



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 44A OF 2004

IN THE MATTER OF ESTATE OF MUGO KANG'AURO (DECEASED)

ROSE WAMUGO NJERU.....APPLICANT

VERSUS

JOYCE KORI MUGO.....1STRESPONDENT

ONESMUS NDWIGA KINANI.....2ND RESPONDENT

AND

WANYAGA MUGO

WAWIRA MUGO

NJOKI MUGO.....INTERESTED PARTIES

RULING

A. Introduction

1. The applicant moved this court vide an application dated 30/11/2020 filed under certificate of urgency wherein the applicant sought for orders; -

1) Spent

2) Spent

3) Spent

4) *That a conservatory order be granted restraining the 2nd respondent, the interested parties, their family, agents, and/or servants from burying the body of the 1st respondent Joyce Kori Mugo in LR No. Ngandori/ Kirirari/2098 and Ngandori/Kiriari/2099 until the hearing and full determination of the Summons for rectification/ annulment of grant dated 21/06/2017.*

5) *Costs be provided for*

2. The grounds upon which the application is based are that LR. No. Ngandori/Kirirari/2098 and Ngandori/Kiriari/2099 lawfully belongs to her in trust by virtue of certificate of confirmation of grant dated 8/10/2019 and which land parcels were bought by her late husband from the late husband of the 1st respondent. That she has learned from reliable sources that the respondents and/or servants intends to bury the deceased on either of the two land parcels without her consent and which acts constitutes an act of malice, disturbance and a threat to peace, order and the rule of law. Further that she will suffer loss, expense and damage due to the act of degrading waste to the land as a result of the said burial. As such, she prayed for court's intervention by the issuance of the restraining orders.

3. In opposition of the said application, the 2nd respondent filed a replying affidavit sworn on 8/12/2020 and filed in court on the said date. In a nutshell, his response is that there is a pending application dated 26/11/2020 at the instance of the interested parties herein and which is scheduled for hearing on 16/12/2020 and wherein the applicant's counsel sought for more time to respond thereto. That the substratum of the said application is to restrain the applicant herein from interfering with burial preparations of Joyce Kori Mugo on LR Ngandori/Kiriari/2098

and which land is registered in the names of Mugo Kang'auro (deceased). Further that the said land parcel has been subject of Civil Suit 13 of 2015 which was instituted at the instant of the Applicant's deceased husband David Njeru Josiah Kariuki against the late Joyce Kori Mugo but which was dismissed for want of prosecution.

4. It was averred further that, the late Joyce Kori Mugo petitioned for letters of administration intestate and she was subsequently issued with the same on 19/08/2004. The said letters of administration were confirmed and a grant issued on 9/09/2016. That the applicant herein filed for revocation of the said grant and which application was opposed by the 1st respondent and which is still pending before this court. As such, it is suspicious how the applicant herein obtained a grant in respect of the suit land which is registered in the names of Mugo Kang'auro.

5. The 2nd respondent contended that the applicant herein chased away the interested parties when they had gone to mark the graveside for the deceased on the suit land thus prompting the interested parties to file the application coming up for hearing on 16/12/2020. He averred that the nature of the orders sought herein can only be granted by the Environment and Land Court and that if the orders sought herein are granted, there will be two conflicting orders.

6. The application was canvassed orally, during which, the parties herein submitted in support of their rival positions.

7. I have considered the application herein, the reply by the respondent and the oral submissions made in court by the parties. In justification of the application for restraining orders against the said burial, the applicant deposed that she is the owner of the suit lands by virtue of certificate of confirmation of grant dated 8/10/2029 and as such the deceased cannot be buried on the suit land without her consent. She annexed as "RWN I" a copy of certificate of confirmation of grant issued in Succession Cause No. 66 of 2016.

8. The respondent on the other hand in opposition to the application and hence justifying their intentions to bury the 1st respondent on the suit lands deposed that there is a pending application in the Environment and Land Court seeking orders restraining the applicant herein from interfering with the burial preparations of the 1st respondent on the suit land and which land belongs to the 1st respondent pursuant to a grant issued to her and revocation of which grant is still pending.

9. The respondent annexed to the replying affidavit, a copy of the title deed to LR Ngandori/Kiriari/2098 and which clearly shows that the suit land is registered in the name of Mugo Kang'auro. From the records, the said Mugo Kang'auro was the husband to the 1st respondent herein. The respondent further attached as "ONK 6(b)" a copy of certificate of confirmation of a grant which indicates that LR Ngandori/Kiriari/2098 was inherited by the 1st respondent. The said grant is however subject to an application for revocation and wherein the applicant therein (the applicant herein) bases the same on the fact that there was a sale agreement between her deceased husband and Mugo Kang'auro (deceased husband to the 1st respondent herein). On the other hand, the applicant attached a certificate of confirmation of a grant issued to her in **Succession Cause No. 66 of 2016- in the matter of estate of David Njeru Josiah Gitari** and wherein LR Ngandori/ Kiriari/2098 was given to her.

10. What comes out from the above analysis of the evidence is that the issue at hand revolves around who between the 1st respondent herein (or the estate of the deceased Mugo Kang'auro) and the applicant is the owner of the suit land (LR Ngandori/ Kiriari/2098).

11. It is now trite that the duty of the probate court is to oversee the transmission of the estate of a deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate (see the case of **Muriuki Muse Hassan Vs Rose Kanyua Musa & 4 Others [2014] eKLR** and **In Re Estate of G K K (Deceased) [2017] eKLR**). Simply put, the Law of Succession Act is basically concerned with the administration of the estates of the deceased persons and the High Court is vested with powers to determine any dispute under that Act. The jurisdiction of this court does not extend to issues of ownership of land and such issues can only be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules and most preferably in the Environment and Land Court. (See the persuasive authority **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR**).

12. It is not disputed that there is a pending application before the Environment and Land Court (CMELC E20 of 2020). I have perused the court record in the said matter and I note that when the said application was before the court on 30/11/2020, the trial court allowed prayer one therein. A copy of the said order is attached to the replying affidavit herein and marked as "ONK 1(b)" and the effect of the same is to restrain the respondents therein (applicant herein being one of them) from interfering with the burial preparations or the burial of the 1st respondent herein on the suit land pending the hearing and determination of the application. The issues before the said court touch on the ownership of LR Ngandori/ Kiriari/2098.

13. The above orders have not been varied and/or set aside. I am thus persuaded by the respondent's deposition that, if the orders sought herein are issued, they will conflict with the existing orders issued in that case No. E020 of 2020. The said orders were issued by a court of competent jurisdiction and the same have not been challenged in any way.

14. If the applicant is not contented with the said orders, she ought to have appealed against the same and/or set them aside. The application herein is just but an abuse of the court process.

15. In the premises aforesaid, the application herein is devoid of merits and the same is hereby dismissed with costs.

Delivered, dated and signed at Embu this 16th day of December 2020.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for the Interested Parties