



REPUBLIC OF KENYA

High Court at Embu

Succession Cause 122 of 2004

In the matter of the Estate of ALFRED MUGO Alias ALFRED MUGO KABARAGU (Deceased)

HENRY KINYUA KIURA

OBED NYAGA KIURA

DANIEL NDWIGA KIURA &

NEPHATIRERI KIURA.....APPLICANTS

V

ESTHER WAMUCHEKE.....1ST RESPONDENT

NYAGA NYAMU.....2ND RESPONDENT

R U L I N G

This is the Notice of Motion dated 16th October 2012 and brought under Rules 49 and 73 of Probate and Administration Rules for the following orders

- 1. The orders made on 30th March 2011 and other subsequent orders issued in Embu CMCC Award No.54/2010 be reviewed and/or set aside.***
- 2. The Applicants be granted an unconditional right to be heard.***
- 3. The court to invoke Section 45 of the Law of Succession Act and grant any further orders to befit justice and prevent abuse of the process of the court.***

The following are the grounds:-

- 1. The respondents obtained the said orders fraudulently by not disclosing to the Chief Magistrate's Court that the High Court had declared that all dealings in respect to the capital asset of the estate were illegal, fraudulent and irregular.***
- 2. The proceedings to obtain the said orders were a nullity from the onset since the panel of elders did not have jurisdiction to order registration of 1 acre from parcel No. GATURI/NEMBURE/316 to the 2nd respondent hence the panel acted ultra vires.***
- 3. The respondent had initially tried to be registered with the said land in her name and the honourable court reverted back the same to the name of the original owner but the respondent went through the back door to defeat justice.***

4. ***The matter is sensitive since it involves and touches on the applicant's inheritance of parcel No. GATURI/NEMBURE/316.***

5. ***The said orders violate the rules of natural justice which demands that one cannot be condemned unheard.***

6. ***The applicants stand to suffer irreparable loss, expense and/or damage and it is in interest of justice that the court forthwith addresses this matter.***

7. ***If the said orders are not reviewed as per the prayers of the applicants this application may be rendered nugatory and that the intended registration of parcel No. GATURI/NEMBURE/316 will result to immense loss to the applicants.***

The application is supported by the affidavit of Henry Kinyua Kiura the 1st applicant. In it he explains the ongoings in this succession cause and the CMCC Award No. 54/2010 and he has annexed the relevant documents marked HKK 1-5.

The 1st respondent filed a long replying affidavit explaining the circumstances under which she sold the part of the land. She paints a picture of a real destitute. The applicants whom she brought up after their father died do not support her.

The 2nd respondent filed a replying affidavit in which he relies on the award vide CMCC Award No. 54/2010. He further highlights the fact that the land in question belonged to the 1st respondent's husband and she required money for her upkeep hence the sale of the land.

Both counsels filed written submissions by consent, which I have carefully read. The 1st respondent is a widow of the deceased – Alfred Mugo Kabaragu. The applicants are the grandchildren of the 1st respondent while the 2nd respondent is the alleged buyer of the one acre.

My perusal of the record shows that the grant herein was confirmed and a certificate of confirmation issued. **It indicates that the 1st respondent's share in the estate is a “life interest”.**

In fact this court was moved by an application dated 30/7/2010 and discovered that the 1st respondent had transferred the land to herself and new titles issued. The court ordered the titles cancelled and the land was to revert to its original proprietor ALFRED MUGO KABARUGU. A perusal of the record of the District Land Tribunal Case No. 19/2010 shows that the matter was heard after the order of 21/9/2010 by Hon. Justice W. Karanja. I say so because of the observations made by the Tribunal at page 2 of its undated award.

It is therefore clear that the respondents moved to the Tribunal in blatant disobedience of the court orders of the Hon. Judge. The Award in CMCC No. 54/2010 has already been adopted in the said file and a judgment of the court and a decree drawn. There is a process for challenging those orders. This court would not review or set aside those orders *suo moto*.

However the existence of those orders in CMCC No. 54/2010 is in itself a confirmation that there is inter-meddling in that part of the estate. Counsel for the 1st respondent has asked this court to invoke Section 37 of the Law of Succession Act to assist the 1st respondent who is an elderly lady. Section 37 of the Law of Succession Act provides

“A surviving spouse is entitled to a life interest under the provisions of Section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may during the period of the life interest sell any of the property subject to that interest if it is necessary for his own maintenance; provided that, in the case of immovable property the exercise of that power shall always be subject to the consent of the court.”

The case here concerns immovable property. Therefore the power to sell is subject to the consent of the

court. The respondent should move the court as is required.

My finding is that the orders of Hon. Justice. Khaminwa on distribution have not been set aside, reviewed or appealed against. Secondly this court has not been moved by the 1st respondent under Section 37 of the Law of Succession Act for the court's consent to sell any of the property under the life interest.

Coming back to the application before me. Under prayer No. 1 as I have indicated that those are orders in a distinct suit and this court cannot review or set them aside in this Succession Cause.

Under prayer No. 2 this was overtaken by events when both counsels decided to file written submissions. Prayer 4: It acknowledged that there is inter-meddling. The 1st respondent is hereby restrained from disposing of any part of the property LR. NO. GATURI/NEMBURE/316 without express authority of this court. I have seen a copy of the official search "HKK2" showing that there has been sub-division.

It is not clear if any titles have been issued yet. Even if they have been issued they were issued on orders that were contrary to the orders on confirmation of the grant issued herein. The property LR. GATURI/NEMBURE/316 still remains the property of the estate of the deceased as the respondent holds a life interest only. And since I have confirmed inter-meddling, I hereby issue an order of inhibition under Section 68(1) of the Land Registration Act to be registered against the said title and/or the new numbers viz 11973 & 11974 until further orders from this court.

The applicants should move with speed and have the orders of the Tribunal and Embu CMCC Award No. 54/2010 dealt with. The 1st respondent may also make the necessary application in line with Section 37 of the Law of Succession Act.

The application therefore partly succeeds. Owing to the close relationship of the parties, I order each party to bear his/her own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mrs. Mumbi Njuguna for Fatuma for Applicants

Ms. Nyaga for Ndorogo for Respondents

parties present

Njue CC