



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 445 of 2009

IN THE MATTER OF THE ESTATE OF MWENDA KAINYIRU(DECEASED)

JOSEPH MUTUA MWENDAPETITIONER/RESPONDENT

AND

STEPHEN MURITHI KITHINO.....2ND BENEFICIARY/APPLICANT

PETER KINYUA KIGUNDA.....6TH BENEFICIARY/RESPONDENT

R U L I N G

The applicant STEPHEN MURITHI KITHINO through an application dated 18th June, 2012 brought under Rule 73 of the Probate and Administration Rules, Section 98 of the Civil Procedure Act and Section 80 of the Registration Act, 2012 seeks the following orders:-

1. *Transfer of L.R. No.Nkuene/Mitunguu-Kithino/1339 to PETER KINYUA KIGUNDA, the 6th beneficiary, be cancelled.*
2. *Sub-division of L.R. No.Nkuene/Mitunguu-Kithino/1235 into L.R. No.Nkuene/Mitunguu-Kithino/1338 and 1339 be cancelled to reinstate the original L.R. No.Nkuene/Mitunguu-Kithino/1235.*
3. *Entry No.2 on the register of Nkuene/Mitunguu-Kithino/1235 purporting to transfer the said parcel to JOSEPH MUTUA MWENDA as the person entitled to the said portion of land under intestation Succession(the then R.L.7) be cancelled to reinstate the name of the said JOSEPH MUTUA MWENDA as the personal representative of the estate of the late MWENDA KAINYIRU.*
4. *Production of the original title deed(s) be dispensed with.*
5. *The said JOSEPH MUTUA MWENDA be compelled to sign all the relevant documents to transfer the said L.R. No.Nkuene/Mitunguu-Kithino/1235 to the applicant, STEPHEN MURITHI KITHINO, and in default the Executive Officer of this Honourable Court, be empowered to sign all relevant documents to effect the transfer in lieu of the said JOSEPH MUTUA MWENDA.*
6. *Costs be provided for.*

The applicant's application is based on the grounds on the face of the application being as follows:-

- a) *The applicant is entitled to 2 acres of land per the certificate of confirmation.*

b) The petitioner/respondent is not entitled to any share in the estate.

c) The petitioner fraudulently registered himself as the person entitled to the 2 acres without any approval by this Honourable Court and proceeded to sub-divide it and transfer 1.00 acre therefrom to the 6th beneficiary, PETER KINYUA KIGUNDA.

d) The petitioner/respondent has adamantly refused to collect the balance of the consideration in the sum of Kshs.90,000/- only out of the original sale price of Kshs.340,000/- either from the applicant or his advocate.

The application is supported by applicant's supportive affidavit dated 18th June, 2012 and annexures thereto. It is further supported by applicant's further supporting affidavit dated 7th February, 2013. The application is opposed and the 1st respondent swore an affidavit in opposition to the application dated 30th January, 2013 to which he has annexed several annexures. The 2nd respondent on his part swore an affidavit dated 30th January, 2013 to which affidavit he annexed several supportive documents.

When the application came up for hearing both Counsel made oral submissions in support of their respective positions. The counsel for the respondent filed list of authorities. The court has carefully considered the submissions by both Counsel. It has also considered the pleadings and the nature of the claim and parties opposing positions.

The applicant's case is that he bought 2 acres from the petitioner and paid Kshs.250,000/- leaving a balance of Kshs.90,000/ which was to be paid simultaneously with execution of transfer documents. It is applicant's contention that the agreement had mentioned him as a beneficiary entitled to 2 acres of the land and further that the 1st respondent would subdivide the parent land into 7 portions of land as per certificate of the confirmation of grant of which parcel number 1235 measured 2 acres and to which the applicant was put into possession. The applicant contends that the respondent instead of transferring the land to him, he fraudulently transferred the land to himself and proceeded to subdivide it into two(2) portions of 1 acre each after which he transferred one (1) acre to 2nd respondent who had already been given parcel No.1240 comprising of 1.03 acres as per confirmed grant.

The respondents are opposed to this application, however, it is not disputed that 2 acres of the subject land herein had been distributed to the applicant as per confirmed grant. The 1st respondent however states that as at the date of confirmation of grant of which parcel number 1235 measured 2 acres and to which the applicant was put into possession. The applicant contends that the respondent instead of transferring the land to him, he fraudulently transferred the land to himself and proceeded to subdivide it into two(2) portions of 1 acre each after which he transferred one (1) acre to 2nd respondent, who had already been given parcel No.1240 comprising of 1.03 acres as per confirmed grant.

The respondents are opposed to this application, however, it is not disputed that 2 acres of the subject land herein had been distributed to the applicant as per confirmed grant. The 1st respondent however states that as at the date of confirmation of grant being on 28th September, 2010 the applicant had not cleared the balance of the consideration of Kshs.90,000/-. The 1st respondent contends that after the grant was confirmed, the applicant called him informing him that he was financially strained and that he would not be able to raise the balance of the consideration whereupon they allegedly mutually agreed to rescind their earlier agreement and agreed inter alia that the 1st respondent registers the 2 acres in his name and after such transfer, the land be sub-divided into 2 equal portions of 1 acre each whereupon the 1st respondent was to retain 1 acre and the other 1 acre to be transferred to the applicant. The 1st respondent further contends that the agreement between himself and the applicant in respect of the 2 acres became null and void the moment six(6) months lapsed from the date of sale and confirmation of grant without the applicant having obtained the necessary consent of the relevant Land Control Board to transfer the land into the applicant's name.

The 2nd respondent on the other hand contends of being a lawful owner of 1 acre of land out of parcel No.1239 having purchased the same from the 1st respondent. The 2nd respondent further contends having bought the said parcel of land in good faith as an innocent purchaser for value consideration after conducting a search at the lands office and getting fully satisfied that the land was clear of any encumbrances and duly registered in the sole name of the 1st respondent.

The applicant took issues with the respondent assertions and on the other hand has controverted the respondent's assertions and denied having ever verbally or otherwise agreed with the 1st respondent to reduce the acreage of his land as awarded in the Succession Cause during the time of confirmation of the grant. The applicant has further argued that his claim is based on the terms of the distribution as per certificate of confirmation of grant and that the issue of the Land Control Board consent does not arise and that the issue of the advocate who drew the sale agreement is not relevant as the current Advocates were not involved in the Succession Cause which is the basis of the applicant's claim.

I have carefully examined and considered the pleadings and authorities relied upon by the parties, which authorities deal with claim for land under adverse possession and an issue of the injunction. I find that the authorities do not squarely fall under the matters in issue in this matter. The issue for consideration in this matter as I understand it is whether a party can after confirmation of the grant distribute the estate contrary to the confirmed grant and without the confirmed grant being rectified or amended whether there are or there are no legal issues that he feels denies a beneficiary his already awarded share.

A careful perusal of the certificate of confirmation of grant clearly show that the applicant was awarded 2.00 acres of the subject land. Similarly the 2nd respondent was awarded 1.03 acres out of the subject land. That the 1st respondent was awarded nothing or rather was not entitled to any share of the subject land. The respondents in this application executed consent to the mode of distribution of estate dated 30th August, 2010 before Commissioner for oaths.

The 1st respondent did not thereafter apply for confirmed grant to be rectified or amended. The 1st respondent remained without any share. The applicant denied having rescinded his earlier agreement with 1st respondent reducing his acreage to one acre. The 1st respondent's contention, that after confirmation of the grant, the applicant called him informing him that he would not be able to raise the balance of the consideration remains a mere allegation, as no evidence to that effect was produced nor was there any demand notice issued to the applicant by 1st respondent for the balance of the purchase price. The applicant on the other hand has exhibited a copy of demand letter and a deposit slip calling for the 1st respondent to pick his money being the balance of the purchase price. It is however instructive to note that the demand letter and the deposit slip are dated 6th March, 2012 whereas the sale agreement was made sometimes in the year 2009.

Further from the affidavit in support, it is not clear how 2nd respondent ended up with 1 acre of land since the agreement between him and the 1st respondent was clearly for sale of 0.50 acres. It is important to note that it was submitted on behalf of the applicant that 2nd respondent cannot claim to have bought 1 acre in good faith as he had signed the consent on the mode of distribution of the deceased estate and further that his original land parcel number 1239, which he had already taken possession of was next to applicant's land.

The 2nd respondent as of the time of signing the mode of distribution knew the 1st respondent had no land and he had none that he could offer for sale leave alone selling any land to him. He knew and was deemed to have known his land was 1.03 acres and that of 1st applicant was 2 acres. He was aware of the scheme of distribution very well. The assertion by the applicant that 2nd respondent was not a bona fide purchaser for value consideration without notice remains uncontroverted by both respondents as the applicant's affidavit has not been challenged.

I would agree with counsel for the applicant that the claim in the instant cause revolves on Succession as

opposed to contract for sale of land. That the issue of the legality of the contract though may be valid, ought to have been raised before parties consented to the mode of distribution and before issuance of a confirmed grant. The respondents if were dissatisfied with the applicant having been awarded 2 acres, they should have sought rectification and/or amendment of grant but not to proceeded to fraudulently effect transfer contrary to court order confirming the grant and start raising the issue of the validity of the contract. I find the respondents acted contrary to the laid down procedure of rectifying a confirmed grant and find that they acted wrongfully and unlawfully.

I therefore find the issue of the lack of consent of the Land control Board having not been raised before the confirmation of the grant to be an afterthought and find that it does not arise at this stage. I also find that since the advocates herein were not involved in the Succession Cause the issue of conflict of interest does not arise. The issue raised in the respondent's submissions should also have been raised as a preliminary point of law before the application had been argued by the Counsel but not after the Counsel had made his submissions in full.

I have carefully looked at the authorities relied upon by the parties herein and hold that the same are not applicable in the instant cause as the same involved claim for recovery of land by way of adverse possession and contract for the sale of land respectively whereas this matter dealt with failure to transfer land as per court's confirmed grant.

Under Section 26(1) (a) and (b) of the Land Registration Act, 2012(No.3 of 2012) it is provided:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer of transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a). on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

In view of the above Section certificate of title is to be held as conclusive evidence of proprietorship and shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is absolute owner, and indefeasible owner, and the same shall not be subject to challenge except on the ground of fraud or misrepresentation to which a person is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the instant case the 2nd respondent though registered as a proprietor, he could not explain how he got 1 acre having purchased only 0.5 acres. The 1st respondent on the other hand could not explain how he got applicant's two(2) acres transferred into his name when he had none at all. The only way the respondents could have got the applicants share without court's order rectifying the certificate of confirmation of grant was through fraud or illegal means and I find that both respondents were party to the illegal acts. I find the titles obtained by the respondents were acquired illegally and unprocedurally and the applicant's challenge to the said title is proper and justified.

Under Section 74 of the Law of Succession Act, it is provided for error in the grant to be rectified. The said Section provides:-

74. Errors in names and descriptions, or in setting out the time and

place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

Rule 43 (1) of the Probate and Administration Rules also provides:-

43. (1) Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.

In view of the foregoing no party can distribute the estate contrary to the approved scheme of distribution by court without seeking alteration or rectification or amendment otherwise there would be no purpose of seeking confirmation of the grant. I therefore find the 1st respondent acted contrary to the certificate of confirmation of grant and his acts were not only unlawful but fraudulent.

Section 76 of the Law of Succession Act gives court power to revoke or annul any grant for reasons set out under the said section, which include grant which was obtained fraudulently.

Having come to the above conclusion and the aforesaid stated reasons and specifically having found 1st respondent had not explained how the suit property was registered in his name yet he had not been entitled to any share of the estate of the deceased and the fact that the 2nd respondent and applicant were named in certificate of confirmation of grant as entitled to 1.03 acres and 2 acres of the subject land respectively and that both parties were aware of each other's respective portions, I would be inclined to allow the applicant's application.

I therefore proceed to make the following orders:-

- 1. The transfer of L.R. NO. NKUENE/MITUNGUU-KITHINO/1339 to PETER KINYUA KIGUNDA, the 6th beneficiary be and is hereby cancelled.**
- 2. THAT sub-division of L.R. NO. NKUENE/MITUNGUU-KITHINO/1235 into L.R. No. NKUENE/MITUNGUU-KITHINO/1338 and 1339 be and are hereby cancelled and reinstated to the original L.R. NO. NKUENE/MITUNGUU-KITHINO/1235.**
- 3. THAT the entry No.2 on the Registrar of NKUENE/MITUNGUU-KITHINO/1235 purporting to transfer the said parcel of land to Joseph Mutua Mwenda as a person entitled to the said portion of land under intestate Succession(the then L.R.7) be and is hereby cancelled to reinstate the name of the said JOSEPH MUTUA MWENDA as the personal representative of the estate of the late MWENDA KAINYIRU.**
- 4. THAT the production of the original title deed for the purposes of transfer in accordance with this order be dispensed with.**
- 5. That JOSEPH MUTUA MWENDA do execute and/or sign all relevant documents to transfer the said L.R. NO. NKUENE/MITUNGUU-KITHINO/1235 to the applicant, STEPHEN MURITHI KITHINO, in default of compliance within 21 days from today the Executive Officer of this Honourable Court to execute or sing all relevant documents on his behalf to effect transfer to the said JOSEPH MUTUA MWENDA.**
- 6. The Land Registrar to be furnished with copy of this court's order for his compliance.**
- 7. Costs of the application to the applicant against the respondents jointly and severally.**

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF MARCH, 2013.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mwarania for applicant(absent)
2. Ndubi for respondent(absent)

J. A. MAKAU

JUDGE