



Atieno & another v Land Registrar Kisii County & 2 others (Succession Cause 13 of 2004) [2024] KEHC 1104 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 13 OF 2004
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

**MATHILDA ATIENO & ANOTHER & ANOTHER & ANOTHER & ANOTHER
& ANOTHER & ANOTHER & ANOTHER APPLICANT**

AND

**LAND REGISTRAR KISII COUNTY 1ST RESPONDENT
LAND REGISTRAR KISII COUNTY 2ND RESPONDENT
LAND REGISTRAR KISII COUNTY 3RD RESPONDENT**

RULING

1. The application herein relates to a matter which is purely administrative. The respondent in this matter is not a beneficiary of the estate but a public servant duly appointed under Section 12 of the [Land Registration Act](#). The said section provides as follows: -

“Appointment of officers. 12.

- (1) There shall be appointed by the Public Service Commission, a Chief Land Registrar, and such other officers who shall be public officers as may be considered necessary for the effective discharge of functions under this Act.
- (2) Any officer appointed under this Act shall be competitively recruited and vetted by the Public Service Commission.”

2. The registrars have powers under Section 14 of the [Land Registration Act](#), as doth: -

“General powers of Land Registrars.



14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—
 - a. require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
 - b. summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;
 - c. refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;
 - d. Cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and
 - e. Order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.

3. The registrars also have discretions on matters they administer. The discretion must at all times be exercised judiciously. The bottom line is that they have statutory and quasi-judicial powers. This is what is being challenged in this case.

Background

4. The deceased herein died on 10/7/1983, 41 years ago. He was aged 80 years. It is not until 23/1/2004 that the dependants sought to have the estate administered. Grant herein has been pending since 2004. Annexed to the initial court document was a search over land parcel number Daraja Mbili/532. This shows that there was a restriction arising from civil Appeal number 34 of 1979. The registrar was informed through a letter ref. number KSI/HCCA NO. 34/1979.
5. In short there was in situ a judgment burdening the only land parcel number Daraja Mbili/532. The matter proceeded at a snail's speed. It is not until 13/6/2018 that the grant was confirmed.
6. Hitherto, there was an order issued by a judgment dated 21/10/2013 revoking a title issued to the respondent/ petitioner. Maurice Odero Koko had made an application for inclusion of the children of the deceased, Margaret Ouko and Maurice Odero in addition to Monicah Odhiambo who was the original petitioner.
28. Another application was filed by Fred Omwoyo Bakora. The same was dismissed. A subsequent application for review anchored on section 93 of the *law of Succession Act* was



dismissed. Without stating so, the court echoed the words of Lord Denning, M.R. in *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, when delivering the opinion of the Privy Council at page 1172 (1) as doth;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

7. As fate would have it, Maurice Odero Okoko died on 31/12/2014. He was somehow replaced with Mathilda Atieno Odero and Joyce Adhiambo Bogita. Monica Adhiambo and Margaret Okoko disappeared from the scene. Given the magic with which the original petitioner and her sister disappeared and were replaced by the dependants of the objector, it is not surprising that the current application is made.
8. It is clear beyond peradventure that from the proceedings the person who dealt with the parcel of land LR Central Kitutu/Daraja Mbili/ 532 was Monica Adhiambo. Any gazettelement will alert her ad her family of the fraudulent confirmation of grant.
9. As a result, when the new administrators found a way of circumventing the confirmation of grant, they applied to be brand new registered owners. The registrar objected to the same and required the original title deed. The applicant could not produce the same without giving away the fact that they shortchanged Monica and Margaret. They proceeded to file this application.
10. The Application sought the following orders: -
 - a. This court e pleased to issue an order compelling the land registrar Kisii county, to comply and effect the terms of the certificate of confirmation of grant. Issued to the Applicants on 13/6/2018
11. They were wondering whether the registrar was a stranger in jerusalem. How dare he demand for a title deed issued way back in 2008. They state that they are not in possession of the title deed and do not know who has.
12. It is true that they are not in possession of the title deed. However, it is not true that they do not know who has the title. The title was fraudulently transferred in 2005 and the court revoked the grant and titles arising from subdivision. The best person to explain should be Monica Odhiambo if she is alive.
13. If the applicants cannot know the whereabouts of the tile, what remains is not to compel the registrar register the grant but to gazette loss of the tile. The respondent relies on regulation 21(1) and (2) of the [Land Registration Act](#).
14. I need not go into the details in view of the findings I have made.
15. The respondent is said not to give a reasonable explanation. This was supported by the affidavit of Mathilda Atieno Odero. She laments that the respondent is demanding the surrender of the original titled issued to the Deceased on 5/5/1978. The Applicants state they are not in possession of the same and do not know its whereabouts. To them the original title deed is now a piece of paper without any valuable consideration. So they think.
16. The Land Registrar, though Oswera Cecilia Hamet filed an affidavit dated 8/6/2022. They state that the application for transmission was made on 14/9/2020. They reviewed the application and noted



that the original Title deed issued to the deceased was not attached pursuant to regulation No. 57(1) and (2) (c) of the land Registration. (General (Regulations) 2017.

17. It is her case that the applicant's ought to pursue steps under Section 3 of the Land Registration Act as read with Regulation 27(1) and 2 of the land Registration Regulations, 2017. They urged me to dismiss the application.
18. A further affidavit was sworn by Nyaenga Moraa Lydia an advocate acting for the parties. I shall disregard the same totalling at this is a contentious matter and an advocate has no right in succession proceedings to swear an affidavit. It is only the administrators who have a right to do so. The Applicant filed lengthy submission. They state that Regulation 21 (ii) and 2 of the Land Registration General Regulations, 2017 relate to the proprietor not a deceased. They state that the Applicants are not enjoined to inform members of the public.
19. The Respondents filed submission on 4/7/2023. They reiterate the section 14 (1) (1) a and c and regulations hitherto referred to. They state that the notion that Regulation 27(1) and 2 relates to registered proprietors only is misguided. They urged me to dismiss the application.

Analysis

20. The application is of the nature compelling performance of a statutory duty. By that very nature, the application must fall as an order of mandamus cannot, be issued in succession cause.
21. Secondly, the Administrators are the proprietors of the suit land. Having submitted and taken over the position of the deceased. Even for argument purposes, if the title was issued 40 plus years ago, how many other rights has the title accrued. How many prescriptive rights could there be. Is there a possibility that this land was sold and is in the hands of a buyer or Monica Adhiambo?
22. All these point to the *raison d'être* for informing the public for the loss. This is to protect the public form dealings involving the title.
23. Regulation 57 provides as doth: -

“ 57.

- (1) A transfer by a personal representative to a beneficiary under section 61(2) of the Act shall be in Form LRA 42 set out in the Sixth Schedule.
- (2) A transfer under paragraph (1) shall be supported by –
 - (a) a copy of the grant of letters of administration or the grant of probate, duly certified by the Court;
 - (b) a copy of the certificate of confirmation of the grant of letters of administration or a grant of probate, duly certified by the court;
 - (c) the certificate of title or the certificate of lease of the parcel;
 - (d) where applicable, a land rent clearance certificate;
 - (e) a land rates clearance certificate;
 - (f) where applicable, the consent of the head lessor;



- (g) any other consent required for registration unless a particular consent has been endorsed on the instrument of transfer; and
- (h) any other document as may be required under the Act, these Regulations, or any written law.”

24. Reading the two, it is clear that there can be no transfer without the original title being surrendered. The administrators must take steps and informs the public as required under Regulation 21 and 27 of the loss. Regulations provides as doth:-

“ 27.

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- (1) A person whose instrument is lost, destroyed or misplaced shall apply for a replacement inform LRA 12 set out in the Sixth Schedule and the application shall be supported by such evidence as is required under Section 33 of the Act.
- (2) Upon receipt of an application under paragraph (1), the registrar shall, by a notice in the Gazette inform LRA 13, notify the public of the loss, destruction or misplacement.
- (3) Where an instrument that has been lodged at a registry is lost, destroyed or misplaced, the Registrar shall notify the registered proprietor, in writing, of such loss, destruction or misplacement for purposes making an application under paragraph (1).”

25. In the circumstances the application is bereft of merit and is dismissed in limine with costs of 20,000/= . These amounts must paid and indicated as a lien on the suit land till paid.

26. Before I depart, it is noted at tendency to get short cuts in the land registry by failing baseless applications in the succession cause. She states or Land Registrar should never be a party in a succession cause. Matters handled under succession and probate matters must relate to the beneficiary’s meddlers and objection. An application to compel performance of a duty must proceed by way of mandamus.

27. Worse still the applicant got the grant in their names without regard to the other two dependants of the deceased, namely: -

- a. Monica Adhiambo
- b. Margaret Ouko

28. In order to avoid hardship, I direct that the confirmed grant shall be revoked. In lieu thereof, a new confirmed grant shall be issued distributing land parcel number Central Kitutu/ Daraja Mbili/532 equally among Margaret Ouko, Maurice Odera Okoko (Deceased) and Monicah Adhiambo. if any of the parties is deceased, their share shall be registered in the names of each of the deceased’s estate and succession carried in the respective estates.



29. The registrar is directed to strictly adhere to the regulation ensuring that the Administrators produce the original title deed, in default to have the same gazetted and advertised as per law required.

Determination

30. In a nutshell I make the following determination: -
- a. The application dated 25/1/2022 lacks merit and is dismissed in *limine* costs of 20,000/= to the Respondent which shall be a lien on the land and should be paid before transfer.
 - b. In order to avoid hardship, I direct that the confirmed grant is hereby revoked. In lieu thereof, a new confirmed grant shall be issued distributing land parcel number Central Kitutu/ Daraja Mbili/532 equally among Margaret Ouko, Maurice Odero Okoko (Deceased) and Monicah Adhiambo. If any of the beneficiaries, is deceased, their share shall be registered in the names of each of the deceased's estate and succession carried in the respective estates.
 - c. The revoked certificate of confirmation of grant be surrendered within 15 days to the court for destruction failing which the administrators shall stand removed without affecting the distribution that I have ordered.
 - d. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Bosire Gichana & Co. Advocates for the Applicants

M.G. Ndiritu Counsel for the Attorney General

Court Assistant - Brian

