



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 10 OF 1985

IN THE MATTER OF THE ESTATE OF THE LATE KAMAU GICHUI(DECEASED)

LEAH MUKAMI GICHUHI.....PETITIONER/RESPONDENT

VERSUS

MONICAH WAMBUI KAMAU.....OBJECTOR/APPLICANT

RULING

1. **MONICAH WAMBUI KAMAU** (the applicant) moved this court by a notice of motion application dated 10.4.2015 under section 3A of the Civil Procedure Rules and Rule 73 of the Probate and Administration Rules. The application seeks for the following orders:

a) **The certificate of lease issued on 21.7.2000 over parcel no. Eldoret Municipality/Block 6/95 granting half share of the property to the parties herein be cancelled.**

b) **The Uasin Gishu County Land Registrar do issue a proper certificate of lease in respect of parcel number Eldoret Municipality 6/95 in accordance with the confirmed grant of letters of administration issued on the 26.7.2012 pursuant to which the petitioner/respondent is entitled to half share of the front shop only and the objector/applicant is entitled to half share of the front shop and all the residential quarters at the back and the developments thereof.**

c) **This court approves the survey plan attached herewith in respect of parcel number Eldoret Municipality/Block 6/95 marked (MWK 6) as a true representation of the shares of the parties herein as specified in the aforesaid certificate of confirmation of grant issued on 26.7.2012**

d) **The petitioner/respondent be ordered to render account of all proceeds acquired from the sale of Eldoret Municipality Block 14/5.**

e) **Costs of this application be paid by the petitioner/ respondent**

2. The application was premised on the grounds that on 4.7.2011 an order was made by Anzangalala (J) to the effect that the certificate of confirmation of grant was issued on 17.2.1997 and on 28.10.1997 was set aside, cancelled or was expunged. Therefore, the certificate of lease issued on 21.7.2000 should be cancelled. Thereafter Anzangalala (J) directed that a proper certificate of confirmation of grant be issued in terms of the consent made on 16.10.1985 by Hon. V.V Patel.

3. The application was supported by an affidavit sworn by the applicant who averred that she was made a co-administrator pursuant to objection proceedings. The estate involved parcel number **Eldoret Municipality Block 6/95 and block 14/5** pursuant to a consent order recorded on 16.10.1985. The parcel no. 6/95 was to be shared whereby the residential quarters at the back would belong to the objector whereas the front shop would be shared equally between the two widows. The petitioner (**LEAH MUKAMI**) was to be awarded 2 acres of the **Eldoret/Municipality block 14/5** whereas the rest of the acres or proceeds was to be shared equally between the two widows. This was adopted as judgment of the court with respect to distribution.

4. The petitioner however without knowledge of the objector obtained two certificates of grant one dated 17.2.1997 and 28.10.1997 and she was issued with a certificate of lease on 21.7.2000 over parcel number 6/95. This was in contravention of the consent order.

5. The above mentioned two grants were cancelled and expunged from the courts record by a ruling dated 4.7.2011 and the court ordered a proper certificate of confirmation of grant in terms of the consent order made on 16.10.1985. That the Uasin Gishu county could therefore not issue another certificate of lease based on the grant issued dated 26.7.2012 as the existing lease had not been cancelled.

6. In addition, the petitioner had disposed off the entire **Block 14/5** in disregard of the consent order dated 16.10.1985 and had never paid her any money or rendered account of the proceeds.
7. In the court record, there is no replying affidavit in response to the application, though the objector keeps referring to it in their submissions and its supplementary affidavit filed on 2.12.2015.
8. The applicant in her supplementary affidavit filed in court on 2.12.2015 maintains that her application is merited and is made in good faith, as the court had ordered that a proper certificate of confirmation of grant be issued. The petitioner was therefore not entitled to the equal share of the entire plot as seen in the certificate of lease which was irregularly obtained. She went ahead to deny the joint letter dated 17.3.2009 which she was made to sign thinking it referred to half share of the front shop and not the entire plot. The letter was drafted long after the petitioner had processed the certificate of lease. She explains that she had not received any share of the proceeds of sale from the Block 14/5.
9. In addition to the above, it is contended that the ruling by Hon. Justice Ngenye did not interfere with nor reverse the consent order of 16.10.1985. The petitioner in Eldoret HCC no. 121 of 1988 in her sworn statement had informed the court that she (objector) had been given a butchery and all rooms that were behind.
10. In her submissions, the applicant reiterated the averments in the application and the supporting affidavit. The estate is in respect of **KAMAU GICHUHI** (the deceased) who died intestate on 4.8.1984 and was survived by two wives **Leah Mukami Kamau** and **Monicah Wambui Kamau**. The estate further relates to **Eldoret Municipality Block 6.95 the town plot** where the objector lives and **Eldoret Municipality 14/5 the Elgon view plot** where the petitioner lives.
11. In regard to the consent order of 16.10.1985 which was adopted by the court as judgment, the objector was to have the residential quarters at the back in regard to block 6/95 and the front shop was to be shared equally by both widows, plot L.R 10492 measuring 4 acres was to belong to the objector **Monica Wambui**, 2 acres in block 14/5 along with all the improvements was to belong to **Leah Mukami** and the remaining acreage was to be sold, and proceeds thereto shared equally between the two wives.
12. The petitioner however obtained two grants which she used to obtain a certificate of lease issued on 21.7.2000. The two grants obtained by the petitioner were cancelled by Hon. Azangalala and he ordered issuance of a proper certificate of confirmation in terms of the consent order made by Hon. Justice V.V Patel on 16.10.1985. That, this ruling was never varied or reviewed.
13. She also points out in her supplementary affidavit, that the national identity card number 123120 used on the certificate of lease against her name is not hers, implying that the petitioner had used other fraudulent means to obtain the certificate of lease. Further, that the joint letter purportedly signed by both parties which was used to subdivide block 6/95 into two equal portions was a nullity as it had no legal basis, because it neither amended nor varied the consent order of 16.10.1985. This court is urged to allow the said application.
14. The respondent in her submissions contends that by virtue of **section 80 of the Land Registration Act and Article 162 of the Constitution**, this court did not have jurisdiction to cancel title in regards to ownership of land, which is within the sole jurisdiction of the Environment and Land court had the jurisdiction to do so. Thus the objector's application is incompetent. The court is referred to **Margret Akai v. Julius Maweu Kilonzo, Nairobi High Court Succ. Cause no. 201 of 2017**, where the trial judge found that the high court had no jurisdiction to order cancellation of titles.
15. It is also argued that the land parcel **Eldoret Municipality block 6** measures **0.041 hectares** which is below the minimum acreage of **0.045 hectares** allowable by the **Uasin Gishu county physical planning standards, guidelines and regulations**. Thus what the applicant is seeking is an unenforceable order. It is also pointed out that the applicant and respondent jointly wrote a letter dated 17.3.2009 seeking to sub-divide the said property and to facilitate issuance of individual titles, which letter has not been expunged from the court records. That the court in its ruling issued by Ngenye (J) on 20.3.2013 in regards to the letter found that the objector was part of the process that enabled the advocate to retain the title of block 6.95. The estate had been shared into two equal parts between each house and the provisions of **Section 28 of the Law of Succession Act** was applied. In support of the respondent's position, reference is made to the case of **Rono v. Rono [2005] eKLR**, where it was stated that distribution of estates was not based on neat mathematical formulae but it was aimed at achieving equity.
16. In addition to the above, parcel number Eldoret municipality block 14/5 was sold to a third party and proceeds shared among beneficiaries and in a ruling delivered on 11.2.1986 the court held that a statement of account had been rendered on 11.2.1986.
17. Further the court was urged to find the applicant as a party who keeps changing her mind since she had initially opted for the matter to go for mediation but had changed mind. This court is urged to dismiss the application with costs.

Analysis and determination

18. The following issues arise for determination:

- i. Whether this court has jurisdiction to order the orders being sought
- ii. Whether the application has merit.

19. The petitioner has raised a pertinent issue which as to be determined first regarding this court's jurisdiction to grant the orders being sought by the applicant. The applicant seeks from this court an order for a proper certificate of lease in respect of Eldoret Municipality block no. 6/95, the survey plan in respect of this parcel be approved and the petitioner to render account of all proceeds. Jurisdiction is everything and if the courts does not have one then it has to down its tool as was held in the *locus classicus* case of **The Owners of Motor Vessel**

"Lillian S" v. Caltex Oil Kenya Limited, (1989) KLR 1.

20. Under **section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules** this court has wide powers to make appropriate orders deemed appropriate in the interest of justice and for preservation of the deceased's estate. **Section 47 of the Law of Succession** provides 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.

21. **Rule 73** provides as follows:

Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of Justice or to prevent abuse of the process of the court.

22. The applicant had moved the court earlier and the court vide its ruling dated 4.7.2011 had ordered cancellation of certificates of confirmation issued. This was because parties had entered into a consent and the same had been adopted as judgment of the court. The said judgment by Justice V.V Patel, was never set aside. Therefore, any certificate of grant issued which had been issued and used to obtain a lease could not be valid.

23. The petitioner has argued that the objector is seeking orders which this court did not have jurisdiction, but from the fore-going, this had already been determined by the ruling of the court, and the issue here is enforcement of the judgment of the court and the certificate of grant which was not per se an issue that falls squarely on the environment and land court.

24. In **Munyasya Mulili & 3 ors v. Sammy Muteti Mulili [2017] eKlr**, the court adopted the decision in **Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru, Nairobi ELC suit NO. (2013) eKLR**, where it opined that,

"in matters of succession disputes touching on land, the 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.

Musyoka J. in this regard in Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

"...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

'Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...'

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

In light of the above, I hold and find that this court has jurisdiction to issue the orders being sought by the applicant. If the orders sought are

not enforceable, then the respondent or the party who finds a challenge in complying has various avenues of redress, including seeking to set aside the orders are appealing against the orders

25. The certificate of lease in respect of **Eldoret Municipality 6/95** was issued based on a grant which was not in tandem with the judgment of the court dated **16.10.1985** and needless to say, the lease has to be rectified. I therefore make the following orders:

a. The certificate of lease issued on 21.7.2000 over parcel no. Eldoret Municipality/Block 6/95 granting half share of the property to the parties herein be cancelled.

b. The Uasin Gishu County Land Registrar do issue a proper certificate of lease in respect of parcel number Eldoret Municipality 6/95 in accordance with the confirmed grant of letters of administration issued on the 26.7.2012 pursuant to which the petitioner/respondent is entitled to half share of the front shop only and the objector/applicant is entitled to half share of the front shop and all the residential quarters at the back and the developments thereof.

c. This court approves the survey plan attached herewith in respect of parcel number Eldoret Municipality/Block 6/95 marked (MWK 6) as a true representation of the shares of the parties herein as specified in the aforesaid certificate of confirmation of grant issued on 26.7.2012

d. There is a statement of accounts in the court record in respect of Eldoret Municipality block 14/5 for the period 2nd Feb 1986 only. The petitioner/respondent be and is hereby ordered to render account of all proceeds acquired from the sale of Eldoret Municipality Block 14/5 for the entire period to-date.

e. Costs of this application be borne by the petitioner/ respondent

E-Delivered and dated this 17th day of June 2020

H.A. OMONDI

JUDGE