



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ORIGINATING SUMMONS CASE NO. E021 OF 2021

GABRIEL MACHARIA NJOROGI

(suing as personal representative of the estate of

Anjelo Kanyuanjohi Macharia (Deceased) APPLICANT

VERSUS

ABSA BANK KENYA PLCRESPONDENT

JUDGMENT

By **Originating Summons** dated **6th of July 2021**, brought under Article 50 of the Constitution, Order 34 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, the Applicant herein sought for orders that;

- 1. THAT the Respondent be directed to discharge its Charge registered against land parcel L. R. No. Loc. 9/KIRURI/459, by signing a discharge of charge (in triplicate) and witnessed by the Respondent's authorized attorneys and or agents in favour of the Applicant, and supply all relevant documents for registration of the same.**
- 2. The Respondent do deliver up to the applicant the original certificate of title pertaining to Land Reference No. Loc. 9/KIRURI/459.**
- 3. The costs of this application be borne by the Respondent.**

The Originating Summons is premised on the grounds set out on the face of the summons and on the Supporting Affidavit of **Gabriel Macharia Njorogi**, who averred; that he was the legal representative of the Estate of **Anjelo Kanyuanjohi Macharia (deceased)**, who died on **10th September 1992**, by dint of a Limited Grant of Letters of Administration ad litem issued on **21st January 2014**. That the deceased person prior to his death had applied for a loan from the Respondent to which his land parcel **L.R No. Loc. 9/KIRURI/459**, was charged in favor of the Respondent. That the said loan was repaid, but the charged property was never discharged and the Respondent continues to retain the Certificate of Title to date. That the Applicant having been granted a Limited Grant for Letter of Administration Ad litem in the **Estate of Anjelo Kanyuanjohi Macharia (deceased)**, to pursue interest in respect of land parcel **L.R No. Loc. 9/KIRURI/459**, the Respondent had been adamant to releasing the original certificate of title to the Applicant.

He averred further; that the request by the Respondent to produce a Certificate for Confirmation of Grant is oblique of the fact that the subject property no longer existed as it was illegally subdivided and new titles issued without surrender of the original title, hence succession cannot ensue for a none existent property. That as a result of the lack of title, he had been unable to pursue the Estate's interest in the subject property in **Muranga ELC Case No. 288 of 2014**. That he cannot obtain letters of administration in respect of the Estate of **Anjelo Kanyuanjohi Macharia (deceased)**, because there are no other properties available for distribution save for **L.R No. Loc. 9/KIRURI/459**, which despite the aforementioned subdivision, the original title is in the custody of the Respondent. That the release of the original certificate of title shall assist the Applicant establish some elements of fraud on the part of the Land Registrar and that the Respondent is amenable to releasing the original certificate of title if a Court order to that effect is issued.

The Application is opposed through Replying Affidavit sworn by **Michael Massawa, Advocate**, on **11th August 2021**, and filed in Court on **12th August 2021**. Michael Massawa deponed that he was a legal officer at the Respondent's Company and that **Anjelo Kanyuanjohi Macharia (deceased)**, had approached the Respondent for a secured loan facility of **Kshs. 300,000/=** and offered **L.R No. Loc. 9/KIRURI/459**, as security for the loan. That the Respondent charged the said title and a charge in its favor was registered on **21st February 1989**. That the prayers sought in the Application cannot be issued and/or enforced against the Respondent as the orders sought are against the known procedures and laws on succession.

That the Applicant only produced a limited grant of letters of **Administration Ad Litem**, which according to the Law of Succession Act,

only allows the Personal Representative of the deceased to commence or defend a suit on behalf of the estate of the deceased. That the said limited grant of **Letters of Administration Ad Litem**, do not give the personal representative control over the estate of the deceased and as such, the Respondent cannot release the original certificate of title to him. Further, that the alleged fraudulent sub division on the subject property does not negate compliance with the mandatory provisions of the Law of Succession Act and the Respondent cannot be faulted for complying with the law in dealing with the estate of the deceased.

The Originating Summons was canvassed by way of written submissions. The Applicant filed his written submissions dated **4th October 2021**, through the **Law Firm of Triple N W & Co. Advocates LLP**. The Respondent filed its written submissions dated **18th October 2021**, through the **Law Firm of Namasaka & Kariuki Advocates**.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is; -

1. Whether the Application is merited

Sections 54 and **55** of the **Law of Succession Act** (herein after referred to as the “Act”) provides:

“A Court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

The **Fifth Schedule, section 14 of the Law of Succession Act** states as follows;

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

Section 55 (1) Law of Succession Act states:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”

Under **Section 3 (1)** of the **Act**, a personal representative is defined as “executor” or “administrator” of a deceased person. The duties of personal representative are defined under **Section 82** of the **Act**. It is provided:

“Personal representative shall subject only to any limitation imposed by their grant, have the following powers:

- a. To enforce by suit or otherwise, all causes of action which by virtue of any law, survive that the deceased or arise out of his death for his estate;**
- b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties all or any part of the assets vested in them, as they think best: provided that.....”**

The Court emphasizes the words “*Subject only to any limitation imposed by limited grant.*” **Rule 73** of the **Probate and Administration Rules** gives Court inherent powers to make orders in the interest of justice or to prevent abuse. The rule imposes a duty on the Court to make orders to protect from waste or to preserve the estate of a deceased. The Court is therefore not toothless in the event of abuse. In the case of **In re the estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR** the Court held the following concerning letters of administration ‘*ad litem*’;

“Section 79 vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that that the provisions in Section 82 can only be fully exercised by a substantive administrator, that is the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation.....”

It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the

strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties.

The Court also arrived at a similar conclusion in the case of **Lydia Ntembi Kairanya & Another – vs – The Hon A. G [2009] eKLR** where the learned Judge stated as follows:

“From what I have been saying therefore there is no dispute that the plaintiffs filed and have prosecuted this suit on the strength of a limited grant of letters of Administration Ad Litem issued to them jointly by this High Court..... it is not disputed that the grant authorized the plaintiffs to file this suit. But that is as far as that limited grant of letters of administration Ad Litem can go. That grant does not contain authority of power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should the plaintiffs be successful. There should have been included in the limited grant. ... Though the plaintiffs prosecuted this suit therefore, they did it without legal power to do so and they lack legal power to collect or receive proceeds from, prosecution of this suit in the event of success...”

From the foregoing, it is clear that a Limited Grant of Letters of Administration *Ad Litem* is usually used when the estate of a deceased person is required to be represented in Court proceedings. Notably, however, limited grant is made due to the exigencies of matters that present an urgent need to file or join or defend suit on behalf of the estate and which cannot wait until full grant is obtained.

The grant issued to **Gabriel Macharia Njoroge** on **21st February 2014**, is a grant of **letters of administration ad litem** and the same was limited to only filing/defending a suit, which purpose has also been indicated on the phase of the said grant. The Court notes that, from the evidence presented before it, neither the applicant nor any other beneficiary (if any) has obtained **Letters of Administration** for the estate of the deceased other than the Limited grant. The Applicant herein cannot therefore purport to use the grant of **Letters of Administration Ad litem**, above mentioned to acquire a discharge of charge from the Respondent. The Court notes further that the **Angelo Kanyuanjohi Macharia** died on **10th September 1992**, and the Applicant has had more than adequate time to approach a Court of competent jurisdiction to take out letters of administration and subsequently a confirmed grant.

It is trite that *Equity aids the vigilant and not the indolent* and a litigant must be vigilant in the conduct of his affairs and the applicant consequently, should have made efforts to apply for, and acquire Letters of Administration. The allegation that the deceased had no other property save for **L.R No. Loc. 9/KIRURI/459**, which was the subject of another suit is no justification for the Applicant's indolence.

Having stated the above, the Court finds and holds that the Limited grant of **Letters of Administration Ad litem** issued on **21st day of January 2014**, cannot be used in the place of a substantive Grant to compel the Respondent to process the discharge of charge for **L.R No. Loc. 9/KIRURI/459**. The Court finds and holds that application dated **6th July 2021**, is **not** merited and proceeds to dismiss the same entirely with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF NOVEMBER, 2021.

L. GACHERU

JUDGE

In the presence of;

Kuiyaki & Alex - Court Assistants

Mr Ndungu for the Applicant

N/A for the Respondent

L. GACHERU

JUDGE