



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 82 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE M'MUTUNGI KITHAMBA

JACNTA KATHURE M' MUTUNGI.....PETITIONER/APPLICANT

VERSUS

ZACHARY KIAMBI MUTUNGI.....1ST RESPONDENT

MARY KAIRUTHI NDUBI.....2ND RESPONDENT

LYDIA KANANU.....3RD RESPONDENT

LUCY MWARANIA.....4TH RESPONDENT

CATHERINE KENDI M' MUTUNGI.....5TH RESPONDENT

RULING

1. This Court on 11th October 2018 delivered a ruling distributing the estate of the deceased herein partly in line with the resolution of the minutes of the family meeting held on 25/2/2018. **Jacinta Kathure M' Mutungi** (the petitioner herein) has since filed an supplication dated 24th September 2019 seeking the following Orders;

a. That this Honourable Court be pleased to rectify the names of the deceased as they appear in the certificate of confirmation of grant to include his other names **Saberio M' Mutungi Kithamba alias Zaberio M' Mutungi Kithamba**.

b. That this honourable court be pleased to order the District Land Registrar- Meru to cancel all titles emanating from **Land Parcel No. Nyaki/Kithoka/753 that is Nyaki/Kithoka 3689-3693, Ntima/Igoki/1871 that is Ntima/Igoki/7974-7979, Nyaki/Mulathankari/2973-2977** and restore the original title deeds **Nyaki/Kithoka/753, Ntima/Igoki/1871 and Nyaki/Mulathankari/529** in the name of the deceased **Saberio M' Mutungi Kithamba alias Zaverio M' Mutungi Kithamba** to enable registration and implementation of the certificate of confirmation of grant issued on 11th October 2018.

2. The application was supported by the sworn affidavit of the petitioner and on these bold grounds;

i. That the certificate of confirmation of grant issued on 11th October 2018 did not include all the names of the deceased.

ii. That the land records for the parcels of land that forms the estate herein bears the names of the deceased as **Saberio M' Mutungi Kithamba and/or Zaberio M' Mutungi Kithamba**.

iii. That the re-distribution of the estate as it was done vide the minutes of the family meeting held on 28th February and the subsequent certificate of confirmation of grant issued on 11th October 2018 affects the title deeds issued earlier hence the need to have them cancelled to pave way for fresh distribution of the estate as per the certificate of confirmation of grant.

iv. That unless the title deeds in respect to the land parcels are not cancelled it will be difficult to register and implement the grant issued on 11th October 2018.

v. That no prejudice shall be occasioned to any of the beneficiaries as it is intended to expedite the process of distribution if the estates herein.

3. The application was opposed by **Zachary Kiamba Mutungi** (the 1st Respondent herein) who averred that in obtaining the confirmed grant which had the original parcels of land which had been subdivided by the petitioner on obtaining the first confirmed grant and which parcels of land are not in existence in the original form, the petitioner and other applicants had the intentions of subdividing the said parcels of land in a different way yet the beneficiaries have developed their respective portions and others have titles i.e in Nyaki/ Mulathankari/529 the resulting subdivisions are continuous and are held by the applicant and one portion she holds with Catherine Kendi Mutungi. On his part the respondent has developed Nyaki/Mulathankari/2977 and any subdivision will affect his developments.

4. That the parcels of land are not in the name of the deceased now but are in the name of the administrator and some beneficiaries hence there is no need to do any corrections of the names of the deceased herein.

5. **Geoffrey Gikundi** also opposed the application through Replying affidavit dated 14th January 2020. He decried the authenticity of the grant issued on 11/12/2018 and stated that by the courts ruling the same did not revoke the earlier grant issued on 6/12/2010. He averred that following the grant issued on 6/12/2010 the administrator proceeded to implement the grant and caused the land parcel Ntima/Igoki/1871 to be subdivided and portions thereof transferred to the beneficiaries. That pursuant to the subdivision he got parcel No. Ntima/Igoki/7979 which parcel he has fully developed. That one of the subdivisions of parcel No. Ntima/Igoki/7974 was sold to a purchaser, Japheth Mwenda Gichuru who has since sold the same to Moses Gichuru while in Nyaki/Mulathankari/529 he got parcel No. Nyaki/ Mulathankari/2974 where he has built a permanent 4 bedroomed house, 14 rental units and planted bananas thereon.

6. The petitioner filed a Supplementary affidavit in response to the averments made by the 1st Respondent and Geoffrey Gikundi. She averred that the issues raised by the 1st Respondent were wholly dealt with in this court's Ruling dated 7th February 2019. That it is not true that the 1st Respondent was not present in the family meeting dated 28th February 2018 and this court can call evidence to that effect. That the 1st Respondent ought to have appealed against the ruling dated 11th October 2018 which adopted the minutes.

7. That in respect to the permanent developments she had already to the surveyor who has informed her that it is possible to subdivide the land equally without affecting each person's properties hence no building or other permanent structures shall be affected.

8. That in respect to the replying affidavit by Geoffrey Gikundi and in respect to Parcel No. Ntima/Igoki/1871 it was deliberated in the family minutes dated 28th January 2018 that whatever he sold shall remain the property of the innocent buyer hence redistribution will not affect him in any other way.

9. That both Zachary Kiamba and Geoffrey Gikundi are opposed to equal distribution of the estate not because of developments but because they occupy a larger portion of the land than others a fact she did not realise at the first instance when she was distributing the land.

10. **Moses Gichuki Njogu** also filed a Replying affidavit dated 18 February 2020 in opposition to the application. He stated that he bought one of the parcels i.e. Ntima/Igoki/7974 from Japheth Mwenda Gichuru after conducting due diligence and has since obtained title to the same. That the title is therefore indefeasible for the reason he is a bonafide purchaser for value without notice of any defect of the vendor's title if any.

11. **Zachary Kiamba Mutungi** also filed a further Replying affidavit on 25th February 2020. He averred that the subdivision in Parcel No. 529 allowed him and others to develop and utilise their respective portions. That the subdivision of the original parcel numbers shows that the difference in size is minimal and in any event he carried out all the developments taking into account the size of the land as shown to him by the petitioner hence he should incur any loss or have his building destroyed due to the subdivisions carried out by the petitioner who is now seeking orders to cancel the same.

12. That there were two applications which this court considered before delivery of its ruling dated 11th October 2018 i.e. his application and application by Catherine Kendi seeking similar orders as the ones sought by the petitioner herein. That the court having considered the said application by Catherine Kendi together with his application dated 22nd November 2018 and having not granted the orders sought therein the petitioner cannot seek the same orders vide her current application.

Analysis and Determination

13. The main issue for determination as raised by the petitioner's application and the subsequent replying affidavits relate to the implementation of the certificate of grant issued on 11th October 2018. The first point of the respondent's disjuncture was that there was no pre-existing certificate of confirmation of grant issued on 11th October since the court's ruling dated 11th October 2018 had not revoked the initial grant.

14. This court's records clearly show that the court issued a grant dated 11th October 2018. Also vide this court's ruling dated 7th February 2019 the court explained the essence of issuance of a fresh confirmation of grant when it held as follows;

“The court having issued orders contrary to those in certificate dated 6th December 2010, it means that automatically a fresh certificate of confirmation would issue.

In the certificate of confirmation dated 6th December 2010, all the assets forming part of the estate of the deceased and both the applicant and Respondent objected to the same as a result the determination made on 11th October 2018 was reached at.”

15. The other preliminary issue is whether this court had determined the application made by Catherine Kendi. At paragraph 11 of the court's Ruling dated 7th February 2019 the court determined the application made by Catherine Kendi, dismissing the same, as far as it had found that there was no reason to revoke the grant. The application brought by the applicant herein is anchored on different set of facts and against the background of new developments in the estate of the deceased hence properly on record.

16. Coming to the Orders sought in the application. I have perused the courts record. Some the parcels are currently are still registered in the name of the deceased and the same have been interchangeably registered as Saberio m' Mutungi Kithambi(parcel No. 2276) and Zaverio M' Mutungi Kithamba (L.r.Ntima/Igoki/3999). Some of the parcels have also devolved to would be benenfiaries e.g. Nyaki/Mulathankari/482 in the name of Helen Kigambi Mugambi and Benard Mugambi Gituru as joint proprietors, Ntima/Igoki/7974 in the name of Moses Gichuki Njogu whereas Nyaki/Mulanthankari/529 in the name of the administrator.

17. This court considered all this deliberations in its Ruling dated 11th October 2018. I have also taken note of the developments made by the Respondents herein. It is clear that some of the parcels sought to be distributed are already in the names of the administrator. This shows that there has been partial distribution of the estate of the deceased. The applicant herein does not provide a sketch map to pinpoint the areas which will be adversely affected in the new scheme of distribution presented by this court's ruling dated 11th October 2018. I do note that she particularly holds a substantial amount of the subdivisions in Nyaki/Mulathanki/529 in her capacity as the administrator of the estate. Purchasers of the estate properties that had so far been devolved to the beneficiaries of the estate are also protected by virtue of section 93 of the Law of Succession Act. It is therefore not apt to revert back the title to the names of the deceased at this time when there has already been partial distribution of the estate of the deceased.

18. I however find that there is need there is need to rectify the names of the deceased as they appear in the certificate of confirmation of grant to include his other names **Saberio M' Mutungi Kithamba alias Zaberio M' Mutungi Kithamba**. This will ease the transfer process.

19. For the avoidance of doubt the distribution of the estate of the deceased shall be in line with the grant issued on 11th October 2018.

20. The application made by the petitioner herein thereof succeeds only in terms of prayer (a) of the application.

21. Costs of the application shall be borne by both parties.

HON.A. ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 28TH DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONG'INJO

JUDGE