



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 5 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE TIMOTHEO GATHERU -DECEASED

JECINTA WANJIKU KIBUCHI.....1ST APPLICANT

JOSEPHINE KARIMA NYAMU.....2ND APPLICANT

LOISE WANJIRA KATHERU.....3RD APPLICANT

VERSUS

MURIITHI KINUA TIMOTHY.....PETITIONER/RESPONDENT

RULING

1. The Applicants approached this court under a certificate of urgency vide a Notice of Motion dated 5th December, 2019 seeking the following orders:

1) Spent

2) This court do lift the prohibitory orders issued on 2/3/2017 and vacate all encumbrances over the Land Parcel No. Mutira/Kaguyu/187.

3) Costs be provided for.

2. The Respondent filed Grounds of Opposition dated 16th December, 2019 where he urged to oppose the summons dated 5th December, 2019 on the following grounds:

i. That there are summons for revocation of grant dated 13th November, 2019 and was served upon counsel for the Applicant on 25th November, 2019. No response has been filed to oppose that application.

ii. That the application is premature and an abuse of the due process of the court.

That both parties filed written submissions.

3. **Applicant's submissions.**

The Applicants filed submissions dated 24th January, 2020 where they reiterated the averments in their supporting affidavit dated 5th December, 2019. The Applicants submit that the exparte order of inhibition is not supposed to last for more than one year yet the said inhibition order has been inforce for 3 years and is oppressive to the Applicants.

They have cited the decision in Grace Wambui Njambuya vs John Waweru Wamai [2019] eKLR. The court stated:

“The court may order a prohibition or inhibition on such conditions as it thinks justifiable in the circumstances. It may be for a period of time or until the occurrence of a certain action. A prohibition may be cancelled after the expiry of the time for which it was ordered or at the proof of occurrence of the event stated in the prohibition.”

4. They further submitted that the occurrence of the event mentioned in the prohibitory order occurred on 24th October, 2019 when the

application was determined and dismissed. Hence, they urge the court to lift the prohibitory order.

5. **Respondent's submission**

The Respondent filed submissions dated 24th January, 2020. He reiterated the issues raised in Grounds of Opposition dated 16th December, 2019, and submitted that the application dated 5th December, 2019 could only have been filed upon the determination of the summons for revocation of grant, such that if the grant is revoked, for the land to revert to the name of the deceased and if dismissed, for the named beneficiaries to share the land.

6. Finally, the Respondent submitted that the prohibitory order will serve the purpose of preserving the suit property pending the hearing and determination of the summons for revocation of grant dated 13th November, 2019

7. The **only issue** I deem necessary for determination is, **whether the prohibitory orders issued on 2nd March, 2017 and encumbrances over the Land Parcel No. Mutira/Kayugu/187 should be lifted.**

8. **Analysis and determination**

The background to this application is an application for review filed by the Respondent dated 2nd March, 2017. In the application, the Respondents sought the following orders:

- i. An order of inhibition do issue against the title of **Land Parcel No. Mutira/Kaguyu/187** pending the hearing and determination of the application.
- ii. That the court be pleased to review and/or set aside the orders of 29th June, 2006.
- iii. That the Certificate of Confirmation of Grant issued on 4th September 2013 be set aside, the names of the beneficiaries be cancelled from the title of the **Land Parcel No. Murira/Kakuyu 187** and the land to revert in the name of **Timotheo Gatheru**, deceased.
- iv. The Certificate of Confirmation of Grant given on 28th January, 2005 and issued on 1st February, 2005 be reinstated.

9. The court noted that the Applicant was seeking to review the order made on 29th June, 2006. The respondent had filed the application but failed to prosecute it to date. In the current application, he abandoned the prayer for review and sought to introduce an application for revocation of grant in his submissions. The same had not been pleaded. The court ruled that the application lacked merit and dismissed it with costs to the Respondent on 24th October, 2019.

10. Once again, the Respondent proceeded to file another summons for revocation of grant dated 13th November, 2019. The main issue of contention was the inclusion of the married daughters of the deceased as beneficiaries of the deceased's estate.

This issue had been decided in the application dated 2nd March, 2017 where the court adopted the orders of Justice Khaminwa on 29th June, 2006 that:

“there was no need to revoke the grant and since there was no objection the correct order was to amend the certificate by including all beneficiaries to share the estate equally as intended by the administrator, their mother.”

The deceased's daughters were named as beneficiaries. This order is still in place having not been set aside.

11. The Applicant submitted that the prohibitory order was issued on 2nd March, 2017 pending the hearing and determination of the application dated 2nd March, 2017. The said application was heard and dismissed on 24th October, 2019 and therefore, prohibition cannot stand on nothing, therefore, the said ex parte order having lapsed on the 24th October, 2019. In **Grace Wambui Njambuya vs John Weweru Wamai [20190 eKLR]** the court stated:

“the court may order a prohibition or inhibition on such conditions as it thinks justifiable in the circumstances. It may be for a period of time or until the occurrence of a certain action. A prohibition may be cancelled after the expiry of the time for which it was ordered or at the time the proof of occurrence of the event stated in the prohibition.”

12. In the matter of **M'anyoro M'ituma (Deceased) [2018] eKLR**, the court rendered that the inhibition and restrictions which are registered against parcel **L.R No. NKUENE/NKUMARI/33** were to preserve the estate of the deceased. Now that the grant herein has been confirmed, the inhibition serves no useful purposes; it is now an impediment to administration and distribution of this estate. The grant herein must be implemented by the administrator without delay. I am aware the law also requires expeditious administration of estates of the deceased persons with a requirement for confirmation within six months.

I wish to adopt the holding of the court in the above case, and add that the Respondent cannot prevent the Applicants from the enjoyment of their late father's generosity as his daughters which position was well stated in the judgment of Khaminwa J. (Supra).

13. I have considered the Respondent's submissions and his application dated 13th November, 2019 which to date he has failed to prosecute, while he terms the Applicant's application under consideration as premature. His submission that his 13th November, 2019 application ought to have been heard before the Applicants holds no water as it is the Respondent's duty to move the court for hearing of his application.

14. As the said application is still "alive", he may decide what to do with it, as the Applicants move to seek delayed justice.

15. As it stands, I agree with the Applicants that the prohibition order dated 2nd March, 2017 has since been overtaken by events and specifically the dismissal of the ex parte order obtained by the Respondent upon which the prohibitory order stood on.

16. Upon a balance of probability, I find the application dated 5th December, 2019 to be well founded and merited. The same is allowed as prayed. The Respondent shall bear costs of the application.

DATED AND SIGNED THIS.....DAY OF..... 2021

HON. J. N. MULWA

JUDGE

DELIVERED AT KERUGOYA THIS 11TH DAY OF NOVEMBER 2021

HON. R. MWONGO

JUDGE