



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 151 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE JOHN NTHIWA NZIOKA (DECEASED)

ANNASTASIA MBINYA NTHIWA.....PETITIONER

VERSUS

SERENADE PROPERTIES LTD.....RESPONDENT

KENYA AFRICAN NATIONAL TRADERS

& FARMERS UNION...PROPOSED INTERESTED PARTY/APPLICANT

RULING

Introduction

The Applicant herein is Kenya African National Traders & Farmers Union, while the Petitioner is the widow of, and administrator of the Estate of John Nthiwa Nzioka (hereinafter referred to as “the Deceased”). The Respondent alleges that it is a purchaser of part of the Deceased property, having been sold the said parcel of land by the Administrator.

The Applicant filed a Summons for Revocation of Grant dated 25th April 2017 seeking the following substantive orders:

1. THAT the Applicant M/s. Kenya African National Traders and Farmers Union be enjoined to this cause as an Interested Party.
2. THAT this Court do issue a temporary injunction restraining the Administrator herein, her servants or agents or anyone claiming title through her from interfering, transferring, charging, trespassing or in any, other way dealing with all those parcel of land described as:
 - a) Donyo Sabuk/Komarock Block 1/68576
 - b) Donyo Sabuk/Komarock Block 1/68577
 - c) Donyo Sabuk/Komarock Block 1/68578
 - d) Donyo Sabuk/Komarock Block 1/68579
 - e) Donyo Sabuk/Komarock Block 1/68580
 - f) Donyo Sabuk/Komarock Block 1/68581
 - g) Donyo Sabuk/ Komarock Block 1/68582
 - h) Donyo Sabuk/ Komarock Block 1/68583

or in any way carrying out further subdivision or developing on the said parcels pending the hearing and determination of this application .

3. THAT this Court do issue a temporary injunction restraining Administrator from any dealings with all that parcel of land described as Donyo Sabuk/Komarock Block 1/67744 or in any way carrying out further subdivision or developing on the suit land pending the hearing and determination of this application.

4. THAT this Court do issue a temporary injunction restraining the Administrator herein, her servants or agents or anyone claiming title through her from interfering, transferring, charging, trespassing on all the parcels of land set out in paragraph 3 & 4 above, or in any way carrying out further subdivision or developing on the said parcel pending the hearing and determination of this suit.

5. THAT this Court do issue a temporary injunction restraining the Serenade Properties Limited, its servants or agents or anyone claiming title through it from interfering, transferring, charging, trespassing on parcel No. Ndonyo Sabuk/Komarock Block 1/67744, or in any way carrying out further subdivision or developing on the parcel of land described as Donyo Sabuk/Komarock Block 1/67744 pending the hearing and determination of this application.

6. THAT this Court do issue a temporary injunction restraining the Serenade Properties Limited, its servants or agents or anyone claiming title through it from interfering, transferring, charging, trespassing on parcel No. Ndonyo Sabuk/Komarock Block 1/67744, or in any way carrying out further subdivision or developing on the parcel of land described as Donyo Sabuk/Komarock Block 1/67744 pending the hearing and determination of this suit.

7. THAT all the certificates of titles issued on 14th April 2015 be revoked and/or annulled and all those titles for all the parcels described as

- a) Donyo Sabuk/Komarock Block 1/68576
- b) Donyo Sabuk/Komarock Block 1/68577
- c) Donyo Sabuk/Komarock Block 1/68578
- d) Donyo Sabuk/Komarock Block 1/68579
- e) Donyo Sabuk/Komarock Block 1/68580
- f) Donyo Sabuk/Komarock Block 1/68581
- g) Donyo Sabuk/ Komarock Block 1/68582
- h) Donyo Sabuk/ Komarock Block 1/68583
- i) Donyo Sabuk/Komarock Block 1/67744

be cancelled and the titles thereto be consolidated and or amalgamated and reverts to Donyo Sabuk/Komarock Block 1/584.

8. THAT this Court be pleased to order the Administrator to transfer 50 acres of all that parcel of land described as Donyo Sabuk/Komarock Block 1/584 in the name of Interested Party M/s. Kenya African National Traders and Farmers Union.

9. THAT this court be pleased to issue any other Order that it may deem necessary.

10. THAT costs of this application be provided for.

The grounds for the application are that the Applicant had purchased all that parcel of land described as Donyo Sabuk/ Komarock /Block 1/584 from the Deceased, and had caused the same to be subdivided among its members. Further, that the Administrator was privy to the said sale transaction but has fraudulently sold it to the Respondent, and that the two parties have committed fraud.

In addition that the Administrator has acted in breach of her duties as a trustee, and thereby committed a crime punishable under the law. The Applicant stated that on account of the fraud, the subdivision of the said parcel of land be canceled and the land be amalgamated and reverts back to the original No. Donyo Sabuk /Komarock Block 1/584.

The Respondent's counsel thereupon filed a Notice of Preliminary Objection raising the following grounds:

1. THAT the Application herein is incompetent and a nonstarter there being no grant capable of being revoked;
2. THAT the Applicants interest in the suit land as it was LR. NO. Donyo Sabuk/Komarock Block 1/584 is statute barred by section 7 of Limitation of Actions Act;
3. THAT the Applicants Summons is an omnibus application incapable of being determined under section 76 of the Laws of Succession Act;
4. THAT the transaction s ought to be enforced by the Applicant's Summons is incapable of being performed as the and control

board consent expired after 6 months and no application for extension was ever made.

On 18th September 2017, this Court directed that the summons by the Applicant and the Respondent's Preliminary Objection be heard and determined together by way of written submissions. The Respondent on the said date also asked that his notice of Preliminary Objection be deemed to be his grounds of opposition to the said Summons.

The Petitioner was initially represented by Andrew Nduva Kitonga Advocate, but later on in the proceedings a Notice of Change of Advocates for the Petitioner was filed by Nzei & Company Advocates. The Respondent is represented by Mamicha & Company Advocates, while the Applicant is represented by W.G. Wambugu & Company Advocates.

The Parties' Respective Cases

The Applicant's Treasurer, one Ibrahim Wanene Kaingati filed an affidavit in support of the application on 26th April 2017, and a further affidavit sworn on 7th November 2017. He stated therein that the Applicant entered into an agreement with the Deceased on 8th August 1994, to purchase a portion of land measuring 50 acres of the property described as Donyo Sabuk /Komarock Block 1/584. He explained and annexed details of the said agreement and transactions with the Deceased as regards payment of the purchase price and obtaining of the land control board consent, and claimed that the Applicant took possession and sub-divided the portion of land which was to be given to its members.

However, that upon undertaking due diligence they discovered that the Petitioner has subdivided the portion of land and sold one of the subdivisions, namely Donyo Sabuk/ Komorock Block 1/67744, to the Respondent. He reiterated in his further affidavit that on 3rd August 1995, the Applicant and Deceased attended the Land Control Board and they were granted the consent by the Board.

The Petitioner on her part filed a replying affidavit she swore on 25th May 2017, and a further affidavit sworn on 14th September 2017 as her response to the summons. She stated therein that she was aware of the sale transaction between the Applicant and the Deceased, however that the payments were never completed by the Applicant, and the agreement cancelled as a consequence of this breach, nor was the land control board consent for the transfer and sub-division given. She annexed correspondence in support of these assertions.

She also averred that the sale agreement dated 08/08/1994 which is relied upon by the Applicant was made between the Deceased as the seller and Kantafu Company Limited as the purchaser, but not with Kenya African National Traders & Farmers Union (the Applicant). Therefore, according to the Petitioner, there is no contractual relationship between the proposed Interested Party and the Deceased in these proceedings, and consequently the Applicant herein has no claim over the estate of the deceased and cannot be enjoined in these proceedings as a party .

The Respondent relied on his Notice of Preliminary Objection as his response.

The Determination

The Parties filed written submissions, with the Respondent filing submissions dated 8th May 2017, while the counsel for the proposed Interested Party filed two sets of submissions dated 17th July 2017 and 6th November 2017. The counsel for the Petitioner filed submissions dated 27th July 2017.

The issues before this Court for determination are whether the Respondent's Preliminary Objection has merit, and if not, whether the Applicant should be joined as an Interested Party in this suit, and whether the temporary and mandatory injunctions it seeks can issue.

On the first issue, the Respondent in its submissions invoked section 76 of the Law of Succession Act to argue that the Applicant had no capacity to be joined as an Interested Party, as it is not disputed that the agreement between the Applicant and Deceased was entered into on 8/08/1994 and that the Deceased died on the 22/01/2010, 15 years after the agreement was executed. Further, that it is now 23 years from the date of execution of the agreement. Reliance was placed on the decision in **Nancy Waithira Mburu v Catherine Kathoni Marete & Another [2014] eKLR** for the position that the Applicant's interest had thus not crystalized, and the same cannot be entertained in a probate court.

The Respondent in this respect cited various statutory and judicial authorities in support of their arguments that the Applicant's rights (if any) to land control board consent got extinguished 6 months after the Agreement was signed. Further, that their claim for land could only have been determined within 12 years and in the proper court, and that this being probate proceedings, it is too late to entertain a claim for land as the court is not clothed with the right jurisdiction to determine whether or not their claim is still existent, and whether such claim can make them a creditor in the deceased estate.

The Petitioner reiterated that the land control board consent to the agreement between the Applicant and Deceased which was mandatory was never granted, and that the Applicant had no *locus standi* for reasons that it was different from the party that the Deceased entered into an agreement with.

The Applicant on its part submitted that this Court has jurisdiction under section 76 of the Law of Succession Act as the Petitioner was appointed administrator on 30th April 2014, and has committed acts of fraud against the Estate, and concealed material facts about the agreement entered into between the Applicant and Deceased of which she was aware. Further, that the Applicant moved the court timeously. Lastly, that the Administrator has powers to perfect the transaction, which the Deceased had commenced especially in light of the fact that she was privy to the sale and that she has also not denied payment, and as the Deceased obtained the consent to transfer the land to the Intended Interested Party.

The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro -vs- Mbaja (2005)1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

In the present application and objection, there are allegations made as regards non-payment of the purchase price and the obtaining of the land control board consent with respect to the sale agreement entered into between the Applicant and the Deceased, and as to when the cause of action arose. These facts have been disputed by the Applicant, and will certainly require further evidence and argument to establish their veracity or otherwise.

This finding notwithstanding, there is one question of law raised in the Respondent’s Preliminary Objection on this Court’s jurisdiction, with the argument being made by the Respondent that this Court has no jurisdiction, for reasons that the issue raised in the present Application is one of the Applicant’s interest in the Deceased’s land, and beyond the powers of a probate Court.

Jurisdiction is always granted by law or other like legal instrument and not by way of political doctrine, as was held by the Court of Appeal in The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989] KLR 1 . The Court stated as follows:-

“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

As to whether this Court, sitting as a succession Court, is the correct forum to adjudicate the Applicant’s claim, Musyoka J. in this regard expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction in In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR 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 a 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.

The issue as to this Court's jurisdiction can therefore only be determined by first answering the question whether this Court can effectively determine the nature of the Applicant's claim over the Deceased's property within the framework provided by the Law of Succession Act.

This Court in this respect notes that the Applicant essentially alleges that a portion of the land known as Donyo Sabuk /Komarock Block 1/584 , which land has since been sub-divided into various other titles, was sold to it by the Deceased during his lifetime and does not belong to the Respondent. The Petitioner and Respondent however contend that the sale agreement between the Applicant and Deceased was not completed as some conditions were not met, particularly on payment of the purchase price and the obtaining of the land control board consent.

Therefore, the question whether there was a valid sale agreement of land between the Applicant and the Deceased, will need to be answered first, before this Court as a probate Court can make a determination at the Applicant's interest in the Deceased's property. This question will in addition involve application of the law on title to and ownership of land, and therefore goes beyond being merely a claim of succession to the Deceased property. It is also a question that arose during the Deceased's lifetime and before the succession proceedings herein.

Disputes primarily and solely concerning ownership and title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution and section 13(1) and (2)of the Environmental and Land Court Act. Likewise, the question as to whether the documents and correspondence attached by the Applicant and Petitioner conferred to the Applicant an interest in the Deceased's land is one that will have to be determined by the said Court .

Lastly, to answer these questions, including the claims of fraudulent registration of title in the Respondent's name, this Court will need to operate outside the framework of the Law of Succession Act, which makes the Applicant's application not appropriate for determination by this Court sitting as a succession Court.

This Court cannot in the circumstances entertain the Applicant's application nor grant the orders sought therein at this stage, until its interest in the Deceased's land has been confirmed by the appropriate Court. For this reason, this Court cannot enjoin the Applicant as an Interested Party, nor consider any arguments on the injunctions it seeks. To this extent this Court therefore finds that the Respondent's preliminary objection has merit.

I accordingly strike out the Applicant's Summons for Revocation of Grant dated 25th April 2017 for the above reasons, with costs to the Petitioner and Respondent.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of February 2018.

P. NYAMWEYA

JUDGE