



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 202 OF 1990

IN THE MATTER OF THE ESTATE OF CHEGE KIRUMBA (DECEASED)

RULING

1. The deceased herein died on 28th July 1983. Representation to his estate was sought by the Public Trustee in Public Trustee Cause No. 341 of 1984. He was expressed to have been survived by nine (9) individuals, being widow and children of the deceased. Their names were listed as Salome Wangui Chege, Rose Wanjiru Chege, John Kiumbuku Chege, Peter Gitau Chege, Simon Macieya Chege, Wanjiru Chege, Muchene Chege, James Njenga Chege and Peter Gachu Chege. He was said to have died possessed of two (2) assets, Dagoretti/Waithaka/44 and a plot at Dandora, Nairobi. A grant of letters of administration intestate was made to the Public Trustee in this cause, HCSC No. 202 of 1990 on 11th April 1990. The said grant was confirmed on 7th August 1990 and a certificate of confirmation to that effect was issued. The said confirmation however did not distribute the estate. It would appear that a further order distributing the estate was made on 15th March 1991 and a certificate issued to that effect. The estate devolved upon the widow, Salome Wangui Chege, as tenant for life and thereafter to the eight (8) children of the deceased in equal shares.

2. On 28th March 2013, an application dated 8th February 2012 was lodged at the registry for revocation of the grant made to the Public Trustee. The same was settled by consent on 4th November 2013, in the terms that the Public Trustee would relinquish the administration of the estate to new administrators, John Kiumbuku Chege, James Gitau Chege, Simon Machieya Chege and Harrison Muchene Chege.

3. There are two applications for determination, dated 1st April 2014 and 24th April 2014, hereinafter referred to as first and second applications, respectively.

4. The first application is brought at the instance of the administrators appointed on 2nd November 2013. It names a Daniel Kahara Wakigo and the Public Trustee as respondents. It seeks several orders relating to Dagoretti/Waithaka/724, 725, 726, 727 and 728 which are subdivisions from Dagoretti/Waithaka/44. The applicants would like the first respondent restrained from evicting or interfering with the applicants' quiet possession of the subject property, orders inhibiting the registration of the said parcels of land and their cancellation. They would also like to have the property restored to the original title, Dagoretti/Waithaka/44 and the Public Trustee ordered to surrender all the documents in her possession relating to the estate to the applicants.

5. The grounds upon which the application is premised are set out on the face of the application. It is stated that the respondents intermeddled with the estate during the administration of the estate by causing the property to be subdivided and a portion thereof transferred to the first respondent, that the first respondent is threatening to evict the applicants from the subject property, that the second respondent has refused to surrender documents and render a true account of her administration of the estate, and that the applicants have been unable to administer the estate due to the refusal by the second administrator to

release the documents. From the affidavit sworn in support of the application by James Gitau Chege, it is stated that the first respondent was alleging that he had bought the subject property from the applicants' mother. It is argued that the mother, now deceased, could not possibly have power to dispose of the said property as she only held a life interest in it at the material time.

6. The response to the application is sworn by Daniel Kahara Wakigo. He states that his late wife had acquired one acre of the estate property from the deceased, in a transaction that was perfected by the deceased's wife after his demise, and excised from Dagoretti/Waithaka/44, culminating in the creation of Dagoretti/Waithaka/724 -727. The matter ended up in court in Nairobi CMCCC No. 1795 of 2005 where the property was decreed to him, a decision which was never appealed against nor set aside or vacated.

7. A number of documents have been attached to the application to support the first respondent's contention. There is correspondence with the Public Trustee to establish that there had been a transaction for the sale of the subject property, which involved the deceased, the applicant's wife and the widow of the deceased. There is copy of a written sale agreement between the applicant's wife and the deceased's widow which was meant to validate the earlier oral arrangement between the deceased and the applicant's wife. There are probate papers in respect of the estate of the applicant's wife. There are also court papers in respect of Nairobi CMCCC No. 1795 of 1995, inclusive of the decree passed on 6th June 1999 which commanded the Public Trustee to transfer and register the applicant as owner of the one acre plot known as Dagoretti/Waithaka/724 -727. There are also documents from the Land Control Board where the Public Trustee consented to the transfer of the property to the applicant, and copies of the title deeds issued in the name of the applicant.

8. There is also a replying affidavit by the Public Trustee. She states that out of the five (5) title deeds of the subdivisions from Dagoretti/Waithaka/44, that is to say Dagoretti/Waithaka/724 – 728, she only had possession of only one, that relating to Dagoretti/Waithaka/728. She explains that the original title to Dagoretti/Waithaka/44 was surrendered to the lands office for the purpose of the subdivision, and therefore it was not in her possession. The deeds for Dagoretti/Waithaka/724 -727 were issued to the first respondent as he was entitled to them as a purchaser. The Public Trustee retains Dagoretti/Waithaka/728 as it is the only portion that is for distribution by the estate. She asserts that she has not refused to surrender the title documents. She avers that she exercised diligence in the administration of the estate. She states that the disposal of the one acre was within the law, and was initially between the deceased and the first respondent's wife, and after his death it was completed by the deceased's wife.

9. The applicants have filed a supplementary affidavit by way of response to the first respondent's affidavit, largely denying the averments made in the said affidavit. It is submitted that the transaction between the deceased's wife and the applicant's wife was entered into when the Public Trustee had not been appointed administrator of the estate of the deceased. The suit in Nairobi CMCCC No. 1795 of 2005 is conceded but it is averred that that court had no jurisdiction to deal with the matter as it concerned the estate of the deceased.

10. The second application is brought at the instance of the person named as the first respondent in the first application, Daniel Kahara Wakigo. He would like the respondents ordered to give vacant possession of Dagoretti/Waithaka/724, 725, 726, 727 and 728 to him, to remove their structures from the subject lands and for police assistance through the Kabete Police Station. On the grounds set out on the face of the application, it is alleged the applicant's wife had acquired the subject property from the deceased and the land had subsequently been awarded to him by the court in Nairobi CMCCC No. 1795 of 2005. The property was then transferred to him by the Public Trustee. He asserts that the property belongs to him and the structures on the land ought to be removed and the respondents ought to render vacant possession of the land.

11. The applicant, in his affidavit sworn in support of the application, avers that his late wife had entered into a sale agreement with the deceased with respect to the subject land for Kshs. 145, 000.00. He contends that the said agreement was not disputed by the respondents and their mother, who later entered into an arrangement with them on the subdivision of the property. After the deceased died, his widow completed the transaction and caused the portion bought to be hived off, and transferred to the applicant,

in a transaction that involved the Public Trustee. A dispute arose between the deceased's widow and her children on one side and the applicant on the other over the cost of the subdivision, which culminated in the filling of Nairobi CMCCC No. 1795 of 1995, which was resolved in favour of the applicant. It was decreed that the subject property be transferred to the applicant, which was eventually done in 2013. The documents referred to in paragraph 7 hereabove are attached to the affidavit of the applicant to support his case.

12. I have gone through the record and I have not come across any response to the application dated 24th April 2014 by way of replying affidavit by the respondents.

13. Directions were given on 22nd April 2015 for the disposal of the two applications by way of written submissions. Both sides complied with the directions and filed written submissions, both of which I have gone through and noted the arguments made therein.

14. I have noted that there were proceedings in another court, Nairobi CMCCC No. 1795 of 1995, where a dispute between the estate and Daniel Kahara Wakigo over a transaction that was allegedly entered into by the deceased herein and the widow of Daniel Kahara Wakigo was resolved in favour of the applicant. The two applications that I am called upon to determine revolve around the said civil case. The full text of the judgment of the court in Nairobi CMCCC No. 1795 of 1995 has not been placed before me, but a copy of the decree was exhibited. The court specifically directed that Dagoretti/Waithaka/724, 725, 726 and 727 be transferred by the Public Trustee to Daniel Kahara Wakigo. It is on that basis that Daniel Kahara Wakigo pleads for orders of vacant possession, while the administrators seek orders to restrain eviction from the said lands, and for a reversion of the titles to Dagoretti/Waithaka/44.

15. It was pleaded by the administrators that the trial court in Nairobi CMCCC No. 1795 of 1995 had no jurisdiction to handle the property as the same was subject to succession or concerned the estate of a deceased person. There can be no merit in the said argument. What was before the civil court was a dispute over the ownership of an asset forming part of the estate between the estate and a third party. Disputes over title to estate property between the estate and third parties are not resolved within the succession cause, but in separate proceedings properly brought under the Civil Procedure Rules. That is precisely what Daniel Kahara Wakigo, being a third party to the estate of the deceased, did. It cannot therefore be said that the civil court had no jurisdiction to handle the dispute; indeed, such a situation is envisaged by Rule 41(3) (4) of the Probate and Administration Rules.

16. As indicated above, there is a valid order of a competent court which has not been set aside. That order or decree was not made in vain. It cannot be just ignored for the court never acts in vain. This probate has not made another order which would vitiate that in Nairobi CMCCC No. 1795 of 1995, so that order subsists and must be given effect.

17. Daniel Kahara Wakigo seeks vacant possession of the property the subject of the decree in Nairobi CMCCC No. 1795 of 1995. What he is asking the probate court to do is in fact to grant orders whose effect would be to enforce the decree in Nairobi CMCCC No. 1795 of 1995. That should not be role of the probate court. A decree of the civil court is enforceable through a process in that court, guided by the relevant provisions of the Civil Procedure Rules. Daniel Kahara Wakigo should move the court in Nairobi CMCCC No. 1795 of 1995 for execution of the decree passed by that court with respect to Dagoretti/Waithaka/724 -727. There is no jurisdiction for the probate court to facilitate execution of the decree in Nairobi CMCCC No. 1795 of 1995 through the instant cause.

18. The administrators ask me to restrain Daniel Kahara Wakigo from evicting them from Dagoretti/Waithaka/724 -727. Such eviction can only be in execution of the decree in Nairobi CMCCC No. 1795 of 1995. The effect of what the administrators are seeking from this court is an order to stop enforcement or execution of the decree in Nairobi CMCCC No. 1795 of 1995, which is something that this court has no jurisdiction to do. They also appear to be seeking that this court declares that Daniel Kahara Wakigo is not entitled to Dagoretti/Waithaka/724-727, and therefore the transactions should be cancelled and the title reverted to the original Dagoretti/Waithaka/44. The making of such an order would amount to this court sitting on appeal to the decision of the court in Nairobi CMCCC No. 1795 of 1995,

yet there is no appeal before me in that respect. If the administrators are unhappy with the decree in Nairobi CMCCC No. 1795 of 1995 then they ought to move that court appropriately regarding Dagoretti/Waithaka/724-727. The orders that they seek herein cannot be sought from the probate court, which did not in the first place make any orders in respect of Dagoretti/Waithaka/724 -727 in favour of Daniel Kahara Wakigo.

19. There is a prayer for rendering of accounts by the Public Trustee. Rendering accounts by administrators is a statutory duty. The Public Trustee recognizes that, and has indicated that she has no difficulty rendering accounts, and has stated that she is in the process of compiling her accounts.

20. Regarding release of documents, the Public Trustee has indicated that Dagoretti/Waithaka/44 no longer exists for it was cancelled upon subdivision of the property into Dagoretti/Waithaka/724 -728. That is a matter that I am prepared to take judicial notice of. She states that she is unable to release the title documents relating to Dagoretti/Waithaka/724 -727 as that property no longer belonged to the deceased or the estate but to Daniel Kahara Wakigo, and therefore the documents of title ought to be in the possession of Daniel Kahara Wakigo. Daniel Kahara Wakigo himself has asserted that these are his assets, and consequently he should be in possession of the documents of title relating to the said property. The Public Trustee however concedes that she has the title to Dagoretti/Waithaka/728.

21. After taking everything into account, I am moved to make the following final orders:-

(a) That the application dated 1st April 2014 is allowed to the limited extent of the Public Trustee releasing the title deed in respect of Dagoretti/Waithaka/728 to the administrators;

(b) That the application dated 24th April 2014 is dismissed in its entirety;

(c) That the parties shall seek the orders sought in the two applications in Nairobi CMCCC No. 1795 of 1995; and

(d) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE