



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Johana Gitau Muchiri (Deceased) (Succession Cause 668 of 2006)
[2023] KEHC 24367 (KLR) (Family) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 668 OF 2006
EKO OGOLA, J
SEPTEMBER 19, 2023
IN THE MATTER OF
JANE MBEKE KATUMO APPLICANT**

RULING

1. The application before the court is dated March 26, 2018. The applicant prays for the following Orders:-
 - a. That the proposed Interested party/Applicant be enjoined in these proceedings as an interested party;
 - b. That the Orders issued by this honourable Court by the Hon. Lady Justice Ougo on January 27, 2016 and any consequential Order be set aside.
 - c. That the costs of this application be provided for.
2. The Application is based on the grounds set therein and the supporting affidavit sworn by the Applicant.
3. To put matters into context, Johana Gitau Muchiri died intestate on 10th June 2004. Grants of Letters of Administration Intestate were issued to Wairimu Gitau and Zipporah Senturua Gitau on 27th April 2009 after a rectification of grant that had been issued on 18th June 2007. The deceased was survived by two widows, five sons, and three daughters.
4. On 2nd December 2015, the co-administrator, Wairimu Gitau filed an Application praying for inter alia the following orders:-
 - “(c) That a temporary injunction order do issue restraining Edward Gitau Njenga by himself, his agents, servants and/or employees from partitioning, entering



into, alienating, and/or in any way dealing with the suit property known as Title No. Ngong Township Block 1/382 (formerly plot No. 117 Residential-Ngong T.Ship) and/or interfering with the Applicant's ownership thereof and/or possession of the same pending the hearing and determination of this application.

- (d) That a declaratory order do issue declaring that the registration aforesaid of the suit property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) in the name of Edward Gitau Njenga, was/is fraudulent, illegal, null and void and did not convey any proprietary rights to him.
- (e) That pursuant to order (d) an order do issue directing the Kajiado District Land Registrar be directed and/or ordered to delete and/or cancel the registration of the said title known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) in the name of Edward Gitau Njenga and instead substitute with the name of the Late Johanna Gitau Muchiri (deceased)."

5. The said Application was supported by the Affidavit of Wairimu Gitau. She deposed that on 12th January 1984, the property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) (hereinafter referred as "subject property") was transferred to the deceased. She annexed the letter of transfer issued to the deceased by the Ole Kejuado County Council. This property was included in the schedule of assets of the estate and when the co-administrator approached the Ole Kejuado County Council to have the property transferred in her name, she was informed that a Certificate of Lease had been issued to one Edward Gitau Njenga, son of the co-administratrix, Zipporah Senturua Gitau on 31st January 1994.
6. After this realization, the co-administrator wrote a letter to the Kajiado District Land Registrar complaining of the fraudulent issuance of the Certificate of Lease to Edward Gitau Njenga. Further to this, she lodged a caution and a restriction at the Kajiado land registry to prevent any further dealings with the subject property. According to the Co-administrator, the Certificate of Lease was either fraudulently acquired or the same is a forgery.
7. On 27th January 2016, the Court recorded a Consent Order between the counsel for the Applicant, that is Wairimu Gitau, counsel for the co-administratrix, that is Zipporah Senturua Gitau and the counsel for the beneficiaries of the 1st house. The Order read as follows:-

- "(c) That a declaratory order be and is hereby issued declaring that the registration of the suit property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) in the name of Edward Gitau Njenga, was/is fraudulent, illegal, null and void and did not convey any proprietary rights to him.
- (d) That an Order be and is hereby issued directing the Kajiado District Land Registrar to delete and/or cancel the registration of the said title known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) in the name of Edward Gitau Njenga and instead be substituted with the name of the late Johanna Gitau Muchiri (deceased)."



8. Now to the instant Application. The Applicant avers that she is the holder of the Certificate of Lease of the subject property, having been duly registered at Kajiado North District Registry on 25th February 2015 having purchased it from Edward Gitau Njenga. She further states that she has been paying land rates and rents on the subject property ever since. She states that the Orders issued by this Court on 27th January 2016 were issued without material non-disclosure of information particularly the ownership of the subject property. The Applicant avers that she was never informed of these proceedings nor was she afforded an opportunity to be heard. She states that the said Orders have greatly interfered with her proprietary rights.
9. The Applicant has annexed to her application a copy of the Sale Agreement between her and Edward Gitau Njenga, proof of payment of the purchase price, acknowledgement of payment of purchase price from Edward Gitau Njenga, Transfer of Land document duly received by the Kajiado land Registry, and the Certificate of Lease registered in her name.
10. On record is an Affidavit of Service. At the time of writing this Ruling, there was no response from the Administrators, from Edward Gitau Njenga, or any of the beneficiaries.

Determination

11. I have considered the Application, the Affidavit in support and the entire record of the Court. The issue to be considered is whether the consent order issued by this court on 27th January 2016 can be set aside more so by a party who was not party to that consent.
12. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
13. In the case of *Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd* [1982] KLR 485, Harris J correctly held inter alia, that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”
14. From the above authorities, it is clear that a consent judgment can only be set aside if it was obtained through fraud or collusion; if the consent was obtained contrary to the policy of the court; if the consent was given without sufficient material facts; or in general for a reason which would enable the court to set aside an agreement.
15. In this instant Application, the co-administrator Wairimu Gitau filed her Application on 2nd December 2015. She annexed a copy of a Certificate of Lease stating that Edward Gitau Njenga was the registered proprietor of the subject property. At the time of filing this Application, the Applicant had already acquired a Certificate of Lease in her name registered on 25th February 2015. The Court recorded the Consent Order on 27th January 2016. The consent was between the counsel for the Applicant, that is Wairimu Gitau, counsel for the co-administratrix, that is Zipporah Senturua Gitau and the counsel for the beneficiaries of the 1st house. Edward Gitau Njenga is the son of Zipporah Senturua Gitau They are both from the 1st house.



16. It is noteworthy that the Applicant's allegations have not been corroborated. But without conducting a mini-trial on the actual and true ownership of the subject property, it is clear that the ownership of the subject property is in question. This is further evidenced by the consent agreement that the registration of Edward Gitau Njuge as the owner of the subject property was fraudulent, null and void. If this is so, there is a high chance that there was material non-disclosure or some form of deceit given that Edward Gitau Njuge already transferred the subject property to the Applicant and further received the purchase price.
17. At this juncture, the Applicant has satisfactorily given reasons to enable this court to set aside the Consent Order of the Court dated 27th January 2016.
18. The ownership of the subject property is in question. Therefore, it is a question that falls within the meaning of article 162 (2)(b) of *the constitution*, that is, the environment and use and occupation of, and title to, land. The Environment and Land Court is vested with the jurisdiction to determine questions on ownership of land.
19. Accordingly, I make the following Orders:-
 - a. The ruling of this court dated January 27, 2016 is hereby set aside.
 - b. Parties and Interested Parties to the property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) are at liberty to file suit in the Environment and Land Court to determine the question of ownership of the property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship).
 - c. Status quo with regard to the property known as Title No. Ngong Township Block 1/382 (formerly plot No. 305/117 Residential-Ngong T.Ship) is to be maintained for a period of 90 days, or such further period as may be directed by the Environment and Land Court should the parties herein seek its orders.
 - d. Cost of the application be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2023

E.K. OGOLA

JUDGE

In the presence of:

Mr. Nyacheo for the Applicant

