



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 113 OF 2018

ONESMUS K. MUNGUTI.....1ST PLAINTIFF/APPLICANT

CHARLES M. MANGUU 2ND PLAINTIFF/APPLICANT

FREDRICK M. MATUMU3RD PLAINTIFF/APPLICANT

VERSUS

BENARD MUSYOKA NYALITI1ST DEFENDANT/RESPONDENT

JOSEPHAT G. NJORA.....2ND DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 9th October, 2020 filed by the Plaintiffs/Applicants under certificate of urgency. It is brought under Article 50(1) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. The Applicants seek the following Orders: -

i) Spent.

ii) THAT orders issued by this Court staying proceedings in this matter pending the hearing and determination of Makueni High Court Succession Cause 252 of 2017 be set aside.

iii) THAT the Honourable Court do hereby schedule this matter for hearing.

iv) THAT the costs of this application be provided for.

3. The application is supported by the affidavit of Phanuel Omondi, Advocate for the Plaintiffs, sworn on 9th October, 2020 on behalf of the Plaintiffs. The basis of the application is that the suit property known as Plot No. 803 Ngai Adjudication Section is set to be distributed in Makueni HCSC No. 252 of 2017 yet the question of ownership is pending before this court for determination. That the Applicants were unaware that the Respondents had obtained orders for stay of the proceedings herein vide the application dated 5th September, 2019 pending the determination of the succession proceedings. That the question of ownership of the suit property, which forms part of the estate in the succession proceedings, is beyond the jurisdiction of the probate court. That this application has been at the earliest opportune time and it is therefore in the interest of justice that the application be allowed.

4. The 1st Defendant/Respondent opposes the application vide his replying affidavit sworn on 6th November, 2020. The affiant has deposed therein that the application is misconstrued and an abuse of the court process. That the application is composed of hollow averments. That the suit property Plot No. 803 Ngai Adjudication Section was subjected to distribution after the issuance of a certificate of confirmation of grant on 12th April 2018 vide Makueni HCSC No. 252 of 2017 In the Matter of the Estate of the late Manguu Kiluli Kyano. That pending hearing and determination in the above succession proceedings, is a summons for revocation of grant dated 5th September, 2019 seeking to challenge the inclusion of the suit property as part of the free estate of the late Manguu Kiluli Kyano. That the Applicants have neither challenged the jurisdiction of the High Court in determining the summons for revocation of grant nor have they sought to stay those proceedings. That the dispute herein relates to a boundary as opposed to ownership of the suit property. That the Applicants were aware of the hearing date for the application which sought for stay of these proceedings and that the present application has been made after unreasonable delay. That it is only the High Court which can determine questions on whether the grant was obtained fraudulently owing to misrepresentation of facts or making of false statements.

5. The Applicants and the 1st Respondent filed their submissions in line with court directions issued on 14th October, 2020. In their submissions dated 25th January, 2021, the Applicants submitted that this court is vested with jurisdiction to determine disputes touching on the use, occupation and title to land under Article 162 of the Constitution and Section 13 of the Environment and Land Court Act. That the only asset subject of Makueni HCSC No. 252 of 2017 is the suit property herein and that the outcome in respect of these proceedings will be presented to the succession cause for effectuation. That the Respondents do not stand to suffer any loss since the suit property has not been distributed amongst the Applicants and that they do not mind this Court preserving it pending the hearing and determination of these proceedings. In support of their submissions, the Applicants relied on two sets of authorities namely: -

1) **In re Estate of Solomon Mwangi Waweru (Deceased) [2019] eKLR;**

2) **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR.**

6. In reply, the 1st Respondent submitted that the Applicants have not established sufficient cause to warrant the orders sought being granted. That the suit property has already been distributed after issuance of the Certificate of Confirmation of Grant in favour of the Applicants on 30th April, 2019. That the said Grant was fraudulently obtained by the Applicants and it is only the Probate Court which has power under Section 76 of the Law of Succession Act to revoke the Grant. That the Grant is the subject of a summons for revocation of grant dated 5th September, 2019 pending before the Probate Court and since it is from the confirmed grant that the Applicants derive their *locus standi* to file their claim herein, then the succession cause ought to be determined first. Lastly, it has been submitted that the application was made in bad faith with the aim of delaying the course of justice. The 1st Respondent has relied on the following authorities in support of his submissions: -

1) **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR;**

2) **In re Estate of Kuriamunage (Deceased) [2019] eKLR**

3) **In re Estate of Wycliffe Akhabale Oluanda (Deceased) [2020] eKLR.**

7. Orders for setting aside are within the wide discretion donated by the rules governing the procedure of this court and the Applicants have sought the exercise of such discretion in their favour under Section 3A of the Civil Procedure Act. Thus, the only question to be answered by the Applicants is whether they have demonstrated sufficient cause to merit setting aside of the order staying proceedings in this matter pending conclusion of the succession proceedings.

8. In my inquiry over the issue before me, I perused the Plaintiff and the Statements of Defence filed herein in order to determine the real matters in controversy. Both the Applicants and the 1st Respondent are in a tussle over ownership of the suit property, Plot No. 803 Ngai Adjudication Section. The land was either initially registered in the joint names of their late fathers or under one of their names. I therefore agree with the Applicants' view that the finding of this court regarding the ownership of the suit property, if that will be the issue for trial, will have a bearing towards the application for confirmation of grant before the Probate Court. It is on the backdrop of this position that I must agree with the findings of my learned brother Justice F. Gikonyo in **re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** wherein he stated as follows:

“...I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement, Environment and Land Court does. It is the court which is constitutionally mandated to determine such matters... The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.”

9. From the above, it must be noted by the Applicants that the Probate Court will not proceed blindly to distribute the estate of a deceased person when the identity of that property has not been ascertained. Accordingly, if there were issues of fraud in the presentation of the application for confirmation of grant by the Applicants in Makueni HCSC No. 252 of 2017, then that ought to be determined first before I can hear the parties on their dispute herein.

10. I accordingly dismiss the application with costs to the 1st Respondent.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 29TH DAY OF JUNE, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi