



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
SUCCESSION CAUSE NO.124 OF 2016
IN THE MATTER OF THE ESTATE OF JAMES KINYURU MUONGI (DECEASED)
BENSON KINYURU MUONGI.....APPLICANT
- VERSUS -
EDWIN GITAU NYORO.....RESPONDENT

RULING

1. This is one of the Succession Causes that simply refuses to die. For all intents and purposes, the substantive issues herein were determined by Lenaola J. (as he then was) in a ruling dated 27/01/2012. A Certificate of Confirmation of Grant was issued by Achode J. on 27/01/2012 pursuant to that ruling.

2. Due to the failure of the parties to cooperate with each other in the process of distribution, some of the administrators approached the Court for certain orders to facilitate the process. This resulted in an order by Musyoka J. on 29/11/2016 which gave four directions:

i. That the Deputy Registrar do execute all the papers in relation to sub-division of land parcel No. Gitaru/Muguga/799 (“Subject Property”).

ii. That the District Surveyor, Kiambu do (sic) implement the above order and Certificate of Confirmation of Grant issued on 27th day of January, 2012.

iii. That the Officer Commanding Station, Kikuyu Police Station do oversee compliance of order (ii) above.

iv. That the costs be borne by the beneficiaries save for Edwin Gitau Kinyuru and Francis Karugi Kinyuru.

3. This should have settled the Cause. It turned out, however, that, in drawing the Certificate of Confirmation, the name of Beatrice Wamuhu Kinyuru, who had been declared a beneficiary in the dispositive ruling of 27/01/2012, was omitted. This necessitated Beatrice Wamuhu Kinyuru to approach this Court on 22/12/2016 for orders that she be so included. That order was granted and a new, rectified Certificate of Confirmation of Grant issued by this Court on 16/02/2017.

4. That should have settled the matter. Only it did not. On 22/03/2017, Beatrice Wambui Maina, one of the administrators and beneficiary took out summons asking for certain orders including orders injuncting the County Surveyor from proceeding with the subdivision of the Subject Property until determination of

her application and asking all the beneficiaries to “issue all the documents of completion of conveyance to the administrator (herself) to complete the transfer as required by law.” Beatrice Wambui Maina also sought for the Court to “grant orders for the letters of administration (temporary grant) to [herself] to enable her process the documents for transfer.”

5. One of the other beneficiaries, Benson Kinyuru Muongi, responded with his own Summons dated 18/04/2017 substantially seeking for orders that the caution lodged against the Subject Property by Edwin Gitau Kinyuru be lifted and removed forthwith and that the transmission of the Subject Property be fast-tracked. This Application was withdrawn by Notice dated 04/05/2017 and filed on the same date although it would appear that none of the parties brought this withdrawal to the attention of the Court when the Court gave directions that the Summons dated 22/03/2017 and that dated 18/04/2017 be heard simultaneously.

6. In any event, parties have submitted on both applications – on the assumption that both are still alive.

7. The parties have filed copious amounts of affidavits and submissions in support or in opposition to the two Applications. In my view, this is a classic case of a lawyer-driven conflict. The Courts have already spoken on the substantive controversy but the parties have persisted in bringing applications before the Court on the process of implementing the Court’s decision.

8. Respecting the Application dated 22/03/2017, the Applicant claims that the orders sought are necessary because her Co-Administrator has commenced the process of registration of the estate but some of the beneficiaries have been left out and their signatures have not been obtained. She further claims that she is appalled that she has received a letter from the District Surveyor indicating that he will visit the property to commence subdivision yet she has not been involved as an Administrator. Her fear is that her Co-Administrator is working in cahoots with some of the other beneficiaries to disinherit other beneficiaries.

9. Most of the other beneficiaries have opposed the Application dated 22/03/2017. On behalf of Andrew Njenga Kinyuru and Miriam Waithera Kinyuru, it is urged that the Application dated 22/03/2017 is misconceived and bad in law since it canvasses the same issues the Applicant has raised in ***Thika ELC Suit No. 486 of 2017 (Beatrice Wambui Maina v The Attorney General & 7 Others)***. Further, it is urged that the Application, in essence, is asking the Court to sit on appeal against the decision of Lenaola J. (as he then was). Further, these two Respondents claim that Musyoka J. already gave orders to have transmission documents signed by the Deputy Registrar on 29/11/2016 and the same have already been effected. Finally, these two Respondents argue that the matter is *res judicata* having been earlier determined and brought to a close vide a consent order recorded in Court on 16/02/2016.

10. Benson Kinyuru Muongi equally opposes the Application dated 22/03/2017 on similar grounds. So has Samuel Wairire Kinyuru, the Co-Administrator.

11. As I stated before, I see little complexity or controversy in this matter. The substantive issues were determined by Lenaola J. (as he then was) on 27/01/2012. Achode J. signed the Certificate of Confirmation of Grant on the same day. Musyoka J. gave orders on how transmission would occur on 29/11/2016. I rectified the Certificate of Confirmation of Grant by consent of all the parties on 16/02/2017. Where, then, is the controversy? If any party was dissatisfied with the substantive decision of Lenaola J., they ought to have approached the Court of Appeal. None did. All that is left is for the transmission of the estate. The Application dated 22/03/2017 does not, in my respectful view, advance the cause of due transmission of the estate. What is worse, it ignores the extant orders of Musyoka J. on how the transmission would occur. That order has not been set aside.

12. Litigation must come to an end at some point or it must be channelled to the higher Court on appeal. This must happen here. The fears by the Applicant that some beneficiaries will be disinherited is speculative. In any event, there are legal mechanisms for ensuring that does not happen or if it does happen, to remedy the same. The distribution of the estate will be as per the rectified Certificate of Confirmation of Grant issued on 16/02/2016. Since the parties have failed to cooperate with each other, the mode of transmission shall be as per the order of Musyoka J. issued on 29/11/2016 (only as amended

to cater for the rectified Grant issued on 16/02/2017). There is nothing more to be said about the Application dated 22/03/2017. Other than to dismiss it – which I hereby do.

13. As for the Application dated 18/04/2017, I will similarly decline to grant any orders on it. As the parties have correctly submitted, there is a substantive suit over the parcel of land in the Environment and Land Court. The issue of removal of caution placed over the Subject Property should be canvassed there. I am well aware of the powers of the High Court when exercising probate jurisdiction as expounded by Ouko J. (as he then was) in *The Estate of George M'Mboroki (Meru HCSC No. 357 of 2004)* as cited to me by the Applicant.

14. However, as I recently stated in *The Matter of the Estate of Muthoni Mbua (Kiambu High Court Succession Case No. 20 of 2017)*, a straight-up suit to remove a caution under section 73 should, by virtue of the definition of “Court” in section 3 of the Land Registration Act, be filed in the ELC. It would appear to undermine the objectives of the Land Registration Act and Article 162(2) to hold otherwise.

15. In the *The Matter of the Estate of Muthoni Mbua Case*, I indicated that there may be cases where the question of removal of a caution might arise tangentially in the course of another litigation. In such cases, whether the parties would be required to go to the ELC to have the caution removed so that they can benefit from the fruits of their judgment in the other litigation or whether the Court seized of the matter can, as a matter of inherent jurisdiction exercise jurisdiction to remove the caution would be context-specific.

16. In the present case, the very existence of a substantive case before the ELC is proof enough that the issue of removal of caution should be litigated there. I need not say more on this.

17. The outcome, then, is that both the Application dated 22/03/2017 and that dated 14/04/2017 are dismissed. I will make no order as to costs.

18. The upshot is that transmission of the estate of the Deceased herein shall proceed as per the orders of Musyoka J. dated 29/11/2016 but following the Certificate of Confirmation of Grant dated 16/02/2017.

19. Orders accordingly.

Dated and delivered at Kiambu this 16th day of January, 2018.

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JOEL NGUGI

JUDGE