



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HIGH COURT CIVIL APPEAL NO. 37 OF 2020

IN THE MATTER OF ESTATE OF KENNETH NJAGI JOSIAH (DECEASED)

MARYETTA NJOKI NYAGA.....APPELLANTY/APPLICANT

VERSUS

LUCY MUTHONI MBOGO.....1ST RESPONDENT

EVANGELINE GICUKU MURIITHI.....2ND RESPONDENT

RULING

A. Introduction

1. Before this court is an application dated 12.02.2021 filed under certificate of urgency and wherein the applicant seeks orders of prohibition to be registered against title numbers LR. Gaturi/Nembure/16552, 16553, 16554 and 16555 pending the hearing and determination of the appeal and the costs of the application.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. In a nutshell, it is the applicant's case that her application for revocation of grant was dismissed by the trial court in Embu CM. Succession Cause No. 105 of 2018 in a ruling delivered on 11.11.2020. That she filed the instant appeal and contemporaneously she filed an application seeking interim orders of stay of execution of the ruling by the trial court (which dismissed the application for revocation of grant) and which orders were indeed granted on 3.12.2020 by this court and which were served upon the respondents herein.
3. That on the day of the hearing of the application, the court extended the said orders. That the applicant upon being served with the replying affidavit realized that the estate being LR Gaturi/Nembure/10174 had already been sub-divided and new titles issued (LR. Gaturi/Nembure/16552, 16553, 16554 and 16555) and sold to a third party and further a share which was to go to one IPWM (minor) and held in trust by GKN had been disposed off and which disposal was to defeat justice and frustrate the appeal. As such, the instant application ought to be allowed so as to preserve the estate herein.
4. The application is opposed by way of a replying affidavit sworn by the 1st respondent and wherein she deposed that the estate of the deceased was equitably distributed amongst the four houses of the deceased and that the implementation of the grant issued is finalized as the suit land was divided as per the confirmed grant (into LR. Gaturi/Nembure/16552, 16553, 16554 and 16555) and wherein LR. Gaturi/Nembure/16552 was allocated to the applicant but registered in the names of the administrators as the applicant refused to surrender her documents for registration and that LR. Gaturi/Nembure/16553, 16554 and 16555 were disposed of by the respective beneficiaries to one Kathuri Njuki Ruita as they could not live in the same area with the applicant since she refused to recognize them as wives of the deceased but called them strangers and thus they sold so as to move to a different place.
5. Further that at the time of service of the interim orders, the suit land had already been sub-divided and sold to the said Kathuri Njuki Ruita and who is not a party to the instant proceedings and who has a right to be heard and to have his titles protected. Further that the applicant will not suffer any prejudice as her share is still intact and preserved by the respondents and as such, the respondents deposed that the application ought to be dismissed with costs.
6. The application was canvassed by way of written submissions and wherein the applicant submitted that she had satisfied the conditions for grant of temporary orders of injunction as required under Order 40 Rule 1(a) of the Civil Procedure Rules and as were expounded in the case of **Geilla -vs- Cassman Brown Co. Ltd (1973) E.A 358**. That she has satisfied that she has a *prima facie* case with a probability of success as she is the legal wife of the deceased as per the marriage certificate annexed to the application and her rights surpasses those of the respondents and which ought to be protected by an injunction.

7. Further that she stands to suffer irreparable harm as she has been forced to move out of her matrimonial home as a result of actions by the new owner (Kathuri Njuki Ruita) who has cut down the food and cash crops the applicant had planted. That the said injustice cannot be compensated by way of damages as she has already suffered irreparable loss. It was submitted that this court ought to issue orders of injunction pending the hearing and determination of the appeal and the property be preserved. Reliance on this was made on the case of **Exclusive Estates Ltd –vs- Kenya Posts & Telecommunication Corporation Civil Appeal No. 62 of 2004**. Further that the balance of convenience is in her favour.

8. The respondents submitted that the main ground for revocation of the grant before the trial court was that the respondents are strangers to the estate of the deceased but they were recognized as per the Chief's letter. Further that the grant was confirmed and implemented and wherein the applicant was provided for and the other sub-divisions disposed off to Kathuri Ruita and which disposal was before the interim orders were issued by this court. Further that the titles held by the said buyer ought to be protected by section 93 of the Law of Succession Act as he bought the land for value and which disposal of the suit properties was in furtherance of the respondents' duties to complete the administration of the estate.

9. I have considered the application herein and the response thereto and further the rival submissions filed. As I have already noted, the applicant seeks orders of inhibition to be registered against title numbers LR. Gaturi/Nembure/ 16552, 16553, 16554 and 16555 pending the hearing and determination of the appeal. It is my considered view therefore that the issue which this court ought to determine is whether the said orders ought to be granted.

10. As for the order of inhibition the same is provided for under section 68(1) of the Land Registration Act 2012. This section gives the court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event. As such, an inhibition order is an order which is in the nature of a prohibitory injunction restraining dealings on land pending further orders by the court. The purpose of the said order is to preserve the property from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter.

11. The conditions for granting of an order of inhibition are now settled. In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions: -

a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.

b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.

c. That the applicant has arguable case."

(See the case of **Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria [2012] eKLR** and **In re Estate of Paul Kimeu (Deceased) [2020] eKLR** which authorities I find persuasive).

12. In the instant case, it is not in dispute that the respondents filed for grant of letters of administration intestate in respect of the estate of the deceased herein and after which Gaturi/ Nembure/10174 was transmitted to the respondents and later sub-divided into LR. Gaturi/Nembure/16552, 16553, 16554 and 16555. It's also not in dispute that all the subsequent sub-divisions were sold to one Kathuri Njuki Ruita save for LR. Gaturi/Nembure/16552. It's my considered view that the said resultant land parcels being in the hands of a third party are at risk of being disposed or alienated or transferred to other parties. Such transfer would be to the detriment of the applicant herein. The applicant's interests needs to be protected. That the refusal to grant orders of inhibition would render the applicant's application nugatory as it might be hard to trace back the estate in the event the grant of letters of administration is revoked on appeal. There is indeed a need to protect the said land parcels from further dealings.

13. The respondents deposed that LR. Gaturi/ Nembure/16553, 16554 and 16555 have already been disposed to one Kathuri Njuki Ruita and who is not a party to these proceedings. However, it is trite law that where a person holds a title to land having been transferred to him illegally, the same cannot stand and ought to be cancelled. The only way the purported title can be imputed at the first instance is by interrogating the validity of the authority which the respondents had, to enable then transfer the suit land to the said Kathuri Njuki Ruita. Once the said grant are revoked, the subsequent dealings cannot stand. (See **Alice Chemutai Too –vs- Nickson Kipkirui Korir & 2 Others (2015) eKLR**. It is my view that the absence of the said Kathuri Njuki Ruita in the instant proceedings cannot bar this court from issuing orders aimed at protecting the estate of the deceased. As such the said objection cannot hold water.

14. Further, as I have already noted, and it's not in dispute that LR. Nos. Gaturi/Nembure/16553, 16554 and 16555 are in the names of the said Kathuri Njuki Ruita. The appeal herein is against the trial court's orders dismissing an application for revocation of the grant made to the respondents. In my view and despite the said land parcels being in the names of the said Kathuri Njuki Ruita, the refusal by this court to grant the orders of inhibition will definitely render the intended appeal nugatory in the event that the said Kathuri Njuki Ruita transfers the properties registered in his name to third parties.

15. Further as to whether the appeal is arguable, it is not disputed that the applicant is the wife to the deceased. Further, and without venturing into the merits of the pending appeal, it is in dispute that the applicant has two children and further that the deceased (from the trial court's record that there are other wives of the deceased). I take judicial notice that under the rules of intestacy, where a deceased is polygamous, all the children should be added together and the surviving spouses added as a unit and further that all persons of equal priority (or superior priority) ought to consent to the grant being made to the petitioners in a petition for grant of letters of administration intestate being made to persons of equal priority and otherwise, there must be an affidavit in that respect). It is my view that on the basis of the above, the intended appeal is arguable.

16. In **Philip Mwangi Githinji –vs- Grace Wakarima Githinji (2004) eKLR** Okwengu J (as she then was) held that before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition.

Such grounds would normally be in the form of a sustainable claim over the suit land. Considering all the above, it is my considered view that the applicant herein has good grounds to warrant the grant of the orders of inhibition.

17. In the premises, prayer (3) of the application is hereby allowed. The order issued herein shall last for 45 days, within which the appeal should be prosecuted failing which the orders issued herein shall lapse.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents