



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 293 OF 2011

In the matter of the Estate of NYAGA M'NGANO (Deceased)

EUSEPHIA IGANDU NYAGA.....1ST ADMINSTRATOR/RESPONDENT

DANIEL MURIITHI NYAGA.....1ST ADMINSTRATOR/RESPONDENT

VERSUS

NJERU ZAKAYO.....PROTESTOR/APPLICANT

R U L I N G

The applicant Njeru Zakayo filed summons (General Form) under Rules 49, 63 and 73 of the Probate and Administration Rules Cap. 160 of the Laws of Kenya seeking for orders that there be a stay of execution of orders issued by this court on 28/04/2014 in this cause confirming the grant and in particular distribution of land LR. No. Kagaari/Kanja/3024 pending the hearing and determination of CMCC No. 94 of 2013.

The applicant in his supporting affidavit and on the face of his application avers that he bought LR. Kagaari/Kanja/3024 from the deceased in 1983. The applicant owned LR. Kagaari/Kanja/2442 which bordered LR. No. 3024. He then applied to the land office for combination of the two parcels of land. This process was completed and title of the combined parcels LR. Kagaari/Kanja/3026 issued in the applicant's name.

In the year 2010, the applicant discovered that the parcel No. 3024 was never registered in his name. The applicant filed CMCC No. 94 of 2013 seeking orders for registration of the land in his name. The administrators who were aware of the pending suit have gone ahead and confirmed the grant with LR. No. 3024 identified as one of the parcels for distribution to the beneficiaries. The applicant argues in his submission that if the orders sought are not granted, his suit NO. 94 of 2013 will be rendered nugatory.

The 2nd respondent Daniel Muriithi in his replying affidavit denies that the applicant ever bought any land from the deceased because he has not annexed a sale agreement, land board consent or even transfer form. He avers that there was no combination of LR.2442 and 3024 as alleged by the applicant. He argues that the pending suit CMCC No. 94 of 2013 has nothing to do with LR. No. 3024. That the proceedings before the Land Tribunal Award No. 17 of 2009 were about a boundary dispute between the applicant and the administrators in respect of parcel No. 3025 and 3026 and did not relate to LR. No. 3024. However, he says the combination of LR. 2442 and 3026 was an error which was later corrected. He urges the court in his submissions to dismiss the application.

Both parties filed written submissions in which they expounded their arguments on the grounds relied on.

The background of this succession cause is important and relevant to this application. This cause was filed by the respondents who are widow and son of the deceased on 14/07/2011 where they listed two assets for distribution in the estate. These are Kagaari/Kanja/3074 and 3024. There was a copy of register presented to court at filing stage stamped, received by the court on 14/7/2011 for LR. 3026 measuring 1.21 ha. This parcel was at that time registered in the name of the Applicant Njeru Zakayo Karinge and the register showed that the land was a product of combination of LR.2442 and 3024 executed by the Land Registrar on 25/10/1983.

The applicant in his affidavit states that he bought the land LR. 3024 from the deceased in 1983. He then combined this parcel with his own LR. 2442 and the new number of 3026 came into existence. He was then issued with the title on 25/10/1983 as shown by the copy of register for LR. 3026. A copy of land certificate for the same land in the name of the applicant was issued on 6/4/1984. He also produced a copy of register or LR. No. 2442 registered in his name on 11/4/1975. The register for this parcel was closed on combination and new LR. number indicated as 3026.

The respondent referred to the combination of LR. 2442 and 3024 as an error which was later corrected. The applicant states that he is the one who applied to combine his two parcels of land and was issued with a title. The documents produced by the applicant and the copy of register filed in court together with the succession cause papers leave no doubt that the combination of LR. 3024 and 2442 existed and was evident on the register for many years since 1984. The respondent cannot be heard to deny the combination when he presented to court the copy of register for the combined parcel. Whether it was an error or not as argued by the respondent is a question to be determined in the right forum.

The 2nd respondent has not explained why he presented to the court an erroneous document purporting to distribute land that was not registered in the name of the deceased.

It is not in dispute that there is a suit pending between the applicant and the respondents CMCC No. 94 of 2013. Although the respondent argues that the suit does not relate to parcel No. 3024, the copy of the plaint annexed to this application states the contrary:

Paragraph 8

That the plaintiff subsequently combined his original parcel of land No. KAGAARI/KANJA/2442 and his newly acquired parcel of land No. KAGAARI/KKANJA/3024 and the combined parcel of land No. KAGAARI/KANJA/3026 was registered in the plaintiff's name on 25/10/1983 and a title deed was issued to him on 6/4/1984.

Paragraph 9

That on 27/10/2010, the plaintiff discovered that the Embu District Land Registrar had wilfully neglected to effect registration of parcel of land No. KAGAARI/KANJA/3024 in the plaintiff's name and also fraudulently canceled the subsequent combination of the said parcel with the plaintiff's original parcel of land No. KAGAARI/KANJA/2442.

REASONSONS WHEREFORE the plaintiff prays for judgment against the Defendant jointly and severally for:-

(a) Registration of parcel of land No. KAGAARI/KANJA/ 2442 and KAGAARI/KANJA/3024 respectively.

(b) Costs of the suit.

Dated this 2nd May 2013.

The contents of the plaint demonstrate that LR. Kagaari/Kanja/3024 is the subject in dispute in CMCC No. 94 of 2013 where the respondents are the defendants. This means that the respondents applied for confirmation of the grant and distributed LR. No.3024 knowing very well that a suit involving the land was pending in court. If the grant confirmed on 28th April 2014 is executed, the suit CMCC No. 94 OF 2013 will be rendered nugatory. The applicant has demonstrated the need to preserve the land in issue till the suit between the parties is determined.

I find the application merited and allow it as prayed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF APRIL, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

1. Ms. Muthoni for R. Njeru for Applicant

2. Ms. Ndorongo for Momanyi for Respondent