



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 11 OF 2018**

**FORMERLY KERUGOYA SUCCESSION CAUSE NO. 56 OF 2012**

**IN THE MATTER OF ESTATE OF FREDRICK MWANIKI MBOGO ALIAS MWANIKI MBOGO (DECEASED)**

**CHARITY WARUGURU MWANIKI.....PETITIONER/APPLICANT**

**VERSUS**

**ANTONY MBOGO MUNENE.....PROTESTOR/1<sup>ST</sup> RESPONDENT**

**JANE WAGUAMA KAMAU.....PROTESTOR/2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner/applicant moved the court vide summons dated 28/08/2018 filed under certificate of urgency and wherein she prayed for orders that: -

1) *Spent*

2) *Spent*

3) *Spent*

4) *That the Honourable court be pleased to order the cancellation of entry number 4 dated 24<sup>th</sup> May, 2018 in the register of LR. KABARE/NJIKU/389*

5) *That the Honourable Court be subsequently pleased to order the cancellation of titles to LR. KABARE/NJIKU/1696, 1697 and 1698 forthwith.*

6) *That this Honourable Court be pleased to punish the respondents herein for intermeddling with the estate of the deceased herein.*

7) *That the costs of the application be provided for*

2. The application is premised on the grounds on its face and further on the supporting affidavit sworn by the petitioner/ applicant herein. In a nutshell, it is the applicant's case that the estate of the deceased herein comprises of LR KABARE/ NJIKU/389 (suit property herein) and whereof the Honourable Court has never issued a certificate of confirmation of grant. That the 1<sup>st</sup> respondent fraudulently used an award issued by the Land Dispute Tribunal made on 23.04.2001 vide an award No. 2 of 1998 to have the suit land sub-divided on 24.05.2018 to give rise to LR. KABARE/NJIKU/1696, 1697 and 1698 and subsequent transfer of LR. KABARE/NJIKU/1696 to the petitioner, LR. KABARE/NJIKU/1697 to the 1<sup>st</sup> respondent and LR. KABARE/NJIKU/1698 to the 2<sup>nd</sup> respondent. The particulars of fraud were itemized therein. Further that the respondents by their acts have intermeddled with the estate of the deceased and needs to be punished as by law provides.

3. The application is opposed by way of replying affidavit sworn by the 1<sup>st</sup> protestor/respondent herein on his own behalf and on behalf of the 2<sup>nd</sup> protestor/respondent and wherein he deposed that the real name of the deceased was Mwangi Mbogo but the original registered owner of the suit land herein was Mwaniki Mbogo alias Nyaga Mbogo. That Mwangi Mbogo changed his name to Mwaniki Mbogo and which change was made with ulterior motives which he never disclosed to other siblings. That he filed LDT No. 2/1998 and whose decision was in his favour and which decision was adopted before the Resident magistrate's court at Kerugoya. Further that the appeal to the Provincial Appeals Tribunal was dismissed and that an order was issued that Executive Officer Kianyaga Senior Resident Magistrate Court to enforce the previous decision of Gichugu land Tribunal.

4. That after the dismissal, the respondent proceeded with the enforcement of the decision but the same was not possible as the land had been charged in favour of Kirinyaga District Co-operative Union and thus he had to halt the enforcement so as to await the land to be discharged. That when the land was still charged, the petitioner filed succession proceedings for the estate of deceased herein and after which the 1<sup>st</sup> protestor filed a protest to the petition. He deposed further that after hearing of the protest, the court confirmed the grant as per the decision of Gichugu LDT after which the petitioner filed an appeal against the confirmed grant which was dismissed and the certificate of confirmation of grant was maintained as had been done before the magistrate court. That pursuant to the said confirmed grant and the decision by Gichugu Tribunal which had been enforced by the Appeal tribunal at Nyeri, the 1<sup>st</sup> respondent decided to enforce the same and applied for the title and was issued with titles for LR. KABARE/NJIKU/1697 and KABARE/NJIKU/1698.

5. The petitioner/applicant with leave of the court filed her supplementary affidavit wherein she deposed that the grant in the instant cause was confirmed by Hon. N.M Kiriba on 3/04/2003 and a Certificate of Confirmation of Grant issued on 7/04/2003 but the said certificate of confirmation of grant was reviewed and set aside on 21/11/2003 and as such the acts of the respondents (in executing the said certificate of confirmation of grant) were illegal, unlawful and void. This informed the court's decision in failing to allow the 1<sup>st</sup> respondent's application which sought orders for the deputy registrar to sign relevant documents so as to have the said certificate of confirmation of grant executed and subsequent declining of a similar application by the respondents herein dated 11/09/2012. As such, the respondents acted in blatant disregard of the orders by the court and illegally, had the suit land sub-divided into two parcels herein and which illegality ought to be corrected.

6. The application was canvassed by way of written submissions wherein both the applicant and the respondents submitted in support of their rival positions.

7. I have perused the application herein, the response thereto and the supplementary affidavit by the applicant in rebuttal. I have further considered the rival submissions by the parties herein and it is my view that the main issue for determination is **whether the same is merited.**

#### **A. Application of the law and determination**

8. In support of the said application, the applicant deposed that the estate of the deceased herein comprised of the suit land which is subject of the succession herein and that this court has never issued a certificate of confirmation of grant but the 1<sup>st</sup> respondent fraudulently used the award issued by the Land dispute Tribunal to have the said land sub-divided into the three parcels whose titles she seeks to have revoked. The reasons as to why the sub-division was said to be fraudulent and unlawful was the fact that the award was made devoid of jurisdiction by virtue of Section 3 of the Land Disputes Tribunal Act; that award had become inoperative by virtue of lapse of time as provided for under Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya; that since the proprietor of the land was deceased and the land was subject of succession herein, the land could not be alienated without the court having issued a certificate of confirmation of grant and beneficiaries signing forms LR7 and LR9; and that there was no sub-division done on the ground so as to conceal the fraud.

9. From the green cards for the resultant land parcels and copies of which were annexed to the application herein as annexures "CWM-1", "CWM-2" and "CWM-3", it is clear that the proprietors of the resultant land parcels (i.e. the applicant and the respondents) were registered as proprietors thereof on 24/05/2018. Further, from all the green cards, it is clear that the consideration for the registration of LR No. Kabare/Njuku/1696 with the applicant was "**Succession Case No. 110 of 2001- PMC Kerugoya & Civil Case No. 166 of 2002- 22/07/2009**"; the consideration for the registration of LR No. Kabare/Njuku/1697 with the 1<sup>st</sup> respondent was "**Succession Case No. 110 of 2001 - PMC Kerugoya – 7/04/2001 vide Civil Case No. 166 of 2009**"; and the consideration for the said registration of LR No. Kabare/Njuku/1698 with the 2<sup>nd</sup> respondent was "**Succession Case No. 110 of 2001- PMC Kerugoya - vide Civil Case No. 166 of 2009 High Court Nyeri**".

10. What comes out of the above is that the sub-division of the suit land into the three resultant parcels and subsequent registration of the same in the names of the applicant and the respondents was pursuant to the certificate of confirmation of grant issued by the court pursuant to the orders of 3.04.2003. In fact, the respondents in reply to the application herein deposed that after hearing of his protest, the court confirmed the grant as per the decision of Gichugu LDT after which the petitioner filed an appeal against the confirmed grant which was dismissed and the certificate of confirmation of grant was maintained as had been done before the magistrate court and it is pursuant to the said confirmed grant the decision by Gichugu Tribunal which had been enforced by the Appeal tribunal at Nyeri, the 1<sup>st</sup> respondent decided to enforce the same and applied for the title and was issued with titles for the resultant land parcels.

11. However, it is clear from the records that after the applicant was issued with the grant, she proceeded to apply for confirmation of the same vide summons for confirmation of grant dated 28/02/2002. The 1<sup>st</sup> respondent filed an affidavit of protest against the said summons on 22/08/2002 and on the date of hearing of the said summons (3/04/2003), the court allowed the mode of distribution as was proposed by the 1<sup>st</sup> respondent herein and a certificate of confirmation of grant was issued. However, pursuant to the orders of 21/11/2003, the orders of 3/04/2003 were reviewed and set aside. What this means therefore is that the mode of distribution as was confirmed by the court on the said date stood set aside and thus basically there is no certificate of confirmation of grant in this cause (and neither is there a confirmed grant) which the respondents herein would have used to apply for the registration of the resultant land parcels.

12. The respondent deposed that after his protest was heard and the grant confirmed, the applicant herein appealed to the High Court against the confirmed grant but the appeal was dismissed and the certificate of confirmation of grant was maintained and it is after this appeal that the 1<sup>st</sup> respondent decided to enforce the same. He annexed a decree from the High Court- Nyeri dated 22/07/2009 issued in Civil Appeal No. 166 of 2002 (annexure "AMM-VIII"). The said case is cited as one whose orders therein were used to have the titles to the resultant land parcels registered in the respondents' names. However, it is clear that the said decree was from a judgment of the High Court pursuant to the appeal from the ruling delivered by the Kerugoya PMC's LDT 2 of 1998. The appeal was not from the orders confirming the grant as was deposed by the respondents herein.

13. In my view, the sub-division of the suit land and registration of the resultant land parcels in the names of both the applicant and the respondents was thus not supported by any legal document and/or backing. The orders which purport to have been used so as to cause the

said sub-division and registration were not in existence at the time of the said transactions and/ or did not allow the same.

14. Indeed, the glaring question is how did the officials at Kirinyaga Land Registry manage to close the register of the suit land and open new register based on court orders which they did not bother to confirm as to their authenticity from the court? How was the registration done without the necessary forms having been filed with the Land Registry (the registers do not indicate as to Forms LR 7 and LR9 having been registered yet the registration of the subsequent titles was said to have been pursuant to transmission)? The only possible answer is that the sub-division of the suit land herein which caused entry number 4 dated 24th May, 2018 in the register of LR. KABARE/NJIKU/389 and further the registration of titles to LR. KABARE/NJIKU/1696, 1697 and 1698 was done fraudulently and may be, with the said land registry officers being complicit.

15. It is trite law that *any allegations of fraud must be pleaded and strictly proved and the standard of proof of the same is higher than that required in ordinary civil cases, namely proof on a balance of probabilities and that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.* (See *Kinyanjui Kamau vs George Kamau [2015] eKLR* and *Kuria Kiarie & 2 Others v Sammy Magera (2018) eKLR*). **In my view, the applicant herein was able to prove fraud and illegality in the process of acquisition of the new titles to the resultant land parcels.**

16. **The respondents did not tender any evidence as to the process they used to get the new titles** to the property of the deceased when it was the subject of a succession cause pending in court and the court had not issued any orders. By their conduct, it is clear that the registration was fraudulent. **In fact, the documents tendered by them confirm the said illegality and fraudulent acquisition of the titles. As the Court of Appeal held in *Munyu Maina –vs- Hiram Gathiha Maina, Civil Appeal number 239 of 2009*, when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.**

17. **The protestors in their submissions sought refuge in sections 24 and 26 of the** Land Registration Act No. 3 of 2012 to the effect that their titles were indefeasible by virtue of being registered owners. However, under section 26(1) a title can be challenged on the grounds that the same was obtained/acquired either: -

*a) through fraud or misrepresentation to which the person is proved to be a party; or*

*b) illegally, unprocedurally or through a corrupt scheme.*

18. As I have already found, the applicant was able to prove fraud in the process of acquisition of the titles to the resultant land parcels. Further, from the records, it is clear that the said registration was unprocedural. As such, it is my view that titles purportedly held by the parties herein cannot enjoy protection by section 26 above-mentioned.

19. Having found that the said titles to LR KABARE/NJIKU/1696, 1697 and 1698 were obtained illegally, unprocedurally and fraudulently, the question therefore is what fate should they suffer? The applicant prayed that the same be cancelled forthwith. The courts have held that where a title is impeached under section 26 (for being obtained fraudulently or illegally), the same ought to be cancelled (See *Alice Chemutai Too –vs- Nickson Kipkurui Korir & 2 others [2015] eKLR* and *Elijah Makeri Nyangw'ara –vs- Stephen Mungai Njuguna & Another [2013] eKLR*). As such, in the instant case, the said titles ought to suffer the same fate.

20. But does this court have jurisdiction to issue the orders cancelling a title? Though this issue was never raised by the parties, jurisdiction is everything and that a court may even raise a jurisdictional issue *suo moto*. (See the Supreme Court in the case of *Nasra Ibrahim Ibren –vs- Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018*).

***A court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.*** (See *Republic –vs- Karisa Chengo & 2 Others [2017] eKLR*).

21. Generally, the issue as to ownership or title to land is under the jurisdiction of the Environment and Land Court (See Article 162(2)(b) of the Constitution and section 13(2) of the Environment and Land Court Act of 2011. However, in the instant case, the registration of the said titles was purportedly pursuant to the orders issued by this Court (probate court). In essence, the registration of the said titles in the names of the respondents and the applicant as well means that the estate of the deceased has been interfered with. The Law of Succession Act was enacted to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.

22. Under Section 47 thereof, this court has jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. Further under Rule 73 of the Probate and Administration Rules, this court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. As such, the court has wide powers to preserve the estate for the benefit of other beneficiaries and for the due process to be followed in the distribution of the same.

23. In exercising of the said powers, this court has powers to **facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.** **It is my view that in the instant case, this court in preservation of the estate of the deceased ought to order** the cancellation of entry number 4 dated 24<sup>th</sup> May, 2018 in the register of LR. KABARE/NJIKU/389 and further order the cancellation of titles to LR KABARE/NJIKU/1696, 1697 and 1698. Otherwise, the court would be failing in its duties to preserve the estate of the deceased. I rely on the persuasive decision in the case of *Santuzza Billoti Alias Mei Santuzza (deceased) –vs- Giacanrio Balasconi [2014] eKLR* where it was held that a *Succession Court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before the grant is confirmed.*

24. There is a host of decisions where courts have held that the High Court has jurisdiction to order cancellation of a title if a matter is a succession cause and the title has been fraudulently or irregularly transferred and which I find persuasive. See for instance *Succession Cause 265/2004 Munyasya Mulili Vs Sammy Muteti Mulili and In re Estate of Leah Wangui Nding'uri (Deceased) [2020] eKLR*

25. The applicant further made a prayer that this Honourable Court be pleased to punish the respondents herein for intermeddling with the estate of the deceased herein. **Section 45 of the Laws of Succession Act** prohibits dealing with properties belonging to a deceased person before obtaining grant. It states: -

**1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**2. Any person who contravenes the provisions of this section shall;**

***a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and;***

***b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administrations."***

26. The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a serious view of intermeddling and makes it a criminal offence. (See *in Estate of Veronica Njoki Wakegito (2013) eKLR*).

27. Acts which amount to intermeddling include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act and any act which has the effect of dissipating or diminishing or putting at risk the free property of the deceased (See *Benson Mutuma Muriungi –vs- C.E.O. Kenya Police Sacco & Another [2016] eKLR*).

28. In the instant case, the respondents (and as the 1<sup>st</sup> respondent well admitted) sub-divided and registered the deceased's property into their names without them being administrators of the estate which was fraudulent and illegal.

29. However, intermeddling being a criminal offence means that accused persons ought to be subjected to criminal prosecution. It is in the said criminal case that the offence ought to be proved by the state to the standards of beyond any reasonable doubts (See Section 107 of the Evidence Act Cap 80 Laws of Kenya, *Woolington v DPP 1935 AC 462* and *Miller v. Minister of Pensions 2 ALL 372-273*).

30. It is my view that this court being a succession court cannot determine on the criminal aspect of Section 45 of the Act. The right court ought to be a criminal court wherein the court will apply the provisions of the Criminal Procedure Code. As such, this court is bereft of jurisdiction to punish for intermeddling as constituted.

31. *The applicant prayed for costs of the application. However, I note that there is an award by the Land Dispute Tribunal which was adopted by the court in Kerugoya SRMC's LDT No. 2 of 1998 vide the orders given by the court on 12/11/1999 and the 1<sup>st</sup> respondent herein was given one (1) acre of the LR No. Kabare/Njuku/389 and the 2<sup>nd</sup> respondent given one (1) acre and the deceased given one and a half (1½) acres. The cause herein was filed on 3/05/2001 and which was after the adoption of the award by the court in Kerugoya SRM Court in LDT No. 2 of 1998. As such, at the time of filing of the instant cause, there was a valid court order giving the respondents herein part of the suit land but the applicant did not disclose that to the court. Despite the applicant having appealed against the said order in Nyeri High Court vide Civil Appeal No. 166 of 2002, the said appeal was struck out in the judgment of Hon. M.S.A Makhandia J (as he then was) on 22/07/2009 and which judgment was never appealed against. As such, the award by Kerugoya SRM's Court in LDT No. 2 of 1998 still stands. Despite the applicant being aware of the above, she nonetheless failed to disclose the same to the court and even applied for confirmation of the grant without disclosing the same to the court.*

32. Costs are awarded at the discretion of the court though as a general rule, costs follow events. In my view, the applicant having hidden from the court the existence of the said award, her hands becomes stinking of dishonesty and as such, she ought not to benefit from the discretionary powers of this court and get costs of the application.

33. It is my view therefore in conclusion that the instant application is merited in terms of prayers 4 and 5. However prayer 6 fails. The applicant should prosecute the offence in the appropriate court. The prayer for costs also ought to fail.

34. *As I have already noted, the orders made on 3/04/2003 confirming the grant were set aside on 21/11/2003 at the instant of the applicant herein. As such, the affidavit of protest filed by the 1<sup>st</sup> respondent herein on 22/08/2002 is yet to be determined and/or the estate distributed. The cause herein was filed in the year 2001 and thus has been in court for nearly twenty years.*

35. The parties herein ought to move with speed and fix the summons for confirmation of the grant dated the 28/02/2002 for hearing so that the court can determine their respective interests and confirm the grant accordingly and bring this long outstanding matter to an end.

36. It is so ordered.

Delivered, dated and signed at Embu this 10<sup>th</sup> day of February, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent