



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO 195 OF 2012

IN THE MATTER OF THE ESTATE OF MAGAMBO IKIARA

KANYUA ELIJAH.....APPLICANT

VERSUS

M'' MURIITHI M'' ARIMI.....1ST RESPONDENT

DEDAN KIMATHI.....2ND RESPONDENT

ELIPHAS KAARIA.....3RD RESPONDENT

RULING

1. **Kanyua Elijah** (*the applicant herein*) is a dependant in the estate herein. The 1st Respondent is the alleged proprietor of **PLOT NO.3A KINORO/KAURUNE MARKET**. The 2nd and 3rd Respondents are both beneficiaries in the estate herein. The significant orders sought in the Summons for further rectification of Grant dated 16th July 2019 are:

a. **THAT** the court the court further rectifies the certificate of grant issued by the court on 26th September 2018 by including **PLOT NO. 3 KARAUNE-KINORO MARKET**.

2. The application is supported by the affidavit sworn on 16th July 2019 by Kanyua Elijah. The deponent averred that on 26th September 2018 she indicated to court that there was a property of the deceased that was left out in these proceedings except that she did not have any document to prove the fact. She stated further that she was advised to move the court appropriately once she gets the documents. She deposed that she has gathered proof of ownership of the said plot and has annexed the minutes' extracts of the council of 1991 and receipt marked **(KE1a & b)**.

3. The deponent stated that the deceased owned **PLOT NO 3 KAURANE-KINORO Market** and as at the time the deceased died in 1981 the said property was intact but much later one of the respondents allegedly transferred the plot to the 1st Respondent.

4. It was averred that the property remains the property of the deceased for its transfer was fraudulent and unlawful meant to deprive the rightful beneficiaries. Further that the applicant and her sisters have suffered in the hands of the brothers who aren't ready to surrender to them the shares they rightfully own.

5. According to the applicant, this court should rectify the grant in order to include the said plot as property of the deceased; effectively revert it back into the name of the deceased and have it awarded to her.

6. The deponent avers that this court has the power to cancel or annul any illegal transfer of an estate property that was transferred after the demise of the proprietor.

7. The 1st Respondent by way of replying affidavit dated 28th August 2019 averred that **PLOT NO 3. KAURUNE-KINORO** belongs to him and not the deceased herein. They annexed a copy of confirmation letter dated 16th August 2019 from the county commissioner of Meru who is the custodian of the official related records. He further annexed copies of photographs of the development of the said plot.

8. The 1st respondent stated that issues of fraud against third parties raised by the applicant do not fall within the ambit of succession proceedings and therefore such allegations ought to be heard and determined by a civil court. Further that court should dismiss the

applicant's application with costs to the 1st respondent.

9. The 2nd and 3rd Respondents have not filed any responses or submissions to this application.

Submissions

10. The Parties were directed to file and serve written submissions. The applicant acting on her own behalf filed her submissions on 10th December 2019 while Kiautha Arithi & Co Advocates for the 1st Respondent filed their submissions dated 23rd June 2020.

11. The applicant in her submissions reiterated the averments in her affidavit and insisted that plot in question belonged to the deceased and it was fraudulently transferred to the 1st Respondent by one of the other two respondents.

12. The 1st respondent in their submissions urged that the court lacks jurisdiction to hear the issues of ownership of the property of a deceased person. Such question should be determined by the Environment and Land Court. Further, the question of fraud cannot be adjudicated in a succession matter.

ANALYSIS AND DETERMINATION

13. I see the following to be the issues for determination by the court: -

- a. **The scope of procedure for rectification of grant;**
- b. **Court's jurisdiction to hear and determine issues raised in the Applicant's summons, and**
- c. **The Applicant's claim of entitlement to Plot No.3 Kaurune-kinoro market (hereafter plot number 3).**

cope of procedure in s. 74 of LOSA

14. The applicant seeks this court to determine that plot number 3 is estate property and distribute it to her. A critical question abounds; whether such substantive remedies may be carried through under the limited procedure provided for rectification of grant in section 74 of the Law of Succession Act?

15. I have lamented before that such substantive matters cannot be carried through under the limited jurisdiction in section 74 of the Law of Succession Act. Perhaps the misconception in invoking section 74 emanates from the fact that, upon successful bid that a property is estate property, rectification of grant will ordinarily ensue. The substantive remedy sought is ascertainment and distribution of estate property. Rectification of grant is merely corollary and consequential effect. See **in re estate of Charles Kibe Karanja (deceased) [2015] eKLR Musyoka J** where Musyoka J. stated the following on Section 74 of the Law of Succession Act and discovery of new assets;

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. 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.....

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

16. Masterly exposition. In light thereof, the scope of the procedure for rectification of grant in section 74 of the Law of Succession Act is limited or restricted to simple matters stated in the section; the procedure is therefore incapable of resolving disputes on ownership of or discovery of new assets as well as further distribution of the estate.

Ascertainment of assets of the deceased

17. Be that as it may, the court answers to a higher calling; protecting, ascertaining and bringing in all the assets of the deceased and distributing them to the rightful beneficiaries. Questions of intermeddling with the assets of the deceased may arise in a succession cause; the court will take jurisdiction and determine such matters as issues in the cause. However, I wish to share some quite tricky experience. I have encountered situations where a civil suit is filed in ELC for determination of ownership of property which is alleged to belong to the deceased but was fraudulently transferred to a third party after the death of the deceased. ELC declined jurisdiction and referred the matter to the High Court for it was of the opinion that the dominant cause of action is succession. There was no succession cause in respect of the deceased that had been filed. One more reality; the deceased was a member of the group ranch that owned the property; he had not been registered as the owner of the property; he did not have the formal title in his name. The title is in the name of a third party. What a squirm? First dilemma; the suit is not a succession cause in which the court can assume jurisdiction; the suit is on ownership of land. Second dilemma; the third party holds the title to the property. These dilemmas may be attributed to the approach adopted. More trouble comes; the property is said to be the only property of the deceased. Can succession proceedings be filed in respect of a property that does not stand in the name of the deceased but another person's name? Details of this experience only succeed in creating a feeling of gauntness and dreariness in the mind of the reader. But, luckily, courts are equipped with tools and experience to deal with such problematic or difficult situations.

18. It bears repeating that under the Law of Succession Act, this court will have jurisdiction to deal with incidents of intermeddling with estate property including real property, which may come in many forms, whether before or after commencement of succession proceedings. The Court of Appeal has also stated that probate and administration court may also deal with evidence of trust in a succession cause. My view is that in determining such issues, the court is exercising its power to protect or ascertain estate property. Nonetheless, where a transaction in land is alleged to be an act of intermeddling or a violation of section 55 and 82 of the Law of Succession Act, there must be clear evidence that the land belonged to the deceased as at his death, and that the impugned transaction was done after the death of the deceased. I say so because transactions on land or relating to land which were done by the deceased or during his lifetime are not acts of intermeddling with the estate of the deceased even if they are fraudulent. Such latter transactions are challenged or litigated upon between the third party and the personal representative of the deceased in appropriate proceedings based on the ordinary law of property. For the avoidance of doubt, the personal representative should be called upon to complete lawful transactions which the deceased commenced but did not finish due to his death. That distinction is important to make.

19. In this case, it has been alleged that Plot number 3 belonged to the deceased but was fraudulently and unlawfully transferred to one of the respondents. This claim will require full plenary evaluation by the relevant court; an exercise that cannot be carried through mere rectification of grant as evidence must be tendered and interrogated to proof intermeddling or unlawful alienation of estate property contrary to the Law of Succession Act. This is achievable through a proper application for review of orders of distribution that had been made by the court. But, if the transaction on real property was done by the deceased or during his lifetime, then, ownership wrangles should be determined by ELC between the third party and the personal representative of the estate of the deceased. And, if the ELC pronounces the deceased to be the owner of the suit property, the order is given effect through a review of orders of distribution in order to include in the estate the new or discovered property and distribute it to the beneficiaries.

20. Before I close, I feel compelled to also cite Musyoka J. ***In Re Estate of Alice Mumbua Mutua (Deceased)*** [2017]eKLR on how to deal with disputes that may arise during succession proceedings. The judge stated as follows:

“...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.

21. Doubtless, disputes on ownership of and title to land which cannot be determined by probate and administration court within the scope I

have discussed above, should be determined by the Environment and Land Court as provided in Article 162 (2)(b) of the Constitution and section 13(1) and (2) of the Environmental and Land Court Act.

22. For the above reasons, I reject the invitation by the applicant to resolve such substantive issues through mere rectification of the grant. However, I do not proclaim a foreclosure here; the judge who will preside over this case may give directions on how the questions raised in this application should be resolved so as not to leave out any estate property or cause prejudice to any party or beneficiary. No orders as to costs. It is so ordered.

Dated, signed and delivered at Narok through Teams Application this 23rd day November 2020

F. GIKONYO

JUDGE