



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 101 OF 2016

IN THE MATTER OF THE ESTATE OF JOSEPH M'NGARUTHI M'RINTAUGU DECEASED

GLADYS KATHURE M'NGARUTHI.....1ST PETITIONER

MARTHA KAREGI M'NGARUTHI.....2ND PETITIONER

VS

FREDRICK MWORIA GITUAMPIA.....APPLICANT

RULING

Fredrick Mworua Gituambia brought application dated 29th September 2017 seeking preservative orders injunction to restrain Evangeline Karuthu the Respondent herein and all the beneficiaries from disposing off or alienating L.R. Kinoru/ 'B', Ruiiri /Rwarera/1249, 235,242,1250 and 2424 pending hearing and determination of the cause herein.

That the court orders nullification of sale of L.R. Ruiiri/Rwarera to one Jacob Kiirinya Namiti as being illegal and fraudulent and to restrain the said purchaser from entering, interfering or otherwise dealing with the said parcel which forms part of deceased's estate. That the Respondent, the Respondents mother and Respondents siblings be ordered to give account for rents and dividends collected from shares, plot No. Kinoru/4 'B' and Ruiiri/31 and to surrender all original titles deeds, log books and share certificates to court or an impartial body for safekeeping pending the hearing or determination of the cause herein. The applicant also sought for costs of applications.

The application is supported by the grounds on the face of application and affidavit of applicant sworn on 29th September 2017 together with annexures FMG 1- Letter dated 23.8.2012 from District Land Adjudication and Settlement, Imenti North confirming parcels Nos. 235, 242 and 1250 Ruiiri/Rwarera as registered under the name Joseph M'Ngaruti M'Rintaugu and Gladys Kathure M'Ngaruti.

MG2 – Letter from District Land Adjudication and Settlement North Imenti District confirming that L.R. Ruiiri/Rwarera/1249 is registered in the names of Joseph M'Ngaruti M'Rintaugu and Gladys Kathure M'Ngaruti. The application was opposed by 1st Administrator through Replying Affidavit sworn on 18th October 2017 and further Replying Affidavit sworn on 15th November 2017 and the advocate said that an injunction is an order under civil procedure rules and is not applicable in succession cause. Mr Ndubi relied on the authority of Kirimi Solomon Magambo & 2 others vs Mutuma Solomon Magambo & another – Succession Cause no. 276 of 2007 wherein Justice Makau in an application to restrain 2nd Respondent from digging a grave, and/or burying remains of the 1st Respondent were made and Justice Makau held that an order of injunction cannot be issued in a succession cause but in Civil matters and he declared the application band in law and misplaced.

It was also argued that parcels of land in question are not yet a subject of this cause and court cannot make an order in respect of parcels not yet included in the cause. He said that the relief sought can only be available to 2nd Administration in Environment and Land Court and not in High Court. Mr Ndubi argued that the properties cited are not subject of this court. It was admitted that parcel of Land No. 1249 – Ruiiri/Rwarera head been disposed because it is not part of the deceased estate.

It was argued that the court cannot issue orders against parties who are not part of proceedings in court. It was argue that decision of the Land Adjudication & Settlement had been appealed as it is not final. He argued the property was jointly owned by deceased and the 1st Administrator. It was argued that there is no evidence to prove that rents and dividends have been received from plots No. Kinoru 4 'B' and Ruiiri 31. It was submitted that it is 2nd Administrator who is enjoying proceeds from the properties cited. It was argued that the duty to account falls squarely on the shoulders of the 2 Administrators herein.

Mr Ndubi urged the court to dismiss application. I have considered the application together with the grounds and affidavit in support thereof as well as the Replying Affidavit and applicants further affidavit and submissions by counsels in support and in opposition to the application and this is what the court has to say:-

Article 159(2) discourages the exercise of Judicial Authority in a manner that causes delay to my discharging justice and giving undue regard procedural technicalities whether Civil Procedure Rules are applicable to the processes in the Law of Succession to me would not matter provided substantive justice is put into consideration.

There is no mandatory provision that the Civil Procedure Rules are not applicable. In my view the Law of Succession falls under the per view of Civil Law. I have also looked at the decision of the Lands Adjudication and Settlement Officer dated 22nd July 2017 in which it was sought that rights on particular parcels of land be ascertained. Annexure FMG 1. The Land Adjudication Officer has said that half of each of the parcels belonged to the deceased and as such should form part and parcel of the assets of the estate to be distributed to the beneficiaries. The Respondents have conceded to the fact that deceased owned land jointly with Gladys Kathure but being that these parcels were not yet registered it can't be said that there was joint ownership as joint ownership has to be expressly registered.

In regard to the proceeds from the plots the administrators should write briefs in their applications for distribution for courts consideration. Orders accordingly. The application is partially allowed.

HON. A.ONG'INJO

JUDGE

RULING, DELIVERED, DATED AND SIGNED IN COURT IN

8TH MARCH 2018.

8.3.18

Before Adwera J

Penina – C/A

Mr Gikunda Advocate for 1st Administrator.

Mr Otieno C. Advocate holding brief for Ndubi for 2nd Administrator and Interested Party.

Court

Ruling delivered dated and signed in court.

FM. 27.6.2018 for issues to be framed and for direction.

HON. A.ONG'INJO

JUDGE