



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**SUCCESSION CAUSE NO 209 OF 2000**

**IN THE MATTER OF WILLIAM AKUMA OMBOGI (DECEASED)**

**PASKARIA MOIGE ONTITA.....PETITIONER/APPLICANT**

**VERSUS**

**JOSEPH MOSE AKUMA.....OBJECTOR/RESPONDENT**

**RULING**

1. This succession cause relates to the estate of **William Akuma Ombogi** (“the deceased”) who died intestate on 16<sup>th</sup> October 1995. The applicant herein, **Paskaria Moige Ontita** ( ‘Paskaria’) filed Chamber Summons under Rules 49 and 73 of the Probate and Administration Rules dated 3<sup>rd</sup> October 2016, seeking the following orders;

*1. That this Honorable Court be pleased to direct its Deputy Registrar to sign **ALL RELEVANT PARTITION & TRANSFER DOCUMENTS** to enable the said **PASKARIA MOIGE ONTITA** be registered as the owner of **HALF (1/2) of L.R NO. CENTRAL KITUTU/MWAMANWA/34** currently registered in the name of **JOSEPH MOSE AKUMA** (the Respondent) herein as per the D.O’s award forwarded to this court on 04/02/2002 and adopted as the Judgment of this Court on 18/07/2003.*

*2. **ALERNATIVELY** and without prejudice to granting prayer 1 above, this Honorable Court be pleased to direct the Kisii County Land Registrar to remove the name of the Respondent herein from the Register in respect of **L.R NO. CENTRAL KITUTU/MWAMANWA/34** and restore the name of the late **WILLIAM AKUMA** to enable the Petitioner/Applicant apply for grant and confirmation to grant.*

2. Paskaria in the affidavit in support of the application deposed that her father Nicholas Nyangeri and the deceased were brothers. Both brothers lived on Central Kitutu/Mwamanwa/34 (‘parcel 34’) but the land was registered in the name of the deceased who held it in trust for his brother Nicholas Nyangeri. Paskaria averred that she is the only surviving child of Nicholas Nyangeri and is entitled to Nicholas Nyangeri’s share in parcel 34.

3. A brief background of this succession cause is that the parties herein referred the dispute surrounding the ownership of parcel 34 for arbitration. The D.O of Mosoch Division, after hearing both parties entered an award in favour of Paskaria by finding that she was entitled to half of parcel 34. Joseph Mose Akuma (‘Mose’) challenged the award but the court dismissed his application and adopted the award as its Judgment. Mose aggrieved by the ruling of the court preferred an appeal to the Court of Appeal, **Civil Appeal No 91 of 2005** challenging the award. The Court of Appeal after hearing the appeal dismissed the Appeal through its judgment delivered on 29<sup>th</sup> July 2011. The applicants contends that she has made attempts to remove Mose’s name from the Register and restore it to the deceased name but to no avail as the Registrar of Lands contends that the D.O acted outside his scope.

4. Mose filed grounds of opposition to the application by Paskaria. He contends that the land registrar has not been made party to the proceedings;that the disputed land is currently occupied by third parties who have acquired title;and that the respondent has subdivided the land to the deceased heirs. Mose further filed a relying affidavit dated 9<sup>th</sup> May 2019 where he deposed that parcel 34 was divided into 4 portions, **CENTRAL KITUTU/MWAMANWA/2718**, **2719**, **2720** and **2721**. He deposed that title for **CENTRAL KITUTU/MWAMANWA/2718** and **2720** have since been issued in the names of Joseph Mose Akuma and James Omare Akuma respectively and that each of the allottees have carried out developments including permanent buildings.

5. Paskaria filed a supplementary affidavit deposing that Mose fraudulently, wrongfully and unlawfully applied to subdivide the suit land to defeat the judgment of the court made in her favour. She deposed that the Kisii County Land Registrar on 9<sup>th</sup> September 2018 cancelled the illegal subdivision hence **CENTRAL KITUTU/MWAMANWA/2718**, **2719**, **2720** and **2721** are non-existent. Mose in his reply to the supplementary affidavit contends that the land registrar has no powers to cancel a title already issued.

6. At the hearing of the application dated 3<sup>rd</sup> October 2016, Mr. Momanyi counsel for the applicant submitted that in 2018 the applicant

discovered that the Objector had sub-divided parcel 34 contrary to the judgment of the court. The applicant served all the judgments and decrees of this court to the Land Registrar who cancelled all the sub-divisions. He contends that in an attempt to implement the court orders, the surveyors went to the grounds and requested Mose to sign the transfer documents but refused to do so hence the current application for the implementation of the court orders. He argued that the application is not against the Land Registrar but for the implementation of the judgment of the court. He contends that Paskaria did not sleep on her rights as the appeal was determined in 2011.

7. Mr. Masese counsel for the respondent advanced that Mose became the registered proprietor of parcel 34 on the 12<sup>th</sup> June 2001 vide **succession cause No.227 of 2000**. He contends that current suit was filed by Paskaria long after Mose was registered as the proprietor. The **Succession Cause No.227 of 2000** in which Mose was appointed the administrator has not been challenged. It was submitted that Mose vide the grant obtained in **Succession Cause No.227 of 2000** sub-divided the parcel 34 into 4 portions which were registered by the land Registrar and the titles issued. They advanced that there is a matter pending before the Environment and Land Court where they are challenging the Land Registrar's action of cancelling the titles. He sought the application be dismissed.

#### **DETERMINATION**

8. The first issue for consideration is whether the applicant has made its case to have the Deputy Registrar to sign the relevant documents to enable Paskaria to be registered as the owner of half parcel 34. In **Rose Wanjiku Kuria vs Nganga Mugwel[2003] eKLR** the court was faced with a similar question, whether the Deputy Registrar could sign transfer forms, partition forms, Land Control Board forms and any other document necessary to enable the applicant to be registered as owner of her portion of the estate. The court in **Rose Wanjiku Kuria vs Nganga Mugwe (supra)** held that by virtue of **section 79 of the Law of Succession Act**, the administrator gets all the property of the deceased vested in him/her and the court further stated that;

***“The Registrar of this court or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the Law of succession Act, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the Law of Succession Act and is therefore null and void.”***

9. I agree with the said findings in the above cited decision. Further section 61 of the Land Registration Act (“LRA”) provides as follows;

#### **Section 61. Transmission on death of a sole proprietor or proprietor in common**

(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

10. Under section 101 of the LRA the court with jurisdiction and empowered to grant the order being sought in this application is the Environmental and Land Court. In view of the foregoing, prayer (1) in the application dated 3<sup>rd</sup> October 2016 therefore fails as this court lacks the jurisdiction to grant the orders being sought i.e. both in prayer 1 and the alternative prayer. There shall be no order as to costs.

**Dated, signed and delivered at Kisii this 5<sup>th</sup> day of February 2020.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Momanyi For the Applicant/Petitioner**

**Mr. Masese For the Respondent/Objector**

**Ms. Rael Court clerk**