

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2775 OF 2004

IN THE MATTER OF THE ESTATE OF GATHUKU MUCHAI (DECEASED)

RULING

1. After I completed hearing oral evidence on 2nd March 2016 on the application for revocation of grant herein dated 8th September 2004, I directed the parties to file and exchange written submissions to facilitate preparation of judgment thereon. Instead of complying with the said directions, the applicant in the revocation application chose to file an application dated 31st March 2016, seeking to have this cause consolidated with another cause pending before the Environment and Land Court being ELC No. 503 of 2009.

2. I directed on 20th January 2017 that the court file in ELC No. 503 of 2009 be availed to enable me determine whether or not I could order consolidation of the two causes.

3. The said file has been availed and I have perused it. I have noted that Muchelule J had, in a ruling delivered in that cause on 5th July 2011, ordered that the said suit be stayed to await outcome of the proceedings herein, that is to say in this succession cause, HCSC No. 2775 of 2004. There is also an order on record signed by Gacheru J in ELC No. 503 of 2009, wherein Gacheru J dismissed the suit for want of prosecution on 20th July 2016.

4. I do not think, in view of the above, that the suit in ELC No. 503 of 2009 is available for consolidation with the instant cause. In the first place, the orders sought in ELC No. 503 of 2009 are for adverse possession. A probate court cannot possibly make such orders in a case where the party seeking the said orders has moved the probate court claiming to be entitled under succession or inheritance law to the same land. The probate court only determines disputes relating to inheritance, by considering the inheritance rights of the parties as per the relevant law. The issue as to whether the applicant was entitled to the same land by adverse possession should be determined by a different court constituted specifically to determine questions relating to that issue.

5. That issue raised in the application dated 31st March, 2016 was properly placed before Muchelule J, and the Judge, in a reasoned and considered ruling, decided to stay the proceedings in the land court to await outcome of the succession proceedings. The applicant should await the said outcome. Should the probate court find him to be a survivor of the deceased entitled in succession law to the property in question, then the cause in ELC No. 503 of 2009 would be rendered irrelevant. Should it, however, turn out that the applicant is not entitled in succession law to anything out of the estate in question, then he would be at liberty to move the Environment and Land Court in ELC No. 503 of 2009 to pursue his alternative claim, that he was entitled to a portion of the subject property by adverse possession.

6. However, it transpires that the said cause has since been dismissed. It is no longer alive, but dead. It does not exist. There is nothing to consolidate.

7. I need not say more. The application dated 31st March 2016 has no merit at all. It exists only for the purpose of dismissal, and I do hereby dismiss the same. I shall, however, order that each of the parties to bear their own costs. I shall further direct the parties to file their respective written submissions on the revocation application. The Deputy Registrar shall cause the matter to be mentioned before the Presiding Judge for appropriate directions. The court file in ELC No. 503 of 2009 to be returned to the relevant registry.

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF MAY, 2018.

W. MUSYOKA

JUDGE