

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 603 OF 2007

(IN THE MATTER OF THE ESTATE OF FRANCIS MACHARIA KANYUNGU (DECEASED))

WILLIAM MUNYAKA KAMIRI.....1ST APPLICANT

GEORGE MWANGI KIBANGO.....2ND APPLICANT

CHRISTOPHER NJUNJI NDERI.....3RD APPLICANT

VERSUS

DOMINIC WAMUGI MACHARIA.....RESPONDENT

RULING

The applicants have sought to have the grant of letters of administration intestate in respect of the estate of Francis Macharia Kanyungu (deceased) made to the respondent on 3rd June, 2008 and subsequently confirmed on 27th March, 2009 revoked or annulled. They have in that regard filed in this court a summons for revocation of grant dated 13th November, 2009 under **section 76 of the Law of Succession Act** and **rule 44 of the Probate and Administration Rules**.

The main ground upon which the summons is based is that the proceedings out of which the grant was obtained were defective in substance because the land parcel identified as title number **Nyeri/Mweiga/229 (suit property)** which is listed as the only asset in the deceased's estate ceased to exist long before his demise. By listing this property which, in the applicant's view, is non-existent, as an estate of the deceased, the applicants have argued that the grant was thereby obtained by making a false statement or by concealment from court something material to the court and also by an untrue allegation of a fact essential in point of law to justify the grant.

According to the affidavit in support of the summons, the title to the suit property was closed on 14th November, 1984 when the property was subdivided into two separate parcels that were subsequently registered as parcel numbers 520 and 533 respectively. Amongst the documents filed while lodging the petition for grant of letters of administration is the original certificate of official search affirming this status of the suit property. It is the applicant's case that since the deceased died in 1990, long after the suit property had been subdivided into separate parcels and distinctly registered, it could not possibly have formed part of the deceased's estate available for distribution as claimed in the petition and in the certificate of confirmation of grant.

In response to the applicants' contentions, the respondent contended that the alleged subdivision of the suit property and the subsequent registration and transfer of the parcels of land excised from the suit property was fraudulent. In the submissions filed on his behalf, the respondent brought to this court's attention a civil case in the Chief Magistrates' court at Nyeri being civil suit number 339 of 2008 pitting the applicants against the respondent and three other persons over the ownership of the suit property and the validity of the subdivision of that property into separate parcels alleged to have been transferred to the applicants.

In the counterclaim lodged by the respondent and his co-defendants, particulars of fraud in the subdivision, transfer and registration of parcels of land excised from the suit property have been pleaded

and the respondent has sought for cancellation of these subdivisions and registrations; he has also asked for reversion of the title of the suit property into its original state.

Without delving into the merits of the applicants' summons, it is clear that issues in dispute concern such questions as the existence or non-existence of the suit property. The alleged subdivision of the suit property into separate parcels and the ownership of those separate parcels are also questions in dispute which deserve attention. All these questions are pending for determination before another court. The competence of that court has not been questioned; indeed when I retreated to write this ruling I called for the original file in **civil case no. 339 of 2008** and noted that parties herein agreed with the court that the suit which was initially filed in this court could competently be disposed of by the magistrates' court. The suit was accordingly transferred to the magistrates' court on 22nd May, 2008. I also noted from the original record that in exercise of its jurisdiction, the magistrates' court issued an injunctive order on 24th June, 2009 restraining the respondent together with the rest of defendants from entering and committing acts of waste on the parcels of land excised from the suit property until that suit has been heard and determined.

It is apparent, therefore, that the issues emerging from the applicants' summons for revocation or nullification of the grant in respect of the suit property are the same issues which have arisen in the suit they filed against the respondent and in the counter-claim that the respondent has lodged against them.

If this court was to proceed with the determination of this summons and make any determinations in respect of the suit property and the subdivisions thereof, it will certainly pre-empt and probably influence the outcome of the suit before the magistrates' court which as noted, is competently seized of the same issues that this court is bound to deliberate upon if it has to determine the summons before it on merits. That course would appear to me to be improper; subject to the parties' right of appeal, the appropriate course would be to allow the magistrates' court take the evidence of the parties at the trial and pronounce itself on such issues as the legal status of the suit property and the subdivisions thereof before the summons herein can be disposed of. To proceed and determine the summons as if either of the parties is right or wrong when the dispute as to who between them is right or wrong is pending before a court of competent jurisdiction would be out of order.

For the foregoing reasons, the determination of the applicant's summons dated 13th November, 2009 is suspended pending the hearing and determination of the **Nyeri Chief Magistrates' Court Civil Case No. 339 of 2009**. It is so ordered.

Signed, dated and delivered in open court this 13th day of February, 2015.

Ngaah Jairus

JUDGE