

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.1783 OF 1993

IN THE MATTER OF THE ESTATE OF WANDIRU KABAIKU- (DECEASED)

RULING

1. The application for determination is dated 1st July 2014. It seeks cancellation or revocation of the title deed in respect of Lari/Magena/187. It is premised on Section 76 of the Law of Succession Act. It also seeks restraining orders directed at the respondents with respect to Lari/Magena/187.
2. The affidavit in support of the application was sworn by the applicant, George Mburu Mwaura, on 1st July 2014. He states that the respondents have refused to surrender the title deed in respect of Lari/Magena/187 to the Land Registrar for Kiambu County for cancellation purposes. He states that the judgment of the court on 15th December 2006 had ordered such cancellation and issuance of a new title deed.
3. He has attached several documents to his affidavit to support his averments. There is the will of the deceased made on 1st October 1986, which gave a half share of Lari/Magena/187 to him. There is a grant of probate of the said will, which was made to the applicant on 10th February 1994. There is also the judgment of this court dated 15th December 2006, which upheld the will of the deceased executed on 1st October 1986 and dismissed the respondent's application for revocation of grant.
4. The respondents replied to the application through an affidavit sworn by the first respondent, Priscilla Mweru Muturi, on 22nd July 2014. She indicates in her affidavit that she was dissatisfied with the judgment delivered on 15th December 2006 and that she has sought leave to appeal against it. She filed a Notice of Appeal and had asked for copies of the proceedings and judgment. She asserts that the subject land belonged to their father, with the deceased only enjoying a life interest. It was therefore not available for willing away. She is of the view that the instant application is pre-mature.
5. Attached to the replying affidavit are several documents. There is a notice of appeal dated 18th December 2006 regarding the judgment of 15th December 2006. There is also a letter dated 15th December 2006 and filed in court on 18th December 2006 requesting for certified copies of the proceedings for the purposes of filing appeal. Finally, there is a copy of the greencard in respect of Lari/Magina/187, showing that the register was opened in 1958 when Kabaiku Mbuthia was registered as owner thereof, and on 22nd August 1995 the property was transmitted to Njoki Kabaiku and the deceased herein, Wandiru Kabaiku, each holding a half share. The green card says nothing about life interest.
6. The application was argued on 23rd July 2014. The applicant urged it in person, while the respondents were represented by Mr. Chege. The respondents took the position that there is a pending appeal and the matters raised in the application ought to await the outcome of the appeal.
7. I note that the application is premised on Section 76 of the Law of Succession Act and Rules 44, 49 and 73 of the Probate and Administration Rules. The orders sought are not grantable under Section 76 of the Law of Succession Act, for the applicant does not seek revocation of the grant. They can however be granted under Rule 73 of the Probate and Administration Rules, which saves the inherent power of the probate court to grant orders in the interests of justice and to prevent abuse of the court process. I am mindful of the fact that the applicant is acting in person.

8. I have noted from the record that the deceased had acquired one half of Lari/Magina/187 through succession on 22nd August 1975. The record does not indicate that she held the interest in life interest, and I am disposed to find that it was passed to her absolutely. She gifted that interest to the applicant by her will made on 1st October 1986, which was subsequently upheld by the court in its judgment of 15th December 2006.

8. The respondents allege that they have filed an appeal against the orders in the judgment of 15th December 2006. The only documents placed before me to support the claim that there is a pending appeal is the Notice of Appeal dated 18th December 2006, and lodged in court on the same date, and the letter dated 15th December 2006 lodged in court on 18th December 2006, asking for certified copies of the proceedings. I understand the respondents to be saying that they have not yet lodged the intended appeal at the Court of Appeal for this court is yet to furnish them with certified copies of the proceedings. Eight (8) years have lapsed since the decree of 15th December 2006; it cannot be good excuse to say that appeal has not been lodged to date for lack of certified typed copies of the proceedings. The delay in lodging the appeal is no doubt inordinate and unreasonable.

9. Even if the respondents had lodged appeal, that of itself would be no excuse for pendency of an appeal does not amount automatically to a stay of a judgment or execution thereof or of its decree. It has not been pleaded that there is a stay of the judgment or of its decree, and therefore there is nothing to stop the applicant from enjoying the fruits of the judgment of 15th December 2006.

10. In view of everything that I have said above, I hereby conclude that there is merit in the application dated 1st July 2014. I do grant the same in terms of prayer 1 thereof. The applicant shall have costs of the application. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE