



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL SUIT NO. 203 OF 2001

IN THE MATTER OF APPLICATION FOR SETTING ASIDE OF A CONSENT JUDGMENT

BETWEEN

SALIMA NURU.....1ST INTERESTED PARTY/APPLICANT

IDRIS NURU.....2ND INTERESTED PARTY/APPLICANT

AND

MAGIRI RIKANYA.....RESPONDENT

AND

IN THE MATTER

BETWEEN

MAGIRI RINKANYA.....PLAINTIFF

AND

MARIAM NURU.....1ST DEFENDANT

NURU MURIITHI HASSAN.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated and filed on 09th January, 2020, the Interested Parties/Applicants seek orders THAT:

1. Leave be granted to the Applicants to be enjoined as interested parties in this suit

2. The consent dated 27th November, 2001 and adopted by the court on 03rd December, 2001 as well as subsequent proceedings be set aside

3. Costs be provided for

2. The application is based on grounds among others THAT:

1.The consent dated 27th November, 2001 between the Plaintiff/Respondent and the Defendants and which was adopted by the court on 03rd December, 2001 was fraudulent and the parties failed to make material disclosure to the court

2. The late MIRIAM NURU did not have capacity to sell land parcel LR No. Abogeta/U-KITHANGARI/859

3. The Interested Parties/Applicants only came to learn of the consent as well as the impugned decree on 14th October, 2019

4. The title deed to deceased's land which had been issued in the name of the Respondent has since been cancelled and ownership of the subject land reverted to the name of the deceased

3. The application is supported by an affidavit sworn on 09th January, 2020 by Salima Nuru (1st Interested Party/Applicant) in which she avers THAT:

1. Interested Parties/Applicants are children of the deceased and administrators of his estate vide Grant of Letters of Administration issued on 12th March, 2019 in MERU HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002

2. Upon the death of the deceased, their mother MARIAM NURU without first obtaining Confirmation of the Grant of deceased's estate purported to sell three (3) acres of deceased's land LR. NO. ABOGETA/U-KITHANGARI/859 to the Respondent as shown by a sale agreement dated 12th June, 2001

3. MARIAM NURU did not have a good title to the subject land and that the purported sale was an act of intermeddling with the deceased's estate and is a nullity

4. The Respondent fraudulently took possession of the entire 5 acres of the subject land

5. The Interested Parties/Applicants were not aware of this matter until a decree in this cause was tendered by the Respondent in MERU HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002. In his affidavit of response sworn on 05th February, 2020 filed on 06th February, 2020, MAGIRI RIKANYA (*Respondent*) avers THAT:

1. He bought three (3) acres of land LR. NO. ABOGETA/U-KITHANGARI/859 from MARIAM NURU (*now deceased*) as shown by a sale agreement dated 12th June, 2001 (Marked MRI).

2. A search at the Land's Registry revealed that the suit land was registered in the name of MARIAM NURU

3. He filed suit to enforce the sale agreement and the suit as compromised by a consent dated 27th November, 2001 (Marked MR4), which was adopted as an order of the Court on 03rd December, 2001 (Marked MR5).

4. Subsequently, LR. NO. ABOGETA/U-KITHANGARI/859 was portioned into two portions LR. NO. ABOGETA/U-KITHANGARI/1467 measuring 1.21 Ha equivalent to 3 acres and LR. NO. ABOGETA/U-KITHANGARI/1468 measuring 0.84 Ha.

5. LR. NO. ABOGETA/U-KITHANGARI/1467 measuring 1.21 Ha equivalent to 3 acres was transferred and he was issued with a title deed dated 04th December, 2001 (Marked MR6).

6. On 06th December, 2001, the 1st Defendant sold to him LR. NO. ABOGETA/U-KITHANGARI/1468 measuring 0.84 Ha for Kshs. 420,000/- and he was issued with a title deed dated 20th December, 2001

7. LR. NO. ABOGETA/U-KITHANGARI/1467 measuring 1.21 Ha equivalent to 3 acres was on 06th February, 2018 portioned into two portions which were registered as LR. NO. ABOGETA/U-KITHANGARI/2756 and LR. NO. ABOGETA/U-KITHANGARI/2757 each measuring 0.62 Ha.

8. On 08th February, 2018, title deeds were issued for LR. NO. ABOGETA/U-KITHANGARI/2756 in the name of Elias Gitari Magiri (Marked MR9(a)) and for LR. NO. ABOGETA/U-KITHANGARI/2757 in the name of James Karani Magiri (Marked MR9(b))

9. It has not been demonstrated that the consent order was obtained fraudulently

5. In a further affidavit sworn on 21st July, 2020, the 1st Interested Party/Applicant contends THAT:

1. The purported sale of the second portion of the suit land has not been proved by a sale agreement and was not subject of this suit.

2. There are no developments on the suit land as purported by the Respondent

3. The Kadhi's Court in Isiolo by a letter dated 27th August, 2018 confirmed that Isiolo Succession Cause NO. 03 OF 1998 in respect of the deceased did not exist in the records of that court

4. The Department of Lands in Meru by a letter dated 23rd August, 2018 confirmed that no grant from Kadhi's Court in respect of the suit land had been filed with them

Analysis and Determination

6. I have considered the Notice of Motion in the light of the court record as summarized hereinabove.

7. I have similarly considered the submissions filed on behalf of the Interested Parties/Applicants and on behalf of the Plaintiff/Respondent and I have deduced the following five (5) issues for determination.

1. Whether this application has been brought without unreasonable delay
2. Whether the Interested Parties/Applicants should be enjoined as interested parties to this suit
3. Whether Mariam Nuru had capacity to pass a good title of deceased's estate to the Plaintiff/Respondent
4. What right does the Plaintiff/Respondent have as a purchaser over deceased's estate
5. Whether Applicant's/Interested Parties' claim is statute barred
6. Whether the consent dated 27th November, 2001 and adopted by the court on 03rd December, 2001 as well as subsequent proceedings ought to be set aside

Whether this application has been brought without unreasonable delay

8. Concerning this first issue, the Interested Parties/Applicants contend that they became aware of this suit on or around 14th October, 2019 when the Plaintiff/Respondent filed a decree obtained in this suit in MERU HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002. The Notice of Motion dated 09th January, 2020 was filed on even date. A delay of 2 months cannot be said to be inordinate.

Whether the Interested Parties/Applicants should be enjoined as Interested Parties to this suit

9. With regard to this second issue, I have considered the persuasive decision in the case of Yusuf Abdi Adan & Another V Hussein Ahmed Farah & 3 Others [2016] eKLR cited by the

Interested/Parties/ Applicants where the court held that:

“.....an Interested Party is one who has a direct interest or stake in the case, though he or she was not a party to the cause ab initio. That, is one, who will be affected by the decision of the Court when it is made either way and who person feels that his/or her interest will not be well articulated unless he himself or she herself appears in the proceedings, to champion his or her cause. Similarly, an interested party has to demonstrate that it is necessary that he/she be enjoined in the suit, so that the Court may settle all the questions involved in the matter and not just to show he has a cursory interest in the subject matter of litigation.

10. I am also content to cite the proclamation by the Court of Appeal in considering the import of Section 76 of the Law of Succession Act in the case of Musa Nyaribari Gekone & 2 Others v Peter Miyienda & another [2015] eKLR, stated THAT:

“The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate.”

11. There is no doubt that the Interested Parties/Applicants are children of NURU KINOTI alias NOORU NURU ALI (deceased) the original owner of land parcel LR No. Abogeta/U-KITHANGARI/859 that is the subject of this suit. They are also administrators of the deceased's estate vide Grant of Letters of Administration issued on 12th March, 2019 in MERU HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002.

12. From the foregoing, I am persuaded that the Applicants are persons with a right or expectancy in the deceased's estate. Their application to be enjoined to this suit as Interested Parties is therefore merited and it is allowed.

13. The Law of Succession Act Cap 160 Laws of Kenya is an Act of Parliament 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.

14. Consequently, I find that the 3rd issue of whether Mariam Nuru had capacity to pass a good title of deceased's estate to the Plaintiff/Respondent and the 4th issue of the right of the Plaintiff/Respondent, as a purchaser of deceased's estate, are not civil matters to be adjudicated in this suit. These issues revolve around the administration of the estate of NURU KINOTI alias NOORU NURU ALI (*deceased*) which is the subject of HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002 pending before this court.

15. The parties before me are also parties in HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002 which in my considered view is the best forum that the 3rd and 4th issues ought to be adjudicated.

16. The determination of the 5th issue of whether Applicant's/Interested Parties' claim is statute barred and the 6th issue of whether the consent dated 27th November, 2001 and adopted by the court on 03rd December, 2001 as well as subsequent proceedings ought to be set aside ought to be litigated upon determination of HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002 and I therefore decline to render any determination on the same at this stage.

17. As a result, the orders that commend to this court and which I hereby issue are THAT:

1. This Notice of Motion dated and filed on 09th January, 2020 was brought without unreasonable delay

2. The Applicants are hereby enjoined as interested parties to this suit

3. The issue of whether Mariam Nuru had capacity to pass a good title of deceased's estate to the Plaintiff/Respondent and the right of the Plaintiff/Respondent, as a purchaser of deceased's estate shall be determined in HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002

4. In the event that the issues of whether Applicant's/Interested Parties' claim is statute barred and whether the consent dated 27th November, 2001 and adopted by the court on 03rd December, 2001 as well as subsequent proceedings ought to be set aside are not conclusively determined at the conclusion of HIGH COURT SUCCESSION CAUSE NO. 384 OF 2002, the parties shall be at liberty to litigated them in this suit

5. Each party shall bear its own costs of this application.

DATED AT MERU THIS 4TH DAY OF MARCH, 2021

T. W. CHERERE

JUDGE

Court assistant - Morris Kinoti

For Interested Parties - Mr. Mutuma for Mutuma & Koskei Advocates

For Plaintiff/ Respondent - Mr. Kariuki for Kiautha Arithi & Co. Advs