

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2642 OF 2003

IN THE MATTER OF THE ESTATE OF ERNEST KERRY KOMO (DECEASED)

RULING

1. The Motion dated 6th September 2016 seeks that the registrar, presumably of the court, be ordered to sign a sale agreement and a transfer in the place of the respondent and that the sale proceeds be shared equally between the parties. The property the subject of the application is not named in the prayers.
2. The application is brought at the instance of Simon Wachira Kerry. The foundation of the application is in the grounds on the face of it and the affidavit sworn in support. The property to be sold is LR No. 37/266/34 Nairobi. The applicant claims that the same is registered in the joint names of himself and the person he has named as the respondent, Monica Kerry Komu. He avers that the grant herein was confirmed; the property in question devolved to the two of them and was subsequently registered in their joint names. He avers that there were orders made by Njagi J. on 5th January 2011 ordering the sale and distribution of the said asset between the applicant and the respondent.
3. There is an affidavit of service on record sworn on 19th September 2016. Its contents are mixed up, for it appears to suggest that the respondent was served on two dates, 6th September 2016 and 13th September 2016. This is signant. The process server says he received copy of the Motion on 13th September 2016, so he could not possibly have served it on 6th September 2016. The process server does not explain in the affidavit how he got to know the respondent. It is alleged that she did not sign the papers. Copy of the document that was allegedly served is not attached to the affidavit of service. In view of the foregoing I am not convinced that there was proper service of the Motion on the respondent.
4. The applicant continues to insist that Njagi J. had ordered on 5th January 2011 that the said property be sold and the proceeds shared equally. I did hold, in my ruling delivered and dated 5th February 2016, that the order that the applicant is relying on, which is purported to have been extracted from the court record on 5th January 2012, does not conform to the type-written ruling that Njagi J. delivered on 16th December 2011. The said ruling is three pages long, and it carries only two orders, at page 3: One, for rendering of accounts and deposit in court of the moneys the subject of the accounts to be rendered, and two, for deposit in court of the title deed to the property. The ruling of 16th December 2011 does not make an order that the said property be sold. The order extracted on 5th January 2012 was therefore at variance with the orders contained in the ruling that the judge delivered on 16th December 2011. The applicant is no doubt uttering a false document.
5. The application dated 6th September 2016 seeks the same orders and is founded on the facts as the one dated 19th May 2015, which was dismissed through the ruling that was delivered on 5th February 2016. A similar prayer was in the application that was the subject of the ruling by Njagi J. The matter is no doubt *res judicata*. It is cheeky of the applicant to keep the court busy by filing an application seeking orders similar to those sought in earlier applications and that the court then dismissed.
6. I would advise the applicant to secure for himself a copy of the ruling delivered by Njagi J. on 16th December 2011, if he does not believe what the court stated in the ruling of 5th February 2016. Better still, the Deputy Registrar should furnish the applicant with a certified copy of the said ruling for his record, and so that he can extract a formal order that correctly captures the orders that were made in the said ruling.

7. I have perused the court record. The grant herein was confirmed on 31st October 2005. The subject property was indeed devolved to the applicant and the respondent jointly. The applicant alleges that the property was subsequently registered in their joint names. Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes *functus officio*. The property in question is no longer estate property. It no longer vests in the administrators. It is no longer subject to the Law of Succession Act, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.

8. The orders that the applicant seeks herein do not lie from the probate court, for they have nothing to do with succession to the estate of the deceased. They have everything to do with the applicant and the respondent, and the property that vests in them. If the two have a dispute with regard to their respective rights to that property, then the proper forum to present their case is the Environment and Land Court. The probate court ceased to have jurisdiction over the matter once the grant was confirmed and the property registered in the joint names of the applicant and the respondent.

9. I do not see any basis upon which I can grant the orders sought. The application dated 6th September 2016 is misconceived and an abuse of the court process. It is hereby struck out. The Deputy Registrar is hereby directed to furnish the applicant with a certified copy of the ruling that Njagi J. delivered on 16th December 2011.

10. It is so ordered.

DATED and SIGNED at NAIROBI this 16TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 20TH DAY OF DECEMBER, 2016.

R. OUGO

JUDGE