



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 574 OF 2005

IN THE MATTER OF THE ESTATE OF KITELE KITINGU (DECEASED)

JOSEPHAT MULLI KITELE.....OBJECTOR/APPLICANT

-VERSUS-

JEREMIAH MUTHOKA KITELE.....PETITIONER/1ST RESPONDENT

SUSAN MBULA KIMATU *alias* SUSAN MBULA MWEU....CONTEMNOR/2ND RESPONDENT

RULING

1. The ruling relates to two (2) applications that shall be addressed chronologically. The first application is dated 2.9.2020 while the second one is dated 30.11.2020.

2. The application dated 2.9.2020 sought five primary reliefs. Firstly, an injunction to restrain the respondents from dealing in the deceased's properties including Kitele Kitingu burial grounds pending hearing and determination of the summons dated 1.9.2020 filed by the applicant; Secondly, revocation of the grant that was issued to the 1st respondent on 13.2.2006 and confirmed on 23.6.2006; Thirdly, that the applicant be appointed administrator of the estate of the deceased; Fourthly, that the 1st respondent render accounts in respect of the properties L.R 12715/153, originally known as Plot 41 on L.R 7147/11/R and the coffee farm proceeds of the land at Kangundo/Masewani Kikambuani; Finally, an order that the property L.R 12715/153, originally known as Plot 41 on L.R 7147/11/R be declared as part of the estate of the deceased and all registrations effected on the register in respect of the said property after the death of the deceased that is from 8.10.1992 be declared null and void.

3. The grounds of the application as stated in the affidavit of Josephat Mulli Kitele were that the petition for grant contains only sons and beneficiaries and no daughters, wives or grandchildren or great grandchildren of the deceased. It was averred that the applicant was not mentioned in the petition. The deponent took issue with the inclusion of James Kitaka Mutua as a beneficiary of the land reference 12715/153 yet he was not a dependant of the deceased. It was averred that the deceased had three wives who bore him children, grandchildren and great grandchildren. It was also averred that the deceased left behind three properties being Kangundo/ Kikambuani/1509 and 1510 as well as Land Reference 12715/153 originally known as L.R 7141/11/R. Copies of searches were annexed and marked JMK4. It was averred that the deceased left behind a will in Kikamba language that expressed the wishes of the deceased. The deponent added that the contemnor was not married to the deceased as she was not known to him. It was averred that the contemnor was directed to render full account of the proceeds of the coffee farm but she declined; that she had been misusing and intermeddling with the estate of the deceased for instance she had sold Land Reference 12715/153 originally known as L.R 7141/11/R without any valid reason; that the same should be declared as part of the estate of the deceased. The deponent sought that he be appointed administrator of the estate of the deceased.

4. In reply to the application was an affidavit deponed by Susan Mbula Kimatu the second respondent herein who emphasized that she is a wife to the applicant's late brother, Justus Mweu and had been living in the house that used to belong to the deceased. She also averred that the said house had been bequeathed to her husband by the deceased which fact was well known by all the family members. She finally averred that the attempt by the objector/applicant to evict her from her only home is unfair and urged the court to reject the application as she needs to mourn her late husband in peace.

5. In rejoinder is an affidavit deponed by Josephat Mulli Kitele the objector/applicant herein wherein he reiterated that the impugned grant ought to be revoked because he was omitted as a beneficiary of the estate of the deceased. It was pointed out that the instant matter relates to the estate of his deceased father and not of his brother Justus Mweu Kitele and therefore the contemnor had no locus in matters pertaining the estate of the deceased. It was reiterated that the will left behind by the deceased distributed his estate amongst his three wives.

6. On record is a supplementary affidavit by Jeremiah Muthoka Kitele the 1st respondent wherein he averred that he was appointed to administer the estate of the deceased by the deceased as evidenced by letter marked JMK1. It was admitted that the applicant and his two brothers were left out of the list of beneficiaries of the estate of the deceased due to an omission that was in good faith. It was averred that the deceased had distributed his property amongst all his wives before his death; that a one Sabina had left the deceased yet she was allocated land by the deceased. It was revealed that the contemnor only settled on her husband's share of land and that it was agreeable to divide the deceased's land as per the wishes of the deceased.

7. In further rejoinder vide an affidavit deponed on 2nd December, 2020 by Josephat Mulli Kitele, the objector/applicant herein who disputed the appointment of the 1st respondent by the deceased as administrator of his estate. He denied that the said Sabina had divorced the deceased.

8. Parties herein filed written submissions. Submitting in support of the application, counsel Kivuva, Omuga & Co. Advocates framed six issues that hinge on revocation of the grant confirmed on 23.6.2006, appointment of an administrator for the estate of the deceased, an order for account, the validity of the sale of Land Reference 12715/153 originally known as L.R 7141/11/R and whether the 2nd respondent is a beneficiary of the estate of the deceased.

9. On the issue of revocation, counsel took issue with the omission of some beneficiaries from the application for grant as well as some properties as well as the inclusion of James Kitaka Mutua as a beneficiary yet he is not a dependent of the deceased. It was also submitted that the deceased left a will. To counsel, the grant was obtained by false pretenses and annulment is a befitting remedy. On the issue of appointment of Josephat Mulli Kitele as administrator, it was submitted that an order to that effect would be in the interest of justice. On the 3rd issue, it was submitted that rendering accounts is a statutory requirement; cited was the case of **In Re Estate of Daniel Muiruri Gatuati (Deceased) 2017 eKLR**. The court was urged to make an order compelling the 1st respondent to render accounts. On the issue of the validity of the sale of Land Reference 12715/153 originally known as L.R 7141/11/R, it was submitted that the same was sold before the confirmation of the grant and without the consent of the beneficiaries. It was submitted that the sale amounted to intermeddling as was found in the case of **In Re Estate of Damaris Njeri Kimani (Deceased) (2015) eKLR** and therefore the sale ought to be declared null and void. In respect of the 5th issue, it was submitted that the contemnor was not legally married in the family and ought to be stopped from wasting the estate of the deceased. It was argued that the 2nd respondent was neither a dependent nor descendant of the deceased and is not entitled to benefit from the same. On the issue of costs, it was submitted that the respondents be condemned to pay costs.

10. The respondents filed submissions dated 18/3/2021 regarding the application dated 2/9/2020. Counsel raised similar issues for determination just like that of the Objector/Applicant namely; Firstly, whether the grant of letters of administration issued on 13/2/2006 to the 1st respondent and confirmed on 23/6/2006 should be annulled; Secondly, whether the Objector/applicant should be appointed as administrator of the estate and that the estate be administered afresh; Thirdly, whether the current administrator should render full and accurate accounts on L.R No. 12715/153 originally known as Plot No. 41 on L.R No. 7147/11/R as well as the coffee/farm proceeds at Kangundo- Masekwani Kikambuani and the number of children of the deceased who have been educated through the said proceeds; Fourthly, whether the parcel No. L.R 12715/153 was sold fraudulently before confirmation of grant and without the consent of all the rightful beneficiaries to the estate.

11. Regarding the first issue, it was submitted that at the time of filing for letters of grant, the beneficiaries who were within the country were involved while those who lived abroad were fully briefed. Counsel pointed out that even though some of the beneficiaries were omitted the same does not warrant revocation of the grant since such an action is discretionary and that the court can issue orders that meet the ends of justice such as ordering a fresh certificate of confirmation of grant that includes the applicants as beneficiaries. On whether the objector should be appointed as administrator of the estate, it was submitted that the applicant has been aware of all the issues in the last twenty-eight years after the death of the deceased but had not raised objections and has been residing abroad for many years thus making him unsuitable as an administrator. As regards the third issue, it was submitted that the administrator has given a full explanation in his replying affidavit. Finally, on the last issue, it was submitted that the beneficiaries within the country were fully involved in the sale of the properties and that the properties have changed hands and hence the objector should lodge claims before the Environment and Land Court for redress. On the claim that the 2nd respondent is not a beneficiary of the estate, it was submitted that she is the wife of one of the sons to the deceased who had since died and that she is entitled to a life interest in the estate of her deceased husband.

12. I have considered the submissions aforesaid. In respect of the first application, the issue for determination is whether the applicant has met the threshold to warrant grant of orders of injunction, revocation of grant, appointment as administrator, account and inclusion of the property Land Reference 12715/153 originally known as L.R 7141/11/R as part of the estate of the deceased.

13. In respect of the prayer for an injunction, I am guided by the case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** that sets out the test to be met when granting an injunction. On the first principle as set out in the case, I am satisfied that the applicant has established a prima facie case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It is evident from the facts tendered in court that part of the estate of the deceased has been subjected to what amounts to intermeddling in the estate. It is also evident that some of the sons of the deceased have not been included as beneficiaries to the estate. It is also evident that some doubt has been raised as to the marital status of the 2nd respondent and therefore her locus with regard to the estate of the deceased appears shaky and ought to be established on preponderance of probabilities.

14. I am satisfied that if the order sought by the applicant is not granted, there will be irreparable loss to the estate of the deceased that cannot be compensated by damages. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, the court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The facts speak for themselves and interference in the estate of the deceased as well as exclusion of beneficiaries cannot be compensated by way of damages.

15. On the balance of convenience test, the circumstances sway in favour of grant of a status quo order only to the extent that it touches the property that the 2nd respondent resides because the 2nd respondent has indicated that she resides on one of the deceased's property as she had been married by a son of the deceased and hence if an injunction is granted, it may amount to a final determination of the rights of the

parties without considering cogent evidence. In respect of the rest of the properties of the deceased, the circumstances sway against interference by the 2nd respondent and therefore the applicant has met the threshold for grant of an injunction to that extent.

16. With respect to the prayer for revocation of grant, the applicant's case is that he was entitled to benefit from the estate of the deceased yet he was not included in the grant. His case is that there are properties that have not been included in the grant yet they ought to have been included. The respondents have admitted omitting the applicant and have given no reason for the said omission.

17. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a.;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c.;

18. I note that there are copies of searches that speak about the fact that the applicant is correct when he avers that there is property that was left out of the grant. The admission by the 1st respondent further buttresses this fact and resultantly the conditions under section 76(1)(b) of the Law of Succession Act have been satisfied. The applicant and other beneficiaries were also not included during the application for the grant and during confirmation of the same. It is noted from the rival affidavits and annexures that the deceased had a large family of three households and many children and grandchildren whose names were not listed in the initial petition application for grant of letters of administration. Again, some assets were omitted from the schedule of distribution. This was a material discrepancy warranting an order for revocation of grant. I am satisfied that the applicant meets the threshold for grant of a revocation order. However, revoking the grant will be too drastic an action as the same has the effect of setting the parties herein as well as the beneficiaries back to the drawing board yet the matter has been pending since 2005. The court has a discretion whether or not to order for revocation of the grant. As the objector's grouse has to do with omission of beneficiaries including himself as well as other assets, the same can be ameliorated by including the names of beneficiaries in the distribution schedule as well as adding the new assets. This then calls for interference with the certificate of confirmation of grant so that the family can file a fresh summons for confirmation of grant. This route will take care of the concerns of all the parties as it will be a win- win for them.

19. In respect of the order seeking that the applicant be appointed administrator, the petition for grant is incomplete now that there is need for revocation of the grant and it would beat logic to salvage what is left. The applicant's quest to be made an administrator becomes moot in the circumstances. In addition, it has been alleged that the deceased left a will and it will not be in order to appoint an administrator yet there is stated to be a will in place. The said will must be presented to the court and to be probed in the event of a dispute thereon. The same will also inform whether the petition for grant is with will (probate) or otherwise. Therefore, it would not be in order to appoint the applicant as administrator but direct that a fresh application be made to prove the will and to include all the details pertaining to the estate and beneficiaries of the deceased. The prayer for being made an administrator is declined.

20. As regards the prayer for account, beneficiaries have the statutory right to obtain an account from the executors of the estate, and at any time they may ask for estate books and documents (See **In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR**). This is because an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration. Further, the executor or personal representative is accountable to the court on how he deals with the estate of the deceased. (See **Paul Rono Pymto & Another v Giles Tarpin Lyonnet [2014] eKLR**. Failure to provide the same is a ground for revocation of grant issued to the administrator.

21. Justice Musyoka in **In Re Estate of David Kyuli Kaindi (Deceased) (2016) eKLR** in addressing the responsibility of an executor or representative to account stated that "*the personal representative must give account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this stage should also state the assets that generate income, stating how much has been collected and how it has been utilized.*"

22. According to the record, the 1st respondent has not provided a full and accurate account of the assets and liabilities of the estate, income received from the property of the estate, and how she had applied the same. An order for account is the most potent remedy available to a beneficiary to the estate of the deceased. Hence, I find that the prayer for account has merit. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoins the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice. The prayer for account in respect of L.R 12715/153, originally known as Plot 41 on L.R 7147/11/R and the coffee farm proceeds of the land at Kangundo/ Masewani Kikambuani is allowed.

23. In respect of the prayer that in effect seeks nullification of transactions conducted by the 1st respondent on the property L.R 12715/153, originally known as Plot 41 on L.R 7147/11/R, the 2nd respondent has neither denied nor accepted that she sold the same. There is no copy of the search and as a result the claims that the same was sold remains mere allegations. I decline to grant the order sought but however, the applicant is free to approach the Land Registrar to register a caution on the said land if need arises.

24. In the application dated 30.11.2020 the applicant sought that *the contemnor/ 2nd respondent herein be held in contempt and committed to civil jail for disobeying the court orders made on 24.9.2020.*

25. The grounds of the application were set forth in the affidavit in support that was deponed by Josephat Mulli Kitele. The deponent averred that the contemnor was injuncted from dealing in the deceased's properties including Kitele Kitingu burial grounds and that the order was served on the contemnor via whatsapp. It was averred that the contemnor instructed her servant one Raphael Wambua Maingi to uproot and replant bananas that are on land parcel Kangundo/Kikambuani/1509. It was averred that the contemnor had not taken steps to purge the contempt and in the result her failure to comply with the court orders should be punished by this court.

26. In reply to the application was an affidavit deponed by the contemnor who averred that she lives on the land parcel number Kangundo/Kikambuani/1509 and had lived there for 20 years hence she could not be restrained from dealing in the land that she lived. She admitted uprooting and replanting banana plants and averred that she had always been doing so on her shamba. She denied knowing the mentioned Raphael Wambua Maingi. She assailed her advocate for pointing out to court that the court order was not capable of being complied with as she lived on the land that she was ordered not to deal in; that she never set foot on the graveyard despite there being overgrown bushes that require clearing.

27. Submitting in support of the application dated 30.11.2020, in placing reliance on the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others (2014) eKLR** it was submitted by counsel for the applicant that the contemnor acted in disobedience of the court order issued on 24.9.2020. It was pointed out that the contemnor admitted doing the same and hence the application dated 30.11.2020 ought to be allowed.

28. The respondents filed submissions dated 18/3/2021 on the application dated 30/11/2020. It was submitted that the 2nd respondent is a wife to the late Justus Mweu son of the deceased and that she has been in occupation of the land in question where she has been farming it for long. It was also submitted that the 2nd respondent does not deny uprooting and replanting bananas on the land as she has always done for the last 27 years. It was also submitted that the order was not clear and also ambiguous as the respondent who lived on the land could not understand it since she had been living there all along yet it was not an order of eviction. It was also submitted that the accusations levelled against the 2nd respondent were not proved to the required standard. Finally, it was submitted that the accusations against the 2nd respondent were malicious and discriminatory in that both the said respondent resides on the same property just like the other beneficiaries who have not been cited for contempt. It was contended by the 2nd respondent that the applicants are waging a malicious vendetta against her with a view to denying her rights under the estate on behalf of her late husband. According to counsel, the applicant has apparent distain and pure hatred towards the 2nd Respondent and wants to use the court process to achieve his evil mission. Counsel urged the court to dismiss the application with costs.

29. Contempt of court consists of *conduct which interferes with the administration of justice or impedes or perverts the course of justice..... Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. –See Osborne's Concise Law Dictionary, P. 102.*

30. In the case of **Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR** Justice Aburili stated that:-

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

31. **Halsbury's Law of England, Vol.9(1) 4th Edition** states as follows;

‘Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgement, Orders or other process of Court and involving in private injury’

32. In the instant application, the court ought to satisfy itself of the elements of civil contempt as were laid out in *Contempt in Modern New Zealand that was cited in North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR* as follows:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

33. From the above definition of contempt of court, the issues for determination are;

a) Who is the contemnor?

b) Were the orders served upon contemnor and was she aware of the said orders?

c) Is the contemnor guilty of contempt of the above stated orders?

d) What orders may the court grant?

34. This application is based on allegations of disobedience of court orders and the contemnor has stated that she resides on the suit land and therefore the court orders cannot be performed. The applicant claims that the court order was served upon the contemnor via whatsapp while the contemnor maintains that she has lived on the disputed land for over twenty years and that she does not know the persons alleged to have sworn affidavits claiming to be her agents.

35. With regard to the 1st issue, the contemnors are on the face of the application stated to be the 2nd respondent. The affidavit on record speaks to the fact that the 2nd respondent went onto the suit land and tilled the same. The 2nd Respondent defended her actions by claiming that she resided on the land and has been tilling the same since she got married to a son of the deceased.

36. With regard to the 2nd issue, the 2nd respondent seems aware of the order and therefore I will not dwell on the issue of service.

37. The 3rd issue is disobedience of the court orders *a priori is the defendant* guilty of contempt of the above stated orders? In the case of **A-G v The Times Newspapers (1974) AC 273**, Lord Diplock said, at pages 311H-312A-B that:-

“--The remedy for contempt of court after it has been committed is punitive; it may involve imprisonment, yet it is summary; it is generally obtained on affidavit evidence and is not accompanied by the special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence. Furthermore, it is a procedure which if instituted by one of the parties to litigation is open to abuse, .. the courts have therefore been vigilant to see that the procedure for committal is not lightly invoked in cases where, although a contempt has been committed, there is no serious likelihood that it has caused any harm to the interests of any of the parties to the litigation or to the public interest-

38. The burden of proof is that the Contempt of Court is proved beyond reasonable doubt that the defendant wilfully disobeyed a court order cited above and instead proceeded to *uproot and replant bananas that are on land parcel Kangundo/Kikambuani/ 1509*.

39. The 2nd respondent has admitted to having uprooted and replanted bananas that are on land parcel Kangundo/Kikambuani/ 1509 but however she stated that she has been doing that for twenty years as that is the land she has been residing on all this time having been married to one of the sons of the deceased.

40. What constitutes contempt of court in the instant case according to the applicant is as follows;

· Contrary to existing valid court orders that prevented the *interference with the deceased's immovable properties*, the 2nd respondent went ahead to *uproot and replant bananas that are on land parcel Kangundo/Kikambuani/1509*.

41. This court is in doubt that the conduct complained of on the part of the 2nd respondent amounted to contempt of the court's orders cited above, in view of the standard set by the law namely proof above balance of probabilities. If indeed the 2nd respondent has been doing this for over twenty years with the knowledge of the applicant, why is it becoming an issue now? I find that the applicant has not discharged his legal duty to prove beyond reasonable doubt the contempt by the 2nd respondent. Indeed, the 2nd respondent has given a credible explanation that she had been on the land for twenty years and had been uprooting and planting bananas all that time. In one of her affidavits, she lays claim onto the land in question as she has been residing on it for a long time having been married by a son to the deceased. I find the explanation rendered by the 2nd Respondent is plausible as the applicant did not file a further affidavit in response to her explanation. I am satisfied that the conduct of the 2nd respondent did not amount to a contempt in view of the explanation rendered and the fact that the applicant had been aware of the 2nd respondent's presence on the suit land for twenty years. It appears to me that the applicant is out to use the order to harass the 2nd respondent.

42. The application dated 30.11.2020 therefore lacks merit and is dismissed.

43. The two applications having been determined, I proceed to make the following orders namely:

i. The certificate of confirmation of grant issued to the 1st respondent on 23.6.2006 is hereby set aside.

ii. The petitioner is ordered to file a fresh summons for confirmation of grant within forty-five (45) days from the date hereof and serve it upon all the beneficiaries.

iii. An order of status quo is hereby issued regarding the 2nd respondent's occupation of L.R Kangundo/Kikambuani/

1509 pending the filing and determination of fresh summons for confirmation of grant.

iv. An order of temporary injunction is hereby issued against the respondents, their servants, agents or any person under their authority restraining them from intermeddling or dealing in any manner with the assets of the deceased pending the determination of the fresh summons for confirmation of grant save for land parcel number Kangundo/Kikambuani/1509 where order (iii) above applies.

v. The respondents are ordered to give an account of proceeds forming part of the deceased's estate being L.R 12715/153 originally known as Plot No. 41 on LR7147/11/R and the coffee farm proceeds of the land at Kangundo/Kikambuani.

vi. As parties are family members, there will be no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 18TH DAY OF MAY, 2021.

D. K. KEMEI

JUDGE