



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 117 OF 2004

GEDION MUGO PETER.....APPLICANT

VERSUS

JOHN GICHOBI GATUMU.....RESPONDENT

RULING

1. What is before me is an application dated 31.08.2020 and wherein the applicant basically prays for orders that the respondent's title in respect to LR Ngandori/Ngoviu/905 be cancelled and the ownership of the said land parcel reverts back to the names of the deceased, Josphat Kababii, and for the costs of the application.

2. The applicant's case from the grounds in support of the application and the supporting affidavit is that he is the sole beneficiary of the estate of the deceased herein and was issued with a certificate of confirmation of grant on 29.04.2010 in respect of the said estate. However, the respondent had fraudulently acquired title to the suit land pursuant to a grant of this court but which grant has been revoked. That as such, the land ought to revert back to the names of the deceased so that it can be registered in his names. That, the respondent has failed to co-operate which has necessitated the instant application.

3. The application is opposed by way of a replying affidavit sworn by Mr. Njeru Ithiga an advocate of the High Court and wherein he deposed that the respondent's interest in the suit land are that of innocent purchaser for value and thus protected under section 92(2) of the Law of Succession Act and thus the prayer for the cancellation of the respondent's title is untenable. Further that the powers to cancel a title are within the jurisdiction of the Environment and Land Court and that there is a pending application being Misc. 37 of 2013 between the parties herein and whose subject matter is the validity of the title held by the respondent in respect of the suit land herein. As such, the application is misplaced and lacks merits.

4. The application was canvassed by way of written submissions. The applicant in support of the application submitted that one Veronica Gitiri Mbogo filed an application seeking revocation of the grant issued to the applicant herein but which application was dismissed vide the orders of 31.10.2017. That the respondent herein filed another application dated 27.02.2018 seeking review and/ or setting aside of the said ruling but which application was also dismissed through the ruling of this court dated 25.07.2019. As such, the confirmed grant in the names of the applicant remains in force and thus the applicant is entitled to enforce the said grant. That however, the suit land had been transferred to the respondent thus making it hard for the applicant to implement the said grant and hence the application herein. Further that this court had power to cancel any title which is acquired fraudulently in relation to a deceased person's estate under section 47 of the Law of Succession Act and Rule 73 of the Probate & Administration Rules. Reliance was made on the case of **Madison Maroka Nyamweya -vs- Bernard Moroko & Another (2016) eKLR** to the effect that this court has jurisdiction to cancel a title and revert the same to the names of the deceased.

5. The respondent on his part submitted that the application herein is *sub judice* as its similar to the application dated 4.12.2012 and as such the instant application ought to be struck out. Further that this court is bereft of jurisdiction to determine matters relating to cancellation of titles as the same is the preserve of the Environment and Land Court as established under the Environment and Land Court Act of 2011 and the same cannot be cured under section 47 of the Law of Succession Act. Reliance was made on the case of **the Estate of Wesonga Namununi (deceased) (2020) eKLR**. Further that Succession Cause No. 117 of 2004 and Misc. 37 of 2013 are two different causes and which have never been consolidated and that Succession Cause No. 117 of 2004 seeks cancellation of title and which is part-heard but Misc. 37 of 2013 has been ongoing and was in relation to revocation of the grant.

6. I have considered the application herein, the response by the respondent and the rival written submissions. As I have already noted, the respondent challenged the jurisdiction of this court to issue orders sought in the application herein on the grounds that the same is *sub judice* and further that this court cannot issue orders with the effect of cancelling a title as the same is within the realm of the Environment and Land Court.

7. It is trite that jurisdiction issue ought to be determined *in limine*. As such, I will determine the issue whether this court has jurisdiction to

entertain the application herein and if the answer to this question is in the affirmative, I will then proceed to determine whether the application has merits.

8. As I have already pointed out, the jurisdiction of this court to entertain the instant application is challenged on the ground of the application herein being *sub judice*. The respondent's case is that there is a pending application being Misc. 37 of 2013 between the parties herein and whose subject matter is the validity of the title held by the respondent in respect to the suit land.

9. The *sub judice* rule is spelt out in Section 6 of the Civil Procedure Act, (Cap 21) as follows: -

6 “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

10. The *sub-judice* rule is meant to prevent courts of concurrent jurisdiction from contemporaneously entertaining trial of two parallel suits in respect of the same subject matter. For it to apply, it is necessary that issues in the subsequent suit be also directly and/or substantially the same issues in the other suit. The remedies sought should also broadly be similar. The parties should also be the same in the two matters or the dispute should be between parties under whom they or any of them claim, litigating under the same time. The matters should be pending before the same court or any other court with jurisdiction to grant the relief claimed. (See **Kinatwa Co-operative Savings & Credit Society Limited –vs- Kinatwa Prestige Ltd [2021] eKLR**).

11. I have indeed perused the court record and I note that on 10.12.2012, the applicant herein filed an application against the respondent herein dated 4.12.2012 and wherein the applicant sought for orders that “the name of John Gichovi Gatumu be deleted from the register of parcel No. Ngandori/ Nguviu/905 and the land Registrar Embu be ordered to register the applicant herein and dispense with the production of old title deed which was issued earlier”. The orders sought in the application herein is that the respondent's title in respect to LR Ngandori/ Ngoviui/ 905 be cancelled and the ownership of the said land parcel reverts back to the names of the deceased Josphat Kababii and for the costs of the application.

12. It is clear that the two applications seek similar orders and that the parties are the same in the two applications. The respondent herein filed his replying affidavit in response to the said application on 15.01.2013. The record shows that when the application dated 4.12.2012 came up for mention on 6.10.2015, Mr. Adande for the respondent prayed that the said application be stayed pending the finalization of Misc. No. 37 of 2013 in which revocation of the grant was being sought. The court made orders that the application dated 4.12.2012 be stayed pending the finalization of the said Misc. Application No. 37 of 2013. There followed an application for reconstruction of the file in Misc. Application No. 37 of 2013 and which was allowed by the orders of 3.11.2015. In the course of the reconstruction of the said court file, the application dated 4.12.2012 proceeded for hearing *viva voce* and wherein the applicant's evidence was tendered in court and the applicant's case was closed on 24.10.2016. The application was fixed for hearing of the respondent's case on 7.12.2016. On the said date, Ms. Muriuki holding brief for Ms. Fatuma for the respondent informed the court that it did not have jurisdiction over the said application and that the same lies within the purview of the Environment and Land Court. The matter was thereafter fixed for a date to address the issue of jurisdiction. This was *vide* the orders of 7.12.2016.

13. There is nothing on record to indicate whether the said application was prosecuted beyond that stage. What is clear, however, is that the parties herein proceeded to prosecute the application in Misc. Application 37 of 2013 seeking reconstruction of the said file and which application was allowed *vide* the orders of 24.02.2016. After that, the application seeking revocation of the grant (application dated 20.03.2013) was fixed for hearing on 9.06.2016. The said application was heard and dismissed *vide* the ruling delivered on 31.10.2017. After that, there was an application dated 27.02.2018 seeking review of the orders of 31.10.2017 and the said application upon being considered by this court, it was dismissed *vide* the ruling delivered on 25.07.2019. What followed is the application herein.

14. It is clear from the above, therefore, that there is indeed a pending application in Embu Succession Cause No. 117 of 2004 and which seeks similar orders with the instant application. The parties are the same and it is pending in this court. It is therefore my view that the application herein is *sub judice* and as such cannot be considered by this court. This court does not have jurisdiction over the said application. The same is hereby struck out.

15. As I have noted, the application dated 4.12.2012 is part-heard and the applicant herein had closed his case. The court made orders that the parties do address the court on the issue of the jurisdiction of this court to determine the said application which sought cancellation of titles. I have noted that the parties herein have made extensive submissions in relation to the said issue. As such, it will be a waste of judicial time to have the parties herein have a date in court to address the court on an issue which they have already expressed their rival positions in respect of. I will therefore proceed to determine the issue as to whether this court has jurisdiction to cancel titles to land. This is bearing in mind further that issue of jurisdiction can be determined *suo moto*.

16. In **re Estate of Leah Wanguii Nding'uri (Deceased) [2020] eKLR**, Hon. R.P.V Wendo J while considering the issue as to whether this court has jurisdiction to cancel titles held as thus:-

“In this case, the respondents filed this cause and brought themselves under the provisions of the Law of Succession Act. The grant that was issued to the respondents was revoked. It means that, all actions taken by the respondents including the registration of the deceased's property in their names was rendered a nullity. Unlike the situation described above by J. Musyoka, the Respondents having brought themselves within the Law of Succession Act, this court has jurisdiction to order cancelation of the said titles so that the land can revert back to the deceased's names and that will enable the applicants to comply with the consent order of 29/04/2008, appointing them as administrators of the deceased's estate and requiring them to show the totality of the deceased's estate. It is only after the administrators have finished administering the estate that the respondents can file suit in the ELC to pursue their rights. The upshot is that the preliminary objection lacks merit and is hereby dismissed.”

See also the case of Santuzza Billoti Alias Mei Santuzza (deceased) –vs- Giacanrio Balasconi [2014] eKLR and Succession Cause 265/2004 Munyasya Mulili Vs Sammy Muteti Mulili).

17. Under Section 47 thereof, this court has jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. Further under Rule 73 of the Probate and Administration Rules, this court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. As such, the court has wide powers to preserve the estate for the benefit of other beneficiaries and for the due process to be followed in the distribution of the same.

18. In exercising the said powers, this court has powers to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

19. It is my considered view that in the circumstances of this case, this court has jurisdiction over the pending application. The grant issued to the respondent having been revoked, it will be in the exercise of the duties of this court (of preserving the estate of the deceased) and after hearing the parties, to have the title which was registered in the names of the respondent cancelled and the land to revert back to the deceased's name for subsequent transmission to the rightful beneficiaries of the estate. Otherwise, the court would be failing in its duties to preserve the estate of the deceased.

20. In the circumstances therefore, I make the following orders:-

1. That the application dated 31.08.2020 is hereby struck out for being sub judice.
2. That this court has jurisdiction to determine the application dated 4.12.2012.
3. That the parties herein are hereby ordered to fix the said application for hearing of the respondent's case on priority basis, this being an old matter.
4. This being a family matter, each party is hereby ordered to bear his own costs in relation to the application herein.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents