



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 652 OF 2015.

IN THE ESTATE OF THE LATE ISAAC KABIRU GITHAIGA (DECEASED)

JECHONIA ODIDA OYUGIAPPLICANT/PROTESTOR

-VERSUS-

SIMON IGOKO KABIRU.....1ST PETITIONER/RESPONDENT

JAMES GATWA KABIRU.....2ND PETITIONER/RESPONDENT

CATHERINE NJOKI KABIRU.....3RD PETITIONER/RESPONDENT

RULING

1. This is a ruling on application dated **12th June 2020** and a preliminary objection dated **16th October 2019**. This Court directed that parties do canvass the application and preliminary objection together.

2. The application seeks the following orders: -

i. That the Grant of Letters of Administration made to Simon Igoko Kabiru, James Gatwa Kabiru and Catherine Njoki Kabiru on the 1st day of December, 2016 and confirmed on the 1st day of December 2016 be annulled and/or revoked.

ii. That the Estate be preserved pending the hearing of the motion herein.

iii. That an order of the temporary injunction does issue against the respondents and agents/representatives from dealing with, disposing off, alienating, leasing and in any manner intermeddle with the Estate pending the hearing and determination of the application and the suit herein.

iv. That an order of permanent injunction does issue against the Respondent and agents/representatives from dealing with, disposing off, alienating, leasing and in any manner intermeddle with the Estate upon the hearing and determination of the suit herein.

v. That the costs of this application be in the cause.

3. Grounds filed in support of the application are as follows: -

a) That the proceedings to obtain the grant were defective in substance;

b) That the petitioner/respondents obtained and confirmed the grant herein with the intention to defraud the applicant by listing Plot No. L.R. No. 12249/127 as part of the deceased estate.

c) That the grant herein was obtained through deliberate concealment of material facts from the honourable court, to the detriment of the protestor/applicant while benefitting the respondents.

d) That the respondents have fraudulently and illegally distributed the estate of the deceased amongst themselves, to the total exclusion of the protestor and who is the sole owner of Plot No. LR. No. 12249/27 by the virtue of legal sale between the deceased and the protestor.

e) That the protestor/applicant stands to suffer irreparable damages should the orders sought not be granted.

4. In support of the application, the applicant filed an affidavit deponed on 12th June 2020 and supplementary affidavit filed on 24th July 2019. He averred that on 10th September 1997, he purchased Plot No. LR. No. 12249/127 from the deceased who died on 11th September 2000; he annexed a copy of the sale agreement and averred that the respondents fraudulently and in total disregard of the law petitioned for and were granted the letters of administration and illegally disposed off the suit property without due regard to the fact that the applicant had purchased it from the deceased but passed on prior to effecting the transfer to the purchaser.

5. He further averred that after the purchase of the suit property, he was sued by the Municipal Council of Nakuru over arrears of Kshs. 23,410.50/= in the said plot vide Nakuru Civil Suit No. 2484 of 1999 which he paid. He stated that the respondents took advantage of the fact that the deceased died intestate and fraudulently and illegally acquired the letters of administration without informing the applicant who discovered about all the developments very late and could not commence objection proceedings since the gazette period of objection had lapsed.

6. The applicant further averred that he is likely to suffer irreparable harm as he was not served or furnished with any proceedings in this cause; that it was unjust as he was denied his legal rights to the suit property and inheritance from the deceased's estate and that it is in the interest of justice that the order sought in the application be granted.

7. In the supplementary affidavit, the applicant averred that the issue in dispute is ownership of the suit property and not about rent issues. He averred that on 3rd July 2019 the 1st respondent was accompanied by auctioneers who had sought to attach the suit property as per the attached Proclamation Notice annexed as JOO -01 and through his advocate, he filed Nakuru ELC No. 58 of 2019 where stay of execution was granted on condition that he deposit a sum of Kshs.126,000/= as stated in the Proclamation Notice; however the 1st petitioner accompanied by auctioneers had already proceeded to attach the property where they demolished the applicant's residential home that was occupied by the caretaker forcing him to leave.

8. He stated that the 1st respondent claimed his action was sanctioned by a Court Order dated 27th June 2019 which the applicant said he was never served with either the application or the Court Order and annexed JOO -04. The applicant stated the respondents are on an illegal takeover mission of the suit property as they were constructing a residential home and erected a perimeter wall contrary to the law and his legal rights as a proprietor.

RESPONDENT'S CASE

9. The respondents opposed this application by filing replying affidavit deponed on 16th October 2019 by **Simon Igoko Kabiru** who stated the respondents being the children to the deceased petitioned for letters of administration intestate and followed the due process to obtain the letters of administration, that the process was proper, transparent and lawful. It was gazetted vide Kenya Gazette Notice dated 29th January 2016 as annexed by the applicant's in their supporting affidavit and no objection was filed. That the grant was confirmed after 6 months and beneficiaries distributed the only property of the deceased amongst themselves in equal shares as per certificate of confirmation of grant and procured the registration and transfer of the suit property in their names to hold in trust of all the beneficiaries.

10. He averred that the subject suit property is owned by the beneficiaries and does not form part of the estate of the deceased therefore the prayers sort by the applicant have been overtaken by event.

11. Respondent further averred that at the time of petitioning for the letters of administration, the suit property was registered in the name of the deceased and it was *prima facie* evidence that he was the absolute and indefeasible owner and the applicant is not a beneficiary nor a dependant in the estate of the deceased; and further states the alleged sale agreement between the deceased and the applicant was not within the beneficiaries' knowledge and it is unfortunate that he is claiming his interests in the said parcel of after the demise of the vendor.

12. He further stated that the allegation that the alleged sale was with vacant possession is false as some of the administrators were brought up in the said property. He stated that the applicant was a mere tenant/licensee on the subject property and he proceeded to sublet it to third party without the respondents' consent and continued to pay rent or surrender possession that is when the respondents took lawful action as the registered proprietor of the suit proprietor. The rates demand notices in respect to the suit property are still being addressed to the deceased and the 1st respondent has been paying and settle them as per the annexed SIK 4 dated 25th June 2014.

13. The respondent further averred that as the signatures in the alleged sale agreement and the alleged final settlement note do differ and doesn't have a date, it is unknown on when it was settled. He stated that the applicant has forged the sale agreement and the acknowledgement note to advance his claim and no such transaction took place since he only advanced his claim after the demise of the person who allegedly sold to him. The applicant claim should fail as it is founded on a sale agreement which is statutory barred as the same has been brought after 22 years as opposed to 6 years as prescribed by the law.

14. The respondents' advocate through the firm of **Gatonye & Gatonye** filed a Notice of Preliminary objection dated 16th June 2019 on the ground that the honourable court lacks jurisdiction to hear and determine an issue of land ownership of the land parcel known as LR. No. 12249/127 which issue transcends the honourable court's jurisdiction courtesy of the provisions of **Article 165(5)(b)** of the **Constitution of Kenya, 2010** and **Section 2 and 13(1)** of the **Environment and Land Court Act, 2011**. He stated that the applicant is forum shopping and should not be allowed as he had filed the suit in Nakuru ELC No. 58 of 2019 suing the 3 respondents seeking reliefs over and respecting the suit property.

APPLICANT'S SUBMISSIONS

15. In their submissions dated 22nd January 2020 and filed on the same day, the applicant restated grounds of the application and averments

in the affidavits filed. And submitted that the issue for determination is whether the honourable court has jurisdiction to hear and determine the matter at hand. The applicant submitted that the matter was instituted in the honourable court under **Section 76 of the Law of Succession Act** and urged the Court to annul or revoke the grant obtained and confirmed in this matter as the same was obtained with the sole intentions of defrauding the applicant since the respondents listed the land parcel No. 12249/27 as part of the deceased's estate and ought not to be listed as part of the estate as the deceased had already sold the same to the applicant vide a sale agreement annexed in the application prior to his death though the title deed had not been transferred to his name.

16. The applicant cited the case of **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where the Court stated as follows: -

“Applying the test of law in Section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this Court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the Court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this Court during confirmation of the grant so as to enable the Court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the Court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

17. The applicant submitted that he was in lawful occupation before he was illegally evicted by the petitioners/respondents despite them claiming they were not aware of the sale yet they had allowed the applicant to live on the parcel of land for 22 years continuous and peaceful without any interruptions and even paid rates in respect of the property after being sued.

18. Applicant further cited the case of **Re Estate of Koninin Ole Kimantiru (Deceased) (2018) eKLR** and came up with a similar finding that the petitioners had concealed material facts to the Court, where the Court stated: -

“Coming to the question of whether there was any fraud and concealment of fact on the part of the respondent, I am similarly obliged to find in the affirmative. Throughout the conduct of Machakos Succession Cause No. 434 of 2013, the respondent neglected to mention that the suit property was not in vacant possession. That the suit property was in occupation by the applicants who had lived there uninterrupted, enjoying quiet possession for nearly 38 years and were in fact purchasers for value.

...in my view, this in itself is enough evidence of fraud on the part of the Respondent.”

19. The applicant submitted that on the above ground, he has the *locus standi* to seek for the annulment of the said grant and the petitioners/respondent avers that the applicant is not entitled to any part of the estate; that there was not within the purview of the Court at the time the grant was being confirmed.

20. The applicant's advocates submit that he is a beneficiary in the estate of the deceased by virtue of **Section 51(h) of the Law of Succession Act** which provides for a mandatory full inventory of assets and liabilities of the deceased's estate; that the applicant falls within the category and definition the liabilities of the estate thus his rights and interests are protected under the said section as it is evident from the applicant's evidence there existed a dealing with the deceased though he passed on before the dealing could be concluded.

21. The applicant concludes by stating the case is rightfully before the honourable court as it is not being called upon to determine the ownership of the suit property as **ELC No. 58 of 2019 Jechonia Odida Oyugi Versus Simon Igoko & 2 others** has been filed to determine ownership, the Court is being called upon to make a finding that there was concealment of material facts which necessitates the annulment of the grant issued to the respondents herein an issue that is well within its jurisdiction.

RESPONDENTS' SUBMISSION

22. The respondents' advocate **Gatonye & Gatonye** advocates filed in their submissions undated and filed on the 5th February 2020. The respondents submitted that this honourable court lacks jurisdiction to hear and determine this case as it is being called upon to determine the ownership of land parcel No. 12249/127 based on a sale agreement that was allegedly entered into between the applicant and the deceased during his life time but the suit land was not transferred to the applicant during the deceased lifetime, neither did he obtain any consent to effect the transfer and therefore it should be adjudicated in the Environment and Land Court and not a Probate Court.

23. The respondent further submitted that the case is also statutory barred as the same has been brought after 22 years as opposed to within 6 years of the date of the alleged date of the agreement.

24. The respondent cited the case of **Priscilla Ndubi and Zipporah Mutiga Vs. Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013** where the Court held as follows: -

“The primary duty of the Probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed...”

25. The respondent submitted that **Article 162(2)(b) of the 2010 Constitution** gave parliament the mandate to establish specialized Courts

with the status of the High Court to hear and determine disputed relating to the environment, use and occupation of and title to land that lead to the establishment of the Environment and Land Court and **Section 13 of the Environment and Land Court Act** provides for duties and powers of this Court to determine disputes arising from among others relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land.

26. The respondents further relied on the case of **Samuel Kamau Machari & Another V Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** which states that;

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or the other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law...where the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitution limit.”

27. The respondent prayed that the application be dismissed with costs.

ANALYSIS AND DETERMINATION.

28. From the applicant’s argument the application is being brought under **Section 76 of the succession Act**. He argues that the respondents failed to disclose material fact and the material fact that was not disclosed is that he purchased land which is the subject matter of this succession from the deceased before he died. He argues that he has been in occupation for 22 years and has even paid rates after being sued.

29. The respondent’s argument is that this Court has no jurisdiction to determine the application herein. The respondent’s argument is that it is seeking to determine ownership of the suit property; to determine sale of the property to the applicant.

30. The applicant is not disputing that determination of ownership of land lie with the Environment and Land Court and stated that there is Environment and Land Court matter filed in that respect.

31. The applicant has attached sale agreement and stated that he was not aware of the succession proceedings and therefore did not file objection proceedings before confirmation of Grant.

32. From averments and submissions of parties, there is no doubt that jurisdiction to determine ownership of land lie with the Environment and Land Court.

33. In response, the respondents contest that the deceased did not sell the land to the applicant as he alleges and he was only a tenant or a licensee, that the alleged sale agreement and the acknowledgement as evident by the applicant were forgery as the deceased signatures and that of the applicant differ in the two documents; that he did not enjoy or have any beneficial interests in regard to the estate of the deceased.

34. In my view these are the issues that should be canvassed before the Environment and Land Court. From the averments, documents attached to the affidavit, I am satisfied that the respondent failed to disclose material facts to the Court in this matter. I therefore revoke the Grant of Letters of Administration confirmed and direct that parties proceed with this matter after determination the Environment and Land Court matter pending in respect of the property herein.

35. **FINAL ORDERS**

- a. Grant of Letters of Administration confirmed on 1st December 2016 is hereby revoked.
- b. The parties to proceed with this succession matter after determination of ELC No. 58 of 2019.
- c. Estate of the deceased to be preserved pending hearing and determination Environment and Land Court and this succession matter.

Ruling dated, signed and delivered via zoom at Nakuru This 18th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Odhiambo & Odhiambo Advocates for Applicant/Protestor Absent

Mr. Gatonye counsel for Respondent/Petitioners