



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

SUCCESSION NO. 647 OF 2005

IN THE MATTER OF THE ESTATE OF THOMAS KANDILI MUSEMBI

ROSE MUKAI MUTALIA.....APPLICANT

VERSUS

FUTUMA MUMBUA MUSEMBI.....1ST RESPONDENT

JOHN NGEREZA MUSEMBI.....2ND RESPONDENT

TERESIA KAVATA.....3RD RESPONDENT

RULING

The application before me is dated 30/7/2015 brought under **Section 47** of the **Law of Succession Act** and **rule 73** of the **Probate and Administration rules**. Orders sought are:

- 1) That this Honourable court be pleased to cancel, nullify and/or annul the Respondents' title to all that piece of land known as NAKURU MUNICIPALITY BLOCK 29/380 (RHONDA) and have it revert back to KAVATA KINDILI (now deceased)
- 2) THAT this honourable court be pleased to issue Eviction orders to forcefully remove the Respondents herein jointly and/or severally, either by themselves, their agents, servants and or anyone claiming through them from all that piece of land known as NAKURU MUNICIPALITY BLOCK 29/380 (RHONDA)
- 3) That this Honourable court be pleased to find that the Respondents herein are in contempt of court orders issued on or about 30th May, 2014.
- 4) That cost of this application be borne by the Respondents.

The application is grounded upon the affidavit of ROSE MUKAI MUTALIA (hereinafter the applicant).

The gist of of the affidavit is that the Respondents herein are children of her late brother THOMAS KINDILI MUSEMBI the deceased in this matter.

The suit land, NAKURU MUNICIPALITY BLOCK 29/380 (RHODA) initially belonged to her late mother KAVATA KINDILI and upon her death, the applicant and the deceased herein applied for a grant of letter in respect of the Estate of KAVATA KINDILI. The property was distributed to her. A certificate

of confirmed grant is annexed.

Despite that fact, the Respondents herein included the said property as an asset in this cause under an *alias* name KALENJIN ENTERPRISES BLOCK 29/380 and managed to inherit the same despite the fact that it never belonged to their father. A Certificate of Confirmed grant to the Respondents is annexed.

It is deponed that the Respondents ultimately transmitted and registered the land in their names. A certificate of search is annexed.

The applicant moved to court on an application for revocation of grant on account of erroneously including the suit land in this succession cause and the court ruled in her favour. A copy of the ruling is annexed.

An extracted order is also exhibited.

Despite the orders the Respondents have failed to hand over the property to the applicant and they continue collecting rent.

The application is opposed and in a replying affidavit sworn by Teresia Kavate Musembi (hereinafter the 3rd Respondent) with authority for 1st and 2nd Respondents has stated that they intend to appeal the ruling made on 30/4/2014.

A copy of notice of appeal is annexed. A letter applying for certified copies of proceedings is exhibited. It is deponed that todate proceedings are not ready. It is urged that the application is premature and should await the outcome of their appeal.

Despite clear directions on how submissions were to be filed, I note that only the applicant's submissions are on record.

I have had occasion to consider the application, the affidavits and submissions on record. The issues for determination are;

1. Whether the title to all that piece of land known as NAKURU MUNICIPALITY BLOCK 29/380 (RHONDA) should be cancelled and revert back to the original owner KAVATA KINDILI.
2. Whether eviction orders should issue against the Respondents.
3. Whether the Respondents are in contempt of court.
4. Who should bear the costs of this application.
5. I have painstakingly gone through the record herein.

This is a straight forward application and for which the Respondents had no arguable defence to and the replying affidavit clearly confirms that. The main stay of the replying affidavits is that the Respondents have filed a notice of appeal.

There are no stay Orders either against the grant issued to the applicant herein or against the orders of court in the ruling dated 30/5/2014. It follows then that the registration of the suit land in the names of the Respondents is not anchored on any legal basis and must be cancelled.

As held in **Sabastian Murungi Boore V. Felister Mbiro**, (2010) eKLR and **James Ndungu Thungu V. Mary Wambui**; this court has Jurisdiction to order cancellation of a title where the registration of such title is on the strength of a grant which has since been revoked. The court has the powers to order cancellation of such a title and have the title revert to the respective deceased persons.

Based on the orders of court of 30/5/2014, the Respondents have no colour or right to remain on the suit land. They have failed to voluntarily remove themselves despite clear orders of court. The eviction orders sought are necessary to enable the applicant enjoy the fruits of her judgment.

As to whether the Respondents are in contempt of court orders, I am hesitant to delve into this limb of the prayers given that the applicant ought to approach the court through the well known elaborate procedure of instituting contempt of court proceedings and I leave it open to the applicant to pursue this line of prayer accordingly if felt necessary.

On costs, I order that the Respondent bear the costs of this application.

Dated, Signed and Delivered at Nakuru this 8th day of June, 2016

A. K. NDUNGU

JUDGE