the applicants/interested parties. He argued that the applicants were not beneficiaries to the estate but were purchasers for value and did not participate in the proceedings before the court leading to cancellation of those titles.
15. Mr. Maina further argued that the court having recognized that there were other people, it would have preserved the titles under section 41 and ask them to go and litigate before the ELC. He submitted that the administrators disregarded the fact that the applicants were owners and went on to distribute the estate.
16. According to counsel, under section 93, any title issued in any estate and thereafter the grant is annulled, the title cannot be affected. He argued that the jurisdiction to cancel those titles did not lie to this court but the ELC under section 26 of the Land Act, 2012. He submitted that certificate of ownership of land is considered to be the conclusive evidence of the owner unless there is evidence of fraud and only ELC can cancel the title.
17. Relying on Article 50(1) of the Constitution, he argued that the applicant's right to fair hearing was violated as they were not heard before their titles were cancelled. Mr. Maina submitted that the respondent's argument that the titles were obtained fraudulently is not an issue for this court's determination.
18. He urged that in *Kathili Muinde's case; cause No.1828 of 2007 paragraphs 1 page 41*, the court stated that P&A is a completely different procedure from the civil procedure. He urged the court to allow the application.
19. Mr. Mucheru, learned counsel for the respondents submitted that in opposition to the application, that the application is untenable as it is a disguised appeal against the decision by **Nyakundi, J.** He argued that although the 1st, 2nd and 3rd interested parties did not participate in the proceedings, the 4th interested party did; that there is a suit before the ELC which seeks orders similar to those sought in the motion and that the applicants are abusing the court process since the application before the ELC is dated 17th May, 2019, the same date as the application herein.
20. Counsel argued that after the impugned ruling by partially confirmed the grant and consent was later recorded distributing the property to some beneficiaries. He contended that the further affidavit filed on 14th October, 2019, attached a consent to sell Ngong/Ngong/52903 and 520904 properties held by the interested parties but those who signed the consent were not beneficiaries to the deceased's estate. Counsel

further argued that the sale had not been sanctioned by the court before the agreements were signed. He prayed that the motion be dismissed with costs.

21. I have considered the application, replying affidavits and submissions made on behalf of the parties. I have also perused the record and in particular the ruling delivered on 19th March, 2019. In that ruling the court, **(Nyakundi, J.)** found that the procedure followed to obtain the grant was defective in substance; that the applicants in that application had denied signing the consent forms and that the grant was therefore obtained by concealment of material information.

22. Based on the above finding, the court annulled the grant confirmed on 10th November, 2009 and removed Dr. Ali Kolela Montet as an administrator. In his place, the court appointed **Major Shaaban Iddi Leposo**. A new grant was issued to Major Shaaban Iddi Leposo and Hassan Idi Malambu as administrators. The court cancelled all titles and subdivisions from **parcel No. Ngong/Ngong/27038** and ordered the parcel(s) to revert to the deceased's estate. The court made a clear order that all parties who had obtained titles with regard to parcel No. Ngong/Ngong/27038, could lodge claims with the new administrators.

23. It is pursuant to those orders that the applicants have sought some orders before this court to set aside or review that order and preserve their parcels of land which were subdivisions of the Ngong/Ngong/27038. They argued that they had obtained titles to the parcels of land and were not party to the proceedings leading to the cancellation of those titles.

24. The application has been resisted by the respondents. They contend that the estate has since been distributed and that the applicants have a similar application before the ELC. In their view, this application is an abuse of the court process.

25. I have considered the arguments for and against the application. What is clear is that the ruling by **Nyakundi, j.** was delivered on 19th March, 2018 while the present application was made over a year later. The fact that there were purchasers was an issue that was brought to the court's attention and when the court made the order cancelling the title deeds, it made it clear that those who may have an interest should make their claims to the new administrations. The court was thus aware of the fact that certain individuals had claims over parcels of land being subdivisions of the deceased's estate.

26. The property, as the respondents contend, has been distributed to the beneficiaries of the estate of the deceased. That notwithstanding, there is evidence that an application seeking similar orders is pending before the ELC. That in my view amounts to an abuse of the court process. The applicants cannot move two courts of concurrent jurisdiction seeking similar orders from either court. They must make a choice, either to litigate in this court or the ELC. They cannot move two different courts with applications aimed at the same problem.

27. I must point out that whereas the respondents argued that the estate had been distributed, the applicants did not adduce evidence to show that the titles had not been cancelled as the court had directed. The court may very well be acting in vail if the titles had been cancelled and the estate distributed. I agree with the respondents that the applicants are guilty of laches and inordinate delay.

28. I must emphasize that this court is not sitting on appeal over its own decision. Some of the arguments raised by the applicants before this court can only be determined on appeal. Since they have moved the ELC, they are at liberty to pursue the matter before that court.

29. In the premise, I find no merit in the application. It is declined and dismissed. Each party do bear own costs.

Dated, signed and delivered at Kajiado this 23rd day of April, 2020.

E.C. MWITA

JUDGE