



In re Estate of Nderi Munyi (Deceased) (Miscellaneous Succession Cause 30 of 2017) [2024] KEHC 8520 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 30 OF 2017**

LW GITARI, J

JULY 11, 2024

IN THE ESTATE OF THE LATE NDERI MUNYI (DECEASED)

BETWEEN

TARTISIO NGAI SAMWEL 1ST PETITIONER

BEATRICE GAAJI NDERI 2ND PETITIONER

AND

PATRICK RUGENDO MBOGO 1ST PROTESTOR

GENASIA NJOKI NDERI 2ND PROTESTOR

RULING

1. The Objector Genasia Njoki Nderi filed a summons under Section 47 of the *Law of Succession Act* seeking orders that this court be pleased to order the cancellation of the irregular and unlawful sub-division and transfer of LR Karingani/Mariani/3639 and revert the same to the names of the administrators to enable proper sub-division in accordance with the ruling of this court dated 5/7/2023 and the rectified certificate of confirmation of grant.
2. The applicant further seeks an injunction restraining Patrick Mwit Nyaga from interfering with LR Karingani/Mariani/7533 which is subdivision of Karingani/Mariani/3639.
3. The summons is based on the grounds that on 5/7/2023 the court ordered the rectification of grant and that the earlier sub-division and transfer undertaken was irregular and erroneous and ought to be cancelled since it was done illegally and denied her the share which was to go to her. That she is the beneficiary entitled to Land Parcel No. LR Karingani/Mariani/3639.
4. The summons is supported by the affidavit of the applicant shown on 26/9/2023 wherein she avers that the administrators sub-divided LR Karingani/Mariani/3639 without involving her and which was not as per the certificate of confirmation of grant. By doing so, the administrator denied her and her sister



Albina Kagendo their share. That the subdivision did not comply with the orders of this court. That the sub-division of LR Karingani/Mariani/7533 which was a subdivision of Karingani/Mariani/3639 was transferred to a stranger one Patrick Mwiti Nyaga. The respondents filed a notice of Pre-liminary Objection and contends that the court is *functus officio* and lacks jurisdiction to issue orders sought by the applicant. That the grant has fully been implemented, the application is an abuse of court process and the same should be struck out with costs.

5. The respondents also filed a replying affidavit sworn on 31/1/2024 by Patrick Mwiti. He depones that he is the registered proprietor of Land Parcel No.Karingani/Mariani/7533 and has attached a copy of the title deed in support of the same. That the land was sold to him by Beatrice Gaaji Nderi after acquiring a share out of land Parcel No.Karingani/Mariani/3639 after succession which is before this court. That the applicant was also a beneficiary of a portion of 0.10 points out of Land Parcel No.Karingani/ Mariani/3639. That the grant has been fully implemented and Parcel No.Karingani/ Mariani/7533 is not part of the estate of the deceased. He further depones that this court lacks jurisdiction to order cancellation of the sub-division and to issue injunctions.
6. The Pre-liminary Objection canvassed by way of written submissions. It is trite law that where a party raises a Pre-liminary Objection the court should determine it first for the simple reason that it may or may not determine the issue in dispute. In *Mukisa Biscuits Manufacturers* (1969) EA 696 at page 700 C.A, it was stated that-

“A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a pre-liminary point may dispose of the suit. Examples are an objection to the jurisdiction to the court or a plea of limitation.”

7. The respondents have raised two issues as follows:-
 1. *functus officio*
 2. Jurisdiction
8. It is important to give a brief background in the matter in determining the 1st issue in the Preliminary Objection. This matter relates to the estate of the deceased Nderi Munyi (deceased) who died intestate on 29/1/2013. A grant of letters of administration was issued to the 1st and 2nd respondents who were appointed as administrators by this court on 15/10/2018. Vide a Judgment of this court dated 31/3/2022 the estate of the deceased was distributed to the beneficiaries. A certificate of confirmation of grant was issued on 31/7/2023 after a rectification of the grant was ordered on 5/7/2023 to correct the acreage of Karingani/Mariani/3639 to read 0.40 Ha.
9. The applicant was allocated land out of Land Parcel No. Karingani/Mariani/3639 measuring 0.10 points jointly with Albina Kagendo Samuel as per paragraph 1 of the certificate of rectification of grant dated 31/7/2023.
10. The respondent contends that the grant has been fully implemented. The respondent has annexed documents showing that Beatrice Gaaji Nderi acquired her share of 0.40 acres out of Karingani/ Mariani/3639 which became Parcel No.7533 which she sold to Patrick Mwiti Nyaga. These facts are not in dispute as the grant was rectified on 5/7/2023. The documents which the respondent is relying on are dated 20/9/2022 which was before the rectification of grant. The Mutation forms for Karingani/Mariani/3639 show that the land was sub-divided into five portions see Annexure P.M.N3. One of the resultant portions is 7533 which the respondent claims that it was sold to him by Beatrice Gaaji and no longer forms the estate of the deceased. Although the respondent contends



that the land which was transferred to Beatrice Gaaji is Land Parcel No. Karingani/Mariani/3639, the grant dated 31/7/2023 after a rectification shows that the property was to be distributed into five portions as specified on the grant. The applicant was to get 0.10 jointly with Albina Kagendo Samuel. However Annextrue G NN-1, the title deed for Karingani/Mariani/3639 was transferred to Taratisio Ngai and Beatrice Gaaji and title deed closed on sub-division. This was contrary to the certificate of confirmation of grant dated 25/4/2022 which was later rectified and maintained the share of Beatrice Gaaji as 0.04 Acres. Taratisio Ngai was not entitled to a share from Karingani/Mariani/3639 . The resultant subdivisions are also in their names that is Karingani/Mariani/7529, 7531 & 7533 and 7532. There is no indication that any of the plots was registered in the name of the applicant. There was none compliance with the grant by 1st and 2nd Respondent. I agree with the applicant that distribution relied on by the respondents has not complied with the distribution of the estate as ordered in the rectified grant and even before it was rectified. A Pre-liminary objection is raised where facts are not in disputes. In the case of *Mukisa Biscuits Company Limited v Westend Distributors (supra)* Sir Charles Newbold P. stated:

“A Pre-liminary Objection is in the nature of what used to be 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.”

11. In this case the applicant has raised a pertinent issued which has been distributed by the respondent and as such the Pre-liminary Objection does not meet the threshold laid in the above cited case as this court cannot determine it without ascertaining some facts.

12. On jurisdiction, [Law of Succession Act](#) gives this court of jurisdiction to entertain applications and issue orders which are necessary in the interests of justice. Section 47 of the [Act](#) provides:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

13. On the other hand, Rule 73 of the [Probate and Administration Rules](#)

“Nothing in these [Rules](#) shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

14. The jurisdiction of the High Court is to determine the estate of the deceased, the legal and/or lawful beneficiaries and distribution of the estate. As such this court has a duty to ensure that the orders are implemented. This is shown by the fact that administrators of the estate of the deceased are supposed to file an account of how the estates has been settled before it can order that file be closed. This is contained under Section 83 of the [Act](#) and in particular Section 83 (g) which provides as follows:-

“Personal representatives shall have the following duties-



83(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.”

15. This court has jurisdiction to hear and determine any matters arising from Probate and Administration until such time that an accurate account is filed.
16. For these reasons I find that the Preliminary Objection has no merits and is dismissed with costs. The applicants applications should be heard and determined on merits.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY 2024.

L.W. GITARI

JUDGE

