



In re Estate of Ali Karisa Wanguma aka Ali Mohamed (Deceased) (Succession Cause 424 of 2013) [2024] KEHC 4925 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 424 OF 2013**

**G MUTAI, J
APRIL 9, 2024**

BETWEEN

**KADZO KARISA CHENGO 1ST APPLICANT
DAMA KARISA CHENGO 2ND APPLICANT
KHAMIS KARISA CHENGO 3RD APPLICANT
ALI KARISA CHENGO 4TH APPLICANT
FATUMA KARISA CHENGO 5TH APPLICANT
SUING FOR AND ON BEHALF OF THE ESTATE OF KARISA CHENGO
NGUMA - DECEASED**

AND

KACHE RUWA KALAMA RESPONDENT

AND

KHALID HADI AHMED PROPOSED RESPONDENT

AND

SHIDA ALI NGUMA RESPONDENT

AND

LAND REGISTRAR, MOMBASA CONTEMNOR

RULING

1. Before this court are two Notices of Motion dated 18th September 2023 and 13th October 2023 and a Preliminary Objection dated 24th October 2023.



2. The application dated 18th September 2023 seeks the following orders: -
 - a. Spent;
 - b. That the Applicants be enjoined onto the suit as Applicants suing for and on behalf of the estate of Karisa Chengo Nguma (deceased) on the strength of a grant of letters of administration ad litem (issued) on 28th July 2022 in Kilifi Succession Cause No. E077 of 2022;
 - c. That the contemnor named herein above be summoned to appear before court within 3 days from the date of this application, to show cause why he cannot purge the contempt by complying with the orders of the court which directed (him) to revoke the resultant title for Plot No. Mombasa/Bububu “A” Settlement Scheme /27 issued on 21st September 2016 and (to) uphold the grant and certificate of confirmation made and/or issued herein on 23rd November 2015 and 14th December 2015, respectively;
 - d. That in compliance with the orders of the court, all the entries made in the green card on the basis of the registration and issuance of a title deed in favour of the respondents herein on 21st September 2016 and the subsequent titles issued herein, originating from the suit property, being Plot No. Mombasa/Bububu “A” Settlement Scheme /27 be revoked forthwith, and a title deed in respect of the suit property be issued as per the succession orders made and/or confirmed herein on 14th December 2015;
 - e. That the contemnor, named herein above, be committed to civil jail for a period of six (6) months for being in contempt of the court orders made and/or issued herein on 27th May 2022 and 16th June 2022, respectively;
 - f. That there be an order attaching the contemnor’s properties whose value is a sum of over Kes.10,000,000/- and an order for the sale of such properties in case of continued disobedience of the court order;
 - g. That there be an order attaching the contemnor’s properties whose value is a sum of over Kes.10,000,000/- and order for the sale of such properties in case of continued disobedience of the court order; and
 - h. That costs of this application be awarded to the Applicants in any event.
3. The application is premised on the supporting affidavit of Khamis Karisa Chengo (hereafter “Khamis”), sworn on 18th September 2023.
4. Khamis stated that this court issued its judgement on 27th May 2022, revoking the grant issued in Mombasa Kadhi’s Court Succession Cause No.214 of 2011 and all subsequent orders, including the resultant title for Plot No. Mombasa/ Bububu “A” Settlement Scheme/27, thereby upholding the certificate of Confirmation of Grant issued herein on 14th December 2015 as the only grant issued by the court, and equally ordering service of the orders thereof upon the Land Registrar, Mombasa.
5. He further stated that the orders were extracted on 16th June 2022 and duly served on the contemnor on 25th November 2022, for compliance purposes. The contemnor wrote to the deputy registrar seeking to confirm the authenticity of the said orders.
6. He averred stated that there is no excuse for disobedience of the court orders as the same were specific. Khamis further deposed that the contemnor had failed and/or refused to comply with the court order despite having prior notice and or knowledge of the same. It was further stated that court orders are not



- issued in vain and should be respected and or obeyed all the time to preserve the dignity and integrity of the court. He urged the court to allow the application as prayed.
7. The 2nd Respondent filed a Replying Affidavit sworn on 9th October 2023. He stated that the 1st Respondent died sometime in April 2022; thus, proceedings against her should abate.
 8. She stated that they sold the suit property to Khalid Hadi Ahmed, the Proposed 3rd Respondent, in 2018 after obtaining a succession order in Mombasa Kadhi Succession Cause No.214 of 2011. The said Khalid Hadi Ahmed had since obtained title to the land and obtained possession thereof. That being the case they had no further interest in the same.
 9. The application dated 13th October 2023 seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to join Khalid Hadi Ahmed in these proceedings as a 3rd Respondent and be granted leave to defend his interest in these proceedings; and
 - d. The costs of this application be provided.
 10. The application is premised on the grounds stated in the said Motion and also on the Supporting Affidavit of Khalid Hadi Ahmed sworn on 13th October 2023.
 11. In response the applicants filed a notice of preliminary objection dated 24th October 2023. The objection was based on the grounds, inter alia, that this Honourable Court has no jurisdiction to entertain the Proposed 3rd Respondent's application as the same goes to the root of land ownership which is solely an issue within the jurisdiction of the Environment and Land Court; that for the above-said reason, the proposed 3rd Respondents applications dated 13th October 2023 should be struck out with costs.
 12. The applicants, through their advocates Kenga & Company Advocates, filed written submissions dated 23rd October 2023 in support of the application dated 18th September 2023.
 13. Counsel submitted that the subsequent registration of other people as having acquired possession or title to the suit land pursuant to the revoked entry no.5 in the green card should automatically be considered null and void as the Respondents had no title to pass to a third party. It was submitted that the main aim of the application is to compel the Land Registrar, Mombasa to comply with the orders of the court, failing which he should be committed to civil jail. Further, it was urged that the existence of third parties, said to have acquired title to the suit premises cannot bar the court from making an order for compliance with its orders. That there being no appeal against the judgement of 27th May 2022 or the setting aside of the same, the said orders remain valid and ought to be complied with. It was further urged that the Kadhi Court orders relied on by the Respondents to sell the suit property were revoked. They, therefore, urged the Court to allow the application.
 14. The Applicants also filed written submissions dated 21st November 2023 in support of their Notice of Preliminary Objection.
 15. Counsel submitted that the Kadhi's Court Succession Orders of 22nd May 2012, having been revoked vide the judgement of 27th May 2022, anything that arises from the said proceedings is a nullity. The 3rd Proposed Respondent cannot re-open the matter that has been conclusively determined. Land ownership disputes cannot be dealt with by a Probate and Administration Court as it lacks jurisdiction.



16. Counsel further submitted that the Proposed 3rd Respondent is not qualified to be enjoined in this matter as he is neither a beneficiary nor a creditor, and his joinder serves no purpose. Counsel urged the court to dismiss the application by the proposed 3rd Respondent and to allow the Applicants' application and uphold Notice of Preliminary Objection.
17. The Proposed 3rd Respondent, through his advocates, Ndegwa, Sitonik & Karina Advocates, filed written submissions dated 10th November 2023.
18. Counsel submitted that the Applicants failed to inform the court that the Proposed Respondent was the registered owner of the subject land and has been in possession of it since 2018. Thus, the Court cannot completely determine this matter without joining the Proposed 3rd Respondent.
19. Counsel identified 3 issues as coming up for determination. These are whether the Proposed 3rd Respondent has sufficient interest in this suit land; whether he is a necessary party in the just determination of this cause and if he is likely to suffer direct prejudice if the orders sought are not issued.
20. On the first issue, counsel submitted the proposed 3rd Respondent has sufficient interest in the suit as he is the registered owner thereof and is in possession of the same. He exercised due diligence before purchasing the suit property from the owners Ali Sharif Nguma, Hadija Sharifu Ali, Salim Sharif Ali Nguma, Abdalla Sharifu Ali, Hamada Sharifu Nguma, Salim Sharif Nguma, Kalama Sharif Nguma, Shida Ali Nguma and Kache Rua Kalama (together as vendors). The Proposed 3rd Respondent has to be heard before any decision which adversely affects him as the registered owner of the property is made. This court cannot hear and determine this suit without hearing the Proposed 3rd Respondent, as any decision made from such proceedings will be a nullity in law.
21. On the second issue, counsel submitted that any decision made in this matter will affect the Proposed 3rd Respondent, thus making him a necessary party. His evidence will enable the court to determine this matter effectively and completely.
22. On the third issue, counsel submitted that the Proposed 3rd Respondent is likely to suffer prejudice if the orders sought are not granted. Counsel urged the court to allow the Proposed 3rd Respondent's application as prayed.
23. I have considered the applications and the Notice of Preliminary Objection, the response therein and the rival submissions by both counsels. The issues that emerge for determination are: -
 - a. Whether this court has jurisdiction to hear and determine the application filed by the Proposed 3rd Respondent;
 - b. Whether the Proposed 3rd Respondent should be joined in this suit;
 - c. Whether the Land Registrar, Mombasa should be held in contempt of court orders.
24. I must determine the issue of jurisdiction first, as without it, I cannot take any further steps and must down my tools. It is urged that the Probate and Administration Court cannot determine this matter as the Proposed 3rd Respondent's application goes to the root of land ownership which is an issue within the jurisdiction of the Environment and Land Court, and not the Probate and Administration Court.
25. The Court of Appeal in *Mukisa Biscuit Manufacturing Ltd vs. West End Distributors Ltd* [1969] EA 696 Law, JA posited that: -

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issue, and this improper practice should stop”.

26. I have considered the Preliminary Objection filed herein at length In my view the same is based on contested matters of fact, which the Court must ascertain. The court must ascertain facts and exercise its discretion on the same. That being the case the Notice of Preliminary Objection must fail.
27. This Honourable Court, in its judgement delivered on 27th May 2022, revoked the grant and subsequent orders issued in the Mombasa Kadhi’s Court Succession No.214 of 2011 on 22nd May 2012, including the resultant Title No. Mombasa/Bububu “A” Settlement Scheme /27, issued in favour of the Respondents. The court recognised the grant of letters of administration intestate made on 8th April 2014, which was confirmed on 23rd November 2015, as the only grant issued by the Court. The court also directed that the orders of the Court be served upon the Land Registrar.
28. On whether the Proposed 3rd Respondent should be joined as a party in this suit, the court in the case of Gladys Nduku Nthuki vs. Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR stated: -

“The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori vs. Chege & 3 Others [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

He must be a necessary party;

He must be a proper party;

3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff;
 4. The ultimate order or decree cannot be enforced without his presence in the matter;
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
29. The Proposed 3rd Respondent argued that he is a necessary party as he is the registered land owner and in possession of the subject suit. Any decision that this court will make will adversely affect him. He further averred that the Respondents had admitted that they sold the land to him in 2018 pursuant to the orders issued in Mombasa Kadhi Succession Cause No.214 of 2011. The Applicants, on the other hand, argued that the Proposed 3rd Respondent is not a beneficiary or a creditor of the estate and thus cannot be enjoined in this matter. His being enjoined in this matter will serve no purpose as judgment has already been entered.



30. Having considered the said application carefully, it is my view that the Proposed 3rd Respondent's application has no merit, as it seeks a joinder of the Proposed 3rd Respondent and not a review of the judgment of the Court. The judgment delivered on 27th May 2022 has not been appealed against, reviewed or set aside.
31. Without the review or setting aside of the said judgment, I am afraid that the joinder of the Proposed 3rd Respondent will be an exercise in futility.
32. Has there been contempt of Court? In the case of Samuel M. N. Mweru & Others vs National Land Commission & 2 others [2020] eKLR stated: -
- “The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”
33. The Court further stated in the said case that: -
- “It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”
34. The applicants argued that the orders arising from the judgement of the court were extracted on 16th June 2022 and duly served on the Land Registrar, Mombasa, on 25th November 2022 for compliance purposes. The Land Registrar wrote to the Deputy Registrar, High Court, Family Division, seeking to confirm the authenticity of the said orders. Despite service and knowledge of the said orders, the Land Registrar failed and or refused to comply with the said Court orders. The Applicants stated that the contemnor is intentionally disobeying the court orders. They urged the court to summon the contemnor to show cause why he should not be held in contempt.
35. The Applicants produced a letter dated 24th November 2022, written by their advocates, Kenga & Company, to the Land Registrar Mombasa and received by the Department of Lands on 25th November 2022, requesting them to revoke the title deed for Plot No. Mombasa/Bububu “A” Settlement Scheme /27 pursuant to the judgement of the court. They also annexed a letter dated 9th August 2023 by their advocates to the Land Registrar, notifying him/her of their intention to commence contempt proceedings.
36. I have perused the court record. It is evident that the Land Registrar was served with the court orders. It is apparent that upon receipt of the said letter, the Land Registrar wrote to the Deputy Registrar, High Court of Mombasa, seeking to confirm the authenticity of the said orders vide a letter dated 9th June 2023. The Deputy Registrar issued a Certificate of Authenticity on 13th June 2023. In the circumstances it is clear that there is an order issued by this court, served on the Land Registrar for his/her compliance. Since he/she hasn't complied, the only conclusion I can draw is that there is bad faith on his/her part.



37. The upshot of the foregoing is that I find no merit in the application dated 13th October 2023. The same is hereby dismissed. The application dated 18th September 2023 is hereby allowed in terms of Prayer No. 3.
38. The matter is hereby listed for Notice to Show Cause on 29th April 2024.
39. This being a Probate and Administration matter, I make no orders as to costs.
40. Orders accordingly.

Dated, signed and delivered in Mombasa this 9th day of April 2024.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Karina for the Proposed 3rd Respondent; and

Mr Kenga for the Applicants;

Arthur – Court Assistant.

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