



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION NO. 161 OF 2014

IN THE MATTER OF THE ESTATE OF NJAGI NJERU ALIAS MBUCHI BARAGU (DECEASED)

AND

JOHNSON MURIUKI.....APPLICANT

VERSUS

JERVASIO NYAGA NJAGI.....1ST RESPONDENT

JANE NDEGI NJERU.....2ND RESPONDENT

PATRICK NGARI NJERU.....INTERESTED PARTY

J U D G M E N T

A. Introduction

1. This ruling is for the summons for revocation/annulment of grant issued and confirmed on 3rd July 2014 in Siakago Law Court in Succession Cause 37/2011.

2. The application is based on the following grounds:

a. THAT the said grant was obtained fraudulently by making of a false statement/or by concealment of material fact relevant thereto.

b. That the said grant was obtained by means of untrue allegation of essential facts.

c. That the said grant was obtained secretly without the knowledge of all the applicant who has legal entitlement of Land Parcels Embu/Kithunthiri/1477 and Embu/ Mavuria/9 as a purchaser.

d. That Siakago PM's Court lacked jurisdiction as land parcels Embu/Kithunthiri/1477 and Embu/Mavuria/9 measuring over 10 acres are valued over 100,000/=

B. Applicant's Case

3. The Applicant testified that the 2nd Respondent sold him the suit properties in 1999 in the presence of her son and another relative when they reduced the agreement into writing and all signed the agreement. He produced a book as evidence showing the 2nd respondent had signed for all payments received from the applicant.

4. The applicant further testified that the suit properties were registered in the name of the deceased and as such they agreed that the succession cause be filed and he be given the land. He testified that he was not informed of the succession proceedings.

5. The applicant testified that he never took possession of the land and when he tried in 2013/2014, he found that the land belonged to someone else.

C. Respondents Case

6. DW1, the 2nd respondent testified that she did not sell the applicant any land in 1999 as she was illiterate and never attended any school. She further testified that she never received any money from the applicant.

7. DW2, the 1st respondent testified that his family never sold the applicant any land and that his deceased brother Dominic Njagi was also not involved in selling the land.

D. Interested Party's Case

8. The interested party testified that he bought L.R. Embu/ Kithunthuri/1477 from Paul Njagi Njeru in 2013 and that no caveat was registered against the title nor objection raised before the land board.

9. He further testified that the aforementioned property had been distributed to Francis Kithaka and this was the reason he supported the revocation of grant by the applicant whom he identified as someone he knew since they were young.

E. Applicant's Submission

10. The applicant submitted that the magistrate court lacked jurisdiction as between 2011 and 2014, Section 49 of the Law of Succession provided that a magistrate could not deal with an estate of a deceased which value exceeded Kshs. 100,000/= and on that basis alone the grant ought to be annulled.

11. The applicant further submitted that the affidavit in support of petition filed in the lower court was a falsity and a concealment as indicated the deceased liabilities at nil.

12. The applicant submitted that the confirmed grant had become useless and inoperative as provided in **Section 76 (e) of the Law of Succession**.

F. Respondents' Submission

13. The respondent submitted that the applicant had failed to prove that the grant issued to them was ripe to be revoked/annulled as provided under **Section 76 of the Law of Succession**.

14. The applicant further submitted that the applicant's claim was statute barred as it contravened the mandatory provisions of **Section 7 of the Limitation of Actions Act** which set the right to recovery of any land at 12 years.

15. In response to the issue of jurisdiction as raised by the applicant, the respondent submitted that the estate was less than Kshs. 100,000/= going by the applicant's own sale agreements.

16. The respondent further submitted that they had filed a suit for recovery of land No. Embu/Kithunthiri/1477 as the suit land aforementioned was no longer part of the deceased's estate and as such the respondent cannot transfer the suit property to the applicant even if they wanted.

G. Interested Party's Submissions

17. The Interested party submitted that the letters of administration were obtained by making a false statement that Mbuchi Baragu was the same person as Njagi Njeru and thus in contravention of **Section 76(b) and (c) of the Law of Succession**.

18. Regarding the applicant, the interested party submitted that the applicant had not annexed a valid sale agreement that would satisfy the requirements of **Section 3(3) of the Law of Contract and the Land Control Act**.

19. The Interested party submitted that in the alternative this court ought to revoke the grant under **Section 82 and 93 of the Law of Succession** as the personal representatives exceeded their powers by purporting to sell the suit property prior to confirmation of grant. He relied on the case of **In the matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**.

H. The Determination

20. The law on the circumstances in which a grant may be revoked or annulled are set out in **Section 76 of the Law of Succession Act** as follows:

“Revocation or annulment of grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e) that the grant has become useless and inoperative through subsequent circumstances.”

21. The first issue whether the Siakago Magistrate’s Court had jurisdiction to handle the succession matter as the estate of the deceased exceeded Kshs. 100,000/= as argued by the applicant.

22. The jurisdiction of the subordinate courts in succession matters is provided under **Section 48 of the Law of Succession Act**. Before the amendment was effected under **Act No. 26/2015** to bring it in tandem with the pecuniary limits set under **Section 7(1) of the Magistrates’ Courts Act, 2015**, the jurisdiction was Kshs 100,000/=.

23. The section provided:

“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76, and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.”

24. This succession cause was filed in the lower court. The documents filed, P&A.5, the affidavit in support of the application indicates that the estimated value of the assets was Kshs. 100,000/=. The applicant submitted that the value of the deceased’s estate was more than Kshs. 100,000/=.

25. The applicant despite claiming that the value of the land exceeded the jurisdiction of the subordinate court has not tendered any evidence. Where the value of the property is in issue, the party raising it must tender a valuation report to assist the court to determine the issue. This the applicant has not done. **Section 107 of the Evidence Act** provides that he who alleges must prove. The applicant has not discharged the burden to prove that the value of the land exceeded Kshs. 100,000/=.

26. This court cannot be called upon through written submissions of the applicants to make assumptions what the net value of the estate. The applicant has a duty to prove that existence of a fact he alleges exists.

27. The issue of jurisdiction is without merits. It is not properly before this court and has not been proven. The applicant has a duty to prove that the value exceeds Kshs. 100,000/=. The applicant has not placed any material before this court to prove that the value exceeds Kshs 100,000/=.

27. This Court’s jurisdiction to hear and determine disputes regarding succession to a deceased’s person’s property is granted by **Section 47 of the Law of Succession Act** which provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient.

28. The Applicant and the Interested Party all claim to have purchased property that forms part of the deceased’s estate specifically, **Embu/Kithunthiri/147** and **Embu/Mavuria/9**. This claim is one that is beyond the powers of this Court sitting as a succession court, and also raises dimensions to their claim that they are *bona fide* purchasers for value that will need to be clarified.

29. Musyoka, J. in this regard expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** as follows:

“....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have

elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

31. The issue as to this Court’s jurisdiction can therefore only be determined by first answering the question whether this Court can effectively determine the nature of the applicant and Interested Party’s claim over the deceased’s property within the framework provided by the Law of Succession Act. The question of the legal effect of the sale agreement entered into between the Intended Interested Party and 1st Respondent, and particularly on the requirement of Land Control Board consent thereto, will need to be answered first, before this court as a probate Court can make a determination at the Intended Interested Party’s interest in the deceased’s property.

32. This resolution of that question will in addition involve application of the law on title to land, and the applicant’s summons therefore goes beyond being merely a claim of succession to the deceased property. It is notable in this regard that disputes primarily concerning ownership of land title to land fall within the jurisdiction of the **Environment and Land Court** as provided by **Article 162 (2)(b) of the Constitution**, and **Section 13(1) and (2) of the Environmental and Land Court Act**. I appreciate that there is a pending suit seeking to settle the issues above specifically **Embu ELC No. 1 of 2015**.

33. The land is **Embu/Kithunthiri/1477** is already registered in the name of the interested party who claims to have bought it from the deceased. The applicant claims to have bought the said parcel as well as **Embu/Mavuria/9** from the deceased which is dispute by the administrator and the family of the deceased. It is in the interest of justice that these ownership disputes be resolved by a competent court.

34. I decline to give the orders sought in the application for the foregoing reasons. Pursuant to the provisions of Section 66 of the Act, the grant was issued to the sons of the deceased who ranks in priority to any other party in this case.

35. It has been brought to the attention of this court that the parties are already litigating in regard to the ownership of **Embu/Kithunthiri/1477** in **Embu ELC case No. 1 of 2015** which is a step in the right direction.

36. I hereby make the following orders: -

- i. That the application dated 11/09/2015 is hereby put on hold pending hearing and determination of the ELC case No. 1 of 2015.*
- ii. That the grant issued and confirmed by Siakago Court on 3rd July, 2014 is hereby stayed pending the outcome of the ELC case.*
- iii. That the cause be mentioned within 90 days for parties to report the progress of the ELC case.*
- iv. Each party to meet its own costs of this application.*

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Maina for petitioners/respondents

Johnson Muriuki - Applicant