



**REPUBLIC OF KENYA**

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

**MISC. SUCCESSION CAUSE NO. 35 OF 2006**

**IN THE MATTER OF ESTATE OF JAVAN MWARARI GIKUNJU MUGWE (DECEASED)**

**SAMUEL MWANGI NDAMBURU.....APPELLANT**

**VERSUS**

**FRANCIS GAKONO GIUTE.....1<sup>ST</sup> RESPONDENT**

**JOSPHAT MURIUKI MBOYI.....2<sup>ND</sup> RESPONDENT**

**GABRIEL LAZARUS MUTHIKE KIRAGU.....3<sup>RD</sup> RESPONDENT**

**HEZRON MUIGAI WAIGWA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this court is an application dated 11.03.2020 and wherein the applicant prayed for orders that this Honourable Court be pleased to issue an order cancelling the title deeds to land parcel numbers LR. Mutira/Kirimunge/645 and 644 and all resultant parcel numbers of LR. Mutira/ Kirimunge/645 being LR. Mutira/ Kirimunge/1381 and 1382 so that the land can revert to the original land parcel LR. Mutira/ Kirimunge/121; that this Honourable Court be pleased to order eviction of the respondents, their agents, servants and anyone claiming through them from LR. Mutira/ Kirimunge/121; that this Honourable Court be pleased to order the Officer Commanding Station, Kerugoya Police Station to provide security during eviction; and that the costs of the application be provided for.

2. The applicant's grounds in support of the application are that on 17.01.2020, this court issued orders cancelling entries 2,3 and 4 in the register of LR. Mutira/Kirimunge/121 and when the applicant presented the said order to the Land Registrar Kirinyaga for registration, the Land Registrar advised him that the said orders will have the effect of cancelling LR. Mutira/ Kirimunge/645 and 644 and sub-divisions of LR. Mutira/ Kirimunge/645 being LR. Mutira/Kirimunge/1381 and 1382 and that though the said parcels were mentioned in the application dated 15.08.2018, they were not captured in the order. That the Land Registrar advised him to get an order cancelling the LR. Mutira/Kirimunge/645 and 644 and sub-divisions of LR. Mutira/Kirimunge/645 being LR. Mutira/ Kirimunge/1381. That the orders sought herein are meant to facilitate the execution of the orders issued on 17.01.2020.

3. Further that the respondents and their agents, servants and anyone claiming through them have unlawfully taken possession of the part of the land and thus it is in the interest of justice for them to be evicted so that the estate of the deceased may be distributed and for the purposes of safeguarding peace and security during eviction, the OCS Kerugoya Police Station ought to be ordered to provide security.

4. The application is opposed by the 2<sup>nd</sup> respondent vide a replying affidavit sworn on 11.08.2020 and wherein he deposed that the application is a non starter and an abuse of the court process and that the issues raised in the application have already been determined by this court and thus the same cannot be revisited in their current form and that this court does not have jurisdiction to determine the same as the court is *fuctus officio*.

5. The application was canvassed by way of written submissions wherein the parties reiterated their rival positions as per the pleadings herein.

6. I have considered the pleadings and the submissions by the parties.

7. However, before determining on the same, I note that the respondent raised the issue relating to the jurisdiction of this court to determine the application herein. As such, this court ought to determine the issue in limine as without jurisdiction, this court will be engaging in an illegal process and can only down its tools. (See **Owners of the Motor Vessel „Lillian S –v- Caltex Oil (Kenya) Ltd [1989] KLR 1**).

8. Despite the 2<sup>nd</sup> respondent having raised the issue as to the application herein having been *res judicata*, there was no guidance given as to the application which has previously been determined by this court. However, I have taken the liberty to peruse the court record so as to ascertain the same and I note that the applicant herein filed an application for revocation of grant dated 4.04.2006 and which application was determined by a ruling delivered by J.N. Khaminwa, J. on 29.10.2008 wherein the Learned Judge did set aside the certificate of succession dated 21.11.1978. The next application which followed was by the 3<sup>rd</sup> respondent dated 23.06.2010 but which was withdrawn vide the orders of 23.06.2011.

9. The other application is the one dated 15.05.2018 filed by the applicant herein and whereby he substantially sought for orders of cancellation of entries 2,3 and 4 in the register of LR. Mutira/Kirimunge/121. The said application was determined in his favour and a ruling delivered on 17.09.2019 by F. Muchemi, J. and orders issued on 17.01.2020. The next application is the instant application. I have perused all the previous applications and I note that there is none which has prayers similar to the instant application. It is my view that the instant application is not *res judicata*.

10. As to the merits of the application, I note that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not oppose the application. The 2<sup>nd</sup> respondent's replying affidavit does not have any deposition to suggest that he is opposing the substance of the application save for the preliminary issues on jurisdiction which I have considered.

11. However, that notwithstanding, it is trite that this court must interrogate the application and see whether the same is merited.

12. It is not in dispute that the applicant herein is the administrator of the estate of the deceased. There is a certificate of confirmation of grant issued in Kerugoya High Court Succession Cause No. 57 of 2013 which was annexed to the application dated 15.05.2018. As I have pointed out hereinabove, the applicant's application for revocation of grant dated 4.04.2006 was allowed by J.N Khaminwa J on 29.10.2008 and in which ruling the Learned Judge did set aside the certificate of succession dated 21.11.1978. What that means is that the sub-division of LR. Mutira/Kirimunge/121 as had been done in the said proceedings and the subsequent sub titles stood revoked and the land by operation of law reverted back to the deceased.

13. I note that the applicant's grounds for revocation of grant were basically that the grant was obtained fraudulently and which ground the court upheld. It is trite law that once a title is cancelled on grounds of the same being obtained fraudulently, all subsequent titles also stand revoked. (See **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR**). It is on the strength of this that the applicant herein was able to file a succession cause at Kerugoya High court and had the said land distributed.

14. However, it appears that the applicant instead of proceeding on the strength of the above legal position and have the land registrar cancel entries 2, 3 and 4 on the strength of the ruling by J.N. Khaminwa J., he chose to come to the court seeking for express orders for the same and which Muchemi, J. granted.

15. The applicant is now back to court seeking orders that the resultant parcels of LR. Mutira/Kirimunge/121 (being LR. Mutira/Kirimunge/645 and 644 and sub-divisions of LR. Mutira/Kirimunge/645 being LR. Mutira/Kirimunge/1381 and 1382) be cancelled so that the suit land can revert back to the original parcel LR. Mutira/Kirimunge/121. As I have already noted, setting aside of the certificate of succession by J.N Khaminwa, J. on 29.10.2008, titles to the resulting parcels stood revoked. Indeed, the cancellation of entries 2, 3 and 4 confirms that any title which might have been issued pursuant to any of such entries stands revoked and which includes LR. Mutira/Kirimunge/645 and 644. LR. It also means that LR. Mutira/ Kirimunge/1381 and 1382 being the resultant parcels of LR. Mutira/Kirimunge/645 stood revoked. In my view, the Land Registrar ought not to have subjected the applicant to more costs by filing the instant application. It was just a matter of interpretation. However, I take judicial notice of the rampant fraud being perpetrated in relation to land and registration of titles and which calls for the said land officials to be more vigilant.

16. I have noted that the applicant is a co-administrator of the estate herein and the grant has already been confirmed. As an administrator, he has a duty to ensure that the estate is administered. This court being the succession court is bestowed with inherent powers to make any order so as to ensure that the ends of justice meet. Further, it has jurisdiction to resolve any dispute under the Law of Succession Act and to issue any order and decree as it deems fit. In furtherance of the court's duty to ensure that the estate of the deceased is administered, it has a duty to remove any obstacle which might impede such distribution.

17. In the instant case, now that the applicant has satisfied the court that he is unable to execute the certificate of confirmation of grant due to the fact that the resultant titles are not cancelled, it is my view that it is in the interest of justice that this court does issue express orders in that regard. As such the application is allowed in terms of prayer one.

18. Further, as I have already noted, the subsequent titles of the sub-division of the suit land cannot stand. The current state of affairs is that the suit land ought to be distributed as per the certificate of confirmation of grant issued in Kerugoya High Court Succession Cause No. 57 of 2013. The respondents herein are not among beneficiaries therein. It has not been pleaded and/or proved that there is any order of stay of execution issued by any court. It therefore means that, the respondents have no claim on the suit land and as such, they are in the suit land illegally. For the applicant herein to distribute the estate to the beneficiaries, the respondents ought to vacate the suit land, otherwise they might impede the distribution of the estate.

19. The respondents in their written submissions averred that the applicant has not shown this court the basis on which he prays for eviction order and that he ought to have filed a suit in an environment and land court. Further that, the applicant does not have the capacity to file the application as the suit land has been distributed and he needed authority to plead from those persons. However, as I have already noted, the respondents deposed as to this court not having jurisdiction over the subject matter as the same was *res judicata* and that the court is *factus officio* and thus the respondents never raised any deposition in opposition to the orders sought in the said application. As it is trite law, submissions are not pleadings or evidence and thus a person cannot argue his or her case in submissions. (See **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**).

20. Nonetheless, this court has inherent powers to make any order for the ends of justice to meet. It will be a waste of judicial time and indeed uneconomical for the applicant to have to move the ELC court for orders which as it appears, are obvious. This court has the powers to make any order which will ensure administration of the estate is complete and to remove any impediment to the administration.

21. Further, the applicant is one of the administrators of the estate herein. Under section 80 of the Law of Succession Act, the administrator has a duty to sue on behalf of the estate. It is my view therefore, that the applicant herein has the locus to seek for orders of eviction on behalf of the beneficiaries in execution of his duties as an administrator of the estate. The said duties can be exercised so as to ensure that the estate is distributed amongst the beneficiaries.

22. It is my considered view therefore, that, the respondents ought to vacate the suit land forthwith within 60 days failure to which the applicant shall be at liberty to evict them from the suit land. Otherwise it will be unjust to the beneficiaries to be hindered from getting their respective shares. The OCS Kirinyaga Police Station ought to supervise the said eviction so as to provide security.

23. As for the costs of the application, it is trite that costs follow events. However, the court has discretion to decide on who should get the costs. In the instant cause, the respondents have refused to vacate the suit land despite the succession certificate having been set aside. As such, they shall pay the costs as their action necessitated the instant application.

24. It is so ordered.

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

**L. NJUGUNA**

**JUDGE**

.....for Applicant

.....for Respondents