



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO.792 OF 2015

IN THE MATTER OF THE ESTATE OF HANNAH MUGURE MWANGI (alias MUGURE MWANGI) – DECEASED

SOLOMON GICHINA MWANGI.....PETITIONER

VERSUS

KENNETH MUCHAI MUNGA.....OBJECTOR

AND

ATHI WATER SERVICES BOARD.....INTERESTED PARTY

R U L I N G

1. This ruling concerns two applications. The first is the **notice of motion dated 29/06/2016** in which the Objector in these succession proceedings, **Kenneth Muchai Munga**, has couched his main prayer in the following words –

**“That the court...be pleased to declare that the actions of the (Petitioner) and the Chief Executive of the (Interested Party of continuing to cut down and uproot tea bushes, constructions, taking possession, surveys and/or such dealings with Title Number LOC 16/KIGORO/490 are contemptuous of the court orders issued herein on 30<sup>th</sup> May 2016, and the two should be punished accordingly”.**

It is thus a contempt application.

2. The Petitioner herein, **Solomon Gichina Mwangi**, petitioned for a grant of letters of administration intestate in respect to the Deceased's estate). Both the Petitioner and the Objector (a child and grandchild respectively of the Deceased) have acknowledged each other as beneficiaries of the estate.

3. The Interested Party, **Athi Water Services Board**, was enjoined in these proceedings by consent.

4. At the time the petition was lodged, it appears that the sole asset comprising the estate was the aforesaid parcel of land, L.R. LOC 16/KIGORO/490. On 30/05/2016 the Objector applied by summons dated 27/05/2016 for the main order –

**“That pending hearing and determination of (the petition) the... court be pleased to issue an inhibitory order restraining the registration of any transfer, transmission and/or any dealings of any nature, including payment of any sale proceeds or further payment of such sale proceeds, taking possession, uprooting or cutting down or cleaning tea bushes, constructions,**

**surveys and/or any dealings or actions whatsoever with or within L.R. NO. LOC. 16/KIGORO/490”.**

5. There is also a prayer for interim relief pending disposal of the application. The court gave such relief by an order entered on 30/05/2016 in terms of that prayer for interim relief. It is that order that is the basis of the contempt application.
6. The contempt application is supported by the affidavit of the Objector annexed thereto. It gives the factual background to the application.
7. On 13/07/2016 the Petitioner filed a replying affidavit to the contempt application. It is sworn by himself. He denied being in contempt of the order of 30/05/2016 and put the Objector to strict proof thereof. He further denied that he was personally served with the order.
8. On 06/09/2016 the Interested Party also filed a replying affidavit to the contempt application. It is sworn by one Emily Kyalo, a legal officer of the Interested Party. In it violation of the court order of 30/06/2016 is denied. It is also deponed, wrongly, that the order was made *ex parte* and that it lapsed by operation of the law. The record of the court shows that the order was in fact made *inter partes* after representation by counsels for both the Petitioner and the Objector. The Interested Party had then not been enjoined in the proceedings. But it is true that the order could not have bound the Interested Party before it became a party in the proceedings and the order served upon it in the usual way.
9. There are other significant matters deponed to in the Interested Party’s replying affidavit, and to which I will revert shortly.
10. The second application in this ruling is the **notice of motion dated 13/01/2017** by the Interested Party in which it seeks the discharge/setting aside of the order of 30/05/2016 (the formal order was issued on 03/06/2016). The grounds for that application include –
  - (a) That subsequent to the filing of the petition herein, and by way of Gazette Notice No. 8675 of 21/10/2015, the **National Land Commission** (the Commission) expressed intention to acquire the property comprising the Deceased’s estate “for construction of a water pipeline from Thika Dam to Kigoro Treatment Works to Gigiri tanks”.
  - (b) That subsequently a public enquiry was carried out at Kigoro Chief’s office on 09/12/2016 for the purpose of establishing claims and interests by any interested party.
  - (c) That the said public enquiry was attended by the Objector, among others.
  - (d) That the property was thereafter compulsorily acquired.
  - (e) That the Commission had already submitted the “compensation award” to the six families with claims to the land acquired, including the Objector’s family, but withheld disbursement of the said award pending determination of the issue of distribution of the Deceased’s estate by this court in this succession cause.
  - (f) That by notice dated 21/12/2016 the Commission took over possession of the acquired land for purposes of implementation of the intended project.
  - (g) That it turned out that the implementation of the project could not proceed because of the court order of 30/05/2016.
  - (h) That it is no longer necessary for the order to remain in place as both the Petitioner and the Objector acquiesced to the compulsory acquisition of the land.
  - (i) That the said order was issued because of the Objector’s interest in the land as a beneficiary of

the Deceased's estate; his said interest is preserved in the compensation award now held and preserved by the Commission pending distribution by this court.

(j) That discharge of the said order will thus not prejudice any beneficiary of the estate, and will facilitate the implementation of a project that is for the public good.

11. The application is supported by an affidavit of the aforesaid legal officer of the Interested Party, Emily Kyalo. It gives the factual background to the application. There is a further affidavit filed on 13/02/2017 in support of the application. It is sworn by one Martha Wanjiku, another legal officer of the Interested Party. The further facts deponed to in the affidavit are that the actual amount of compensation is KShs.34,570,000/00 which the National Land Commission is holding pending distribution of the Deceased's estate by this court in this succession cause as that money now forms part of the Deceased's estate; and that the land that was compulsorily acquired, L.R. LOC. 16/KIGORO/490, is no longer part of the Deceased's estate.

12. The Objector responded to the Interested Party's application by his replying affidavit filed on 17/02/2017. He has persisted in his position that the Petitioner and the Interested Party were and continue to be in contravention of the court order of 30/05/2016. He has further deponed, *inter alia*, that he is aware that the Petitioner has filed *Nairobi HC Misc Suit No. 48 of 2017* seeking to be given -

**“The balance of the purchase prize”; and that all monies paid in respect of L.R. LOC. 16/KIGOTO/490 “either to the (Petitioner) (KShs. 43,268,750/00) or payable by the National Land Commission or any other party be deposited in court forthwith”.**

13. On 29/05/2017 the Petitioner filed a further replying affidavit to the contempt application.

14. On 17/02/2017 all three parties through their learned counsels acknowledged the fact of the compulsory acquisition by the Government through the Commission of the parcel of land comprising the Deceased's estate and sought time to discuss the matter with a view to recording a consent. Eventually no consent was forthcoming.

15. On 29/05/2017 the court directed that both applications be heard together by way of written submissions and highlighting thereof. The Petitioner's submissions were filed on 23/06/2017 while those of the Objector were filed on 17/07/2017. The Interested Party's submissions were also filed on 17/07/2017.

15. I have read and considered those submissions. None of the parties wished to highlight. I have also read all the affidavits filed in support of or in opposition to the two applications.

17. I am satisfied from the totality of the material now before the court as follows –

(a) Some of the acts of the Petitioner and the Interested Party complained of by the Objector as constituting disobedience of the court order of 30/05/2016 were done prior to issuance of that order in expectation of the compulsory acquisition of the land that comprised the Deceased's estate, L.R. LOC. 16/KIGORO/490.

(b) As soon as the Interested Party learned of the order it desisted from doing any further act on the land that could be construed as disobedience of the aforesaid court order. I have also not found any evidence of formal service of the order upon the Interested Party.

(c) There is bad blood among the beneficiaries of the Deceased's estate, particularly as between the Petitioner and the Objector. They both are suspicious of each other's actions in respect of the Deceased's estate. There is a perception among them that they could be stealing a match on each other. This perception may be based on reality or is just mere suspicion because of lack of communication.

(d) The land in question, L.R. LOC. 16/KIGORO/490, having been compulsorily acquired, does not form part of the estate of the Deceased any longer. What now forms part of the estate, and which shall be distributed as such, are the proceeds (compensation award) of the compulsory acquisition.

(e) The proceeds of the compulsory acquisition appear to be properly preserved by the National Land Commission pending distribution by this court in these succession proceedings. Should there be any query regarding the quantum of the proceeds, any interested beneficiary can apply, either in these proceedings or in other proceedings, in respect thereof for further and proper disclosure of the quantum of such proceeds.

(f) The main focus of the Petitioner and the Objector therefore now should be to move forward these proceedings so that an administrator(s) can be appointed to enable the court to expeditiously determine the persons beneficially entitled to the Deceased's estate and their respective shares in an application to confirm grant.

18. As the court has had occasion to state in these proceedings, these are succession proceedings in respect to the Deceased's estate. This is not a civil/land dispute between the Objector on the one hand and the Petitioner and the Interested Party on the other. Ordinarily succession proceedings are meant to be simple, focused and ought to be dealt with without undue delay.

19. In respect to the two applications in this ruling therefore, the orders and directions that commend themselves to the court are as follows –

**(a) The contempt application by the Objector (notice of motion dated 29/06/2016) is hereby dismissed. Parties shall bear their own costs thereof.**

**(b) The application by the Interested Party (notice of motion dated 13/01/2017) is allowed in prayer 4 thereof. The order of this court made on 30/05/2016 (and formally issued on 03/06/2016) is hereby set aside. Parties shall bear their own costs of the application.**

**(c) The Interested Party is hereby struck out from these proceedings to leave in place only the Petitioner, the Objector and other beneficiaries of the estate of the Deceased.**

**(d) The Petitioner shall within thirty (30) days of delivery of this ruling take appropriate steps to move forward the petition herein.**

Those shall be the orders of the court.

**DATED AND SIGNED AT MURANG'A THIS 17<sup>TH</sup> DAY OF NOVEMBER 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 17<sup>TH</sup> DAY OF NOVEMBER 2017**