



REPUBLIC OF KENYA

High Court at Embu

Succession Cause 75 of 2011

IN THE MATTER OF ESTATE OF NDEGWA WARUI..... DECEASED

AND

MICHAEL MUTHIKE NDEGWA..... APPLICANT

VERSUS

ALFRED WARUI NDEGWA..... RESPONDENT

R U L I N G

This Ruling refers to two applications dated 3/10/2011 filed by the 1st interested party and the one dated 18/10/2011 filed by the other 4 interested parties. Both applications have been brought under Order 45 rule 1 and 2 Civil Procedure Rules, Rules 60, 63 and 73 of the P&A Rules.

They seek the following orders;

- 1. The Applicants in the application dated 18/10/2011 be enjoined as interested parties**
- 2. That the Court reviews and/or sets aside its orders made on 21st July 2011.**
- 3. The Court to declare that the land L.R. NO. Mwea/Tabere/B/199 does not form part of the estate of NDEGWA WARUI (deceased).**

The applications are supported by the grounds on the face of the application plus the affidavits of Ismail Bakiti and Mary Muthoni Kamau who are interested parties. The main ground is that the said orders were obtained through concealment of material facts to the Court. The Respondent filed a replying affidavit disputing all that has been stated by the Applicants/Interested parties.

Counsels agreed to dispose of both applications by way of written submissions. They all complied. A background to the land known as L.R. No. Mwea/Tebere/199 has been given by each side of the parties. The submissions have been very helpful as they have brought out the issues that are involved herein. Through the affidavits and the submissions it has been shown that this matter has been in Court in different forms. First of all as things stand there are new titles in what used to be known as L.R. Mwea/Tebere/199. There are parties who have titles over this land and these are the interested parties.

I have had a chance to look at Kerugoya Senior Resident Magistrate Succession Cause No.2/99 where the assets in the estate of Ndegwa Warui were listed as;

- 1. Kirinyaga/Marurumo/90**
- 2. Kirinyaga/Gathigiriri/300**

The land L.R. Mwea/Tebere/199 was not among them. It is therefore important for this Court to know why it was not included among the assets. And what prompted the realization in 2011 to have it included after the confirmed Grant had been revoked/annulled? The Kerugoya Criminal Case No.660/10 found **ALFRED WARUI NDEGWA** guilty of transferring this land Mwea/Tebere/199 first to himself and then to others who are probably the interested parties herein. He did so yet this parcel was not among those he was to administer under the confirmed Grant in Kerugoya Succession Cause No.2/99.

By an application dated 28/2/2011 the Respondent herein applied for revocation of grant. This application was heard exparte on 31/3/2011 and allowed, and the Respondent herein granted letters of administration. The Kerugoya Succession Cause was then transferred to Embu High Court which is the current file. The Respondent again filed an application dated 17/5/2011 and appeared on 21/7/2011 by Counsel. He again got exparte orders;

a) Deciding that L.R. Mwea/Tebere/B/199 formed part of the estate of Ndegwa Warui

b) And that the subdivision on the said land was null and void

c) The land Registrar Kirinyaga was ordered to rectify the land's register in respect of LR. Mwea/Tebere/

B/199 to read in the name of Ndegwa Warui as

the rightfully registered proprietor and a title deed

in his name.

d) That the Respondent was granted leave to amend

the schedule of the assets in the petition for grant

of letters of administration for the estate of Ndegwa

Warui to include Mwea/Tebere/B/199.

All these orders were granted exparte. It was never brought to the attention of the Court that there were people living on these subdivisions of the land Mwea/Tebere/199. Had the Court had these facts it could have brought the interested parties on board in order to hear them. Secondly the other cases Embu HCC No.123/2009 and High Court Misc. Cr. No.22/2010 which were ruled on were not brought to the attention of the Court. There are parties who are claiming ownership of this land besides the Ndegwa Warui family. Rules of natural justice as entrenched in the constitution demand that every party should as much as possible be accorded a chance to be heard. The interested parties were not accorded that right by this Court.

Counsels have submitted alot on the issue of resjudicata and the rulings of my sister lady Justice Wanjiru Karanja (as she then was). These are issues that will be dealt with after the interested parties and Alfred Warui have been properly served with the application that led to the orders that were issued on 21st July 2011.

The declaration whether L.R. Mwea/Tebere/B/199 belongs to the deceased's estate or not is a serious issue. All parties herein are laying claim to it and it can only be decided upon after all parties have participated. It would even involve the giving of viva voce evidence so that parties are cross-examined. The record does not show that Alfred was ever examined by the Court on 21/7/2011 as alleged by the Respondent and his Counsel.

Its noted that Kirinyaga County Council has been mentioned severally by all the parties yet its not a party herein. It should be enjoined to shed more light on the ongoings herein.

I therefore grant the following prayers;

- 1. The Applicant's to be enjoined as interested parties herein.**
- 2. The exparte orders issued on 21/7/2011 are hereby set aside.**
- 3. The application dated 15/7/2011 to be served on all parties including Afred Warui. They should file responses within 14 days of service.**
- 4. Owing to the acrimony that appears to exist between the parties herein this Court directs that pending the hearing interparties of the application dated 15/7/2011 there shall be no construction going on, on the disputed property.**
- 5. And finally its noted that this estate in issue falls within Kirinyaga County which falls under Kerugoya High Court. And this being a matter that is not part-heard I hereby transfer it to Kerugoya High Court for hearing and determination. Mention on 6/3/2013 before Hon. Lady Justice C. Githua for further directions.**

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF FEBRUARY 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;

M/s Nyaga for Muide for Respondent

Njue – C/c