



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 264 OF 2000

IN THE MATTER OF THE ESTATE OF JOHN MACHOGO OMARI – DECEASED

RULING

1. A walk down memory lane reveals that the deceased, **John Machongo Omari**, passed away on the 15th June 1985 at the age of eighty nine (89) years. He was survived by five (5) sons including the applicant and the respondents in the present application.

In 1999, the applicant **Andrew Nyakundi Machongo**, applied for probate respecting the estate of the deceased which consisted of a portion of land described as L.R No. KISII-NYARIBARI/MASABA/BONYAMASICHO/289 (herein, estate property).

The application was made at the High Court in Kitale. A hand written will dated 18th December 1984 was annexed to the application. On the 10th April 2000, the applicant moved the Court for the grant of letters of administration with will annexed and on the 11th April 2000, the Court ordered that the matter be transferred to this Kisii High Court from Kitale High Court.

2. Upon transfer to this Court, the application dated 10th April 2000, was fixed for hearing on 26th November 2001, on which date necessary letters of administration were issued to the applicant as there was no objection on sight.

However, on the same date, instead of the expected grant of letters of administration with will annexed what was issued to the applicant was a certificate of confirmation of grant in which the applicant was reflected as the sole beneficiary of the estate of the deceased. The estate parcel was transmitted to the applicant as the absolute owner.

On 3rd December 2001, the respondents and others applied for revocation and annulment of the grant which it may be noted was not formally issued. Nonetheless, the application was certified as urgent on 5th December 2001, and slated for hearing on 17th December 2001.

3. The record does not show what happened on the appointed date i.e 17th December 2001, thereby implying that the application was never prosecuted on that date as intended. The matter remained inactive until the 3rd July 2003, when the applicant filed a formal application for confirmation of grant dated **27th January 2002**.

The application was fixed for hearing on 24th September 2003, on which date it was stood over to 9th February 2004, on which date it was stood over generally before being re-fixed for hearing on 15th July 2004, on which date it was again stood over generally and later on the same day an application dated 25th

October 2003, was fixed for hearing on 27th October 2004.

4. The application dated 25th October 2003, was actually a notice to one Machongo Machongo to attend Court on 9th February 2004, for cross-examination and to produce specified documents for inspection. The matter came up in Court on 27th October 2004, and was stood over generally and on the following day (28th October 2004) the application dated 27th January 2002, was revived and fixed for hearing on 1st February 2005 on which date it was stood over generally before again being fixed for hearing on 28th November 2005 when it was stood over generally.

On 20th April 2006, the application was fixed for hearing on 20th September 2006, when it was again fixed for hearing on 1st March 2007, when it was stood over generally after the parties informed the Court that they intended to negotiate with a view to settlement of the matter.

5. On 15th February 2006, the applicant filed an application dated 15th February 2007, for rectification of the certificate of confirmation of grant dated 26th November 2001, to be a grant of letters of administration awaiting confirmation. The application was however, compromised by a consent signed by both parties and filed in Court on 1st March 2007, to the effect that the application be allowed as prayed and that the applications dated 3rd December 2001 and 27th January 2002, be withdrawn with no orders to costs.

6. Accordingly, a proper and formal grant of letters of administration intestate dated 24th October 2007 was issued in favour of the applicant.

On 7th March 2008, the applicant filed summons for confirmation of grant dated 6th November 2007.

The summons were fixed for hearing on 23rd May 2008, but nothing happened on that day. But, on the 3rd September 2009, the summons were fixed for hearing on 9th October 2009, on which date the grant was confirmed as prayed.

On 15th October 2009, an application dated 14th October 2009, was filed by the respondent **Paul Onsongo Machongo**, for rectification of the certificate of confirmation of grant in the manner proposed therein such that each of the five (5) sons of the deceased would be entitled to 7.2 acres each of the estate property instead of 7.0 acres each.

The application was fixed for hearing on 6th November 2009, on which date it was fixed for directions on 16th November 2009, but nothing happened on that day.

On 17th November 2009, the application was fixed for hearing on 22nd January 2010, on which date it was stood over generally and later fixed for hearing on 12th March 2010.

7. However, the application (dated 14th October 2009) was on 5th February 2010, fixed for direction on 19th February 2010, when it was stood over generally and re-fixed for directions on 12th March 2010. But, on that 12th March 2010, the application was withdrawn. The matter did not end there. Three (3) years down the line on the 23rd December 2013, an application dated **16th December 2013**, was filed by the respondents, Paul Onsongo and Mark Machongo a.k.a Mark Omaiko, by way of a Notice of Motion pursuant to the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, seeking orders to the effect that the intended partition of the estate property be stayed and that the Kisii County Land Registrar and Surveyor be ordered to partition the estate property according to the demarcation already obtaining on the ground.

8. The application was initially for hearing on the 7th April 2014, but was on that date adjourned with directions that a fresh hearing date be taken in the registry.

On 11th November 2014, the matter was scheduled for hearing but instead directions were given that the application be heard by “viva-voce” evidence on a date to be taken in the registry. Curiously there was an order for extension of interim orders yet such orders are not reflected in the record.

On the 9th June 2015, the application came up for hearing but was adjourned to 13th June 2015 with an order that the “status-quo” be maintained. Several other adjournments followed thereafter and finally on the 1st March 2016, the Court directed that the application be heard by way of affidavit evidence and written submissions. In that regard, the submissions were to be filed and served on or before the 14th March 2016, when the matter was to be mentioned to confirm compliance. Indeed, on that date the matter was mentioned and parties confirmed that they had filed their respective written submissions. There was a brief highlighting of the submissions by the applicant’s advocate **MR. Bosire**. The petitioner respondent was represented by **MR. Ochoki**, holding brief for **MR. Nyagwencha**.

9. This ruling is therefore in respect of that application dated 16th December 2013 whose main prayer at this juncture is for an order that the Kisii County Land Registrar and Surveyor do partition the estate property according to the demarcation already obtaining on the ground. The initial first prayer was for a stay of the intended partition pending the hearing and determination of this application. This prayer appears to have been overtaken by events as the property was to be partitioned on 17th December 2013 but this was not done.

Basically, matters revolving around sub-division or partitioning of land would fall within the jurisdiction of the Land Court rather than a Succession Court. This is the more reason why the petitioner contended in his submissions that the applicants have a recourse to file a suit in the Land Court.

This Court would thus divest itself of the jurisdiction to deal with matters touching on demarcation of the estate property regard being given to the fact that the grant subject of this cause was duly confirmed and a certificate of confirmation of grant dated 9th October 2009, issued to that effect.

10. The appropriate schedule to the said certificate of confirmation of grant clearly specifies the agreed mode of distribution of the estate property. Therefore, this Court cannot interfere with what was agreed by the parties on how to share the estate property among the beneficiaries of the estate. Indeed, the present application seeks to have the Court intervene in a matter which has already been finalized. The application cannot be an incidental factor to the main succession cause as contended by the applicants. Seemingly, a dispute has arisen in the course of the execution of the certificate of confirmation of grant but this has created fresh issues which ought to be addressed in the Land Court rather than this Court. It would not therefore be far-fetched to opine and hold that the present application is a gross abuse of the court process. The best the applicants can do is to file a land case against the petitioner/respondent in the Land Court or move this Court altogether for the revocation of the material grant and/or the material certificate of confirmation of grant or both. It is only in that way that the question touching on the distribution or sub-division of the estate property would be treated as being incidental to the main succession cause.

In sum, the present application is wanting in merit and is hereby dismissed. Each party shall bear their own costs of the application.

J.R. Karanja

Judge

[Read and signed this 24th day of March 2016 in the presence of Mr. Nyangwencha for petitioner/respondent and Mr. Soire holding brief for Mr. Bosire for applicant]

