



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 163 OF 2005

IN THE MATTER OF THE ESTATE OF KAMUNGE KAGITHI DECEASED

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT CASE NO.600 OF 2014 FORMERLY NYERI NO.168 OF 2008

AND

IN THE MATTER OF LAND PARCEL NO. AGUTHI/GITITU/7

AND

THE RESULTANT TITLES AFTER PARTITION INTO AGUTHI/GITITU/690 AND AGUTHI/GITITU/691

HARRISON MUHOHO MWANGI.....APPICANT

VERSUS

KIGUOYA KAMUNGE.....RESPONDENT

**RULING**

1. The application is dated the 20/02/2019 and is premised under the provisions of Rules 49 and 73 of the of **The Probate and Administration Rules**; the applicant seeks the following orders;

(i) Spent

(ii) That the Honourable Court be pleased to order the Tetu Deputy County Commissioner to call for the title of Land Parcel No. Aguthi/Gititu/7 from the respondent, for the handing over to the County Land Registrar, Nyeri.

(iii) That the Honourable Court be pleased to order the County Land Registrar, Nyeri to receive, withdraw and/or destroy the title document of Land Parcel No. Aguthi/Gititu/7 from the respondent.

(iv) That the Honourable Court be pleased to make such order and/or further orders/ directions as may be just and expedient in the circumstances.

(v) That the costs of this application be borne by the respondent.

2. The application was unopposed as the respondent who had been served with the application failed and/or neglected to file any response thereto; the respondent was also not in attendance despite having been duly served with a hearing notice;

3. The applicant relied on the grounds on the face of the application and on the supporting affidavit; in essence the Applicant seeks an order from this court to call for the title for Land Parcel No Aguthi/Gititu/7 (**subject property**) which is in the hands of the respondent; a search conducted at the Lands Registry in Nyeri indicates that the respondent obtained the Title Deed for the subject property on the basis of a Grant issued by this Court on the 16/05/2008; that the same was obtained without a letter from the area Chief and there was non-disclosure of a material fact that the title had been sub-divided and other titles generated;

4. Whereas the applicant claims that the original Title for the subject property was closed upon its subdivision into Land Parcel Nos. Aguthi/Gititu/690 and Aguthi/Gititu/691 before the issuance of the Grant;

5. That there had been a multiplicity of suits between the two parties inclusive of ELC No.600 of 2014 wherein the respondent also alleged that the applicant had obtained the parcel Aguthi/Gititu/691 fraudulently; that the aforesaid suit was determined in favour of the applicant; that all avenues have been exhausted in the applicant's favour and the only issue remaining is the surrender of the original title which is currently in the wrong hands of the respondent

6. The applicant sought advice from the County Land Registrar Nyeri and the Deputy Commissioner Tetu and was duly informed that the title document could only be recalled by a court order;

7. The applicant prayed that the orders sought be granted as the applicant verily believes that the respondent may mislead the general public on the validity and genuineness of the title that is still in his custody;

### **ISSUES FOR DETERMINATION**

8. After taking into consideration the submissions made by the applicant the only issue this court finds for determination is;

(i) Whether this is a suitable case for this court to invoke its inherent powers and grant the orders sought;

### **ANALYSIS**

9. The applicant seeks the court's assistance to compel the Tetu Deputy County Commissioner to call for the title of Land Parcel No. Aguthi/Gititu/7 from the respondent; and for the re-called title to be handed over to the County Land Registrar, Nyeri and upon its receipt the said official to withdraw and/or destroy the title document;

10. The application is premised under the provisions of Rules 49 and 73 of the Probate and Administration Rules; the provisions read as follows;

***“49 A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”;***

***“73. Saving of inherent powers of court***

***Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

11. By citing the above rules the applicant is in essence seeking interventions from a probate court and the applicant is asking this court to invoke its inherent powers and thereby grant the orders to prevent further abuse and mischief that the respondent may cause;

12. It is trite law that the Law of Succession Act provides avenues for the beneficiaries and dependants to protect and distribute an intestate's estate and also allows them to ventilate their grievances; the question that arises is whether the applicant can be described as a beneficiary or a dependant and whether the intervention sought is within the functions and jurisdiction of a succession court;

13. In this instance the applicant submitted that upon conducting a search at the Lands Registry in Nyeri it indicated that the respondent obtained the Title Deed for the subject property on the basis of a Grant issued by this Court on the 16/05/2008; that the same was obtained without a letter from the area Chief and there was non-disclosure of a material fact that the title had been sub-divided and other titles generated;

14. This court reiterates that the Law of Succession provides beneficiaries and dependants with ways to ventilate their grievances; which would mean that the applicant if he falls into any of the two categories ought to have approached the court by filing an application for Revocation of the Grant; and the grounds are two fold making untrue statements and/or concealment of material facts;

15. By failing to move the court as stated above would lead to the presumption that the applicant is neither a beneficiary or a dependant of the deceased and can therefore best be described as a third party; unfortunately the Law of Succession Act does not cater for interventions by third parties particularly like the one sought by the applicant of calling in of the title from the respondent and the directing of county officials to perform certain duties under the guise of succession proceedings are found to be clearly outside the functions of a succession court;

16. This court cites with approval and is persuaded by the decision of the court in the case of **Re: Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**; the court aptly expounded on the scope of the jurisdiction of the probate court and held 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.***

27. 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.

28. 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 ...’*

29. 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. From the material placed before this court, it is this court’s considered view that the probate court is not the appropriate court to grant the orders sought; and finds that this is not suitable case in which to invoke its inherent powers as envisaged by Rules 49 and 73 of the Probate and Administration Rules;

#### **FINDINGS AND DETERMINATION**

18. In the light of the forgoing this court makes the following findings and determinations;

- (i) That this is not suitable case in which to invoke its inherent judicial powers;
- (ii) The application is found to be incompetent and is hereby struck out;
- (iii) There shall be no order as to costs.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 30<sup>th</sup> day of May, 2019.**

**HON.A. MSHILA**

**JUDGE**