



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 288 OF 2013

IN THE MATTER OF THE ESTATE OF NTHAKANIO M'NGUNGU (DECEASED)

MARY ROSE NAMU.....1ST APPELLANT

ELIZABETH CIUNGU.....2ND APPELLANT

VERSUS

KITHAKA NTHAKANIO.....RESPONDENT

RULING

A. Introduction

1. The applicants moved this court vide an application dated 7/02/2020 brought under certificate of urgency and wherein the applicants prayed for, amongst other orders, that: -

a) The court do cancel the Title Deed for Title No. Kagaari/ Weru/505 registered in the respondent's name and the same be reinstated in the name of the deceased (Nthakanio M'ngungu) for transmission by to the Applicants who are beneficiaries as per the certificate of confirmation of grant as issued on the 28th February 2017;

b) The subdivision of Kagaari/Weru/505 resulting in Title Number Kagaari/Weru/10294 and Title Number Kagaari Weru/10295 in the names of the respondent be revoked;

c) The subdivision of the suit property be effected according to the proposed subdivision plan annexed herein in accordance with the provisions of the certificate of confirmation of grant as issued on the 28th February 2017;

2. The said application was premised on the grounds the face of the application and in the supporting affidavit sworn by Mary Rose Namu. The applicants deposed that the respondent had proceeded to subdivide the suit property into LR Nos. Kagaari/Weru/10294 and Kagaari/Weru/10295 and registered the titles in the respondent's name and they were suspicious that he would sell one of the parcels and thus disinherit the other beneficiaries. It was pursuant to the above that they sought the orders in the application.

3. The application was opposed by the respondent vide a replying affidavit sworn on 26th February 2020 and wherein he deposed that the application was malicious, bad in law and an abuse of the court process as the court dismissed a similar application dated 6/03/2019 and the court effectively pronounced itself on the issue raised again in the application herein.

4. Further he deposed that the applicants had been the impediments to the administration of the estate due to the myriad applications in court and further that the sub-division of the suit land into two portions was in the process of executing certificate of confirmation of grant but he was not able to proceed with further execution as the beneficiaries had failed to contribute funds to enable further sub-division despite him having incurred costs for sub-dividing the land into the two portions. He deposed that as such, he would suffer prejudice if title number LR Nos. Kagaari/Weru/10294 was to be cancelled for he has incurred expenses in administering the land. He blamed the applicants for failing to play their part to have the land sub-divided despite them being in a position to do so.

5. In their further response filed pursuant to the order of 2/03/2020 that granted the applicants leave to file the same, the applicant denied the averments in the replying affidavit to the effect that they were their application was an abuse of the court process and further deposed that they were never an impediment to the implementation of the certificate of confirmation of grant but the respondent had failed in his responsibilities to administer the estate.

6. Further the sub-division of the land into two shares and registering the same in his names was in contravention of the certificate of confirmation of grant and void ab initio and the proposed mode of distribution did not amount to "faithfully abiding by the court orders" but

contempt of the court authority over the matter. Further that they had not failed to contribute to the process but only that the respondent has acted against the Certificate of confirmation of grant and they cannot be parties to acts to undermine court's authority.

B. Issues for determination

7. I have considered the application herein and the responses thereto. I note that the respondent in his replying affidavit raised an issue to the effect that the application was malicious, bad in law and an abuse of the court process as the court dismissed a similar application dated 6/03/2019 and the court effectively pronounced itself on the issue raised again in the application herein. This issue touches on the *doctrine of res judicata* which goes to the root of the application.

8. It is trite law, whenever the issue of jurisdiction is raised, the Court is under an obligation to deal with it *in limine* because without it, the Court cannot make one more step. As such the issues which in my opinion ought to be determined are: -

i. *Whether the instant application is res judicata?*

ii. *If the application is found to be properly before the court, its merit will be determined.*

C. Applicable law and Determination

i. Whether the instant application is res judicata?

9. The doctrine of res judicata is to the effect that a court should not try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court (See Section -7 of the Civil Procedure Act and **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**).

10. Upon perusal of the record, I note that the applicants filed the application dated 6/03/2019 seeking among others for the following orders: -

That the title of LR. Kagaari/Weru/505 registered in the name of the respondent (Kithaka Nthakanio) be cancelled and reinstated in the name of the deceased to enable transmission by registration in the name of the applicants who are beneficiaries and that the Deputy Registrar be authorized to sign all necessary documents for transmission.

11. The court heard the parties on this application and in its ruling delivered on 19/01/2019 dismissed the prayer for cancellation of the title and made the following orders: -

a) That caution placed on LR. Kagaari/Weru/505 be and is hereby lifted.

b) That the respondent was directed to executed all the necessary documents for implementing the grant failure to which the Deputy registrar was authorized to sign them.

c) That the shares of deceased siblings shall be held in trust by the administrator and another beneficiary who shall surrender the properties to the beneficiaries upon attainment of the age of majority.

12. It is clear from the record that the prayer for cancellation of title for LR. Kagaari/Weru/505 was heard and determined by this court. However, it was based on different facts in that the application before the court mainly dealt with a removal of caution and execution of the grant.

13. The applicant's second prayer is for cancellation of title for LR. Kagaari/Weru/10294 and 10295 which are resultant parcels after subdivision of Kagaari/Weru/505. It is alleged that the respondent contrary to the grant subdivided LR. Kagaari/ Weru/505 into two parcels and registered them in his names.

14. These facts are indeed different from the facts in th previous applications. The court did not deal with the issue of cancellation of the original title. It is my finding that this application revolves around registration of LR. Kagaari/ Weru/505 in the names of the respondent and to new sub-division titles cannot be said to be *res judicata*.

15. It is my finding that the application is not *res judicata*.

16. On perusal of th copy of register for Kagaari/Weru/505 I notice that the land was registered in the name of the land was registered in the name of the deceased Nthakanio M'Ngungu on 17/04/1962 and title issued on 16/10/2007. The proprietorship changed on 16/06/2017 to the name of the respondent Kithaka Nthakanio citing an order resulting from Succession Cause No. 288 of 2013 which is the file before this court.

17. The history of this cause is that it was filed at Runyenjes Senior Resident Court on 15/09/2009 and later because the Runyenjes Court lacked pecuniary jurisdiction to deal with the matter following the respondent being appointed the administrator on 29/10/2009. Confirmation of grant was by consent of the parties that led to the distribution between the beneficiaries according to the two houses of the deceased on 28/02/2017.

18. The respondent was registered as proprietor of the deceased's land Kagaari/Weru/505 on 16/06/2017. It is important to note that the court in Succession Cause No. 288 of 2013 never gave any order that the respondent be registered the sole proprietor of the land. This act of transmission by the respondent was not only illegal but criminal.

19. The subdivision of the original parcel LR. Kagaari/Weru/505 by the respondent resulted into two parcels as follows: -

i. LR. Kagaari/Weru/10294 measuring 4.42 ha.

ii. LR. Kagaari/Weru/10295 measuring 6.64 ha.

20. The respondent admits that he carried out the said subdivision and registering the parcels in the names contrary to the grant. He states that he was unable to implement the grant as it was because the siblings of the deceased's first house some of whom are the applicants herein refused to contribute funds to cater for the survey and for registration on transmission.

21. The respondent together with his siblings are from the 2nd house of the deceased. He further states that the applicants have been very uncooperative since he was appointed the administrator of the estate. Copies of the mutation and searches for the two respective parcels were annexed to the pleadings of the parties. Both parcels are registered in the names of the respondent.

22. This court requires to determine whether the respondent as the administrator of the estate acted according to the law in carrying out the subdivision of the estate of the deceased in two portions.

23. The grant was confirmed on 28/02/2017 and distributed the estate comprising of Kagaari/Weru/505 as follows: -

LR. Kagaari/Weru/505

- | | | |
|-------------------------|---|------------|
| i. Elizabeth Ciungu | - | 3.75 acres |
| ii. Alexander Njue | - | 3.75 acres |
| iii. Peter Gakono | - | 3.75 acres |
| iv. Mary Rose Wanjiru | - | 3.75 acres |
| v. Robert Thathi | - | 3.00 acres |
| vi. Paul Kithaka |) | |
| vii. Mercy Rose Wanjuki |) | 12 Acres |
| viii. Gatavi Jane |) | |
| ix. Justina Marigu |) | |

24. The act of subdividing Kagaari/Weru/505 whose registration he had procured fraudulently, into two parcels resulted into continuous fraudulent acts.

25. As for the first house, their prayer is that the title for the two parcels LR. Kagaari/Weru/10294 and 10295 be cancelled and that the whole asset of deceased reverts to his deceased's name.

26. It is imperative that the grant confirmed on 28/02/2017 was the final order of the court on distribution of the deceased's estate. From the record, the distribution was by consent of all the beneficiaries. If the respondent had any problem in implementation of the grant as he claims, he would have approached the court together with the beneficiaries who would be affected by any change on the grant. This would have been done by hearing the parties by consent of the parties.

27. The act of acting contrary to the grant is further act of illegality that should not be condoned. In his replying affidavit, the respondent opposes this application and pleads that if the titles were to be cancelled, he would incur a heavy financial loss because the applicants refused to contribute any funds for the expenses of survey and transmission. If the respondent is to incur any loss, he only has himself to blame because of his fraudulent acts. This court has a singular duty of ensuring that its orders are complied with and that the law is not violated.

28. I have looked at the mutation for subdivision of the original land Kagaari/Weru/505 showing that two resultant parcels are not of the same size. LR. 10294 measures 6.64 ha (16.4 acres). From the grant each house was to get fifteen (15) acres to be distributed among the respective beneficiaries. As alleged by the applicants, the administrator has without any colour of right carried out subdivision and given his mother's house a bigger portion of the other house.

29. I am surprised that the applicants in their previous applications had never brought out these issues of fraud on part of the respondent that were intended to deny some of the beneficiaries of their rightful share. As I have already said, the respondent's action was against the law and violated the trust granted to an administrator. The Land Registry Embu also joined the respondent in this acts of fraud by allowing

subdivision in a succession cause without following the law.

30. Under Rule 73 of the Probate and Administration Rules, this court is empowered to make orders in the interest of justice in a succession cause. It provides: -

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

31. Due to the nature and facts of this case, this court will make some orders that will serve the interests of justice as regards the administration of the estate.

32. For the foregoing reasons, I hereby allow the application dated 7/02/2020 in the following terms: -

a) That the subdivision and registration of LR. Kagaari/ Weru/50 5 in the names of the respondent is hereby nullified and the land reverts to the names of the deceased Nthakanio M'Ngungu.

b) The current registrations for LR. Kagaari/ Weru/10294 and 10295 is hereby nullified for all intents and purposes.

c) That the appointment of the respondent Kithaka Nthakanio as the administrator of the estate is hereby revoked.

d) The 1st applicant Mary Rose Namu of the 1st house and Jane Gatavi of the 2nd house are hereby appointed as co-administrators of the deceased's estate and a fresh grant and certificate of confirmation to issue in their joint names in the terms of the grant confirmed on 28/02/2017.

e) That in case of any disagreement between the two co-administrators in the implementation of the grant, the Deputy Registrar of this court shall execute all the necessary documents.

f) That the administrators have sixty (60) days to implement the grant.

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JULY 2020.

F. MUCHEMI

JUDGE

Judgment delivered and sent through emails.