



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 259 OF 2003

IN THE MATTER OF THE ESTATE OF THE LATE EZEKIEL MUNGAI KAMAU

GEORGE KINYANJUI MUNGAI.....APPLICANT

VERSUS

FRANCIS KINYANJUI MUNGAI.....1ST RESPONDENT

MICHEAL NJENGA MUNGAI.....2ND RESPONDENT

RULING

The 1st respondent, (who is the applicant herein), Francis Kinyanjui Mungai, brought the chamber summons dated 30th January, 2014 praying that the Deputy Registrar of this court be ordered to execute the documents necessary to give effect to the certificate of confirmation issued by this court on 26th May, 2010.

The application is supported by his affidavit and is premised on the grounds that the grant issued by this court was confirmed on 26.5.2010; that the respondent (who is the applicant in this cause), (George Mungai Ng'ang'a) and is a co-administrator with the applicant has prepared and submitted forms to various authorities without involving his Co-administrators and he has become uncooperative and that it is necessary that the Deputy Registrar of this court be given authority to sign the forms which are requisite . for transmission of the properties of the estate of Ezekiel Mungai Kamau and to give effect to the grant.

Francis Kinyanjui Mungai has, *inter alia*, deposed that the other co-administrator (Michael Njenga Kamau) and himself have attempted to execute mutation forms but the respondent has refused to sign the documents. He contends that as co-administrators they have a duty to render a true and just account of the estate of the deceased and to administer the estate of the deceased in accordance with the law. Further that since all administrators need to concur on the proposed sub division and given that two of the co-administrators have already agreed, it is necessary that this court directs the Deputy Registrar of this court to execute the mutation forms on the part of the respondent.

In reply the respondent, George Mungai Ng'ang'a, filed the affidavit sworn on 10th February, 2014. In that affidavit, he has deposed that the suit property (MITI MINGI/MBARUK BLOCK 5/22) was bequeathed to him entirely; that the respondents had their respective portions transferred to them and he cooperated to effect transfer in their favour. Further, that he has met the conditions imposed on him in respect of the suit property, and being the beneficiary of the suit property, he sold a portion of the suit property to the Catholic Diocese of Nakuru. The purchaser engaged a surveyor and subdivided the property into 72 sub-plots, the church space and a grave yard as required of him. He requested the applicants to execute the necessary documents to effect transfer but the applicants refused to execute the

documents claiming he had not curved out the land as per the confirmation. Following the impasse, his advocate moved the court for directions. The presiding judge (Emukule J.) advised that a district surveyor be sent on the ground to establish the factual position on the ground.

Following the advice of the court, the parties recorded a consent to the effect that the district surveyor be sent to the ground.

It is the respondent's case that they appointed a surveyor who visited the land and made his report. In that report the surveyor made the following findings:-

a) That the portion for the church and the cemetery had been curved out and that there was a 9 metres road;

b) That the parcel of land had been sub-divided into 23 plots for the church and the cemetery had been given provisional numbers.

The respondent has explained that after confirmation and filing of the report, the advocates for the respective parties went to court and recorded a consent to the effect that the graveyard be registered in the joint names of the parties. They also agreed that the parcel of land given to the church be transferred and registered in its name. The respondents also agreed to execute transfer documents for him.

Arguing that the plan annexed to the application is bogus and terming it an attempt to re-plan the land after the confirmation by the district surveyor, the respondent has reiterated that the sub-division was done in accordance with the certificate of confirmation.

The respondent also contends that it is the applicants who refused to execute the mutation forms he forwarded to them. For the foregoing reasons, the applicant/respondent urges the court to order the Deputy Registrar of this court to execute the mutation forms annexed to his reply affidavit and not those submitted by the applicant.

Following an order for filing and exchange of written submissions, the advocate for the respective parties filed submissions From the pleadings hereto and the submissions filed in respect thereof, the sole issues for determination are:-

1) Whether the court should direct the Deputy Registrar of this court to execute the documents required to effect transfer of the suit property; if yes,

2) Which documents should the Deputy Registrar Execute?

It IS not In dispute that before the 1st respondent/ applicant brought the instant application, the applicant/respondent had moved the court for similar orders. In the applicant/respondent's application

dated 5th October, 2011 the applicant/respondent had moved the court seeking an order directing the respondents to execute the forms of transfer by transmission of the suit property and in default an order directing the Deputy Registrar of this court to sign the form on behalf of the respondents.

Pursuant to the applicant/respondent's application mentioned above, the parties entered into two consents. The first one was recorded on 24th October, 2011 while the other one was recorded on 20th December, 2012. In the former consent, the parties agreed:-

"The District Surveyor do visit the suit land (MITI MINGI/BARUK BLOCK 5/22) and make a report within (30) days."

Apparently, the District Surveyor visited the suit property and submitted a report as agreed. See annexure GMN 4 attached to the applicant/respondent's replying affidavit. The report of the District Surveyor, inter alia, provided:-

"The applicant (now respondent) parcel number is Miti Mingi/Mbaruk 5/22 1st Respondent's parcel number is **Kiambogo/Miroreni Block 1.2752** 2nd Respondent parcel 1s **Kiambogo/Miroreni Block 1/2753**.

Following the subdivision of Applicant's parcel both church and cemetery have been set aside and connected by a 9m road.

This confirms that the applicant's parcel has been sub-divided into 72 sub-plots and further reflects the church and cemetery as per provisional number as 23 and 16 respectively. The 4m lane is between provisional parcels 17 and 18 hence offering further connectivity to the 1st and 2nd respondents."

In the latter, the parties executed a consent to the effect that:-

"1. That the graveyard with an access road to it be registered in the joint names of George Mungai Ng'ang'a, Francis Kinyanjui Mungai and Michael Njenga Mungai;

2. That Independent Pentecostal Church of East Africa is entitled to 0.202 Hectares and a title be issued in its name to the said acreage at their own cost;

3. That the applicant, (now respondent) is entitled to 3.37 hectares. The same be transferred to the applicant and the co-administrator do execute all the requisite forms to facilitate the transfer."

It is clear from the foregoing consents that the parties hereto had agreed on how to share the suit property.

Although the 1st respondent/ applicant herein claims that the applicant/respondent has refused to cooperate with them in getting the requisite documents executed, it appears that it is the applicants herein who failed to meet their part of the bargain. The report of the District Surveyor presented to court before the parties executed the 2nd consent was categorical that the suit property had been sub-divided as agreed between the parties.

I note that in the instant application the 1st respondent/ applicant is not seeking to set aside the consents herein. That being the case, and since the 1st respondent/ applicant does not challenge the report of the district surveyor annexed to the respondent replying affidavit, I agree with the respondent's advocate that the instant application is res judicata and an abuse of the court process.

Being satisfied that the respondents' have refused to execute the documents required to give effect to the grant herein, I direct the Deputy Registrar to execute the documents submitted by the applicant/respondent in accordance to the consent orders herein.

The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 20th day of June, 2014.

H.A. OMONDI

JUDGE