



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1874 OF 2011

IN THE MATTER OF THE ESTATE OF ERIC WILLIAM MBELLA (DECEASED)

RULING

BACKGROUND

1. The deceased herein whose estate these proceedings relate one Eric William Mbela died intestate on 31st December 2010 leaving behind a widow Josphine Egwa Mbela and children K M M and M K M then minors aged 17 and 13 years respectively.
2. Among the assets left behind by the deceased according to Form P & A5 filed on 19th August 2013, is L.R. No. [particulars withheld] Loresho the property that is now disputed then registered in the names of the deceased and his mother Elizabeth Wanjiku Muchira as joint tenants.
3. Having petitioned for a grant of representation in respect of the deceased's estate, a grant of letters of administration intestate was made and issued jointly to Josephine Egwa Mbela (the widow), Getrude Mbogho and Norah Chao Kidemu on the 22nd July 2015. The same was confirmed on 11th April, 2016 and estate distributed with orders that L.R. No. [particulars withheld] Loresho be registered in the names of the three administrators to hold in trust for the two sons of the deceased namely K M M and M K M.
4. Pursuant to the demise of Eric Mbela the deceased herein, his mother a co-tenant in the disputed land moved to the land registry and registered his death certificate against the property on 12th April 2011 thus devolving and vesting the same into her name as the sole proprietor. Having removed the name of the deceased from the title register, Elizabeth Wanjiku Muchira became the absolute sole beneficiary with the power to sell which she did exercise by selling the property to the applicant herein Kilinochi Limited vide a transfer dated 1st July 2011 and registration and issuance of title in the name of Kilinochi Limited made on 17th August 2011.
5. Upon discovery that the property had been sold by Elizabeth Mbela her mother-in-law, Josephine Egwa Mbela the widow of the deceased moved to the Environment and Land Court on 28th June 2012 vide civil case No. 459/2012 seeking an injunction against Elizabeth Wanjiku Muchira and Kilinochi Limited from levying distress against her or in any way interfering with her quiet enjoyment of the suit property. Among the prayers sought in the plaint dated 28th June 2012 by Josephine (administrator) are; a declaration that the suit land was a family property held in trust by Elizabeth Wanjiku Muchira for the benefit of the plaintiff (administrator/widow of deceased) and her children; a declaration that residential property L.R. No. [particulars withheld] Loresho was fraudulently transferred to the 2nd defendant and that the transfer and subsequent registration be cancelled; an order that the suit property be registered in the name of the plaintiff (Josephine Egwa Mbela and lastly; the 2nd defendant (Kilinochi Ltd.) by itself, its agent or servants be restrained by permanent injunction from evicting the plaintiff and her children being the deceased's dependants from their residential property L.R. No.[particulars withheld] Loresho.
6. During the pendency of the said proceedings before the ELC Court, Kilinochi Ltd. the current registered owners of the land in question having bought the same from Elizabeth Wanjiku Muchira formerly a joint tenant to the deceased, decided to move to this court being an interested party with the sole purpose of securing and or protecting their beneficial interest over the land. The application herein was filed out of sheer apprehension that the said land may be transferred to third parties any time pursuant to a certificate of confirmation of grant issued to Josephine Egwa Mbela and two other co-administrators on the 11th April 2016.

Applicant's Case

7. Vide application dated 14th March 2018 filed on the same day, the applicant herein Kilinochi Ltd sought the following orders:

(1) Spent.

(2) That an order made herein on 11th April 2016 directing the registration of property L.R. No. [particulars withheld] Loresho in the names of Josephine Egwa Mbela, Getrude Msagho and Norah Chao Kidemu as trustees for K M M and M K M be stayed.

(3) That the order made herein on 11th April 2016 directing the registration of property LR No. [particulars withheld] Loesho in the names of Josephine Egwa Mbela, Getrude Mbogho and Norah Chao Kidemu as trustees for K M M and M K M be set aside ex. debito Justiciae.

8. Application is supported by grounds on the face of it and affidavit deponed on 14th March 2018 by Adan Sheikh Ahmed a director to the applicant company in which he averred that the suit property was legally and procedurally bought from Elizabeth Wanjiku Muchira the registered owner to whom the said property devolved and vested upon following the death of her son the co-tenant.

9. The applicant attached a land transfer executed in its favour dated 17th August 2011 (Annexure ASA.1) and a copy of the plaint in respect of ELC case No. 459/2012 wherein the administrator Josephine Egwa Mbela has sued them together with Elizabeth Wanjiku Muchira the seller (Annexure "ASA 2").

10. It is the applicant's contention that pending determination of ownership in respect of ELC Case No.459/12 between Josephine Egwa Mbela the administrator and Elizabeth Wanjiku 1st defendant and the applicant (2nd respondent), the orders of 11th April 2016 wherein the grant was confirmed and the property distributed to the administrators as trustees for the deceased's children should be stayed.

11. In his oral submissions, Mr. Havi for the applicant submitted that the property in question having been held in joint tenancy between the deceased and his mother Elizabeth Wanjiku, the same property automatically devolved to the surviving tenant in this cause Elizabeth Wanjiku Muchira in accordance with Section 91(3) and (4) of the Land Registration Act No. 3 of 2012. Counsel further submitted that the title having devolved to Elizabeth Wanjiku who in turn procedurally sold the same to the applicant, the property in question ought not to have been listed as part of the deceased's estate free for disposition or distribution pursuant to Section 3 of the Law of Succession.

12. Learned counsel urged the court to stay execution of the orders of confirmation of grant issued on 11th April 2016 pending determination of ownership dispute now pending before the ELC court. To buttress his arguments, counsel relied on the case of **Isabel Chelangat vs Samuel Tiro Rotich & 5 others (2012) KLR being Eldoret ELC Case No. 915/2012** in which the court held that:

"a joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.

Respondent's Case

13. In response to the application, the respondent Josephine Egwa Mbela filed a replying affidavit of even dated on 11th April 2018 confirming that she had obtained a certificate of confirmation of grant in respect of her late husband's estate wherein the property in question jointly owned by the deceased and his mother was listed as one of the assets. She maintained that the said property has been and still is her matrimonial home. She alleged that the transfer of the said property by her mother-in-law to the applicant was fraudulent as she was not notified and that a suit she had filed challenging the said fraudulent sale is still pending before the ELC court.

14. She contended that the property having been transferred to the applicant's name, she had no means of transferring the same hence the application herein is rendered superfluous. She therefore prayed that the same be dismissed. In her submissions, M/S Sebastian holding brief for Ngetich counsel for the respondent reiterated the averments contained in the replying affidavit urging the court to recognise the property as matrimonial property in accordance with Section 10 of the Matrimonial Property Act.

Analysis and Determination

15. I have considered the application herein, affidavit in support and replying affidavit. I have also considered rival submissions by both counsels. The only issue rendering itself for determination is whether this court can stay execution of the orders contained in the certificate of confirmation of grant issued on 11th April 2016 pending determination of the ELC court suit No. 459/2012 Nairobi.

16. According to the affidavit in support of the application and replying affidavit, both parties are in agreement that prior to the demise of the deceased herein, he was registered with his mother as joint tenants in respect of the property in question. There is no dispute either that subsequent to the death of Eric William Mbela, his mother did register his death certificate in the lands office and the land automatically devolved into her as the sole owner hence empowering her to sell to the applicant who assumed ownership on 17th August 2011 upon transfer by her.

17. The property in dispute is currently registered in the applicant's name yet the same is appearing in the certificate of confirmation of grant as having been distributed to and held in trust by the administrators for the benefit of the deceased's children. According to the grant, the entire property was distributed without any mention of Elizabeth Wanjiku Muchira originally the joint owner nor was any provision made in her favour. There is no dispute that the property was held by the deceased and the mother jointly. As to whether the mother (Elizabeth Wanjiku Muchira) was holding title in trust for the deceased's family is an issue for determination before the land court where ownership dispute is pending currently.

18. Since there is a dispute over ownership and a suit between the applicant and respondent before the ELC Court is yet to be determined, this court cannot venture and assume jurisdiction to determine ownership through this succession case. As admitted by both parties, the court that is properly seized of jurisdiction is the ELC court. The grant herein has already been confirmed and the same property distributed. There is no harm in making orders staying the orders of 11th April 2016 directing registration of the said property in the name of the administrators for the benefit of the children.

19. It is in the interest of justice for both parties that execution of the said orders be stayed only in so far it affects the property in question

pending hearing and determination of the suit now pending before ELC court. For those reasons prayer No. 2 is hereby granted as prayed.

20. As regards prayer No. three which is seeking orders to set aside orders of confirmation made on 11th April 2016 generally, the same will be prejudicial to the beneficiaries of the estate as there are several properties involved to which nobody is claiming beneficial interest over. Secondly, to set aside the orders completely will amount to issuing omnibus orders thereby determining ownership which is not within the purview of this court. For those reasons, prayer No. 3 is hereby disallowed.

21. Having made the said finding, application herein is allowed only in terms of prayer 2. This being a family dispute, costs shall abide by the cause.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S OchiengCounsel for the applicant

No appearance forCounsel for the respondent

Edwin Court Assistant