



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
SUCCESSION CAUSE 160 OF 2011

GODFREY MBUBA KIRAI.....APPLICANT

VERSUS

JULIESTA MARUTA MBUNGU & 6 OTHERS.....RESPONDENTS

R U L I N G

This is the Notice of Motion dated 9/1/2012 brought under Section 7 of the Civil Procedure Act, Order 2 Rule 15(1) (b) and 3 of the Civil Procedure Rules and Rule 93 Probate and Administration Rules seeking an order striking out the main application for being *res judicata*. The grounds being as follows:

(a) The application for revocation of grant is res judicata as the issues raised herein was determined in Embu HCCA No. 14/04.

(b) The instant suit is scandalous, frivolous and vexatious.

(c) The instant suit is an abuse of the Court process.

The same is supported by the affidavit of the 1st Respondent/Applicant. She says this matter arises from a Runyenjes succession Cause No. 7/2003 and Embu HCCA No.14/04 between GEOFREY MBUBA KIRAI (Applicant/Respondent) and JULIESTA MARUTA MBUNGU (1st Respondent/Applicant). The subject was distribution of the estate of the deceased comprising land parcel No. MAGUMONI/MAKUUNI/758 which is the subject matter in the present case. She depones that the Grant has been implemented and the estate distributed to the beneficiaries who have subdivided them into 34 resultant parcels which have been transferred to various persons.

The Applicant/Respondent (Godfrey) in his replying affidavit indicates that he was never informed of the succession proceedings though he had placed a caution on the land. He has a consent for subdivision (GMK 2a & b). Embu HCCA No. 14/04 allowed the Appeal (GMK 3a & b) but the 1st Respondent/Applicant went ahead and subdivided the land creating new titles.

That the Appeal did not conclude the matter. Both learned Counsels for both parties filed submissions which I have keenly studied. This matter raises serious issues which I believe will be addressed as I go through the history.

Godfrey Mbuba Kirai Applicant/Respondent is a brother to the late MBUNGU KIRAI who was a husband to JULIESTA MARUTA MBUNGU the 1st Respondent/Applicant. Godfrey and his late brother had a Civil Suit in Nyeri high Court – HCCC No. 17/85. (Godfrey Mbuba Kirai Vs Mbungu Kirai). Judgment was given in favour of the Plaintiff (Godfrey). A decree was drawn to the effect that the Defendant (now deceased) was to cause the land parcel No. MAGUMONI/MAKUUNI/758 to be subdivided into 2 portions of 20 acres and 6 acres and then 6 acres were to be transferred to the Plaintiff. The Deputy Registrar was to sign all the necessary documents to effectuate the subdivision and transfer of the 6 acres in the event that the Defendant did not.

I have seen an application for consent to the Land Control Board by Mbungu Kirai dated 15/4/1985. And on 25/4/85 the consent was granted (GMK 2a). Even with this consent the said subdivision was not done. On 10/6/1997 MBUNGU KIARI died. The Respondent/Applicant sat with his decree and consent from 1985 – 1997 while the deceased brother was alive. The succession cause in respect of the deceased's estate was not filed until 2003. Still the Respondent/Applicant did not do anything to enforce the decree. When the grant was confirmed and a certificate issued on 18/9/2003 the Applicant/Respondent was served with an application seeking to lift cautions filed by the Respondent/Applicant.

The trial Magistrate heard the application and allowed it. The Respondent/applicant who claimed lack of knowledge of the succession proceedings indicated through his counsel that he would file an application for revocation of grant. This was never to be. Instead he filed an Appeal No. 14/04 for setting aside of the trial Magistrate's orders lifting cautions, inhibition/restrictions. He never applied for revocation of grant. The appeal was allowed on 3/10/2007. The Applicant /Respondent again went and sat to wait.

On 26/7/2010 the Applicant/Respondent filed in application vide HCCA No.14/04 seeking orders that the subdivision of MAGUMONI/MUKUUNI/1622-1628 be reverted to the original number No. MAGUMONI/MUKUNI/1622-1628 be given 6 acres. This is bearing in mind that the Grant had never been revoked/annulled. This application was dismissed with costs on 21/1/2011. The Respondent/Applicant now filed the main application for revocation of grant on 3/5/2011. This is the Application that the Applicant/Respondent wishes to be dismissed for being *res judicata* because all issues have been dealt with.

From my above narrative, it is clear that the issue of the 6 acres of the Respondent/Applicant has never been addressed or determined. The following facts are clear:-

- 1. Juliesta was not a party in the Nyeri HCCC No. 17/85.**
- 2. The decree in the Nyeri case giving the Respondent/Applicant 6 acres was issued on 10/4/85.**
- 3. The Land Control Board gave consent for subdivision on 25/4/85. The Respondent/Applicant never sought the assistance of the Deputy Registrar in case he was having difficulty in executing the decree.**
- 4. The deceased Mbungu Kirai died 12 years after the decree and consent had been given. The Respondent/Applicant chose not to pursue his brother for his 6 acres of land during his life time (12 good years).**
- 5. Even after his brother's death the Respondent/Applicant did nothing until he was woken up with an application asking him to remove the cautions he had placed on the land in the year 2003.**
- 6. The administrator had meanwhile following the order of the trial Magistrate distributed the land to the beneficiaries as there was no order of stay of the orders of the trial Magistrate by the time the Appeal was allowed on 3/10/2007. There was nothing to inhibit.**
- 7. Meanwhile I have noted from the file that there are 33 new titles that have been borne out of the subdivisions. It means there are several persons who have either bought or have been given the new parcels. These people have beneficial interest in the land and Section 93 of the Law of Succession Act protects all such purchasers and beneficiaries.**

All these new owners have not been joined as parties to this suit, as interested parties. Though I do not find this matter to be *res judicata* I do find that the Respondent/Applicant slept for too long on his rights. A number of the persons occupying the suit land are doing so legally by virtue of Section 93 of Law of Succession Act.

I would not want to be seen to be dealing with the main application for revocation but even if the Grant were to be revoked it would not serve any useful purpose as title has changed hands to too many persons many of who bought the land legally. Maybe the best the Respondent/Applicant could do is to claim the 6 acres from the estate as a liability if at all there is any land for him to be given.

It is very unfortunate but that is the truth of the matter and the Applicant/Respondent should know this. In light of the above, the Applicant in the main application should take time and decide whether he still wishes to proceed with his application. The application dated 9/1/2012 is however dismissed.

Each party to bear his/her own costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 21ST DAY OF JUNE 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Muthoni for ithiga for applicant

Applicant present

Respondent present

Njue CC