



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 625 OF 2009

IN THE MATTER OF THE ESTATE OF DOMENICO DE MASI (DECEASED)

MUNYAKA KUNA CO. LTDAPPLICANT

V E R S U S

BERNADO VINCENZIO DE MASIADMINISTRATOR/RESPONDENT

MOSES MAINA NGUGI.....1ST INTERESTED PARY

SAMUEL PETER WAWERU MAINA.....2ND INTERESTED PARTY

RULING

Factual Background

1. By a Notice of Motion dated 17th May 2019 and filed on 20th May 2019 pursuant to Sections 3A and 63(c) of the Civil Procedure Act, Orders 22 Rule 28(1) and 40 Rule 3(1) of the Civil Procedure Rules, Sections 55 and 82(ii) of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the Applicant sought orders as below;

- (a) That the application filed herewith be certified urgent and service thereof be dispensed with at the first instance.
- (b) That the 1st and 2nd Interested Parties be cited in these proceedings as having intermeddled with the property of the deceased.
- (c) That the property of Bernado Vincenzo Demasi the administrator of the estate of the deceased Domenico De Masi be attached, and he be detained in prison for a term not exceeding six months unless in the meantime the court directs his release for disobedience and breach of orders of this Honourable Court.
- (d) That the illegal registration of subdivisions of the deceased's property known as L.R. 42/11 and transfers thereof contrary to the orders of this court in contempt of court be declared null and void and all the titles arising from the illegal transfers be revoked and cancelled.
- (e) That there be orders of temporary injunction to restrain the Respondent from wasting, damaging, alienation, sale, removal, disposition, or any dealing whatsoever with any of the resultant subdivisions of the deceased's property known as L.R No. 41/11 pending hearing interpartes of this application.
- (f) That there be orders of temporary injunction to restrain the 1st Interested Party from wasting, damaging, alienating, sale, removal, disposition, or any dealing whatsoever with the Titles L.R. 42/20, 42/25, 42/26, 42/30 & 42/31 being the illegally registered subdivisions and transferred property of the deceased herein and or any further or other resultant subdivisions thereof of the deceased's property known as L.R. No. 41/11 pending hearing interpartes of this application.
- (g) That there be orders of temporary injunction to restrain the 2nd Interested Party from wasting, damaging, alienating, sale, removal, disposition, or any dealing whatsoever with the Titles L.R. 42/32 & 42/33 being the illegally registered subdivisions, further subdivisions and transferred property of the deceased herein and or any further or other resultant subdivisions thereof of the deceased's property known as L.R No. 41/11 pending hearing interpartes of this application.
- (h) That the costs of this application be provided for.

(i) Any other orders that the court may deem fit to grant.

2. The application is predicated upon grounds stated on the face of it and an affidavit in support sworn on 17th May 2019 by the applicant. In response, the respondent/administrator filed his replying affidavit sworn on 31st July 2019 denying acts of disobedience against the said court order/s.
3. Equally, the 1st Interested Party filed his replying affidavit sworn on 17th October 2019 denying disobeying the alleged court order and instead claimed purchaser's interest over L.R. 42/30 and 42/21 which he claimed to have bought from the administrator pursuant to a legally issued court order vide a Certificate of Confirmed Grant. Also, the second interested party filed his replying affidavit on 17th October 2019 claiming purchaser's interest over L.R. No. 42/32 and 42/33 pursuant to a Certificate of Confirmation of grant issued by this court.
4. Before I proceed to determine on the salient legal issues raised on contempt of court orders and ownership dispute over a section of the estate by the interested parties, I would wish to give out a brief historical background pertaining this matter.
5. The deceased in this case died intestate on 14th July 2000 leaving behind L.R. 42/11 Nairobi as the only asset. On 18th March, 2009 Bernardo Vincenzo De Masi petitioned this court for a grant of letters of administration. Subsequently, the court issued the grant on 27th July 2009. Vide Summons dated 27th August, 2009 the administrator sought confirmation of the said grant and proposed the estate to be shared out between himself and Moses Maina the 1st interested party in this application. Prior to filing of that application, one Bruno Rosiello had filed a caveat dated 3rd November 2009. Equally, Munyaka Kuna Co.LTD had filed their caveat on 15th April 2010 claiming purchaser's interest and therefore creditors to the estate.
6. During the pendency of the two caveats, the administrator filed a fresh Summons dated 7th October 2010 seeking confirmation of the grant. It was during this time that an additional asset L.R. 5908/8 was introduced for distribution. Consequently, the grant was confirmed on 31st January 2011 and estate shared out as per the proposed mode of distribution.
7. On 1st March 2011, Munyaka Kuna Co. Ltd (caveator) filed a Notice of Motion dated 28th February 2011 seeking an injunction to restrain sale, transfer, alienation and or sub-division of L.R. 42/11 Nairobi to which he had purchaser's interest. Further, he asserted that the grant was irregularly and fraudulently obtained without their participation and concealment of material facts considering that confirmation was done without due regard to the pending caveat.
8. Munyaka's application was allowed exparte on the date of filing and then confirmed on 14th March 2011 after interpartes hearing. Later, Munyaka filed Summons dated 2nd March 2011 seeking revocation or annulment of the grant made on 31st January 2011 based on the grounds of; fraudulent acquisition of the grant, non-disclosure of material facts to the case and, that the proceedings were defective in substance taking into account that there was an affidavit filed on 17th August 2010 in opposition of the application for confirmation of grant which he later learnt was mysteriously plucked from the court record.
9. On 22nd May 2012, parties recorded a consent staying distribution of the estate pending hearing and determination of HCC No. 107/2011 in which Munyaka claimed transfer of 6 acres out of L.R. 42/11 Nairobi between Munyaka Kuna Co. Ltd and the administrators of the estate in which Munyaka claimed transfer of 6 acres. On 24th September 2018, parties confirmed that the ELC Case No. 107/11 had been determined in favour of the applicant. A decree dated 14th June 2018 was filed in court confirming that the ELC had awarded 6 acres out of L.R. 42/11 to the objector on grounds of adverse possession.
10. After canvassing the revocation application, this court upheld the same vide its ruling dated 6th November 2018 thus declaring and ordering;

(a) that the application for confirmation dated 7th October 2010 and filed on 8th November 2010 be expunged from the court record;

(b) that the certificate of confirmation issued on 31st January 2011 be revoked;

(c) that the petitioner's/applicant's application for confirmation of grant dated 27th August 2009 be set down for hearing.

(d) that the administrator to include Munyaka Kuna Co. Ltd as a beneficiary of six (6) acres out of L.R. 42/11 Nairobi as per the decree in ELC Case No. 107/11.

(e) that the matter be set down for mention within 14 days from the date of delivery of the ruling to confirm compliance.

11. Instead of following these directions, Munyaka Kuna and Co. Ltd filed this application seeking the prayers set out herein above.

Applicant's Case

12. According to the applicant (Munyaka Co. Ltd), they bought six acres out of L.R. 42/11 which was later sub-divided sometime 2001 into L.R. 42/21 measuring 5 acres and L.R. 42/22 (1 acre) in their favour. That when he learnt of the petitioner's petition for grant of letters of administration, he filed a caveat on 15th April 2010 (Annexure DK 2) culminating to a court order dated 1st March 2011 (Annexure DK 3) restraining the Petitioner and or his agents from alienating, selling, disposing or interfering with Title No. 42/11.

13. That upon hearing the application, the court confirmed the injunctive orders on 14th March 2011 (see annexure KD 3(a)) and further inhibited the Chief Land Registrar from registering and dealing with Title No. 42/11 or any resultant sub-division pending hearing and determination of the application for revocation / annulment of the confirmed grant of letters of administration.

14. They further averred that, the sub-division of L.R. 42/11 Nairobi and subsequent sale of part of it to the interested parties was illegal and contemptuous against the court order.

15. They went further to claim that the interested parties have since served them with a plaint in ELC No. 98/2019 in which Simon Peter Waweru Maina (2nd interested party) is seeking purchaser's interest over L.R. No. 42/32 and 42/33 being sub-divisions out of L.R. 42/11. That in the said plaint, the 2nd interested party is claiming having bought the two parcels of land from the administrator/respondent sometime on 19th July 2012 (see annexure DK7). They further stated that, vide ELC Case No. 99/2019, the 1st interested party is also claiming purchaser's interest over L.R. No. 42/30 and 42/31 being sub-divisions out of L.R. 42/11. He also claimed to have bought the same from the petitioner on 22nd April 2013.

16. It was further averred that, to defeat the operation of this court's orders, the respondent managed to interfere with land's office records to reconstruct a new file to perpetuate illegal sub-division and subsequent transfer of part of the estate to 3rd parties hence the need to punish him for contempt.

17. In her submissions filed on 19th August, 2019 M/s. Chege for the applicant reiterated the averments contained in the affidavit in support of the application. Although M/s. Chege made reference to L.R. 41/11 as the asset left by the deceased, it is possibly an oversight as the actual land in question is L.R. 42/11. It is M/s. Chege's submission that the court having nullified the grant issued on 31st January 2011, any other further sub-division of L.R. No. 42/11 is not only illegal but an act bordering on criminality. Counsel further submitted that the ELC Case No. 107/11 had fully determined the applicant's claim favourably.

18. That by the respondent ignoring court orders of 1st March 2011 and 14th March 2011 restraining him from alienating, selling or disposing the property the subject of the pending succession amounts to an act of court contempt. To support this position, counsel referred the court to Section 45 of the Law of Succession which criminalizes intermeddling with the estate of a deceased person. Further reliance was placed on the decision in the case of **In the matter of the Estate of Veronica Njoki Wakagoto (deceased) (2013)eKLR** where the court held that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law and any person who acts to the contrary handles the estate without authority hence guilty of intermeddling.

19. According to M/s. Chege, the respondent sold the property belonging to the deceased without authority as letters of administration had not been processed. Learned Counsel further submitted that since the grant is yet to be confirmed, no further dealings on the original land should be entertained. She further referred the court to the holding in the case of **Machakos High Court Civil Case No. 95/2001 John Kasyoki Kieti v Tabitha Nzivulu Kieti & Another** in which the court held that commencing a suit on behalf of the estate before obtaining a grant of representation amounts to an act of intermeddling with the estate.

Administrator's/respondent's response

20. In response vide his replying affidavit filed on 15th August, 2019 the administrator/respondent contended that he was legally issued with a confirmed grant culminating to the sub-division of LR No.42/11 and subsequent transfer of various sub-division products to the current owners. He denied mutilating court file records nor interfering with land registry documents. That the interim court orders of 1st March 2011 and confirmed on 14th March 2011 were superseded by the certificate of confirmation of grant which in effect is a judgment paving way for execution.

21. He further averred that, the land registry file was reconstructed after following due process. He stated that the applicant did not meet the threshold for grant of injunction orders. Despite being given an opportunity to file his submissions, the administrator respondent did not file any.

1st Interested party's response

22. The first interested party relied on his replying affidavit filed on 17th October 2019 claiming L.R. Nos. 42/30 and 42/31 being products curved out of the sub-division of L.R. 42/21 which he allegedly bought from the administrator. He attached a Certificate of Title Deed (Annexure MNM 1) registered on 16th January 2018 in his name.

2nd Interested party's response

23. Vide his replying affidavit filed also on 17th October, 2019 the 2nd Interested Party claimed purchaser's interest over L.R. 42/32 and L.R. 42/33 which were products of sub-division of L.R. 42/11 the subject of this succession cause. He claimed that he has since filed a **Civil Suit No. 98/19** before the ELC Court to protect his interest. He also attached two title deeds (Annexure SPW1) issued on 16th January 2018.

24. In submission, Mr. Kabaka Ombui appearing for the Interested Parties, filed his submissions on 11th November 2019 literally reiterating the averments contained in the interested parties' respective replying affidavits. Counsel basically contended that his clients legally bought the parcels of land in question pursuant to a lawful court order in this case a confirmed grant. That the two cannot be cited for contempt of court. According to Mr. Ombui, it is the applicant who is intermeddling with the property of the interested parties.

Rejoinder by the applicant

25. In his rejoinder, the applicant filed a further affidavit sworn on 19th August 2019 in which he averred that the dispute over the applicant's right over L.R. 42/11 having been determined by ELC No. 107/11, the same is res-judicata and cannot be litigated again through the back door. He further stated that the administrator cannot hide behind the interested parties to further litigate over a finalized matter. That the applicant had no legal authority to sub-divide and distribute the land while fully aware of the existence of a court order barring such acts.

26. In his further submissions in response to the interested parties' submissions, M/s Chege re-submitted entirely on the whole case without restricting herself to the issues raised in the interested parties' submissions.

Analysis and determination

27. I have considered the application herein, responses by the respective parties and submissions by counsel for the applicants and interested parties. Issues for determination are;

(a) whether the respondent and interested parties intermeddled with the estate herein and committed acts of contempt of court against court orders of 1st March 2011 and 14th March 2011;

(b) whether the sub-division and transfer of the resultant parcels of land out of L.R. 42/11 is null and void.

(c) whether a temporary injunction can issue in the circumstances.

Whether the Respondent and Interested Parties intermeddled with the estate herein and committed acts of contempt of court against its orders dated 1st March 2011 and 14th March 2011

28. From the facts analyzed above, there is no dispute that the administrator/respondent did petition for a grant of representation in respect of the estate of the deceased herein where L.R. 42/11 Nairobi was the only asset originally listed. It is also not in dispute that the applicant moved to this court and lodged a caveat on 15th April 2010 effectively stopping any transactions on the said land pending further court orders. Prior to that, the petitioner had obtained a grant of letters of administration on 27th July 2009 paving way for filing of an application for confirmation on 31st August 2009.

29. However, for unknown reasons, after a caveat was lodged, the respondent abandoned the original application for confirmation and filed a fresh one on 7th October 2010 culminating to its confirmation on 31st January 2011. Aggrieved by this development, the applicant lodged an application dated 28th February 2011 but filed 1st March 2011 thereby obtaining restraining orders for the administrator not to carry out any sale, transfer or alienation over the subject land. At the same time, the applicant filed a revocation application on 2nd March 2011 seeking revocation of the confirmed grant. On 22nd May, 2011 by consent, distribution of the estate was stayed pending the outcome of ELC 107/11 which eventually acknowledged the applicant as the legal owner of 6 acres out of LR No.42/11. The ELC further directed that Munyaka be registered as the rightful owner of 6 acres out of LR. No. 42/11.

30. What is the implication of the respondent's act of sub-division of LR No. 42/11 and sale to 3rd parties among them the interested parties? The law under Section 45 of the Law of Succession Act is quite clear in that, nobody is supposed to engage on any dealings over the estate of a deceased person unless authorized by the court and anything to the contrary amounts to a criminal act known as intermeddling with the estate of a deceased person.

31. Any person who acts contrary to the aforesaid provision is deemed to commit an act of intermeddling with the estate of a deceased person hence a criminal offence punishable by law. (See **Jeremiah Kamau Gitau and Others v Wandai and five others (1989) KLR 231** where the court held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling with the estate.

32. However, for any person to be held culpable of intermeddling with the estate of a deceased person, the person alleging such criminal act must prove the same beyond reasonable doubt. See **In the matter of the Estate of Dr. John Muia Kalii (Deceased) Machakos HCC Succession Cause No. 81/1995** where J. Mwera held that;

“Since intermeddling is a criminal offence evidence to support an allegation of it must be very strong.”

33. It is apparent from the pleadings herein that the respondent did sell part of the estate to the 2nd interested party on 19th July 2012 and 1st interested party on 22nd April 2013. All these transactions were done after the court had enjoined and or stopped any dealings, sale or alienation of L.R. 42/11 on 1st March 2011 and 14th March 2011. Despite the existence of these orders pending hearing and determination of the revocation application, the respondent went ahead and sold part of the estate out of L.R. 42/11 after applying for sub-division of L.R. 42/11 on 25th June 2001 before even obtaining a grant of representation.

34. Did the act of selling the land to the interested parties amount to an act of intermeddling with the estate and therefore acts of contempt to a court order? It is trite that a court of law has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. In arriving at this finding, I am guided by the decision in the case of **Woburn Estate Limited v Margaret Bashforth (2016)eKLR** where the Court of Appeal stated that:-

“The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in

question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times.”

35. In the case of **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah and Another Civil Application No. 39/1990**, the court held that;

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

See also **Hadkinson v Hadkinson (1952)2 AII ER 567.**

36. **In Kiru Tea Factory Company Ltd v Stephen Maina Githiga and 14 Others (2019)eKLR** the Court of Appeal stated that, for an order of contempt to succeed one must prove the terms of the order; knowledge of the terms of the order; Failure by the respondent to comply with the terms of the order and willfulness to disobey by the respondent.

37. It is clear from the terms of the order of 1st March, 2011 and 14th March, 2011 that the respondent was not supposed to sell or alienate, dispose land parcel No. 42/11. The respondent does not deny existence and knowledge of these orders. His only defence is that he acted upon the certificate of confirmation which distributed the estate.

38. However, the grant was confirmed on 31st January 2011 much earlier before the orders of 1st March 2011 and 14th March 2011 which restrained him from selling, disposing or alienating the said land. The injunctive orders were to be in force until the revocation application was heard and determined. That application was determined on 6th November 2018. Effectively, the act of selling part of L.R. No. 42/11 to the interested parties the year 2012 July and 2013 April respectively amounts to blatant disregard of the two court orders.

39. To hide behind the confirmed grant whose execution was stayed by virtue of the disobeyed order is an act of dishonest. For those reasons, I am satisfied that the respondent did act in contempt of court orders of 1st March 2011 and 14th November 2011.

40. Are the interested parties guilty of any act of contempt? There is no proof that the interested parties were aware of the said orders. They acted on the facts as presented by the respondent that he had a grant which gave him authority to sell land which was not true as it had been stayed. In accordance with the holding in **Refrigeration and Kitchen Utensils and Kiru case (supra)**, the interested parties were not aware of the terms of the order hence cannot be said to have willfully disobeyed the order.

Whether the Sub-division and transfer of the resultant parcels of land out of L.R 42/11 is null and void

41. As stated herein above, the grant issued on 31st January 2011 was revoked on 6th November 2018 and the petitioner directed to prosecute his original application for confirmation dated 27th August 2009 with the applicant as a beneficiary of 6 acres on account of being a creditor to the estate and recognized under the doctrine of adverse possession pursuant to ELC No. 107/11 which recognized him as the rightful owner of 6 acres.

42. This court’s judgment of 6th November 2018 and the decision in ELC No. 107/11 has never been appealed against nor set aside. With the stay of execution of the confirmed grant and subsequent revocation of the grant, any action taken in furthermore of that grant including sub-division and transfer of L.R. 42/11 to 3rd parties among them the interested parties herein is null and void. Accordingly, the Land Registrar Nairobi Lands office is hereby directed to cancel all sub-divisions and titles issued thereof and the land to revert to the original title deed (L.R. 42/11) for further distribution subject to confirmation of the grant which is yet to be determined as parties have not moved the court as directed in the Judgment of 6th November 2018.

Whether a temporary injunction can issue in the circumstances.

43. Grant of temporary injunction is guided by statutory provisions and case law. Order 40 of the Civil Procedure Rules provides for issuance of injunctions. In the celebrated case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358**, it is incumbent upon the applicant to prove that he has a prima facie case with a probability of success; that he is likely to suffer irreparable damage which cannot be adequately compensated in monetary terms If the orders are not granted and that, whether the scales of justice tilts in his favour.

44. From the judgment of this court dated 6th November 2018 and the ELC decision in ELC No. 107 /2011 which gave 6 acres to the applicant, it is obvious that the applicant has a prima facie case with a probability of success; he is likely to suffer irreparable damage which may not be adequately compensated in monetary terms and, that the scales of justice does tilt in his favour. The interested parties cannot claim valid ownership rights over what has been declared illegal. No legal title can arise out of an illegality or illegal process.

45. Having held as above, it is my finding that the applicant has proved his case to the required degree and therefore allowed with orders that;

(a) The Respondent/Administrator be and is hereby found guilty of disobeying court orders of 1st March 2011 and 14th March 2011 hence held in contempt of court to which he is sentenced to a fine of Kshs. 50,000/- payable within thirty (30) days in default to be arrested and serve thirty (30) days in jail.

(b) That the sub-division of L.R. 42/11 and subsequent transfer of the resultant parcels of land be and is hereby declared as null and void.

(c) The Land Registrar Nairobi land registry is hereby directed to cancel the sub-divisions and transfer of any part of the said land to any party for the land to revert back to the original Title No. L.R 42/11 pending hearing and determination of the pending application for confirmation.

(d) That an order of injunction to issue in respect of L.R. 42/11 and or its resultant portions after subdivision restraining any sale, alienation, distribution or any dealings thereon until further orders from this court.

(e) Parties to set down for hearing the application for confirmation dated 27th August 2009.

(f) Costs against the respondent awarded to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE, 2020.

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J. N. ONYIEGO

JUDGE