



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 759 OF 2010

IN THE MATTER OF THE ESTATE OF PAUL MWANGI NDERITO (DECEASED)

RULING

1. Before me is a Notice of Motion dated 11th January 2020 filed by Elizabeth Wanjiru Mwangi one of the two administrators herein under Section 1, 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act (*Cap. 21*) and Sections 79, 80, 82, 83 and 94 of the Law of Succession Act (*Cap. 160*), as well as Order 40 Rule 1 & 10 of the Civil Procedure Rules, seeking the following orders, some of which have been spent –

1. (spent)

2. (spent)

3. That a declaration be and is hereby issued that the properties known as NAIROBI/BLOCK 209/9673, and DAGORETTI/RIRUTA S 645 were at all times to these proceedings comprised in the estate of Paul Mwangi Nderito (deceased), and were registered in the names of Bernard Nderitu Mwangi and Irene Mugure Nderitu to hold in trust for him and, subsequently for the estate.

4. That a mandatory injunction be issued requiring and directing Bernard Nderitu Mwangi and Irene Mugure Nderitu, to forthwith transfer the properties known as NAIROBI/BLOCK 209/9673 and DAGORETTI/RIRUTA S 645 to Elizabeth Wanjiru Mwangi.

5. That further and in addition to prayer number 4 above, an order be issued directing the Registrar of Lands to forthwith transfer and register the properties known as NAIROBI/BLOCK 209/9673 and DAGORETTI/RIRUTA S 645, into (the name of) Elizabeth Wanjiru Mwangi.

6. That such further or other orders as are appropriate for the effective administration of justice be issued.

7. That the costs of the proceedings be provided for.

2. The application has grounds on the face of the Notice of Motion which are that the applicant was the administrator of the estate of Paul Mwangi Nderito and that NAIROBI/BLOCK 209/9673 was registered in the names of Bernard Nderitu Mwangi and Irene Mugure Mwangi while DAGORETTI/RIRUTA S645 was registered in her name and Bernard Nderitu Mwangi her son and both were in trust for the deceased and his estate, that Bernard Nderitu Mwangi and Irene Mugure Nderitu willfully and without coercion, incentive or promise executed the consent to confirmation of grant herein in which the said properties were listed as part of the estate of Paul Mwangi Nderito (*deceased*), that the said properties were bequeathed to Elizabeth Wanjiru Mwangi in the last Will and Testament of the deceased which Will was confirmed and distribution done by the court on 11th March 2013, but that on 28th December 2019 the applicant discovered that the safe in which she had kept the title deeds to all the properties of the deceased had been broken (into) and all legal documents stolen without visible sign of breakage and that the applicant had made a report on the incident to Kileleshwa Police Station which was noted under OB NUMBER/31/28/12/2019, and that there was real danger that whoever stole the said documents might use them for criminal purposes.

3. The application was filed with a supporting affidavit sworn by the applicant Elizabeth Wanjiru Mwangi on 14th January 2020 in which it was deponed that the Will of the deceased bequeathed inter alia NAIROBI/BLOCK 209/9673 and DAGORETTI/RIRUTA S645 which were at the time registered in the joint names of Bernard Nderitu Mwangi and Irene Mugure Mwangi for 209/9673 and in the names of the applicant and Bernard Mwangi Nderitu for S645 respectively, that the said registration in the names other than the deceased's name, was meant to be in trust for him, and that the deceased had commenced the process of reconveyance of the assets from the children to himself before he died, and that the said Bernard Mwangi Nderitu and Irene Mugure Nderitu voluntarily executed the consent to the mode of distribution of assets of the deceased, and that the Will bequeathed all the assets of the deceased to the applicant, and that another asset of the deceased NAIROBI BLOCK 118/465 was now apparently unlawfully transferred to a person by the name of IZAAK MWANGI on 14th May

2019 after the death of the deceased.

4. No response was filed to this application, though I note that a Summons for revocation of confirmed grant dated 29th April 2020 was filed by the co-administrator Irene Mugure Nderitu through M/s Shako & Company Advocates, on the ground that the applicant herein Elizabeth Wanjiru Mwangi had failed to execute documents to finalise the distribution of assets to wind up of the estate.

5. Though the application is not opposed, the burden is on the applicant to prove the claims for the grant of the prayers sought as required under Section 107 of the Evidence Act (Cap. 80). As this is in the nature of civil proceedings, the standard of proof is on the balance of probabilities.

6. The first request of the applicant is for a declaration that the subject two land assets belong to the estate of the deceased. This being a succession court in which the jurisdiction of this court is limited to determination of the identification of beneficiaries and distribution of the net assets belonging to the deceased, I cannot in my view determine the substantive issues regarding ownership of land or any other property. The substantive determination of and declaration of ownership to land under the 2010 Constitution was reserved for the Environment and Land Court under Article 162(2)(b) and (3). Though I have perused the documents relied upon by the applicant, I can only observe that title documents for the two plots are not in the name of the deceased as stated by the applicant, and neither the will nor the certificate of confirmed grant specifically lists the said two land assets as belonging to the deceased.

7. In particular, I also note that none of the two land assets was mentioned in the Will, as the contents of the Will do not in fact mention any land parcel number, but merely mentioned plots which were not described to make their identity discernible. I thus leave the issue of ownership there. In my view therefore, if the applicant desires to get substantive findings or declarations on the ownership of the subject two pieces of land, she should approach the Environment and Land Court.

8. The second issue relates to the prayer for a mandatory injunction. There are necessary legal requirements for the grant of orders of mandatory injunctions, and I also note that Order 40 of the Civil Procedure Rules relied upon by the applicant relates only to the grant of temporary injunctions.

9. It is trite that courts have been reluctant to issue mandatory injunctions at interlocutory stage, and in any case will grant mandatory injunctions only when a higher standard of proof is attained by an applicant above the standard for prohibitory injunctions. In the case of **Kenya Breweries Ltd & Another –vs- Washington O. Okeya [2002] eKLR the Court of Appeal stated –**

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff.

Moreover, before granting a mandatory interim injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had been rightly granted that being a different and higher standard than was required for a prohibitory injunction.”

10. The applicant herein actually asks for the grant of a final mandatory injunction, not an interlocutory mandatory injunction. In my view she was required to establish unreservedly that the subject land belonged to the deceased, and also that in the confirmed grant of letters of administration it was given to her. She did not prove either.

11. Having found that there is no established proof of ownership of properties NAIROBI/BLOCK 209/9673 and DAGORETI/RIRUTA S 645 in the name of the deceased PAUL MWANGI NDERITU and that such ownership can only be determined in the Environment and Land Court, I find that this court is not entitled to grant the mandatory injunctive orders sought.

12. The 3rd issue is whether this court can issue orders that the Registrar of Lands do register transfers of the two land assets in the name of the applicant. In my view, the two land properties not having been registered in the name of the deceased and distributed to the applicant, the court cannot issue an order to the Registrar of Lands to register the plots in the name of the deceased after he died, since no evidence was tendered to establish that the assets belonged to him, nor can this court issue orders for the said two land assets to be registered in the name of the applicant as she does not currently have any colour of such right to the same, nor did the confirmed grant of letters of administration distribute the assets to her.

13. To conclude, in my view, the application is misconceived and has no legal basis and is for dismissal. I dismiss the application. As the respondents did not file any response to the application, I make no orders as to costs.

Dated and delivered at Nairobi this 26th day of October, 2020.

George Dulu

JUDGE

Delivered virtually due to COVID-19 pandemic and regulations issued by the Ministry of Health.