



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 112 OF 2008

In the Matter of the Estate of Misheck M' Mboroki M'Raijuni alias Misheck Mboroki (Deceased)

ROBERT MUTWIRI M'MBOROKI.....1ST APPLICANT

RUTH NKATHA RUKARIA.....2ND APPLICANT

Versus

ESTHER KATHAO M'MBOROKI.....1ST RESPONDENT

ERRA TIRINDI GATOBU.....2ND RESPONDENT

SARAH KIENDE M'MBOROKI.....3RD RESPONDENT

JACKLINE NTINYARI KAREMI.....4TH RESPONDENT

EDWARD MWAKI RIUNGU.....5TH RESPONDENT

RULING

[1] On 28th February, 2017 the court delivered a partial ruling in this matter. The relevant part of that partial ruling is reproduced below:

[3] Now, these conflicting facts call for a pragmatic approach. Accordingly, I order that the Executive Officer together with a surveyor from the Meru County survey office, within 21 days shall visit the two pieces of land, namely L.R NO ABOTHUGUCHI/IGANE/261 and ABOTHUGUCHI/IGANE/2156 and establish:-

(1) Whether the family of the 1st Applicant lives on L.R NO ABOTHUGUCHI/IGANE/261 or ABOTHUGUCHI/IGANE/2156;

(2) Whether the 5th Respondent has constructed a permanent dwelling house, planted coffee and other subsistence crops on L.R NO ABOTHUGUCHI/IGANE/2156; and who actually lives on this land; and

(3) Whether the 1st Applicant has constructed a shed on L.R NO ABOTHUGUCHI/IGANE/2156.

The report on the above matters shall be filed within 30 days of today and shall form part of the

record. Upon receipt of the report, I shall give further directions on the matter. Meanwhile, the ruling in respect of the applications dated 29th July 2013 and 24th July 2014 is arrested until this report is received. It is so ordered.

Dated, signed and delivered in open court at Meru this 28th day of February 2017

F. GIKONYO

JUDGE

[2] On 20th April 2017, parties pointed out to the court some errors in the partial ruling and suggested how the errors should be corrected. The errors were as a result of a normal slip. Accordingly, I direct the said partial ruling to be amended as follows:-

- (i) Parcel described in paragraph 3 of the said partial ruling as L.R NO ABOTHUGUCHI.IGANE/261 shall read as L.R NO ABOTHUGUCHI.IGANE/621; and
- (ii) Reference to 4th Respondent in paragraph 3(2) of the said partial ruling shall be replaced with 5th Respondent.

[3] The report ordered in the partial ruling has been filed and I now embark to resolve the substantive issues in controversy in the two applications dated 29th July 2013 and 24th July 2014. The first application is the Amended Summons for Revocation of Grant dated 29th July 2013 and is expressed to be brought pursuant to Section 76 of the Law of Succession Act, Rules 26, 44, 49 and 73 of the Probate and Administration Rules and all other enabling provisions of law. The significant orders sought in the application are two, namely:-

- (1) An order of revocation of grant of letters of administration issued to Esther KathaoM'Mboroki on 29th January 2009;**
- (2) An order of inhibitions upon L.R NO ABOTHUGUCHI/IGANE/2155 and ABOTHUGUCHI/IGANE/2156;**
- (3) An order restraining of the Respondents from intermeddling with or interfering with the 1st Applicant's quiet possession in or evicting him from ABOTHUGUCHI/IGANE/2155; and**
- (4) An order of rectification of register in respect of L.R NO ABOTHUGUCHI/IGANE/2155 and L.R NO. ABOTHUGUCHI/IGANE/2156 by cancelling the name of JacklineNtinyari and Edward MwakiRiungu and revert it back into the name of the deceased.**

[4] The 2nd Application dated 24th July 2014 is essentially asking for stay of execution of the judgment and decree in NKUBU CMCC NO 61 OF 2013.

1ST Application

[5] This application is premised on the affidavits sworn by the Applicants, the grounds set out in the application as well as others elaborated in the submissions filed by the Applicant. According to the Applicants, the 1st Respondent has greatly intermeddled with the estate by among other things selling all the estate property to the 4th and 5th Respondents. And, the 1st Applicant who lives on the estate is now threatened with eviction. In addition, the Applicant stated that the grant herein was obtained by making of a false statement or by concealment of something material to the case. They explained the concealment to consist in filing this cause secretly and fraudulently and without informing the applicants who are

grandson and daughter of the deceased. They urged that they were not notified of these proceedings, and thus, the grant should be revoked.

[6] The Applicants further argued that the deceased's original parcel of land was ABOTHUGUCHI/IGANE/626 but the 1st Respondent subdivided it into L.R NO. ABOTHUGUCHI/IGANE/2155 and L.R NO. ABOTHUGUCHI/IGANE/2156 which she transferred to her daughters the 2nd and 3rd Respondents. The said daughters thereafter sold the entire estate properties to the 4th and 5th Respondents. Despite the fact that the 1st Applicant had been given L.R NO ABOTHUGUCHI/IGANE/2155 by the deceased in 1978 and has lived on the said estate property all his life, the 1st Respondent did not include him in the list of beneficiaries. Now the 1st Applicant and his family have been issued with a demand notice of eviction by the 4th Respondent.

Application was opposed

[7] The 2nd Respondent filed a Replying Affidavit sworn on 10th April 2014 on her behalf and that of the 1st and 3rd Respondents. She averred that the father of the 1st Applicant Mugambi M'boroki was given by the deceased L.R NO ABOTHUGUCHI/IGANE/621 which is occupied by the family of the 1st Applicant. She stated that they even buried their later father on that land. According to her, the 2nd Applicant merely wanted to buy land from the 1st Respondent but she was refunded her purchase price. She deposed that the 2nd wife's house was also provided for by the deceased and so they have not laid any claim to the estate. She averred that the 1st Applicant has never lived on the estate property; he just put up a shed in order to claim occupation. The property in issue is the share of the 1st Respondent and the 1st Applicant should be stopped from re-opening concluded cases for his selfish interest. The land was sold to third parties and should not be redisturbed. She did not see any reason to revoke the grant herein.

[6] The 5th Respondent also filed a Replying Affidavit sworn on 15th July 2015. He stated that L.R NO ABOTHUGUCHI/IGANE/2156 was properly transferred to him as a bona fide purchaser for value without notice. He averred that he purchased it from the 1st Respondent who is the rightful owner of the said land as it was her legal share from the deceased's estate. He urged that his rights as bona fide purchaser for value without notice are protected in the Constitution as well as the Land Registration Act, 2012. In addition, he stated that having bought the land from a person holding a grant of letters of administration his ownership is protected under the Law of Succession Act. He also took immediate possession and use of the land in question wherein he has undertaken extensive developments including a permanent dwelling house, he has planted coffee trees, bananas and other subsistence crops. He insisted that none of the Applicants have ever lived on the said land and that the allegations by the 1st Applicant are false and dishonest calculated at misleading the court. He termed the Applicants as busy-bodies and speculators for land where they do not have any claim. He requested the court to lift the inhibition registered in this land.

[8] From the grounds cited by the Applicant, for him to succeed in an application for revocation of grant, it must be shown:-

1. THAT the Grant of Letters of Administration and subsequent Confirmation of the same was obtained fraudulently by making false statement as the family had not consented to the filing of the succession cause.
2. THAT the Grant was obtained by untrue allegation of fact in that the succession cause was filed secretly without involving the members of the family of the deceased which was a clear fraud.

[9] I must admit that this case presents unique facts and I will determine it on that basis. First, it is not in doubt that the 1st Respondent is the widow of the deceased and the administrator of the estate of the deceased herein. But it seems that the deceased had two houses; that of the 1st Respondent and of the grandmother of 1st Applicant who seems to be the mother of the 2nd Applicant. The 1st Respondent

claims that the father of the 1st Applicant was provided for by the deceased who gave him **ABOTHUGUCHI/IGANE/621**. This property has not been accounted for. The Report by the Executive Officer of the court dated 12th day of April 2017 merely stated that **“the parties and their advocates took us to another land ABOTHUGUCHI/IGANE/621 which was is about ½ kilometer away to point out that the first applicant does not live there”**. The report neither told us whether the land was a bequest by the deceased to the father of the 1st applicant nor gave any detailson the ownership history of this land was given by the report. But I can correctly guess this omission was because the surveyor had not accompanied them as I had ordered. In the circumstances of this case, the court should first embark on establishing the estate property and all bequests that the deceased made during his life time for purposes of administration of this estate. I note also that the 1st Applicant did not tell the truth when he stated that he lives on **ABOTHUGUCHI/IGANE/2156** when in fact he lives on **ABOTHUGUCHI/IGANE/2155**. It seems his intentions were ill-motivated in order to obtain orders prejudicial to the 5th Respondent. The 5th Respondent purchased **ABOTHUGUCHI/IGANE/2156** from the administrator after confirmation of grant. He has also built a permanent house on the said land and established permanent crops and plantations on the land. The 1st Applicant did not disclose these facts. Again, his intentions were not bona fides. At the moment, there is nothing on which I can cancel the title of the 5th Respondent in respect of **ABOTHUGUCHI/IGANE/2156**. One more thing; the 2nd Applicant claims to be the daughter to the deceased. It seems the identity of all beneficiaries is still not done. All these things only add spanners into the works and will need proper evaluation before final orders could be granted. Now therefore, I issue the following orders:

1. For now, I order an **order of inhibitions upon L.R NO ABOTHUGUCHI/IGANE/2155 only. For clarity, no inhibition will be registered upon ABOTHUGUCHI/IGANE/2156;**
2. **For now, the Respondents shall not evict the 1st Applicant from ABOTHUGUCHI/IGANE/2155; and**
3. **All the other prayers in both applications are arrested until the above issues are addressed by the parties appropriately. I is so ordered.**

Dated, signed and delivered in open court at Meru this 24th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Mutuma for applicant

Mwiti advocate for 1st and 2nd respondents

Ojiambo advocate for Wamache advocate for 3rd and 4th respondents

Ng'eno advocate for 5th respondent.

F. GIKONYO

JUDGE