



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO. 224 OF 2006

IN THE MATTER OF THE ESTATE OF NDIINGURI KARUGIA (DECEASED)

DAVID NG'ANG'A.....APPLICANT

VERSUS

SIMON NGIGI KAMAU.....1ST RESPONDENT

SAMWEL MACHIRA MUGAI.....2ND RESPONDENT

HENRY NJOROGE NJONJO.....3RD RESPONDENT

LUKE MUCHIRA NYAGA.....4TH RESPONDENT

ROBERT KUNGU MUIRURI.....5TH RESPONDENT

JANE GATHONI WANGETHA.....6TH RESPONDENT

FREDRICK GICHUHI NJENGA.....7TH RESPONDENT

JOSEPH KINUTHIA.....8TH RESPONDENT

ELILEEN W. KINUTHIA.....9TH RESPONDENT

NELSON MURITU NJENGA.....10TH RESPONDENT

KENNETH NJENGA MUNGAI.....11TH RESPONDENT

SAMWEL NGUGU MUNGAI.....12TH RESPONDENT

DAVID NGANGA NJENGA.....13TH RESPONDENT

SARAH WANJIKU KAMAU.....14TH RESPONDENT

RULING

1. The summons dated 22nd January, 2020 is expressed to be brought under Rule 49 of the Probate and Administration Rules, Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 1, 2, 3 and 4, Order 50 Rule 1 of the Civil Procedure Rules 2010, Order 45 Rule 1, 2 and Article 40 of the constitution of Kenya. Principally, the applicant is seeking the following orders:

i. An order to revise, amend and/or set aside the court's ruling delivered on 29th January, 2019 to the extent that

a) The sale of 99 plots namely L.R No 28641/4 upto L.R No. 28641/103 by Hannah Gathoni Gichuri(deceased) to the respondents be declared null and void

b) A declaration do issue that the respondents are not entitled to protection under Section 93(1) of the Law of Succession Act

ii. A declaration do issue that the late Ndinguri Karugi is the rightful owner of the land known as L.R 7340/59 now registered as L.R 28641 in Mavoko Municipality

iii. An order that the ownership of L.R No. 7340/59 now registered as L.R No. 28641 in Mavoko Municipality be vested in the names of the Administrators of the Estate of the late Ndinguri Karugi for onward transmission to its rightful beneficiaries

iv. The Officer Commanding Ruai Police station do enforce compliance of the orders

v. Cost of the application be provided for.

2. The application is based upon grounds set out in the summons and supported by the affidavit of the applicant David Ng'ang'a sworn on 23rd January 2020 wherein he deponed that he is an administrator of the estate of the deceased. He avers that his sister-in-law Hannah Gathoni now deceased fraudulently applied for and was issued with a grant of letters of Administration of the estate of their late father which she used to transfer the suit property to herself in exclusion of other beneficiaries. The grant was subsequently revoked. He further states that he registered a caution over title to the suit property as entry no. 752 dated 12th September, 2006 which remained in force during the period when the property was allegedly sold to the respondents.

3. Further, the applicant states that on 12th July, 2017 the respondents approached the court claiming to be innocent purchasers for value, which application was dismissed in a ruling by Hon. Lady Justice Muigai dated 29th January, 2019 with other orders being issued. He avers that there are glaring inconsistencies in the orders issued dismissing the application and Order No. 8 which declares that the rights of the applicants are protected by Section 93(1) of the Law of Succession Act until they canvass their proprietary rights in the Environment and Land Court. He asserts that the Honourable Court overlooked the fact that the property had not been transferred at the time the Respondents were purchasing the suit land and that he had already lodged a caution.

4. The applicant further claims that on diverse dates between 2009 and 2012 Hannah Gathoni entered into sale agreements on parcels of land carved out from the suit property. That this was done despite the existence of orders issued by Hon Justice Angawa and Hon. Justice Lenaola which restrained the parties from dealing with the suit property and the existence of a caveat placed on the property. He also claims that on 6th December 2013, Hannah Gathoni transferred the suit property to herself in total disregard of the orders issued by Justice Kimaru on 13th July, 2013. He asserts that in 2014 while his application for revocation of grant was still pending, he filed ELC Misc 82 of 2014 in the High Court at Nairobi which court granted restraining orders issued by Hon. Justice Gacheru on 27th November, 2014.

5. The applicant depones that in 2016, when a dispute arose between Hannah Gathoni and the respondents herein vide ELC 559 OF 2014 over the sale of the plots, he made an application to be enjoined in the cause. However, before the application could be heard and determined, the parties entered into a consent which was adopted by the court on 9th June, 2016. The applicant alleges that his name was mischievously included in the consent as an interested party to cause confusion to the Chief Land registrar to facilitate the removal of the caution he had placed on the suit property. Further, the respondents' claim that they purchased all 99 plots carved out from the suit property is inconsistent with the consent adopted which only indicates 55 plots had been purchased. He asserts that the court in ELC 559 of 2014 also made a finding that this court has jurisdiction to hear and determine the matters in question in these proceedings in its ruling delivered on 18th September, 2019. The applicant denies also engaging the firm of Njenga Mucai and Company advocates in the matter.

6. Lastly, the applicant accuses the respondents of not being innocent purchasers for value having colluded with his sister-in-law to disinherit the beneficiaries of the estate of the deceased. He avers that no consent was issued from the land control board before any transfer was made and the conferment of powers of attorney issued on diverse dates to the children of Hannah Gathoni during the pendency of the caution and injunctive relief orders is evidence of the involvement of the respondents in the fraudulent acquisition of the suit property. He asserts that the claim by the respondents has delayed and restrained the beneficiaries of the estate of the deceased from distribution.

7. In response to the summons, the 1st respondent Simon Ngigi Kamau on behalf of the other thirteen respondents swore a replying affidavit on 12th February, 2020. He avers that the application is defective for seeking orders against individuals not parties to the suit, their application for enjoinder having been dismissed by the court in its ruling delivered on 29th January, 2019. Further, that on 6th March, 2017 this court revoked the Grant issued to Hannah Gathoni which grant the respondents acted on to purchase L.R No. 28641 as innocent purchasers. The Court further issued an order reverting all the properties comprising of the estate of the deceased to the deceased. He states that the court further issued the orders maintaining the status quo regarding the estate of the deceased. In the same ruling, the court directed that all the properties be held in trust for all beneficiaries of the estate of the deceased until the grant is obtained, confirmed and distribution commenced.

8. On the application for review, the 1st respondent states that this court has no power to review a judgment or a ruling of another court being ELC No. 559 of 2014 being that this is not an environment and land court. Further, the ruling of 29th January, 2019 did not provide protection to the respondents under Section 93 of the Law of Succession Act but only advised the respondents to ventilate their claims as innocent purchasers once summons for confirmation have been filed. The court also stated that their interests shall be protected once they establish their property rights in the Environment and Land Court. He asserts that the application for review is a misrepresentation of the court's previous rulings.

9. The 1st respondent depones that the prayer for the property to revert back to the estate of the deceased was already granted by the rulings of the 6th March, 2017 and 29th January, 2019 to protect the estate of the deceased and the same orders cannot be re issued by the same court. He urges the court to dismiss the summons with costs for it was filed due to the applicant's failure to understand previous court proceedings.

10. The summons was canvassed by way of written submissions. In his submissions the applicant highlighted the merits of his application while relying on the case of **Jane Gachola Gathela v Priscilla Nyamira Gitungu and another [2006] eKLR, Lawrence P. Mukiri Mungai, Attorney of Francis Muriki Mwaura v Attorney General and 4 others [2017] eKLR** and **Re Estate of Christopher Jude Adela (deceased) [2009] eKLR** in support of his claim. The respondents through Magera and Gwara Advocates in submitting that the orders sought are defective and should be dismissed relied on the cases of **Njue Ngai v Ephantus Ngai and another [2016] eKLR**.

11. I have considered the summons, the response and the submissions of the parties in juxtaposition to the set criteria for grant of revision orders, to determine whether the Applicant has met the threshold for grant of the sought orders. The applicant sought to revise, amend and/or set aside the court's ruling delivered on 29th January, 2019.

12. The remedy of review of court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure rules. Among the imported procedures is the device of review under the Civil Procedure Rules. In the relevant rules on review under the Civil Procedure Rules, an order of the court can be revised on the grounds of an error on the face of the record or discovery of new and important evidence, that was not available at the time of the making of the order sought to be reviewed, or for any other sufficient reason. (See **Musyoka J exparte Estate of Charles Kibe Karanja (Deceased) [2015] eKLR**)

13. The order which the applicant is seeking to be reviewed, amended and/or set aside was issued by Muigai J on 29th January 2019. Clause 8 of the order stated that the purchasers' interest/claims shall be protected under Section 93(1) of the Law of Succession Act until they canvass and ventilate their proprietary right(s) in the Environment and Land Court. The applicant is seeking a revision of this clause to the effect that the sale by Hannah Gathoni Gichuri (deceased) to the respondents be declared null and void and therefore a declaration that the respondents are not entitled to protection under Section 93(1) of the Law of Succession Act. The grounds upon which the application is based is that there is evidence that the respondents are accomplices in the illegal fraudulent acquisition of the property from Hannah Gathoni(Deceased)

14. However, it is not contended that this new material or evidence was available to the Applicant at the time when the earlier application that led to the order sought to be reviewed was made. It has not been demonstrated that the alleged new matter could not have been discovered by the exercise of due diligence. Accordingly, I find that there is no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made. The applicant needed to meet the prerequisite conditions for an order of review to issue. That is:

- a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time of the decree that was passed or order that was made;
- b) There was a mistake or error apparent on the face of the record; or
- c) There were other sufficient reasons;
- d) That the application was made without undue delay.

15. The grounds for review are specific and the applicant should have endeavored to bring himself under any of the above. That however, is not the end of the matter. The Court is entitled to review its earlier decision if the applicant discloses the existence of any other sufficient reason. In this case, there are several decisions which have the effect of maintaining the status quo with respect to the properties of the estate of Ndungiri Karugia pending the application for confirmation and distribution. The issue raised by the applicant that the respondents purchased property from Hannah Gathoni Gichuri now deceased, upon which they base their claims as purchasers for value in my view is a weighty matter that cannot be ignored.

16. The Applicant has alleged that the process that brought about the acquisition of the suit property by the respondents was flawed. On the other hand, the respondents have averred that the said application was immature, as the issues raised cannot be determined at this stage. They continued that the applicant is using a shortcut to achieve his goal without the involvement of other administrators of the estate of the deceased and asserts that he has no locus standi to bring an application against respondents not party this cause.

17. The court also notes that the applicant has made allegations of fraud against the respondents contending that the purported sale of the suit property was irregular, unlawful and null and void ab initio. Bearing all these facts in mind, I find that a determination thereof and the remedies sought in this application can only be determined after a full trial where the evidence of sale and purchase is adduced orally and tested through cross examination.

18. In my considered view the orders sought being in prayer (i)a, (ii), and (iii) were already granted in the ruling of Muigai J dated 29th January, 2019. The remaining issues can only be determined when the application for confirmation of grant is filed and the respondents are afforded an opportunity to raise their protest. For the foregoing reasons, I decline to grant the orders sought.

No orders as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 29TH DAY OF JULY 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondents