



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

SUCCESSION CAUSE NO. 264 OF 2000

IN THE MATTER OF THE ESTATE OF THE LATE JOHN MACHONGO OMORI

AND

ANDREW NYAKUNDI MACHONGO.....PETITIONER/ APPLICANT

VERSUS

PAULO ONSONGO

MARK MACHONGO.....RESPONDENTS

RULING

1. The Chamber Summons dated 23rd August 2019 is expressed to be brought under **Rule 73** of the **Probate and Administration Rules** and **Section 18** and **19** of the **Land Registration Act 2012**. The orders sought by the applicant are;

1. That the Land Registrar of Kisii County together with the County Surveyor do revisit land parcels No. NyaribariMasaba/Bonyamasicho/1858,1859,1860,1861 and 1863 and re-establish and fix their respective boundaries in accordance with the mutation form dated 20/12/2013 in the custody of the County Surveyor;
2. That either party be at liberty to be represented by a surveyor of its choice during the exercise;
3. That this honourable court be pleased to order the respondents herein to execute personal bond to maintain peace during the exercise of re-establishing and fixing the boundaries;
4. That this honourable court be pleased to order the Sub-County Commander Masimba Police Station to provide security during the exercise;
5. That the Land Registrar Kisii County and the County Surveyor to file their report in this court [within] 30 days from the date of the exercise;
6. That the respondents bear the costs of the Land Registrar and the County Surveyor in any event.

2. The grounds in support of the application are set out at the foot of the application and in an affidavit sworn by the applicant on 23rd August 2019. The applicant deposes that following the issuance of the certificate of confirmation of grant in the estate of his deceased father on 9th October 2009, the estate's sole property, land parcel no. NyaribariMasaba/Bonyamasicho/289 was subdivided by the county surveyor in accordance with the confirmed grant. Later on, the respondents removed the beacons that had been installed by the County Surveyor and insisted that the case had not been finalized.

3. The applicant claims that when he took the county surveyor to his parcel of land to re-establish the boundaries on 16th August 2019, the respondents and their children came armed and threatened him and the surveyor, thus halting the exercise. He prays for an order directing the land registrar and the county surveyor of Kisii County to revisit the estate and install new beacons. He also seeks that the respondents be ordered to execute a personal bond to maintain peace during the exercise.

4. To counter the application, the respondents filed grounds of opposition on 10th December 2019. They averred that the application was legally incompetent since the matters raised in the application were *res judicata* and this court is *functus officio* having rendered its ruling on the issue of demarcation of boundaries. They also averred that the mutation map sought to be adopted had never been adopted as part of this court's judgment. The respondents urged the court to treat their affidavits sworn on 16th December 2015 and 3rd August 2015 as their further reply to the application.

5. Directions were taken to dispose of the application by way of written submissions. I have duly considered the submissions of the applicant which were filed on 3rd January 2020 and those of the respondents which were filed on 13th July 2020.

6. Before I tackle the issues arising from the parties' affidavits and submissions, I will give a brief background of the protracted proceedings leading up to this application.

7. The applicant and respondents herein are sons of the late John Machongo Omori who died on 15th June 1985. The applicant insists that the deceased died testate while the respondents maintain that he died intestate. The issue of whether or not the deceased had a will was not placed before this court for determination. The proceedings show that a grant of letters of administration was issued to the applicant by a consent entered on 1st March 2007. A confirmed grant distributing the deceased's land parcel no. NyaribariMasaba/Bonyamasicho/289 was then issued on 9th October 2009 and each of the deceased's sons or their widows got the following shares of the land;

1. Andrew NyakundiMachongo – 7 acres
2. MarkMachongo – 7 acres
3. TeresiaNyaresoOndieki – 7 acres
4. Paul Onsongo- 7 acres
5. Sabina MomanyiMageto and TurusilaMosariMageto- 3.5 acres each

8. On 16thDecember 2013, the respondents moved the court seeking *inter alia* that the Kisii County Land Registrar and Surveyor be ordered to partition land parcel no. NyaribariMasaba/Bonyamasicho/289 according to the demarcations already obtaining on the ground. In a ruling dated 24th March 2016, J.R. Karanjah J. dismissed the application and held;

“9. ... Basically, matters revolving around sub-division or partitioning of land would fall within the jurisdiction of the Land Court rather than a Succession Court. This is more the reason why the petitioner contended in his submissions that the applicants have a recourse to file a suit in the Land Court.

This Court would thus divest itself of the jurisdiction to deal with matters touching on demarcation of the estate property regard being given to the fact that the grant subject of this cause was duly confirmed and a certificate of confirmation grant dated 9th October 2009, issued to that effect.

10. The appropriate schedule to the said certificate of confirmation of grant clearly specified the agreed mode of distribution of the estate property. Therefore, this Court cannot interfere with what was agreed by the parties on how to share the estate property among the beneficiaries of the estate. Indeed, the present application seeks to have the Court intervene in a matter which has already been finalized. The application cannot be an incidental factor to the main succession cause as contended by the applicants. Seemingly, a dispute has arisen in the course of the execution of the certificate of confirmation of grant but this has created fresh issues which ought to be addressed in the Land Court rather than this Court. It would not therefore be farfetched to opine and hold that the present application is a gross abuse of the court process. The best the applicants can do is to file a land case against the petitioner/respondent in the Land Court or move this Court altogether for the revocation of the material grant and/ or the material certificate of confirmation of grant or both. It is only in that way that the question touching on the distribution or subdivision of the estate property would be treated as being incidental to the main succession cause.

In sum, the present application is wanting in merit and is hereby dismissed.”

9. Undeterred, the respondents instituted proceedings before the Environment and Land Court vide Kisii ELC Case No. 194 of 2017 where they sought the following orders;

1. An order that Kisii County Land Registrar and Surveyor do subdivide land parcel no. NyaribariMasaba/Bonyamasicho/289in accordance with the demarcations and developments already on the ground;
2. A permanent injunction restraining the defendants by themselves, their agents and/or servants or any person claiming through themfrom interfering with the demarcations and/or developments of the plaintiffs as it exists on the ground;
3. Costs.

10. The applicant was the defendant in the suit before the Environment and Land Court. He filed an application to dismiss the suit on several grounds including the fact that the matters raised in that suit were *res judicata*. In a ruling dated 13th May 2019, Mutungi J. agreed that the suit was *res judicata* since the issues raised in that suit ought to have been raised in this Succession Cause. He held that the Confirmed Grant had

provided the manner in which the property would be distributed and the Environment and Land Court could not vary or revoke the grant. He also held that the after confirmation of the grant, subdivisions were effected and each beneficiary allocated their respective portions of the land.

11. Turning to the present application, the main prayer sought by the applicant is for reestablishment and fixing of boundaries by the Land Registrar and the County Surveyor. To my mind, this was a matter which was directly and substantially in issue before J.R. Karanjah J. The applicant seems to have reframed issues in an attempt to persuade this court to issue orders that were declined. I have quoted extensively from the ruling dated 24th March 2016 where the learned Judge made a final determination on those issues. He was categorical in his decision that matters pertaining to the demarcation of land fall outside the jurisdiction of a Probate Court. He observed that an issue had arisen in the course of the execution of the certificate of confirmation of grant and the only way to invoke the jurisdiction of the Probate Court was by asking it to revoke the grant.

12. The certificate of confirmation of grant issued on 9th October 2009 remains unchallenged and is still in force. The mutation forms annexed to the applicant's affidavit and marked ANM-1, show that land parcel no. Nyaribari Masaba/Bonyamasicho/289 was subdivided in strict compliance of the confirmed grant. I find I can do no more than echo the sentiments in the ruling dated 24th March 2016 that this court lacks jurisdiction to deal with matters touching on demarcation of the estate property. Consequently, the application dated 23rd August 2019 is dismissed. Each party shall bear his own costs.

Dated, signed and delivered at Kisii this 30th day of July 2020.

A. K. NDUNG'U

JUDGE