



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C 32 OF 2020

JULIA MUTHONI MBURU.....APPLICANT/PLAINTIFF

VERSUS

SAMMY MUIRURI GITAU.....1st RESPONDENT/DEFENDANT

JOHN WAINAINA GITAU.....2nd RESPONDENT/ DEFENDANT

RULING

1. The Applicant moved this Court vide the Notice of Motion dated 8/3/2021 for orders:

a) That the District Registrar Murang'a be ordered and/ or authorized to remove/ lift the prohibitory order lodged on 14/11/1969 and the restriction lodged on 1/8/2003 on the land parcel number LOC.7/ ICHAGAKI/635 (suit land).

b) That the Defendants/ Respondents to pay the costs of the application.

2. The application is founded on nine grounds and Supporting Affidavit sworn on 8/3/2021 by the Applicant, Julia Muthoni Mburu. It is the Applicant's averments that she is the Administrator of the estate of Gitau Murage, the registered owner of the suit land. That vide Nairobi succession cause No. 791 of 2004, the Estate of the deceased was distributed as per Certificate of Confirmation of Grant dated 2/6/2011. That transmission has not been effected due to existing registered restriction and prohibition. That the foregoing registration was as a result of orders from Murang'a SPM No. 112 of 2003 and Nairobi Civ. No. 2 of 1969 respectively.

3. The Applicant contends that SPM No. 112 of 2003 was dismissed for want of prosecution whereas Nairobi Civ No. 2 of 1969 could not be traced. That due to the occurrence above, the registrations has no legal purpose and ought to be removed. It is further her contention that the Respondents are not willing to remove the registrations and have reason for their refusal.

4. The application is opposed.

5. The Respondents filed their Replying Affidavit sworn by the 1st Respondent, Sammy Muiruri Gitau who deponed that the succession cause was commenced without their knowledge. That the Applicant being the granddaughter of the deceased, did not have the locus to take out the letters of administration in their place. That the Applicant took out the letters of administration so as to deprive them their entitlement to Maragua Ridge Settlement Scheme No. 56. Further that the Applicant has caused sub-division of the foregoing land at the exclusion of other beneficiaries. They oppose the removal of the registration until their interest on Maragua Ridge is determined. He posits that the succession cause was previously filed by his late brother who died before letters were issued. That the Applicant then secretly applied to be enjoined in the succession cause and took out the letters of administration.

6. Parties elected to argue the application orally. The Applicant submitted that a caution was registered in 2003 and removed in 2008. That the estate of David Gitau has not been sub-divided due to an existing Court order registered in 2014. It was her submissions that the Defendants do not want her to benefit from her grandfather's estate despite not filing any petition over the estate. Further that she is entitled to her father's estate who died in 2004.

7. The 1st Respondent submitted that he did not intend to remove the caution until he knows the position of Maragua Ridge which is a family land. He told the Court that the Applicant fraudulently obtained the grant of Letters of administration of the Estate of Peter Gitau. Additionally, that the Applicant obtained a grant in respect of cause no. 791 of 2004 instead of cause no. 146 of 1996 which her father had filed. He concluded by submitting that the Applicant was not a truthful person and should not benefit from cause 791.

8. The 2nd Respondent submitted that he is opposed to the removal of caution for the reason that the land, Maragua ridge, belonged to his father. That the parcels of land belonged to their deceased father who purchased them from chief Gatitu.

9. It is not in dispute that the Applicant and the Respondents are related and are all beneficiaries of the estate of Gitau Murage. Also that the Applicant's father, David Mburu Gitau, deceased was a brother to the Respondents. A perusal of the records indicates that David Mburu Gitau took out letters of administration in respect of his deceased father's estate in Murang'a Succession Cause No. 149 of 1996. The Grant was confirmed and the objectors therein moved the high Court to challenge the grant in Nairobi Succ No. 791 of 2004.

10. On 2/6/2011 the High Court revoked the grant and appointed JULIUA MUTHONI MBURU, HANNAH WAMBUI MBURU and GACHICHI GITAU as Administrators of the estate of GITAU MURAGE. The grant was subsequently rectified vide the ruling delivered on 12/10/2018 making the Applicant herein the Sole Administrator. There has been preferred no Appeal in respect of the rulings. Section 79 of the Law of Succession Act vests the property of the deceased on the Applicant herein and is mandated to distribute the estate in accordance with the grant.

11. There is no record of the proceedings in Civil Suit No. 2 of 1969 to enable this Court to establish the purpose of the registration of the prohibition. According to the title deed extract attached to the application the prohibition was registered on 14/01/1969.

12. With respect to the restriction, the same was registered on 1/08/2003 pursuant to Murang'a SPM No. 112 of 2003. None of the parties has given details to the facts founding the suits or to the specific registrations. From the application it appears that the estate of Gitau Murage has not been distributed.

The Applicant remains the bona fide Administrator of the estate of Gitau Murage having been duly appointed by the Court which order has not been challenged. The Respondents have opposed the removal of the registrations on the basis of an existing trust. To this end, it is my considered view that the issues for determination would be;

- a. Whether the honorable Court should consider the issue of trust.
- b. Whether the Prohibitory orders lodged on the suit land on the 14/1/69 and 1/8/03 should be removed.
- c. Who shall pay the costs.

13. On whether the honorable Court should consider the issue of trust. The suit property is LOC. 7/ ICHAGAKI/ 635 whereas the property on purported trust is the Maragua Ridge. From the record the Maragua ridge property is registered as MURANG'A/ MARAGUA RIDGE/ 56 registered in the name of David Mburu Gitau. The Respondents contend that the property was registered in the name of David to hold in trust for his siblings. The 2nd Respondent told Court that the maragua property belonged to their deceased father and he did not want the Applicant to benefit from the property, the reason was not told.

14. This Court is alive to the judgment of the High Court of 2/6/2011 which ordered as follows "That the assessment of the evidence on the record has found that plot No. 56 Maragua Ridge is not family property and was not held under trust for the benefit of the entire family as claimed for the reason given and for this reason it is not available for distribution" Against any shadow of doubt the issue of trust was dealt with by the Court. If the Respondents have an issue with the Maragua Ridge property, they had the option to challenge the order of Court but failed to do so.

15. Order 7 of the Civil Procedure Rules provides;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially an issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

(See Nairobi Civ App No. 107 of 2010 Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR). There being no Appeal or an application challenging the order this Court is bound by the orders.

16. On whether the registrations should be removed, this Court notes that the property in dispute is Maragua Ridge and not the suit property. Part seven of the Land Registration Act allows interested parties to any land to register dispositions or restrictions thereon. On restrictions, Section 76 of the Land Registration Act provides:

(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

(2) A restriction may be expressed to endure—

(a) For a particular period;

(b) Until the occurrence of a particular event; or

(c) Until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or

charge is restricted.

17. The impugned restriction was registered on 1/8/2008 subject to a Court order in Murang'a SPM No. 112 of 2003. It was a term of the order that registration "restraining any dealings until case is finalized" "The above excerpt provides that a restriction shall be held for a certain period or until the occurrence of something. In the present case, it was to exist until the determination of the suit. The Applicant has attached a copy of an order issued on 25/2/2021 which indicates that the suit was dismissed for want of prosecution.

18. The effect of the dismissal was that the suit was finalized. The Court of Appeal in Civ App No. 29 of 2015 **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR** held that

"a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed".

19. There is no evidence that the orders were set aside and the Respondents did not raise an issue on this.

20. As it is the matter was finalized and in the strength of the wordings of the Court in the restriction the same terminated. In Nakuru Misc App No. 331 of 2016 **David Macharia Kinyuru v District Land Registrar, Naivasha & another [2017] eKLR** It will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.

21. It is also the finding of the Court that the Respondents were actually Defendants in SPMCC No 112 of 2003 and there is no evidence that the orders of the Court dated the 12/8/2008 have been set aside vacated and or appealed.

22. In view of the Court orders dismissing the case, it is the finding of the Court that the prohibitory orders registered as entry No 3 on the 1/8/03 is now spent and should be removed.

23. On the question of prohibition, according to the copy of the green card, it was registered on 14/1/69 subject to Nbi civil suit no. 2 of 1969. The Applicant has informed the Court that the file cannot be found. There are no details of this case presented to the Court. The entry reads;

"Prohibitory order (civil suit 2/69)"

24. An inhibition is defined under the Land Registration Act to mean prohibition. Section 68 provides:

(1) The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the Court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

25. Section 70 of the Land Registration Act provides that an inhibition shall not be cancelled except; at the expiration of the time stated in the inhibition; proof of satisfaction of the Registrar of the occurrence of an event stated in the inhibition; and by a consequent order of the Court.

26. The purpose of a prohibitory order is to preserve a property and it takes the nature of injunctions. (**See Embu ELC no. 324 of 2015 Dorcas Muthoni & 2 others v Michael Ileri Ngari [2016] eKLR**).

27. The order as lodged on the register, on the face of it, does not explain what it was prohibiting and for how long. The terms of the said prohibition were not disclosed.

28. The reason why the Respondents have advanced is that the prohibition should not be removed until their entitlement to the land at Maragua Ridge is determined. This issue was settled by the judgement of Justice R N Nambuye dated 2/6/2011 where the Court stated as follows;

"the assessment of the evidence on record has found that plot 56 Maragua Ridge is not family property and was not held under trust for the benefit of the entire family as claimed for the reasons given and for this reason it is not available for distribution".

29. I have perused the said Judgements dated 2/6/2011 and the Ruling dated 12/8/2018 and it is crystal clear that the said Respondents fully participated in the proceedings. It is therefore not true that the Applicant secretly caused herself to be appointed as an administrator of the estate.

30. According to the said judgement of the Court the suit land is to be distributed to Gachichi Gitau, John Wainaina Sammy Muiruri and Hannah Wambui Mburu. The Respondents are therefore beneficiaries of the suit land. In any event there is no evidence that the prohibitory

order No 2 on the register is in their favour.

31. The Respondents have not demonstrated any prejudice that they will suffer if the prohibition is removed. They stand to benefit from the distribution of the estate as per the Court orders in Succ cause No 791 of 2004.

32. Be that as it may, it is the view of this Court that leaving the prohibition on the title for a period in excess of 50 years is unjust. The injustice is such that the administrator is being hampered from distributing the estate of the deceased. Leaving the prohibition to subsist will continue to cause more injustice to the estate and its dependents, the Respondents included. A prohibition being an encumbrance on the land cannot last in perpetuity.

33. Empowered by section 70 (d) of the Land Registered Act and for the reasons given above I find that this is a case that the Court can and will properly exercise its powers to meet the ends of justice.

34. In the end I grant the application in its entirety.

35. Parties are related and therefore order that each to meet the costs of the application.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF JULY, 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Applicant: Present in person

1st Defendant/Respondent: Present in person

2nd Defendant/Respondent: Present in person

Court Assistant: Alex