



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. E252 OF 2020**

**ELIZABETH WANJIRU MWANGI**

**(Suing as the administrator of the Estate of PAUL MWANGI NDERITO.....PLAINTIFF**

**VERSUS**

**IRENE MUGURE NDEITU.....1<sup>ST</sup> DEFENDANT**

**BERNARD NDERITU MWANGI.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS, NAIROBI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant is one of the administratrix of the estate of the late Paul Mwangi Nderito (Deceased). The 1<sup>st</sup> Defendant was the wife of the deceased. The 1<sup>st</sup> Defendant/Respondent is the Applicant's daughter and is a co-administratrix of the Estate of the deceased . The 2<sup>nd</sup> Defendant/Respondent is the son to the Applicant.

2. The deceased died leaving a written will in which he bequeathed his properties to the beneficiaries named in the will. The Applicant and the 1<sup>st</sup> Respondent applied for a grant of probate in HCSC No.759 of 2010. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents consented to confirmation of grant of probate . After the confirmation of grant of probate, the Applicant made an application in the succession cause in which she sought for a mandatory injunction seeking that she be registered as owner of Nairobi/Block 209/9673 and Dagoretti/Riruta/S645.

3. The Judge who heard the application in succession cause ruled that as there was no proof that LR No. Nairobi/Block 209/9673 and LR Dagoretti/Riruta/S645 were in the name of the deceased, the issue of their ownership could only be determined by the Environment & Land Court. LR No. Nairobi/Block 209/9673 is registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the same having been transferred to them by the deceased on 17<sup>th</sup> August 2001. LR Dagoretti/Riruta/S645 is registered in the name of the Applicant and the 1<sup>st</sup> Respondent.

4. The Applicant filed a notice of motion dated 30<sup>th</sup> October 2020 in which she seeks the following orders.

**1. Spent**

**2. That the conservatory orders be issued restraining the Defendants, their servants, agents, assignees, or anyone acting under their authority, from transferring, disposing of, alienating, charging, or in any manner whatsoever dealing with or interfering with the Plaintiff's quiet possession of the properties known as Nairobi/Block 209/9673 & Dagoretti/Riruta/S645, pending the hearing and determination of this application.**

**3. That a declaration be and is hereby issued that the property known as Nairobi/Block 209/9673 & Dagoretti/Riruta/S645 were at all material times to these proceedings comprised in the Estate of Paul Mwangi Nderito (Deceased) and were registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to hold in trust for him and, subsequently, for his estate.**

**4. That a mandatory injunction be issued requiring and directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to forthwith transfer the properties known as Nairobi/Block 209/9673 and Dagoretti/Riruta /S645 to Elizabeth Wanjiru Mwangi.**

**5. That further and in addition to prayer number 4 above, an order be issued directing the Registrar of Lands to forthwith transfer and register the properties known as Nairobi/Block 209/9673 and Dagoretti/Riruta/S645, to the name of the Plaintiff**

**Elizabeth Wanjiru Mwangi.**

**6. That such further or other orders as are appropriate for the effective administration of justice be issued.**

**7. That the costs of these proceedings be provided for.**

5. The Applicant contends that LR No. Nairobi/Block 209/9673 and Dagoretti/Riruta/S645 which were described in the deceased's will as Kileleshwa House and Dagoretti House respectively were bequeathed to her and that since the same had been registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Dagoretti property in her name and that of the 1<sup>st</sup> Respondent, the said properties are held in trust for the estate of the deceased and that as the deceased bequeathed them to her, she should be registered as the owner thereof.

6. The Applicant further contends that the 1<sup>st</sup> Respondent has threatened to evict her from the Kileleshwa property and that the titles to the properties of the deceased were stolen from the safe in Kileleshwa house which is a matrimonial property and that the 2<sup>nd</sup> Respondent has since confessed to stealing the title documents. It is on this ground that she is seeking injunctive orders to preserve the two properties.

7. The Applicant argues that the court should grant the mandatory orders which she is seeking as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have already consented to confirmation of grant of probate in which she is named as the sole beneficiary of the two properties. The Applicant further argues that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' lawyer had started the process of transferring the two properties in issue only that the process could not be carried through as the 1<sup>st</sup> Applicant was making unreasonable demand of cash payment before she could sign transfer.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed the Applicant's application based on a replying affidavit sworn on 8<sup>th</sup> March 2021. The Respondents contend that there is nowhere in the will it is said that the properties were held in trust for the deceased. The Respondents have denied any partial transfer of any of the disputed properties as alleged by the Applicant. They argue that the consent to confirmation of grant of probate did not in any way take away the rights of the registered proprietors of the properties in dispute.

9. The Respondent further contend that no one can bequeath a property which does not belong to him to a third party and that a will does not supersede a legally registered document. The Respondent further argue that there was no follow up of the alleged theft of title documents with the police and that the Applicant is out to soil their names. The Respondents complain that the Applicant has barred them from accessing the properties in issue yet they are children of the deceased and that there can be no grant of final orders at interlocutory stage.

10. In a further affidavit sworn by the Applicant on 12<sup>th</sup> March 2021, the Applicant contends that the 1<sup>st</sup> Respondent has committed perjury for which she should be punished in that in the succession cause, she swore to matters which she has now completely contradicted. The Applicant further contends that she did not press any criminal prosecution against the 2<sup>nd</sup> Respondent because she is his mother.

11. I have gone through the Applicant's application as well as the opposition to the same by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I have also gone through the submissions by the parties herein. The issues which emerge for determination are firstly whether the Applicant has demonstrated that she has a prima facie case with probability of success and secondly whether the mandatory orders sought should be granted at interlocutory stage.

12. There is no doubt that there is bad blood between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This is clear from the tone in the averments in the affidavits and even in the submissions. The Applicant is being accused in the submissions of forum shopping even when it is clear that she came to the Environment and Land Court after the Family Division of the High Court stated that it did not have jurisdiction to address the issue of ownership of the two properties in issue.

13. There is no contention that the Kileleshwa property is solely registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Though the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had consented to confirmation of grant of probate, they appear to have changed their minds. This property was bequeathed to the Applicant in the will of the deceased. This is the case with the Dagoretti property which is in the Applicant's name and that of the 1<sup>st</sup> Respondent.

14. There is real danger that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents may want to deal with the Kileleshwa property as they wish. There is affidavit evidence which is not controverted that this is the matrimonial home of the Applicant. Should the Respondent decide to even charge or sell it, the Applicant will suffer loss which may not be compensatable in damages as she has lived in the property for over five decades. Even the balance of convenience favours her in that she is residing in the property which has already been bequathered to her.

15. It is therefore clear that injunctive orders should be granted to preserve the property. Whether the Applicant has chosen to call what she seeks as conservatory orders, this is neither here nor there as it is clear that she has moved the court under Order 40 of the Civil Procedure Rules. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot therefore be heard to argue that conservatory orders cannot be given where the issues concern private citizens and not public bodies.

16. On the second issue, this is not a clear case where mandatory orders should be granted. There is need to interrogate in what context the deceased transferred the properties to the Respondents and the Applicant and how in a will, this position changed. There is also need to interrogate whether indeed the deceased had started the process of getting back his properties as alleged by the Applicant or not. This is therefore no case where mandatory orders can be granted as sought by the Applicant. I therefore decline to grant prayers 3,4, and 5. I grant prayer 2 of the Application dated 30<sup>th</sup> October 2020 until hearing and determination of this suit. As the parties herein are related, I direct that each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JUNE 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of :-

Mr Thuo for Defendant/Respondent

Court Assistant: Okumu

**E.O.OBAGA**

**JUDGE**