



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 509 OF 2014
IN THE MATTER OF THE ESTATE OF KIPRONO BIEBEI NYANGUSI
JOTHAM MUIRURI KIBARU.....APPLICANT
VERSUS
JOSEPH RONO.....RESPONDENT

RULING

1. The summons dated 18th March, 2015 was brought under **Section 47** of the **Law of Succession Act** and **Rules 49** and **73** of the **Probate and Administration Rules**. The Applicant, Jotham Muiruri Kibaru, is not a dependant or a beneficiary of the deceased. However, he has an interest in one of the properties that form part of the estate of the deceased namely, **Title Number Dundori/Muguathi Block 2/20** (the suit property), which he alleges to have acquired title by way of adverse possession and is currently in possession and occupation.
2. There are two cases that have been filed in relation to this property. In Nakuru ELC NO. 60 of 2013, the applicant has sued the deceased and is seeking among other orders, a declaration that he is the rightful owner of the suit property. In the second suit, Nakuru ELC 126 of 2012 the applicant has been sued by a third party, Simon Towett Maritim, who is also seeking declaratory orders of ownership and eviction orders against the applicant.
3. His present application is for stay of confirmation of the grant issued herein and distribution of the suit property until the two suits which have now been consolidated are heard and determined.
4. The Respondent swore a replying affidavit on 13th July, 2015 in opposition to the application. He argued that the applicant has no locus in these proceedings as he is neither a beneficiary of the deceased nor an objector. He argued that those proceedings should not have any bearing to the present cause as he is not a party in them. The Respondent admitted that ELC No. 60 of 2013 was filed against the deceased. However the same abated after his death. Therefore, there being no suit in existence, there is no basis to grant a stay.
5. In response to the replying affidavit, the Applicant filed a further affidavit on 17th November, 2015. He annexed to this affidavit a copy of an application made in his suit in the Environmental and Land Court seeking to revive the case and substitute the deceased with the legal representatives of the estate. This application is slated for hearing sometimes in September, this year.

6. The application was canvassed by way of written submissions. The Applicant's submissions were that this court has unlimited jurisdiction by virtue of **Section 47** of the **Law of Succession Act** to determine any dispute that may arise under the Act. The procedure by which third parties may bring applications not provided for under the rules is by way of summons under Rule 49 of the Probate and Administration Rules.

7. Counsel argued that the applicant has an interest in the property and is not a mere busy body. The question of abatement of the suit is one that can only be determined by the Environment and Land Court where the suit has been filed.

8. The Respondent reiterated the contention in his replying affidavit that the applicant has not raised any issue that can be determined by the succession court. He argued that the Rule 49 only applies to matters that relate to the estate of the deceased person. The current application seeks to enforce matters that are outside the estate and must therefore fail. In addition, Rule 73 which saves this court's inherent powers to make such orders it deems necessary in the interest of justice or to prevent abuse of the court process, also doesn't apply to matters extraneous to the estate.

Analysis and determination:

9. The purpose of a succession court as can be deduced from section 2 of the Law of Succession Act is to oversee the succession and distribution of the estate of a deceased. The term estate is defined under section 3 (1) to mean ***“the free property of a deceased person”*** and free property is then defined as ***“that property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”***

10. The substratum of this application is whether the deceased was legally competent to freely dispose of the suit property during his lifetime notwithstanding that it was registered in his name. The applicant has alleged in the instant application that he has acquired title by way of adverse possession to the suit property. He has filed a suit in the Environment and Land Court which is vested with the requisite jurisdiction to determine matters of title and ownership by **Article 162 (2) (b)** of the **Constitution**. There is pending an application in that court for revival of the suit and substitution of the deceased with the legal representative of his estate.

11. The issues raised are relevant to this court because they concern whether the property constitutes the estate of the deceased and therefore falls within the jurisdiction of this court. It would be an abuse of the court process for the grant to be confirmed and the property distributed to the beneficiaries and thereafter it is revoked after it is determined that the property in fact belonged to third parties. The powers conferred on this court by Rule 73 were intended to be exercised in these kind of cases.

12. It follows that this court cannot confirm the grant in so far as it purports to distribute the property to beneficiaries when there is a dispute concerning whether the deceased had an interest in it. It is only until the deceased's interest has been ascertained and the property then is declared to be his free property within the meaning of Section 3 (1), that the court can exercise its jurisdiction to oversee the transition of the property to the beneficiaries.

13. For this reason, the application dated 18th March, 2015 is allowed. The distribution of the property known as **Title Number Dundori/Muguathi Block 2/20** is hereby stayed pending determination of ELC NO. 60 of 2013 and Nakuru ELC 126 of 2012. The administrator is however free to apply for partial confirmation of the grant in relation to the properties which the deceased's title is not disputed. The applicant is awarded the costs of this application which shall be borne by the estate.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 22nd day of June, 2016.

A. K. NDUNG'U

JUDGE