



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS, FAMILY DIVISION
SUCCESSION CAUSE NO. 523 OF 1985
IN THE MATTER OF THE ESTATE OF JEREMIAH KIMANI WANGIRE DECEASED)

RAPHAEL MURIITHI NGUGI.....APPLICANT

-Versus-

PAUL THUO KIMANI.....RESPONDENT

R U L I N G

1. The deceased Jeremiah Kimani Wangire died intestate on 27th February 1984. He was survived by the following:

- a. Ruth Wambui Kimani (widow) (deceased)
- b. Paul Thuo Kimani (son)
- c. Philip Mwangi Kimani (son)
- d. Naftali Mutegi Kimani (son)
- e. Raphael Kibui Kimani (son)
- f. Mary Wanjiru Kimani (daughter)

2. The grant of letters of administration with regards to the deceased's estate was issued to Ruth Wambui Kimani and Paul Thuo Kimani on 8th October 1986. Among the properties listed to form part of the estate of the deceased is land parcels No. Loc 9/Kiruri/3 whose ownership is contested because it is alleged to be ancestral land and held by the deceased in trust for his brother Joseph Ngugi Wangire. The grant is pending confirmation.

3. Raphael Muriithi Ngugi, the applicant herein and the deceased's nephew (the son of Joseph Ngugi Wangire) brought summons dated 10th April, 2014 under Section 76 of the Law of Succession Act seeking for orders that:

- a. The grant of letters of administration intestate made on the 8th day of October, 1986 be revoked.
- b. Pending the hearing and determination of the application herein this court be pleased to order

that the caution put in place against L.R. No. Loc.9/Kiruri/3 be in place so as to preserve the suit property.

4. The application was opposed vide a Notice of Preliminary Objection dated 26th July, 2016 seeking to have the summons for revocation or annulment of grant dated 10th April 2014 dismissed with costs on the grounds that:

i. The summons for revocation or annulment of grant dated 10th April 2014 is incompetent and bad in law and does not lie under section 76 of the Law of Succession Act.

ii. The applicant's claim lies in respect of the estate of one Joseph Ngugi Wangire who is his father and not the deceased herein.

iii. The only cause of action available to the applicant as disclosed in his pleadings and affidavits and statements and the evidence tendered is based on a trust which is legally not triable by a succession court but by the Environmental and Land Court;

iv. The grant was issued to the administrator while the applicant was well aware that he was not a next of kin of the deceased and had been correctly advised by Gautama and Kibuchi Advocates that he could not become the administrator of the estate of the deceased, hence the grant was rightly issued to the applicant and cannot now be revoked.

Administrator/Respondent's submissions

5. Mr. Mbuthia, counsel for the respondent submitted on the issue of the grant having been obtained irregularly and through non-disclosure of material facts, that disclosure of an alleged trust is not requisite when dealing with the issue of a grant. he asserted that the grant was properly issued and pointed out that the applicant's witness statement reads as follows:

“On 19th April 1984, all the descendants of Jeremiah signed a letter to Gautama Kibuchi Advocates appointing me to be administrator of the estate of Jeremiah Kimani. This demonstrated their confidence in me handling their affairs. However, the advocate advised that only surviving next of kin would be recognised by the court. Therefore, I could not become the administrator.”

This, Counsel argued, indicated that the applicant admitted that he was ineligible to get the grant at this stage. That therefore the grant was issued correctly.

6. On the issue that not all beneficiaries were disclosed to the court to warrant the issuance of the grant, counsel argued that if beneficiaries were left out, they were not in respect of the estate of deceased herein, but in respect of the estate of Joseph Ngugi Wangire who is the father of the applicant. The estate herein is in respect of the late Jeremiah Kimani Wangire, hence failing to include the family of his brothers is not a matter for revocation of grant.

7. On the grounds that assets were left out while filing the petition, counsel contended that this is a matter or issue that the administrators are supposed to deal with by bringing in all assets and dealing with liabilities. It cannot be a basis for revocation of grant.

8. Counsel submitted that the issue of trust can only be addressed under **Rule 41(3)** of the **Probate and Administration Rules**. Since this matter is pending confirmation of grant, and it is not open for the applicant to file a protest, his recourse lies in filing a suit in the ELC Court as stated under **Rule 41(3)** of the **Probate and Administration Rules**. Counsel relied on **HC Milimani No. 12 of 2010 (OS)** in the matter of trusteeship and trustee **Lands Act Cap 167 Laws of Kenya** and in the **matter of the estate of Njuguna Waweru Mungai Alias Njuguna Waweru** in which **Musyoka J** was of the view that the matter of a trust should be determined as directed by **Rule 41(3) of the Probate and Administration**

Rules and in the meantime confirmation should be stayed.

9. He further submitted that this position was reinforced in **HC Succ Cause No. 352 of 2013 at Murang'a In the matter of the estate of Zabron M. Gaga (alias Zabron Mwangi)**, where the court found that the issue of a trust should be a subject in separate proceedings pursuant to **Rule 41(3) of the Probate and Administration Rules**. Counsel argued that the applicant's quest for revocation of grant is misplaced and bad in law and the summons for the revocation of grant should be dismissed with costs.

Objector/Applicant's submissions

10. Mr. Mirugi, learned counsel for the applicant referred the court to the case of **Mukisa Biscuit Manufacturers Ltd Vs West End Distributors Ltd (1969) EA 696** on the definition of a preliminary objection. He also cited the case of **Sultan Hardware Ltd & Another vs African Banking Corporation Ltd Kisumu High Court Civil Case No. 149 of 2003**. In the foregoing case Tanui J held that unless the points raised are strictly points of law, a preliminary objection cannot be upheld.

11. Counsel submitted that a P/O cannot be used to determine the application for revocation of grant as lodged by the applicant. That to ascertain whether the application does not lie under **Section 76 of the Law of Succession Act**, the petitioners will be required to bring evidence before the court to that effect. This may be done through pleadings and affidavit evidence in an effort to support the objection.

12. Counsel asserted that the P/O herein raises questions of fact because this court has to ascertain whether:

- i. The summons for revocation or annulment of grant is incompetent and bad in law and does not lie under section 76 of the law of succession Act.
- ii. The claim by the applicant lies in respect of the estate of Joseph Ngugi Wangire and not the deceased herein.
- iii. The grant was rightly issued and cannot now be revoked.
- iv. The issue of trust is triable by the Environment and Land Court and not the Succession Court.

He argued that the P/O is not sustainable as it does not consist of pure point of law for it to stand.

13. Counsel submitted that the applicant's interest is in the property known as L. R. NO. LOC.9/KIRURI/3 for and on behalf of his father, the late Joseph Ngugi Wangire. That the registration of the said land under the name of the deceased herein was not absolute as this was ancestral land and the deceased's registration was for the benefit of persons claiming under the deceased's brother too, which was well known by the persons claiming entitlement to the property herein.

14. He relied on the case of **James Aggrey Nyapola Michael & Another vs Rosemary Irene Wanga [2014] eKLR** where the Environment and Land Court held that, intestate and testamentary succession to, and the administration of the estates of the deceased persons are governed by the **Law of Succession Act**, which under **Section 47** gives the High Court jurisdiction to deal with any matter arising under the Act. The High Court in this regard therefore has concurrent jurisdiction to hear and determine disputes of succession relating to land.

15. He further relied on the case of **Henry Njung'e Kirika & Another v Kezia Njango Kirika [2014] eKLR** where **Nyamwea J** held that, if the plaintiffs are aggrieved as beneficiaries of the deceased's estate, and arising from the acts of the defendant as an administrator of the estate, then the right forum to ventilate their grievances is in the succession cause in the High Court of Kenya, and not in this court. Counsel referred to Practice Direction No. 6 which directs that all cases touching on inheritance, succession and distribution of land under the Law of Succession Act shall continue to be filed and heard by the High Court or the Magistrates Courts, of competent jurisdiction.

16. Counsel submitted that 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.

Determination

17. I have considered the evidence and submissions by both counsels and the authorities in support of their respective cases. I note that the law pertaining to a Preliminary Objection was settled by the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Co. Ltd [1969] EA 696**. A preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. A preliminary objection according to Law J. A was stated to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or refer the dispute to arbitration.”

18. The Preliminary Objection filed challenges this court’s jurisdiction to deal with the issues raised by the applicant herein in his application for revocation of grant dated 10th April 2014. In the application for revocation of grant, the applicant challenges the deceased’s ownership of parcel of land registered as L.R. No. LOC.9/KIRURI/3. It is the applicant’s case that though the parcel of land registered as L.R. No. LOC.9/KIRURI/3 is absolutely registered in favour of the deceased, it was ancestral land which was held by the deceased in trust for his father Joseph Ngugi Wangire, and hence the parcel does not form part of the estate of the deceased available for distribution.

19. Under **section 26(1)** of the **Land Registration Act** the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

20. This court lacks jurisdiction to address the illegality and or misrepresentation alleged by the applicant against the deceased with regard to the title of land registered as L. R. No. LOC.9/KIRURI/3. This issue regarding title to land should be challenged in the Environment and Land Court created under **Article 162(2)(b)** of the **Constitution of Kenya 2010** and **section 13** of the **Environment and Land Court, 2011 (Cap 12A of the Laws of Kenya)**.

21. The issue of trustees can only be addressed under **Rule 41(3)** of the **Probate and Administration Rules**, which provides:

“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 the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the civil procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act proceeded to confirm the grant.”

As far as this court is concerned, land registered as L.R. No. LOC.9/KIRURI/3 is registered in the names of the deceased Jeremiah Kimani Wangire. The land therefore *prima facie* forms part of the deceased’s

estate. Any challenges to that title ought to be directed to the Environment and Land Court.

22. From the foregoing, it is apparent that the preliminary objection has merit as filed. The application for revocation of grant to the extent that it challenges the title of land registered as L. R. No. LOC.9/KIRURI/3 is therefore stayed for seven months for the applicant to pursue his recourse with the Environment and Land Court.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **23rd day of November 2017**

.....

L. A. ACHODE

JUDGE