



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 127 OF 2007

In the matter of the Estate of Simon Ndirangu Ngugi – Deceased

JANE NJERI NDIRANGU.....PETITIONER/RESPONDENT

VERSUS

RUTH WACHEKE KABUGI.....APPLICANT

RULING

1. This is an application dated 04/04/2018 seeking for orders of cancellation of titles LR. GATURI/WERU/9166-9168 and GATURI/WERU 8269-8272, 11553-11155 and reinstatement of the original title LR. GATURI/WERU/1270 and thereafter a portion measuring 0.20 hectares be carved out and be registered in the name of the applicant.
2. The alternative prayer seeks that the respondent be ordered to transfer LR. GATURI/WERU/11153 each measuring 0.10 ha to the applicant and that the Deputy Registrar be authorized to sign all the necessary documents to facilitate the transfer of the portion of land to the applicant.
3. The applicant seeks further that the Land Registrar be authorized to dispense with the original titles. The application is supported by the supporting affidavit of the applicant sworn on 04/04/2018. It is deposed that in the grant confirmed on 08/07/2010, the applicant was awarded a share in form of land LR. GATURI/WERU/1270 measuring 0.2 ha. It is further claimed that the respondent who is the administrator executed the grant and shared out the land of the deceased to some beneficiaries and 3rd parties leaving out the applicant. The land is now sub-divided into several portions being LR. NO. GATURI/WERU/8269-8272 and GATURI/WERU/11153-11155 with some of the parcels already transferred to 3rd parties.
4. It is contended that the said transfer was illegal and improper for it was not in accordance with the grant. The applicant prays for cancellation of the titles resulting from the sub-division so that the grant may be implemented appropriately.
5. Alternatively, she prays for the title of two parcels LR. No. GATURI/WERU/8289 and 11153 to be transferred to her name.
6. The application was opposed by the respondent in her replying affidavit. She stated that this court in its ruling delivered on 05/10/2016 determined the issues raised in this application.
7. The respondent referred to Paragraph 16 where the court said that the issue of the validity of the sale agreement was within the jurisdiction of the Environment and Land Court.
8. It is further argued that the applicant is claiming the land as a purchaser and did not pay for the land. It is contended as well that the mere inclusion of the applicant's name in the grant does not give her a right to the portion of land indicated therein. It is argued that this court cannot deal with this matter because its mandate ended with the confirmation of grant.
9. This application was argued by way of written submissions filed by the respective Advocates for the parties. Messrs Joe Kathungu represents the applicant while Messrs Fatuma Wanjiku & Co. represented the respondent.
10. The issues arising from this application are two-fold: -
 - a) Whether this court has jurisdiction to hear and determine this application,
 - b) Whether this application is res-judicata,

c) Whether the applicant is entitled to the orders sought.

11. The jurisdiction of this court is provided for under Section 64 of the Law of Succession Act which provides: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

12. The jurisdiction is extended to the Magistrate’s court from the rank of the Resident Magistrate under Section 48 and 49 of the Act. The grant was confirmed on 08/07/2010 and was later implemented by the respondent who left out the applicant. As such the grant was executed contrary to its contents.

13. The issue is whether this court or any other court has power to deal with a Succession Cause after confirming the grant. The answer is in the affirmative that the court can entertain other applications/summons after confirmation. These may include revocation of grant, enforcement of the court orders, substitution of the parties, rectification of grant among others.

14. Section 47 gives the court wide powers to entertain any application and to make any orders in accordance with the provisions of the Act. The issue of enforcing the terms of a grant are therefore within the powers of this court contrary to the argument of the respondent that this court is functus officio.

15. It is my finding that this court is possessed of the powers to determine this application. The grant confirmed on 08/07/2010 distributed the estate of the deceased comprising of GATURI/WERU/12780 as follows: -

- i. JANE NJERI NDIRANGU - 0.95 HA
- ii. SIMON NDIRANGU NGUGI - 0.23 HA
- iii. NANCY WANJIKU NGUGI - 0.23 HA
- iv. RUTH WACHEKE KABUGI - 0.20 HA

16. The respondent who is the administrator proceeded to sub-divide and distribute the land contrary to the grant. The land was sub-divided into eleven (11) portions which were given to some of the beneficiaries leaving out the respondent. It is important to note the grant authorized sub-division of only four (4) portions.

17. It is claimed that some of the plots have been sold to third parties by the respondent, an allegation which has not been denied.

18. The respondent had sought to remove the applicant from the grant through summons for revocation of grant dated 03/10/2012. The ruling of this court delivered on 05/10/2016 dismissed the application for lack of merit.

19. The grant confirmed on 08/07/2010 is still in force since it has not been revoked. This was the legal document that was supposed to guide the respondent in distributing the deceased’s estate. Distribution in any other manner such was used by the respondent was illegal, null and void. This act by the respondent is contrary to the law and an abuse of the court process.

20. In the event that an administrator does not comply with the orders of the court and acts contrary to the provisions of the Law of Succession Act in distributing the estate, in total disregard of the existence of a valid grant, this court is empowered to grant the necessary orders to ensure compliance with the law.

21. The respondent is wrong to say that the court dealt with the issues herein in the summons for revocation dated 03/10/2012.

22. In that application, the court was dealing with revocation of grant under Section 76 of the Law of Succession Act. The issues in this application are distinct and only arose after the respondent unlawfully distributed the deceased’s estate. I find this application is not *res judicata*.

23. It is imperative to state that this is not a matter for the Land and Environment Court but an issue falling under the Law of Succession Act. This court has powers to make any orders for enforcement or for compliance with the provisions of the Act to the letter where necessary. The applicant relied on the case of **JOSEPH MUTUA MWENDA VS STEPHEN MURIITHI KITHINO [2013] eKLR** where the court in dealing with a similar issue pronounced itself thus: -

“In view of the foregoing no party can distribute the estate contrary to the approved scheme of distribution by court without seeking alteration or rectification or amendment otherwise there would be no purpose of seeking confirmation of the grant. I therefore find the 1st respondent acted contrary to the certificate of confirmation of grant and his acts were not only unlawful but fraudulent”.

24. I am in agreement with the observation of the court in the **JOSEPH MWENDA case (supra)** that the act of an administrator who executes a grant contrary to its contents amounts to not only dishonesty but to fraud.

25. The grant was confirmed on the application of the respondent with no objection from any of the family members. It seems the applicant changed her mind later and has vowed to defeat the cause of justice after she lost in the application to revoke the grant.

26. The respondent argued that the parcels of land resulting from the sub-division are registered in the names of 3rd parties who are not parties to this cause. This is a Succession Cause where the administrator breached her duty to those who were beneficially entitled to shares in the estate.

27. Even if the 3rd parties were to be summoned in this cause or joined to this application, it would be a futile exercise since the non-compliance with the law will remain. Bringing the 3rd parties on board will not justify the illegal act of the applicant. The 3rd parties may be purchasers in good faith but have a remedy against the applicant under the law.

28. It is my finding that the applicant has established that the respondent has illegally distributed the estate of the deceased. I am satisfied that this application has merit and it is allowed in the following terms: -

i. THAT the sub-division by the respondent done contrary to the grant is hereby declared null and void.

ii. THAT the titles resulting from the sub-division of GATURI/WERU/1270 namely GATURI/WERU/9166-9168, GATURI/WERU/8269-8272 and GATURI/WERU/11153 be and are hereby cancelled.

iii. THAT the land LR GATURI/WERU/1270 shall revert to the name of the deceased pending distribution in accordance with the grant confirmed on 08/07/2010.

iv. THAT in default of distribution as ordered in prayer 3 within sixty (60) days the share of the applicant of 0.20 ha shall be excised from LR. GATURI/WERU/1270 and be registered in the names of the respondent.

v. THAT the Deputy Registrar is hereby authorized to sign all the necessary documents in execution of prayer 4 in favour of the applicant.

vi. THAT the Director of Criminal Investigations(DCI) Embu do investigate the act of the illegal sub-division of GATURI/WERU/1270 with a view of charging any person found responsible.

vii. THAT the report of the DCI be submitted to the Deputy Registrar for directions within sixty (60) days.

viii. THAT each party to meet her own costs of this application.

29. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kathungu for Applicant

Ms. Nzekele for Wanjiku for Respondent