



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 270 OF 2014

IN THE MATTER OF THE ESTATE OF NDUI KIBAU.....(DECEASED)

JULIUS MUNENE KIBUCHI.....APPLICANT

V E R S U S

MAKUI MBUI NJOGU.....RESPONDENT

RULING

1. The applicant Julius Munene Kibuchi filed an application dated 19/7/2017 seeking an order that inhibition orders do issue prohibiting the registration of any dealings on the register of land parcels No. Kabare/Njiku/3072, 3073,3074, 3076, 3077 and 3078 pending the hearing and determination of summons for revocation or annulment of grant herein. This court issued an interim order of prohibition exparte pending the hearing and determination of the application interpartes.
2. The application is based on the ground that land parcel No. Kabare/Njiku/625 was initially registered in the name of Ndui Kibau deceased whose estate this matter relates. The land has been sub-divided into Six land parcel above. The applicant asserts that he is a beneficiary entitled to the estate but was left out when the estate was distributed. He has already filed an application for revocation of grant and has learnt tht the respondent is in the process of selling, transferring or otherwise disposing off the aforesaid land.
3. A replying affidavit opposing the application was filed by Makui Mbui Njogu who is the administrator of the estate of the deceased. His contention is that the applicant is not entitled to the estate. He submits that when the grant was confirmed on 11/5/2015 all the beneficiaries attended court. The grant was confirmed and land parcels Kabare/Njiku/625,3072 and 3078 were subdivided and distributed. The respective titles have already been issued. He deposes that Sarah Kariuko Ndui who is said to have been the mother of Madalina Wangu was present in court when the grant was confirmed and did not indicate that she had a daughter by name Madalina Wangu. That the children of Madalina Wangu are not beneficiaries. That the estate has been distributed and title deed issued even to 3rd parties. Who are not members of the family for valuable consideration and are not parties in this application.
4. The respondent further submits that Madalina Wangu is the daughter of Sarah Kariuko Ndui and her interest ought to be found in parcels of land registered in the name of Jeremiah Muriithi Ndui who was registered on her behalf. He submits that the applicant obtained a limited Grant in the estate of Madana Wangu Kibuchi who is not the same as Madalina Wangu. That no death certificate has been annexed to demonstrate the identity of Madana Wangu Kibuchi is also known as Madalina Wangu.
5. The applicant's case is that he a rightful beneficiary of the estate of the deceased herein by virtue of being a grandson and was left out during the distribution of the estate. He claims to be the son of Madalina Wangu who is a daughter of the deceased who died on 5/10/1990 and he has already obtained letter of administration in her estate. He has learnt that the respondents are in the process of selling the land. He has filed an application for annulment or revocation of grant.
6. The parties agreed to canvass the application by way of written submissions.
7. For the applicant it is submitted that the issue for determination is whether the applicant is entitled to inhibition orders. He submits that the grant of Letters of Administration was confirmed on 11/5/2015 and the land parcel was distributed. That the applicant was disinherited during the Confirmation of Grant together with the children of Madalina Wangu. The respondent proceeded to swiftly cause the grant to be registered and there were resultant numbers. He submits that the orders sought are statutorily provided for as opposed to equitable orders of injunction. He relies on **Section 68 of the Land Registration Act No. 3/2015** which clothes this court with unfettered discretion to issue the inhibitory orders sought. That **Section 47 of the Law of Succession Act** and '**Rule 73 of the Probate and Administration Rules**' gives this court discretion to entertain any application and issue such orders as it deems fit in the circumstances. That the relevant orders to be issued at this stage are the inhibitory orders in order to preserve the subject matter.

8. For the respondent it is submitted that Sarah Kariuko Ndui was before court on 11/5/2015 when the grant was confirmed and represented her children and herself. That she did not fail to provide for all the dependants, beneficiaries and or her children. That the application is fraudulent as the applicant has presented two names Madalina Wangu and Madana Wangu Kibuchi. That after the applicant obtained a Limited Grant he filed succession Cause No. 160/2017, Para 4 of the supplementary affidavit filed on 23/10/18. The cause was dismissed vide a ruling on 13/12/17. There has been no appeal. The applicant was claiming the same interest he is seeking in this matter and the court ruled that the estate of Sarah Kariuko Ndui was jointly owned and the interest passed on to the surviving owners and not heirs.

9. It is submitted that the application lacks merits and should be dismissed.

10. I have considered the application. The issue for determination is whether the court should order inhibition orders to be issued over land parcels No. Kabare/Njiku/3072,3073,3074,3075,3076,3077 and 3078.

11. The applicant relies on **Section 68 Land Registration Act** which gives the court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event. The principles for the granting of an injunction are the same one as those for the granting of an injunction. The principles were laid down in the **Case of Giella –v- Cassman Brown(1973)E.A 358**. The applicant must establish a prima facie case with a probability of success. An injunction will not normally be granted unless damages will not be an adequate remedy. Where the court is in doubt the application will be decided on a balance of convenience.

12. For the court to determine whether the applicant has a prima facie case, it has to interrogate the applicant's case based on his pleadings and the supporting evidence. Where the respondent has opposed the application, it is from the assessment of the materials laid before court that it will determine whether the applicant has made a prima facie case.

13. The applicant claims that he is a beneficiary entitled to the estate of the deceased. He has averred that he is the son of a daughter of the deceased one Madalina Wangu who is deceased. He has obtained a Limited Grant for the purpose of filing a suit and it is issued in the estate of Madana Wangu Kibuchi. The applicant has not tendered evidence to prove that Madana Wangu Kibuchi and Madalina Wangu are one and the same person. The Chief's letter dated 29/12/11 refers to Madalina Wangu. The two names are different and no evidence was tendered to prove that it refers to the same person who was a daughter of the deceased. The applicant has failed to discharge the burden of proof that the names refer to the daughter of the deceased.

14. The applicant obtained a Limited Grant which was very specific. It was stated to be for –“ **but Limited for the purpose of filing a suit only,**” see annexure JMK -2-, a grant is limited and applies only for the purpose for which it has been issued. **Rule 36 (1) & (2) of P & A Rules** provides:-

“(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of estate and until a further grant is made.”

15. Where purpose for which the Limited grant has been achieved, the grant becomes spent and a party must move the court as provided under the **Act** to obtain a full grant. The applicant after obtaining the limited grant moved to Gichugu Principle Magistrate's Court and filed Succession cause No.160/2017 against Jeremiah Muriithi Ndui, Jamleck Muchiri Ndui, Johnson Wamwati Ndui and Lucia Wanjiku Simon. Annexure MMN-1-. The suit was on 13/12/17 dismissed for lack of merits. The purpose for which the Limited Grant was issued was spent.

16. The applicant upon the suit being dismissed came to this court to seek revocation of grant and an order of inhibition. Where one files a suit and is dismissed for lack of merits and he does not prefer an appeal, the claim becomes res judicata and is prove that he has no valid claim against the parties who he had sued.

The applicant is not a first line defendant in the estate of the deceased. **Section 29 of the Law of Succession Act** defines dependant to mean

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

A grandchild claiming a share of the estate of the deceased grandparent is not entitled to the estate of the deceased as of right but is required to prove dependency – that is to say that the deceased had taken him as his own. The claim by the applicant is only based on the ground that he is son of the daughter of the deceased. There is no claim for dependency. From the foregoing I find that the applicant has not demonstrated that he has a prima facie case with a probability of success. The claim he had against the respondent was dismissed for want of merits.

17. On the issue of grant, the grandmother of the applicant was present when the grant was confirmed. She is Sarah Kariuko Ndui who it was

stated was to hold her portion for Jeremiah Mureithi, Lucy Wanjiku, Jamleck Muhuri and Johnson Wamwati. Her share was to be held by Jeremiah Muriithi Ndui for himself and children of Sarah Kariuko. The portion held by Jeremiah Muriithi Ndui has been shown to be Kabare/Njiku/3074 and 3072.

18. The confirmed grant catered for the children of Sarah Kariuko. The respondent in the Replying affidavit has deponed that the applicant's claim lies against Jeremiah Muriithi Ndui. Sarah Kariuko was present during confirmation. She represented herself and her children.

19. There is limitation of time within which a claim for dependency can be filed **Section 30 of the Law of Succession Act** provides:-

“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”

20. Part III of the Act which the section refers deals with provision for dependants. A claim for dependency which is filed after the grant has been confirmed and estate distributed is time barred.

21. There is also the consideration of survivorship. It is consideration as to who survived the other. This required determination because a claim to the estate of a deceased person is based on the fact the deceased died before the person laying a claim in his estate. The deceased in this case died on 4/11/2009. The applicant's mother who he calls Madana Wangu Kibuchi as shown on annexure JMK 2 the Limited Grant, died on 5/10/1990. She therefore pre-deceased the deceased in this case. She did not survive the deceased. She therefore had no claim in the estate of the deceased and by extension the applicant who is claiming as a grandson of the deceased by virtue of being a son of his late daughter. The applicant has not met the criteria set down in the Act for a claim by a grandchild and his claim is also time barred.

22. In Conclusion:-

The applicant has not established a prima facie case to warrant this court to issue an order of inhibition on the parcels of land which have been listed as he has not proved that:-

- He is not a dependant.
- He has presented two possible names of his alleged deceased mother which has cast doubts on his claim.
- Any claim for dependency is time barred.
- The mother of the applicant pre-deceased the deceased.

23. The applicant's claim against the respondents is res judicata in view of the decision in Gichugu Principle Magistrate's Court Succession Case No. 160/2017.

24. The application lacks merit and is dismissed.

25. The inhibition order issued by this court on 22/9/17 is set aside.

Costs to the respondents.

Dated at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE