



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 619 OF 2008

IN THE MATTER OF THE ESTATE OF PETER KARIUKI THANDE – (DECEASED)

ISHMAEL KAGUNYI THANDEAPPLICANT

VERSUS

DAVID GITHUMBI THANDERESPONDENT

RULING

1. The Applicant herein ISHMAEL KAGUNYI THANDE filed an application dated 21.1.2019 seeking the following orders:

(i) THAT this Application be certified as extremely urgent and one deserving to be heard exparte in the first instance.

(ii) THAT pending the hearing and determination of this application inter-partes, the Honourable Court be pleased to grant a Temporary Injunction Order restraining the registration of all that parcel of land known as Land Reference No. 11360/458 (Orig. No. 11360/434) in the names of DAVID GITHUMBI THANDE, the Respondent herein or in any other manner thereof restraining the Respondent from any activity that will interfere with the status quo pertaining to the land or procuring the Title for the said parcel of land.

(iii) THAT the Honorable Court be pleased to direct that distribution of the estate of the deceased can and shall only be in accordance with the Certificate of Confirmation of Grant dated 9th June, 2014.

(iv) THAT an order be made that ISHMAEL KAGUNYI THANDE is the lawful beneficiary entitled to be registered as the proprietor of all that parcel known as Land Reference No. 11360/458 (Orig. No. 11360/434).

(v) THAT costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Applicant of even date in which it is deposed that the Applicant and the Respondent are both administrators of the Estate of the deceased herein and they are siblings.

3. They were issued with grant of letters of administration herein and the grant was confirmed on 9.6.2014 wherein the applicant was allocated 30 acres of all that parcel of land known as LR NO. 11360/10 (Originally No. 11360/1 and 4)

4. The Applicant further stated In the affidavit that the said land comprises 24 acres that had been left to him by his father and 6 acres held by his mother in trust for him and where the homestead is now situated and the burial site where their parents are buried.

5. The Applicant further stated that he sought to sub-divide the land and have a separate title for the burial site which was done creating the portion in dispute being LR.NO. 11360/438 (Originally 11360/434).

6. The Applicant stated that he recently learnt with shock that the Respondent has submitted to the lands office a transfer document for the Registration of the said portion in his favour hence this application. He said the homestead and burial site have always been under his control.

7. The Respondent DAVID GITHUMBI THANDE filed a replying affidavit dated 14.2.2019 in which he stated that he is the proprietor entitled to ownership and possession of the said property known as LR. NO. 11360/458 (hereafter referred to as the suit property)

8. The Respondent also deposed among other issues that he filed a suit in the Thika Environment and Land Court No. 21 of 2019 seeking damages from the Applicant herein together with restraining orders and eviction in the form of removal of a gate constructed by the Appellant and also return of Deed plan No. 40544 for LR No. 11360/458.

9. The Respondent also filed a Notice of Preliminary Objection dated 28.6.2019 to the Application dated 21.1.2019 on the following grounds:

(i) THAT this Court is functus officio having pronounced itself pursuant to the confirmed grant issued on 9.6.2014.

(ii) THAT the Application raises issues of ownership and proprietorship which are the preserve of a Court exercising its environment and land jurisdiction and not a family court.

(iii) THAT the said Application is otherwise incompetent, fatally and incurably defective as the same offends the provisions of Rule 59 (1) of the Probate and Administration Rules and is further premised on inapplicable sections of the law.

10. I find that this matter is pending before Thika ELC No. 21 of 2019 and therefore the same is *subjudice*.

11. **Section 6** of the Civil Procedure Act also provides as follows:-

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.

12. **Dr. Kiama Wangai v John Mugambi & Republic, [2012] eKLR** which restated the res sub judice principle as provided for in **Section 6** of the Civil Procedure Act that,

“A court shall not proceed with any proceedings in which the matter in issue is also directly and substantially in issue in previously instituted proceedings between the same parties where such proceedings are pending before the same or any other Court having jurisdiction to grant the same relief claimed.”

13. I also find that the suit property land parcel No. 11360/458 was not included in the properties that were listed in the confirmed grant issued on 9.6.2014 and no application has been made before this Court for rectification of the said grant.

14. I accordingly disallow the Application dated 21.1.2019 for reasons that there is a dispute pending before THIKA ELC Case No. 21 of 2019 on the ownership of the suit property.

15. If ownership dispute is determined and the ELC Court finds that the suit property belongs to the estate of the deceased, the parties will be required to file a summons for rectification of the grant issued to the Applicant and the Respondent on 9.6.2014.

16. I also find that it is not true that this Court is functus officio as parties are at liberty to file summons for rectification of a grant or certificate of confirmation if it is established that the suit property was left out.

17. However in the current case, the parties will await the determination of ownership dispute before Thika ELC Case No. 21 of 2019.

18. Each party will bear its own costs of both the application and the preliminary objection.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATHONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.