



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE 615 OF 2013

IN THE MATTER OF ESTATE OF M'MUCHEKE MBOGITA (DECEASED)

BETWEEN

JAMES MURUNGI MAINGI.....APPLICANT

AND

MOFFAT KIMATHI SAMWEL..... 1ST RESPONDENT

ANN MUKUBA NDUBL.....2ND RESPONDENT

RULING

Introduction

1. On 21st May, 2018, letters of administration issued to **Moffat Kimathi Samwel (1st Respondent)** and the court ordered that fresh ones be issued jointly to **Moffat Kimathi Samwel (1st Respondent)** and **James Murungi Maingi (Applicant)** on 21st May, 2018.

2. Subsequently by a ruling dated 8th day of November 2018, this court revoked the Certificate of Confirmation of Grant dated 07th August, 2018 distributing the estate comprising **LR. NO. ABOTHIGUCHI/KARIENE/1887** solely to the Applicant and made the following orders:

1) The applicant James Murungi is not the only dependant

2) The estate should be devolved to Moffat Kimathi Samwel, James Murungi Maingi, Godfrey Kithinji (grandsons of the deceased) and the alleged daughter of the deceased if any

3) In event none is identified the portion that is meant for deceased alleged daughter to be shared by the 3 grandsons equally.

3. Subsequently, the Certificate of Confirmation of Grant dated 07th August, 2018 was rectified and the estate was distributed equally to **Moffat Kimathi Samwel, James Murungi Maingi, Godfrey Kithinji** since the deceased's daughter had not been identified.

Summons

4. By Summons for revocation dated 08th September, 2020 filed on 09th September, 2020, **James Murungi Maingi (Applicant)** prays for orders for revocation of the grant on the grounds that the grant was rectified fraudulently and that the estate was distributed to strangers.

5. The application is also supported by an affidavit sworn by the Applicant on 08th September, 2010 in which he avers that the grant in his favour was rectified without his knowledge and distribution was made to one Godfrey Githinji contrary to the court order.

6. By his replying affidavit sworn on 21st October, 2020 and filed on 30th September, 2020, **Moffat Kimathi Samwel (Petitioner/1st Respondent)** deposed that he was the sole beneficiary of deceased's estate in his capacity as grandson from the deceased's first wife and further the Applicant who is a grandchild from the deceased's 2nd wife was entitled to the estate. He further avers that he already sold **LR. NO. ABOTHIGUCHI/KARIENE/1887** to the 2nd Respondent and that the land is therefore not available for distribution. Annexed to the affidavit is a title deed issued to 2nd Respondent on 27th June, 2014. His averments are supported by Daniel Nkonge M'irangu and Paul

Kithinji N’Nkanata.

7. That Moffat Kimathi Samwel (**Petitioner/1st Respondent**) already sold the land comprised in the estate to Ann Mukuba Ndubi (**2nd Respondent**) is confirmed by 2nd Respondent in her undated affidavit filed on 28th October, 2020. Annexed to it is a sale agreement dated 10th June, 2014 between her and the 1st Respondent, and a title deed issued to 2nd Respondent on 27th June, 2014 among other documents. She further avers that she has been in occupation of the disputed property and has developed it as shown in annexed photographs.

Analysis and Determination

8. I have considered the affidavit evidence on record and submissions for the Petitioner/Applicant and for the Respondents. The gravamen of this application revolves around distribution of **LR.NO. ABOTHUGUCHI/KARIENE/1887**.

9. The court record demonstrates that both parties were heard through their respective advocates before the grant was rectified and the Applicant’s assertion that grant was rectified fraudulently is therefore without merit.

10. The chief’s letter dated 24th May, 2013 filed by the Applicant on 08th November, 2013 named Godffrey Githinji as a beneficiary of deceased’s estate. The Applicant allegation that the said Godffrey Githinji is a stranger to the estate is inconsistent with his own documents and it is rejected.

11. I would have ended my ruling at that stage but I would fail in my duty if I fail to determine a very important issue that has arisen in the course of this application. The issue revolves around the sale of deceased’s estate and affects the distribution of the estate as ordered by the court.

12. It is worthy to note that as at 8th day of November 2018 when the Certificate of Confirmation of Grant dated 07th August, 2018 was rectified and the estate distributed equally to **Moffat Kimathi Samwel, James Murungi Maingi, Godffrey Kithinji, Moffat Kimathi Samwel** had 4 years earlier disposed off the estate to the 2nd Respondent by a sale agreement dated 10th June, 2014 and a title deed issued to 2nd Respondent on 27th June, 2014. This fact was not disclosed to the court.

13. Section 45 of the Law of Succession Act (**the Act**) provides as follows:

(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.

14. Section 82 of *the Act* provides that:

Personal representatives 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 the deceased or arising out of his death for his personal representative;

(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—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; (Emphasis added.

15. **Moffat Kimathi Samwel** was not a Personal representatives of the deceased and even if he had been, he had not right to sell the deceased’s land to Ann Mukuba Ndubi (**2nd Respondent**) before confirmation of the grant in this cause. **Moffat Kimathi Samwel**, an intermeddler, did not have a good title which he could pass to Ann Mukuba Ndubi (**2nd Respondent**) and her title which was obtained irregularly cannot be protected by law.

16. The court ruling dated 08th day of November 2018 distributing the estate comprising **LR. NO. ABOTHIGUCHI/KARIENE/1887** equally to **Moffat Kimathi Samwel, James Murungi Maingi, Godffrey Kithinji** is still valid and ought to be implemented to the letter.

17. As pointed out hereinabove, it is apparent that the fact that the suit property had been disposed of was not disclosed to the court when it made the ruling 08th day of November 2018. That court’s order cannot be realized for the reason that the title deed to the suit property has already been irregularly transferred to Ann Mukuba Ndubi (**2nd Respondent**).

17. Court orders are not made in vain. It was appreciated by **Ojwang, J** (as he then was) in ***B vs. Attorney General [2004] 1 KLR 431*** that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

18. Having said that, it is the duty of this court to issue such orders as will ensure that its orders are not made ineffective.

19. From the foregoing analysis, it is hereby ordered:

i. Summons for revocation dated 08th September, 2020 and filed on 09th September, 2020 has no merit and it is dismissed

ii. In order to protect the integrity of the court and to give effect to ruling dated 8th day of November 2018 distributing the estate comprising LR. NO. ABOTHIGUCHI/KARIENE/1887 equally to Moffat Kimathi Samwel, James Murungi Maingi, Godfrey Kithinji, an order is hereby issued revoking the title deed for the said land issued to Ann Mukuba Ndubi (2nd Respondent).

iii. The title shall revert to the name of the M'MUCHEKE MBOGITA (deceased) subsequent to which it shall be distributed equally to Moffat Kimathi Samwel, James Murungi Maingi, Godfrey Kithinji

iv. Costs shall be in the cause

DATED AT MERU THIS 11TH DAY OF MARCH 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant - N/A

For 1st Respondent - N/A

For 2nd Respondent - N/A