



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 284 OF 2009

In the matter of the Estate of NJUGUNA THAGICU (Deceased)

RENSON NYAGA NGUU.....PETITIONER/RESPONDENT

V E R S U S

JOSPHAT NJERU GITHINJI.....PROTESTER/APPLICANT

R U L I N G

1. This is an application dated 15/06/2017 seeking for orders for cancellation annulment of the title deeds for land parcel L.R. No. Ngandori/Kirigi/9217 resulting from sub-division of L.R. No. Ngandori/Kirigi/2587 and that the land reverts to the name of the deceased herein Njuguna Thagicu.

2. It also seeks for orders that L.R. No. Ngandori/Kirigi/2587 be registered in the name of Josphat Njeru Githinji.

3. The grounds in the support of the application is that the court revoked the grant issued to the respondent in respect of Ngandori/Kirigi/2587. The applicant is a beneficiary of the court's ruling of 29/05/2014 ordering that the estate be distributed to all the beneficiaries.

4. It is further stated that the respondent has transferred two of the resultant sub-division parcels L.R. Ngandori/Kirigi/9215 and 9216 to third parties who were not beneficiaries of the estate. This action of the respondent has disinherited the applicant who is a beneficiary.

5. The respondent in his grounds of opposition raises several issues: -

a) That the application is res judicata since issues raised were heard and determined in the ruling of the court delivered on 29/05/2014 for the application dated 14/07/2010.

b) That the application is an abuse of the due process of the court for raising issues already determined by the court.

c) That the applicant is guilty of non-disclosure to the effect that none of the parcels in issue herein are registered in the names of the respondent or in the names of the deceased.

6. The parties argued by way of written submissions filed by their respective counsels. Messrs. Mugambi Njeru represents the applicant/objector while Messrs. Morris Njage & Co. represents the respondent/petitioner.

7. The issues arising from this application are as follows: -

a) Whether the application is competent; and

b) If it is found to be competent whether the orders sought should be granted.

8. The background facts are that the respondent who is a grandson of the deceased applied for letters of administration in this cause on 25/05/2009. The cause was gazette on 26/09/2009. The grant was confirmed on 18/02/2010. The estate of the deceased comprising of two land parcels L.R. Ngandori/Kirigi/2587 and Ngandori/Kirigi/ 2590 was distributed to two sons and two grandchildren of the deceased and one Moffat Njeru Nyaga whose name did not appear in Form P&A.5. His name was however included in the letter of the chief dated 27/05/2009.

9. In an application dated 14/07/2010 for revocation of the grant was filed by the applicant alleging that he was disinherited and that being a

..... of the deceased he was not informed of the proceedings.

10. The application was allowed by D. Manjanja, J. in his ruling delivered on 29/05/2014. From the records relied on in this application, the following are the facts as concerns the registration of the parcels of land in issue herein:

11. L.R. Ngandokri/Kirigi/2587 that was registered in the name of the deceased Njuguna Thagicu before this case was filed.

12. The land was subdivided into four (4) parcels of land vide grant in this succession cause No. 284 of 2009 on 13/10/2010. The resultant parcels were registered as follows: -

i) L.R. NGANDORI/KIRIGI/9214 – Renson Nyaga Nguu

ii) L.R. NGANDORI/KIRIGI/9215 – Benson Muriithi Ileri

iii) L.R. NGANDORI/KIRIGI/9216 – Blamwel M. Gachuria

iv) L.R. NGONDORI/KIRIGI/9217 –Renson Nyaga Nguu

13. Ngandori/Kirigi/2587 was still in the name of the deceased as at 05/12/2012 with a caution registered in favour of the applicant Josephat Njeru Githinji. However, the land is in the name of Moffat Njeru Nyaga a grandson of the deceased.

14. The grant confirmed on 18/05/2010 indicated that the beneficiaries were as follows:

LR NGANDORI /KIRIGI/2587

i) Ephantus Njagi Nguu 0.20 ha

ii) Benson Nyaga Nguu 0.20 ha

iii) Peris Muthoni NGUU 0.20 ha

iv) Morris Mbogo Nguu 0.19 ha

LR NGANDORI KIRIGI/2590

v) Moffat Njeru Nyaga - solely

15. It is therefore correct to state that the assets of the deceased were not distributed in accordance with the grant confirmed on 18/05/2010. The applicant disinherited some grandchildren named as beneficiaries in the grant and brought in 3rd parties to take the shares. This was a serious violation of the law by the applicant and any title issued contrary to the grant was based on an illegality.

16. The grant was revoked after this illegal transaction has been effected. The courts attention was not brought to the said illegalities during the revocation of the grant.

17. The court revoked the grant on grounds that it was obtained fraudulently and through non-disclosure of facts material to the case. This was through an application by the applicant being a son of the deceased. He claimed to have been disinherited by the respondent in this case. On record is another application for revocation of the grant by three daughters of the deceased who also claim to have been disinherited. This application seems not to have been prosecuted.

18. The position of this case is that the grant confirmed on 18/05/2010 was revoked on 29/05/2014.

19. On the issue of the application being *res judicata* I hereby refer to the summons for revocation of grant dated 14/06/2010 and the supporting affidavit. The prayer was for “revocation of grant”.

20. In the ruling of the court, the Judge dealt with the grounds in the supporting affidavit and on the face of the application. These revolved on the allegation that the grant was obtained fraudulently by making a false statement and concealment of some facts material to the case.

21. The summons for revocation was allowed after the applicant satisfied the court on the grounds he relied on.

22. The records clearly support the applicant’s contention that he never applied for cancellation of the titles or any other prayer save as that of revocation. The court did not address the issue of cancellation of titles issued on the basis of the confirmed grant as shown by the court ruling.

23. The respondent relied on the case of **JOHN FLORENCE MARITIME SERVICES LTD. & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS EALR [2015] 2 EA** where it was held:

i) An objection based on *res judicata* need not be taken on a formal application.

ii) *Res judicata* based on a cause of action in the latter proceedings is identical to that in the earlier proceedings, the later having been between the same parties or their privies and having involved the same subject matter.

iii) Cause of action *Res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings.

iv) In such a case, the bar is absolute unless fraud or collusion is alleged.

24. Section 7 of the Civil Procedure Act provide for the provisions on which the doctrine of *res judicata* is based. It provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation.

(5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation.

(6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

25. The ingredients of *res judicata* as drawn from the said provision are as follows:

i. That the issue in dispute between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded;

ii. That former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title;

iii. That the court or tribunal before which the former suit was litigated was competent and determined the suit finally.

26. It was observed in the **John Maritime** case that the rationale behind *res judicata* is based on public interest that there should be an end to litigation over the same matter. The doctrine also ensures the economic use of court’s limited resources and timely termination of cases.

27. Does this application fall under the provisions of section 7 of the Civil Procedure Act? In my view, the issue in dispute herein is cancellation of titles. It was not directly or substantially in dispute in the earlier application. The parties in this application are the same as those in the former application and are litigating under the same title. Although the court hearing the former application was competent, it did not determine the issues suit finally. The only thing it did was to revoke the grant as it was requested to do in the proceedings.

28. I am of the view that the court upon revocation of grant should have gone further to facilitate the parties to appoint another administrator which it did not do.

29. As for the cancellation of the titles, although the prayer is quite distinct from that of revocation of the grant, the applicant had the option to include it in the same application if he knew that the grant had already been executed. The court would have addressed the two issues/prayers in the same application and economized on the courts resources.

30. However, the two prayers or issues are quite distinct and the cancellation of the titles did not arise in the subject matter of the ruling. In my view, the subject was not directly or substantially in issue before the judge who heard and determined the earlier application.

31. For the foregoing reasons, I find that this application is not *res judicata* and it is therefore properly before this court.

32. The respondent raised the issue of the 3rd parties who benefited from shares in the estate having not been joined in this application and that they would be condemned unheard in the event that the prayers sought herein were granted. This is in respect of Blamwel Gachuria registered as proprietor of LR. Ngandori/Kirigi/9216 and 9217. One Peris Muthoni is registered owner of LR. Ngandori/9214. The parcel No. LR. Ngandori/ Kirigi/9215 is registered in the name of Benson Muriithi Ireri and is said to be charged with Cooperative Bank to secure a sum of Kshs.180,000/=.

33. It was argued that the rules of natural justice require that no party will be condemned unheard. The respondent further submitted that the Section 93 of the Succession Act protects the interests of purchasers.

34. The section 93 provides:

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for. “

35. As I have stated in this ruling, the respondent bringing on board people who were not beneficiaries in the original grant and giving them shares was an act of fraud and illegality. Any registration based on illegality cannot end the protection of the law. Section 93 affords protection of purchasers in cases where the law has been complied with.

36. It was held in the case of **MONICA ADHIAMBO VS MAURICE ODERO KOKO [2016] eEKL**R that:

“The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.

37. The court further held in the case of **RE-ESTATE OF CHRISTOPHER AIDE ADELA (DECEASED) [2009] eKLR** that purchase of immovable property from the deceased’s estate may be invalidated if shown to be either fraudulent and/or upon other serious defeats and/or irregularities.

38. The respondent was found by the court to have obtained the grant confirmed on 18/05/2010 by fraudulent means and by non-disclosure of fact material to the case.

39. This grant was nullified for the said reasons. The effects of a nullified grant is that there is that any transaction made under the grant before revocation is null and void *ab initio*. This is an automatic result of non-compliance with the law or of fraud. A court of law does not have to make a pronouncement on its nullity.

40. Any sub-division done or any titles obtained by virtue of the grant revoked on 29/05/2014 are void *ab initio* and hereby so find and declare.

41. The respondent in his affidavit said that he was dissatisfied with the ruling of the judge for giving orders for revocation and that he filled an appeal in the Court of Appeal. He annexed a notice of appeal dated 06/06/2014 yet to be filed for it bears no official court stamp. It is addressed to the high court of Kenya in this succession.

42. I am of the view the notice ought to have been addressed to the Court of Appeal and should bear the official stamp it was filed.

43. furthermore, if there was any pending appeal, it would have been heard by now four (4) years down the line. It remains that no order for stay of the judge’s ruling of 29/05/2014 was ever obtained.

44. From the foregoing reasons, I am of the considered opinion that the applicant has satisfied the court that the titles resulting from the revoked grant ought to be cancelled forthwith. It is hereby ordered that the titles for LR Ngandori/Kirigi/9214, 9215, 9216 and 9217 be and are hereby cancelled. The land L.R 2587 will be registered in the name of the deceased pending determination of this case.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF OCTOBER, 2018.

F. MUCHEMI

J U D G E

In the presence of: -

Ms. Ngige for Mugambi for Applicant

Mr. Muthomi for Njage for Respondent