



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 11 OF 2020**

**ESTHER LAARA.....1<sup>ST</sup> PLAINTIFF**

**FLORAH NJABANI MUCHEKE.....2<sup>ND</sup> PLAINTIFF**

**SABINA KAUKU M'MUCHEKE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DAVID BIRITHIA LAURI.....1<sup>ST</sup> DEFENDANT**

**NORAH MWARI THIRARI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated 21.2.2021 brought under **Sections 3 and 3A of the Civil Procedure Act** and all other enabling provisions of law, the plaintiffs/applicants seek an order compelling the D.C.I. to investigate the allegations of fraud against the defendants/respondents at the land control board in 2014 including the transfer form, identification number of the person who identified the transferor, the spousal consent form from the wife of the transferor, allegations of impersonating the 3<sup>rd</sup> applicant and the inclusion of family members on the day of attending the land control board. The application is supported by an affidavit of Sabina Kauku M'Mucheke sworn on the even date.
2. The grounds of the application are that, it was only the 3<sup>rd</sup> applicant who could give the consent before the deceased transferred the land to the 1<sup>st</sup> respondent; the 2<sup>nd</sup> respondent who is married to the 1<sup>st</sup> respondent allegedly took up the 3<sup>rd</sup> applicant's position during the land control board; the deceased was psychotic for some time hence the spousal consent given was forged; she did not attend the alleged land control board meeting; a report has been made at the police; there was impersonation and hence the need to seek the D.C.I. to investigate the matter otherwise the estate of the deceased shall suffer gravely.
3. The application is opposed by the respondents through a replying affidavit sworn by David Birthia Lauri on 9.6.2021. The basis of their opposition is that the applicant's participated in **Maua Succession Case No. 1 of 2017** distributing **L.N Ithima/Antuamburi/2448** to the 1<sup>st</sup> defendant as per the confirmation of grant.
4. Secondly, it is averred a similar application on similar grounds was filed in the succession cause and dismissed.
5. The second ground is after the succession cause, the applicants appealed to the High Court Meru which confirmed the lower court decision after which the applicants filed appeal **No. 23 of 2019** currently pending at the Court of Appeal Nyeri.
6. Third, he states the manner in which he acquired the property has been confirmed by a court of equal status hence the application is tantamount to seeking the D.C.I. to investigate regular court decisions.
7. Forth, it is averred the pending appeal touches on the suit land hence the applicants are forum shopping for a different verdict before this court.
8. Fifth, it is averred the application is res judicata hence an abuse of the court process.
9. Sixth, it is averred the alleged documents were part of the evidence in the succession cause which the applicants had occasion to challenge but rulings were made overruling the objections hence the applicants are abusing the court process so as to litigate already determined issues.
10. Further, the respondents maintain the subject property was under their deceased father's name hence the reason they applied for a grant. The court has therefore no jurisdiction to re-determine the issue since the applicant participated in the succession cause, consented to the distribution and is therefore estopped from renegeing on the matter and purporting to use a back door to reopen issues already determined.

11. Additionally, the respondents take the view that at the succession proceedings, the issues of fraud, mental status of the deceased and impersonation were never raised.
12. Lastly, the respondents aver the court should guard the integrity of its proceedings and prevent frivolous, vexatious and other such acts as the ones by this application whose aim is to abuse the court process.
13. With leave and by consent, parties opted to dispose the application through written submissions dated 1.11.2021 and 12.7.2021 respectively.
14. The plaintiffs' claim is the defendants fraudulently transferred **L.R No. Ithima/Antuamburi/2448** to the 1<sup>st</sup> defendant without the consent of the family members and while they knew their father, the late M'Mucheke M'Anaiba was of unsound mind.
15. They seek for the invalidation/cancellation of the title so as to have it reverted to the name of the deceased estate.
16. The defendants deny the claim and state the court lacks jurisdiction to hear and determine the matter since it was determined in a **Succession Cause No. 1 of 2017 at Maua CMCC Court**, later at **Meru High Court Civil Appeal No. 30 of 2018** and now is pending in the **Court of Appeal Nyeri being Civil Appeal No. 23 of 2019**.
17. Secondly, the respondents aver the issues raised in the suit were all determined by a court of competent jurisdiction to finality hence the suit is re judicata and res subjudice.
18. Lastly, the defendants state the land was acquired, registered after the confirmation of the grant and transmission through regular and lawful court process.
19. The defendants filed a notice of preliminary objection on the basis that the court lacks jurisdiction regarding **Parcel No. Ithima/Antuamburi 2448** on account of the previous decrees and the pending appeal, the plaint raises no known cause of action against the defendants, that the suit is fatally defective and an abuse of the court process. Similarly, the defendants filed a list of documents dated 14.8.2020.
20. In reply to the defence, the plaintiffs aver the defence is made of mere denial and equivocally averred that no court of law has ever determined the matters raised in the plaint.
21. The issues for determination are:-
- a) **If the court has powers to issue an order compelling the D.C.I. to perform its duties regarding the OB.**
  - b) **If the applicants have any legal basis to seek for the orders sought.**
22. The basis of the plaintiffs' claim is that **L.R No. Ithima/Antuamburi/2448** was fraudulently acquired by the 1<sup>st</sup> defendant without the consent of family members.
23. The particulars of fraud on the part of the 1<sup>st</sup> defendant are he grabbed the land, influenced the 2<sup>nd</sup> defendant to impersonate the 3<sup>rd</sup> plaintiff and lie to the land control board and that the land was unprocedurally, illegally and or irregularly transferred, he colluded with unscrupulous land committee members to approve and be issued with an illegal land control board consent, while the deceased was mentally unstable.
24. Regarding the particulars of fraud on the 2<sup>nd</sup> defendant, it is averred she colluded with the 1<sup>st</sup> defendant to have the land transferred so as to disinherit the deceased beneficiaries and or she impersonated the 3<sup>rd</sup> plaintiff so as to block her from attending the land control board.
25. It is not disputed that the office of the Directorate of Criminal Investigations is an independent department. **See Kenya Commercial Bank Ltd. & 2 Others –vs- Commander of Police & Director of Criminal Investigations Department & Another [2012] eKLR.**
26. In **Titus Barasa Makhanu –vs- Police Constable Simon Kinuthia Gitau & 3 others [2016] eKLR**, the court held:
- “The Chief Justice may however not direct the command of the National Police Service as headed by the Inspector General. The Independence of the Police Service is the investigations of any particular offence or in the enforcement of the law is enshrined in the Constitution under Article 245 (4).”***
27. For a party to seek for court orders such as the request herein, there must be not only be a factual basis but also a legal basis.
28. In **Lenny M. Kivuti –vs- Abdullahi Maalim Ahmed [2020] eKLR Angote J.** was urged to order the D.C.I. – Land Fraud Unit to carry out investigations to establish the person involved in the alleged forgery of title documents and institute criminal proceedings as appropriate.
29. The facts were that the applicant who was a registered owner of the land in issue had visited the Survey of Kenya and found his land had been subdivided by a certain firm on instructions of the respondent based on a forged title deed and transfer forms which the applicant had never signed or approved.

30. In instant case, the court has looked at the certificate of official search dated 1.12.2016. It indicates one M'Mucheke M'Anaimba was issued with a title deed on 28.5.1992 and a caution was registered by Joseph Thurania on 28.2.2014.

31. The amended judgment dated 27.3.2018 and the certificate of confirmation of grant issued on 27.3.2018 reveals the 1<sup>st</sup> defendant acquired the land through transmission. The judgment delivered by **Mabeya J.** on 29.11.2018 confirms the manner in which the 1<sup>st</sup> defendant was granted the suit land in line with **Part V and Section 31 of the Law of Succession Act Cap 160 Laws of Kenya.**

32. The applicants' first ground of appeal in the memorandum of appeal filed at the Court of Appeal on 8.2.2019 is that the Learned trial Judge erred in law and in fact in failing to find that the distribution of the deceased estate comprised in **L.R No. Ithima/Antuamburi/2448** by the subordinate court was against the provisions of the **Law of Succession Act** and the **Constitution.**

33. The second ground is that the Learned trial Judge misconstrued and relied on untested evidence to deny the appellant and the other beneficiaries of the deceased the estate comprising of **L.R No. Ntima/Antuamburi/2448.**

34. The prayers sought in the Court of Appeal are; the judgment of the Superior Court to be set aside and an order of fresh distribution of the deceased estate of **L.R Ithima/Antuamburi/2448** to be undertaken as per the appellants' proposal.

35. Given the above, it is obvious the plaintiffs' facts as pleaded in paragraph 7 of the plaint are untrue, misleading and contrary to the particulars and evidence given by the plaintiffs in both the Lower Court, the High Court and the Court of Appeal.

36. The applicants have not told the court if they ever visited the offices of D.C.I. Land Fraud Unit and made a formal complaint and thereafter made a follow-up.

37. There is evidence that after the certificate of confirmation of grant, the court granted orders for the executive officer to sign the transfer forms in favour of the 1<sup>st</sup> defendant.

38. There is therefore no basis to seek this court to act in vain and order for investigations on documents which have no relevance to the issue at hand as held in **V –vs- Attorney General [2004] 1 KLR 431.**

39. A party coming to court must seek for orders in furtherance of justice but not with ulterior motives ostensibly to settle scores. **See Kuria & 3 Others –vs- Attorney General [2002] 2 KLR 69.**

40. The court finds the application lacking merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**