



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CASE NO 752 OF 2012**

**In the Matter of the Estate of Cypriano Kaiji Gikono (Deceased)**

**DAVID MWITI CYPRIANO.....1<sup>ST</sup> PETITIONER**

**JOYCE NKUENE CYPRIANO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**EVANGELINE KARUGWATA GIKONO.....CAVEARO/APPLICANT**

**RULING**

1. Before me is a Summons dated 23/4/2019 expressed to be brought under section 76 of the Law of Succession Act, rule 41 and 73 of the Probate and Administration Rules, section 1A & 1B of the Civil Procedure Act, Order 40 rules 1, 2 and 3 of the Civil Procedure Rules and Articles 10(2)(b), 40, 159(2)(a), (b), (d) and (e) of the Constitution of Kenya, 2010. The application essentially seeks inter alia:

- i. An injunction against Bonface Mwingi Kaiji, Gakii Kaiji and Joyce Nkuene Cypriano from trespassing or entering upon or in any manner interfering with the applicant's occupation of LR No. NKUENE/TAITA/163, (Hereafter suit land);**
- ii. Annulment or rectification of grant so as to remove the suit land from the list of estate property.**
- iii. Reversion of the suit land into the names of the applicant**
- iv. Enforcement of order by OCS Nkubu Police station; and**
- v. Punitive costs to be awarded.**

2. The summons is supported by grounds set out in the application, the supporting affidavit, further and supplementary affidavits filed together with annexures thereto. These grounds were augmented through written and oral submissions by counsels.

3. The application accused the administrator of intentionally and deceitfully causing inclusion of the suit land as estate property. She accused them further of causing the suit land to be registered in their names. She claims that the respondents resorted to harassing her until she was forced to make a formal complaint out for which they were charged and convicted at Nkubu Courts. Now the applicant fears for her life. They are also attempting to succeed her in her land, yet she is still alive. She claims that her property is protected under the constitution.

4. The caveator states that she is the registered owner and exhibited the title deed. She accused the Respondents to have colluded with the land Registrar to transfer her land to them.

5. The written submissions expounded on the allegations by the applicant. The submissions were illuminated further in strong and pointed oral submissions by counsel made on 30/07/2020.

6. On 30/07/2020, Ms Materi, learned legal counsel for the caveator submitted that she had filed a further affidavit annexing a copy of; (i) judgment and proceedings, (ii) ruling by LOT No. 2/2008 which adopted the award in favour of the caveator; (iii) Green card; (iv) Title deed showing caveator in the registered owner of the suit land. She submitted further that her client was awarded the suit land through order from Nkubu court which is annexed to the further affidavit. According to her, it will be most unfair to include the suit land as estate property given the circumstances. These orders she said, were never appealed upon. She urged the court to remove the suit property from the list of estate properties. She concluded with the request that her client's application be allowed for rectification of title.

7. Kaumbi, learned legal counsel for the administrator urged that the caveator, made a similar application dated 11/3/2014 in which

ownership of the suit property was determined by the High Court in case No. 26 of 2006. The caveator subsequently went to the Land Tribunal. Thus, the LDT decision cannot override that of the High Court. In the application of 11/3/2014 the issues being raised now were raised but the application was withdrawn.

8. Kaumbi argued further that the caveator fully participated in succession cause No. 63 of 2000 in respect of the estate of Francis Nyamu Mukono and the suit land was awarded to the deceased in the instant cause. All these matters being raised now were presented to and settled by court. He also referred the court to rulings by Sitati, J and Ouko J (as he then was) on these issues. He was of the view that the caveator cannot now seek to rely on the LDT decision. He referred the court to the grounds of objection he filed on behalf of his clients.

9. Ms. Materi quickly added that ownership was not canvassed by case No. 26 of 2006. All parties were also present in LDT proceedings which was a competent court.

## **ANALYSIS AND DETERMINATION**

10. The court with the approval of the parties framed the issue for determination to be;

### **a) Whether ownership of the suit land was settled by the High Court.**

See proceedings for 30/7/2020

11. According to Mr. Kaumbi, ownership of the estate property was determined in Meru succession cause No. 63 of 2000 by Ouko J (as he then was) and Sitati J in their respective decisions. He submitted that being disoriented with the decision in the succession cause she filed HCCC No. 26 of 2006 which was dismissed on 13/1/2009. Succession proceedings ensued thereafter.

12. Ms. Materi was of a different view that ownership was not determined by Sitati J or Ouko J (as he then was) as her applications under consideration by the said Judges were for injunctions. Of dismissal of No. 26 of 2009; she argued that the said suit was dismissed on a preliminary objection. Therefore, ownership was not determined.

13. Parties have taken quite disparate positions over whether ownership of the suit land was determined or not. I do note that Ms. Materi places preponderant emphasis that ownership of the suit property was only determined by Land Tribunal in LDT case No. 68 of 2008 whose award was adopted as order of court in Nkubu PMC LDT No. 2 of 2008. Ms. Materi was categorical that the Land Tribunal was a competent court. With tremendous respect to counsel; I doubt whether the Land Tribunal had jurisdiction to determine ownership of land. To my mind, their jurisdiction was limited to disputes *inter alia* on boundaries and land use.

14. Be that as it may, the record from lands office show that as at 1/2/1999 the registered owner of the suit land was Francis Nyamu Gikono. On 29/12/1999 the applicant was registered as the owner. It appears that after criminal Appeal No 237 of 2001, the property was registered in the name of Cypriano Kaiji Gikono on 10/3/2003. On 20/2/2015, the applicant was registered as owner of the suit land. Now the land stands in the name of the Respondents pursuant to the grant herein.

15. Recapitulation of these facts and events is relevant, for fraud has been alleged by both parties against each other. It appears- and previous courts noted this- that the applicant have not clearly formulated her claim in proper court proceedings so that her claims could be determined effectively. She attempts to stake her claim through succession causes- which to me is most inappropriate approach unless she is armed with a valid court order vesting ownership in her which the court should give effect in the succession cause. In saying this, I am aware she claims ownership was settled in the LDT; but I have already expressed my reservation on the competence of Land Tribunal to determine ownership of land. Consider the LDT decision in light of the decision by the High Court in succession cause 63 of 2000 and this one that the suit land is estate property. I should think that, perhaps, the applicant does not assign appropriate proportion of weight or relevance to the said determination in the succession causes. If she could count or clothe those decisions with the necessary legal vitality, perhaps, it may occur to her that other forums, say, appeal or a suit in ELC, may be appropriate in her quest for ownership of the suit land. She may have a valid claim. But, as long as the decisions remain *in situ*, applications for injunction and rectification or revocation or annulment of grant may nib in the bud. She has participated in these proceedings throughout and she would have known better the appropriate intervention before and after confirmation of grant. At this stage, her application to exclude the suit land unless armed with a valid court order may be a toll order to achieve. Rule 41 of the Probate and administration Rules may not even assist her, for the rule is applicable before confirmation of grant.

16. On the foregoing, see the decision by Musyoka J. **In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** that:

**“....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.**

**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 are 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.**

**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 ...’*

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.

17. I do note that Ms. Kaumbi suggested appeal against orders of the court in the succession cause would have been more appropriate. This route seems to have been renege to the background. In sum, the applicant’s application is not meritorious. As far as succession causes are concerned the suit land is estate property in cause number 63 of 2000 and was appropriated to the deceased herein in a valid grant. And, it was again distributed in the instant succession cause to the beneficiaries of the deceased. For those reasons, I dismiss her application with no orders as to costs.

**Dated, signed and delivered at Narok through Teams Application this 23<sup>rd</sup> day of November, 2020**

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**F. GIKONYO**

**JUDGE**