



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 313 OF 2008

IN THE MATTER OF THE ESTATE OF LOISE WAITHERA STANLEY (DECEASED)

1. LOISE SINTOIYA STANLEY

2. PENINA DOUGLAS

3. HUDSON KAMAU NDUNGU APPLICANTS

AND

1. CHARLES SARUNI KIEYA

2. SAMSON SANKALE KIEYA

3. REBECCA WAIRIMU KIEYA INTERESTED PARTIES

RULING

By way of a Chamber Summons dated 31st August, 2012 the Applicants **CHARLES SERUNI KIEYA, REBECCA WAIRIMU KIEYA** and **SAMSON SANKALE KIEYA** prayed for the following orders

“1. THAT the applicants herein be granted leave to enjoin in this matter as interested parties.

2. THAT the Honourable Court do issue preservation orders to prohibit any dealings whether by subdivision, sale, charge, transfer, lease or in whatsoever manner on the land Title Number

Ngong/Ngong/3209 by the Administrators Peninah Douglas and Hudson Kamau Ndungu either by themselves or their agents, servants, representatives or any other person or body pending the hearing and determination of this application.

4. THAT this Honourable Court do order a temporary stay of execution of the order made on 18th July, 2012.

5. THAT this Honourable Court do set aside and vacate the order made on 18th July, 2012.

6. THAT this Honourable Court do give any such or further orders as may be necessary to enable the ends of justice to be met.

7. THAT costs be in the cause.”

The application was supported by the Affidavit of 'Charles Saruni Kieya' deponed on 3rd August, 2012. The application was opposed by the Interested Parties who are the administrators of the estate of the late **LOISE WAITHERA STANLEY**. A Replying Affidavit dated 6th September, 2012 deponed by **PENINAH DOUGLAS** was filed in court on the same date. On 3rd October, 2012 the Respondents also filed a Preliminary Objection to this application on the basis that the Interested Parties have no *locus standi* in this matter. The application was disposed of by way of written submissions and each of the parties duly filed their submissions in court.

The estate in question under this cause is that of the late 'Loise Waithera Stanley' who passed away on 30th November, 2006 at the age of 56 years. In order to fully comprehend the facts it is necessary to narrate a brief history of this cause. The deceased Loise Waithera was the 2nd wife of the late '**STANLEY KAILOL KIEYA**' who passed away some time back. The late 'Stanley Kailol Keiya' had three (3) wives as follows:

1. Loise Sintoyia Stanley
2. Loise Waithera Stanley (the deceased herein)
3. Rebecca Wairimu Stanley

Amongst the properties left behind by the late Stanley Koilol Kieya was a parcel of land Reference No. Ngong/Ngong/3209 measuring about 2.43 hectares (which is the subject matter in this cause). The Estate of the late 'Stanley Koilol Kieya' was administered by the Public Trustee. Title to Ngong Plot No. 3209 was issued on 14th April, 1999 in the names of all three (3) widows as tenants for life and to hold in trust for the children of the deceased. The Respondents herein are the children of the 2nd wife Loise Waithera whilst the Applicant is a son to the 1st wife Loise Sintoyia.

Following the death of their mother Loise Waithera in 2006 her children Penina Wanjiku Douglas and Hudson Kamau Ndungu with the full consent of their siblings obtained Letters of Administration over the estate of their mother on 23rd October, 2008. One of the assets listed in the petition as belonging to the deceased was a $\frac{1}{3}$ share of Ngong/Ngong/3209 whose value was estimated to be Kshs. 4.0 million. On 17th January, 2011 the grant issued to the two was duly confirmed. The proposed mode of distribution of the estate indicated that the $\frac{1}{3}$ share of Plot 3209 Ngong would be divided amongst all the four children of the deceased in equal shares. On 10th May, 2012 the said administrators filed a Chamber Summons seeking orders for surveyors to sub-divide the plot into three portions of 2 acres each at the expense of the estate. This application was granted by Hon. Justice Muriithi on 18th July, 2012. On 3rd September, 2012 the present application was made seeking the setting aside of the courts orders of 18th July, 2012. The basis for the present application is that the subject property being Ngong/Ngong 3209 is held in trust under the estate of Stanley Kailol Keiya and the Administrators of Loise Waithera Stanley are alleged to have been attempting to sub-divide the same without consultation with and/or consent of all the other beneficiaries of the estate of the late Stanley Koilol Kieya.

The Preliminary Objection dated 3rd October 2012

By way of the Preliminary Objection dated 3rd October, 2012 the respondents averred that

“(i) The Applicants have no *locus standi* to bring the application.

(ii) The Application contravenes the provisions of Section 18(2) Land Registration Act, 2012 and/or Section 21(4) Registered Land Act Cap 300, Laws of Kenya as read

together with Section 5 Civil Procedure Act Cap 21 Laws of Kenya.”

I have carefully considered the submissions made by both counsel regarding this Preliminary Objection. Though it is correct that the present cause relates to the estate of Loise Waithera and whilst it is also true that the Applicant **is not** one of the beneficiaries of the late Loise Waithera, it is a fact that the subject land Plot 3209 Ngong was held in trust by the said Loise Waithera (and the other 2 wives) for **all** the beneficiaries of the estate of the late Stanley Kailol Kieya. The Applicant is the first born son of the late Stanley Kailol Kieya and in that regard has *locus standi* in this matter.

Secondly, the matter before court is not a boundary dispute per se. The issues before the court relate to a trust bestowed on the widows of the late Stanley Kailol Kieya and allegations made of the breach of such trust. This is properly speaking a succession cause. As such the Preliminary Objection is in my view misplaced. I do hereby dismiss the same.

The Chamber Summons dated 31st August, 2012

By this application the Applicant sought to have set aside the orders made in this matter on 18th July, 2014. I have carefully considered the submissions filed in this regard. Whilst the applicant contends that the proposed sub-division was being done without any consultation and/or consent, the documents available indicate otherwise. The affidavit sworn by the respondent Peninah Douglas avers that the sub-division had been the subject of an arbitration before the Elders and Assistant Chief of Olkeri Sub-Location on 25th February, 2012. All three houses were represented at that forum. The 1st wife (mother to the Applicant) was said to be agreeable to the sub-division whilst the 3rd wife Rebecca Wairimu had asked to be awarded a slightly larger position of Ngong Plot 3209 as she had been living thereon for approximately 15 years. The final outcome of this arbitration was the conclusion that all three (3) wives share Ngong Plot 3209 equally without any delay. It was on this basis that a $\frac{1}{3}$ portion was awarded to each house (wife).

The main contention in this matter is the share of the parties in Ngong/Ngong/3209. The Respondents as administrators of the estate of Loise Waithera contend that the share due to her (and therefore the share available to themselves as beneficiaries) is a $\frac{1}{3}$ portion of Plot 3209. I did call for and was availed a certified copy of the Certificate of Confirmation of a Grant in **Nairobi High Court Succession Cause No. 1704 of 1992 - Matter of the estate of Stanley Kailol Kieya**. The Grant was confirmed on 1st April, 1993. It further indicates that the late Loise Waithera was entitled to a 10% share of the estate. All the other beneficiaries (including the applicant) were provided for in various shares. I did examine also the P&A Form 5 in (Nairobi) Succession Cause No. 1704 of 1992. The only immovable asset listed as belonging to the late Stanley Kieya was Plot No. Ngong/Ngong/3209. This is the very same parcel of land which is in issue in this present case. The fact is that plot No. 3209 was distributed in various shares to all the beneficiaries of the late Stanley Kieya as per the schedule attached to the confirmed grant and there appears to have been no challenge by any party to said schedule of distribution of Plot 3209. That being the case this court under the doctrine of '*Res Judicata*' cannot depart from what was already decided. In the circumstances what is available to the respondents is only the 10% share of Plot 3209 assigned to their mother and **not** a one third share as claimed. It is clear that the orders for survey made by Hon. Muriithi on 18th July, 2012 were made erroneously as this previous distribution was not brought to his attention. I therefore set aside the court's order of 18th July, 2012 and I direct that the parties proceed to survey and distribute amongst the beneficiaries of the estate of Loise Waithera **only** the 10% share assigned to her. No order on costs.

Dated and delivered in Mombasa this 24th day of September 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Otieno for Applicants

No Appearance by Respondents

Court Clerk Mutisya