



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 501 OF 2013

In the Matter of the Estate of Kiragara Bagiri (Deceased)

GRACE KAGWIRIA.....APPLICANT/OBJECTOR

Versus

JAPHETH MBURUGU RINGERA.....1ST RESPONDENT

JULIUS NDUBI RINGERA.....2ND RESPONDENT

RULING

Confirmation identifies share of person

[1] The application dated 6th October 2016 is essentially asking for conservatory orders to restrain the Respondents, their servants or agents or employees from entering upon, constructing any structures, cultivating, trespassing, using, selling or in any manner whatsoever dealing with land parcel Number ABOTHUGUCHI/GITHONGO/416 until this cause is heard. The application is expressed to be brought under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. It is supported by the affidavit of the Applicant.

Applicant: I am beneficial owner

[2] The Applicant averred that by a Certificate of Confirmation of Grant dated 1st December 2015, her share was identified to be and she is entitled to 1 ½ acres of land in L.R NO ABOTHUGUCHI/GITHONGO/416. But, the Respondents, in contravention of the grant herein has leased out the said share of the Applicant to one Martin Mwiti for 3 years for a consideration of Kshs. 15,000. The Applicant stated that she and her children will suffer unless these acts by the Respondents are stopped. She claimed that some beneficiaries sold their share in the estate and they are now making further claim in order to disinherit the Applicant and her children.

[3] The Applicant reinforced her arguments in her submissions dated 14th November. Of importance, she submitted that the third parties to whom the estate property has been leased should be evicted for they are intermeddling with the estate of the deceased.

Respondents' claim they live on the land

[4] The Application was opposed through the affidavit of 1st Respondent/petitioner who deposed inter alia that they have all along lived on the suit land and so they cannot be restrained from entering the said land. He accused the Applicant of using her application dated 6th October 2016 to circumvent the

application for revocation of the grant dated 26th September 2016. He refuted claims by the Applicant that he has leased out the land and called these claims to be merely empty claims based on hearsay. He took the view that the said application is a waste of judicial time. In their submissions, they argued that the Law of Succession Act does not envisage application of order 40 of the Civil Procedure Rules. In any event, she did not specify the size of the land which ought to be affected by the injunction- the 1 ½ acre she was earlier awarded is not even registered in her names. They submitted further that the size of land each party should get is still in dispute in this case and so the injunction should not be granted.

DETERMINATION

No wrong without remedy

[5] Much has been argued in this matter. But I wish to state that the law will never suffer wrong without a remedy. The application dated 6th October 2016 has sought for conservatory orders in the nature of restraining orders to prevent leasing out of the estate property to third parties especially the 1 ½ acres identified and specified by the court in the Certificate of grant dated 1st December 2015 to be the entitlement of the Applicant. I stated in the case of **Re the Matter of the Estate of M'Ajogi M'Ikiugu alias Ikiugu Ajogi (Deceased)** that:-

“... beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the Law of Succession Act.

Therefore, once a person's beneficial interest in an intestate estate has been identified and specified in the Certificate of Confirmation of Grant, it constitutes that person's entitlement in the estate and is capable of protection by the law as belonging to that particular person. And, there is no requirement in law that such interest so identified and specified should first be formally registered in the name of the beneficial owner for it to constitute that person's entitlement or to be protected by law as such. Accordingly, the contrary submission by Mr. Baithambu which seemed to suggest that such interest will only become the person's entitlement and protected in law only upon formal registration into that person's name is entirely indefensible in law and I reject that argument.

[6] Now applying that test, in accordance with the Certificate of Confirmation of Grant dated 1st December 2015, the Applicant is entitled to 1 ½ acre in land in L.R ABITHUGUCHI/GITHONGO/416. The said share is protected in law as her entitlement and any alienation of that share other than in accordance with the confirmed grant offends the law and will be restrained. I should also state the obvious; that the administrator of the estate shall only administer the estate in accordance with the confirmed grant. But, it seems that the administrators herein have chosen to anticipate the result of the application for revocation dated 26th September 2016 and have acted contrary to the grant issued to them and confirmed as such. The said application is yet to be determined by the court and as such, the distribution of the estate is as set out in the Certificate of Confirmation dated 1st December 2015. I am saying these things because the administrators in this case seem not to understand the scope of their power. It bears repeating that, the application for revocation is yet to be determined. I am, therefore, impelled to remind that the power of administrators is only as per the grant and as permitted by the law of Succession Act; and does not include indulging in prophetic forecast of the decision of court on the application for revocation of grant. This misapprehension by the administrators of their power has resulted into offensive acts which should be restrained. The Applicant gave a specific name of the person to whom the administrators herein leased out the portion of land belonging to her. Such act would be in violation of the grant issued to them and the law. There is nothing to make me disbelieve her statement on the leasing out of the land belonging to her; and that is why she approached the court. The Respondents have not offered anything to the contrary except merely dismissing her claims as untrue and without substantiation. I am convinced by the facts as narrated by the Applicant that these things have

happened. Accordingly, I direct that the 1 ½ acres identified and specified to belong to the Applicant in L.R ABITHUGUCHI/GITHONGO/416 shall not be leased out to any person or interfered with by any person including the Respondents, as long as these proceedings are pending. If any lease has been given to one Martin Mwiti in respect of the 1 ½ acres in L.R ABITHUGUCHI/GITHONGO/416 belonging to the Applicant, the lease is hereby determined and he will be evicted forthwith from the land. But I am aware of the pendency of the application dated 26th September 2016 about which I gave directions on 26th September 2016. Only the Applicant in the current application filed submissions. The actual applicant in the said application for revocation of grant has not filed submissions as had been ordered. Accordingly, I direct them to file their submissions so that I can determine the issue in controversy once and for all. It bears repeating that for as long as the grant is not revoked or annulled, it remains in force. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Baithambu advocate for petitioner

1st Petitioner – present

Applicant's in person - present

F. GIKONYO

JUDGE