



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.8 OF 2018

IN THE MATTER OF THE ESTATE OF LEAH WANGUI NDIING'URI (DECEASED)

ELIZABETH NDUTA MUNORU.....1ST APPLICANT

HANNAH NYOKABI NGONYO.....2ND APPLICANT

-VERSUS-

JANE WACUKA NDUNG'U.....1ST RESPONDENT

WAKABA NDERI MUCHIRI.....2ND RESPONDENT

AND

JOSEPH MWANGI KARAGO & 5 OTHERS.....INTERESTED PARTIES

AND

PETER NJONDE BORO.....INTENDED INTERESTED PARTY/APPLICANT

RULING

The chambers summons dated 09/02/2011 was brought by *Elizabeth Nduta Munoru* who described herself as an administrator of the estate of *Leah Wangui Nding'uri* – the deceased. The other applicant in the matter is *Hannah Nyokabi Ngonyo*.

In the said application, the following orders were sought;

- 1. That the Registrar of Lands Nyahururu be directed to cancel all entries made in the register of parcel No. Nyandarua/South Kinangop/781 on 27/12/2016 in favour of John Ndung'u Gichuki and Wakaba Nderi Muchiri and further closing the title for sub division on 21/12/2016 pursuant to the fraudulent grant of letters of administration issued on 09/06/1998 or any other entries made thereafter as a consequence thereof;***
- 2. That the suit property does remain in the name of the deceased, Leah Wangui Nding'uri;***
- 3. That the name of Nding'uri Mwika, the co-administrator who died on 13/10/2008 be removed as one of the administrators of the deceased's estate.***

The grounds for bringing the said application are that the subject land plot 781 was transferred to the respondents pursuant to a grant of letters of administration which has been revoked and that one of the co-administrators *Nding'uri Mwika* is now deceased.

The respondents *John Ndung'u Gichuki and Wakaba Nderi Muchiri* in reply to the application, filed a preliminary objection to the application on 22/01/2019 to the effect that;

- 1. This Honourable Court does not have jurisdiction to grant the prayers sought in the application;***
- 2. That the application is incompetent and/or defective in substance.***

Before I delve into the issues raised in the preliminary objection, I must first set out the background of this case;

The respondents herein petitioned for letters of administration for the estate of the deceased **Leah Wangui**, though they are not beneficiaries of the deceased's estate. In the petition, they indicated that they were sons of the deceased. The applicants filed an application dated 21/05/2007, for revocation of the said letters of administration issued to the respondents on 09/06/1998 and confirmed on 29/03/2008. The grounds for revocation were inter alia, that the respondents were not beneficiaries of the deceased's estate; the respondents did not obtain the consent of the beneficiaries to petition the court, and that the respondents alleged to be sons of the deceased which was false and misleading. The application was heard on 29/04/2008 and Justice Onyancha revoked the grant of letters of administration issued on 09/10/1998 and confirmed on 29/03/2008 by a consent dated 29/04/2008 and a fresh grant of letters of administration was issued to the applicants. **Elizabeth Nduta and Hannah Nyokabi and Nding'uri Mwika** (now deceased) the applicants herein.

When the grant was made to the respondents on 09/06/1998, entries had been made in the register of the subject parcel No. 781 on 27/12/2006, in favour of the respondents and the register for the plot was closed upon subdivision; that despite the revocation of the grant of letters of administration, the entries in the register on parcel 781 still exist which makes it difficult for the applicants to administer the deceased's estate; that the court had further ordered that the applicants file a fresh application and forms showing the totality of the deceased's estate and a list of beneficiaries. That is what provoked the application dated 09/08/2011.

The respondent filed submissions which were highlighted by **Ms. Karuga** who argued what **Article 162 of the Constitution** set up special courts which include the Environment and Land Court and it is only that court which has the jurisdiction to cancel a title issued pursuant to a fraudulent grant and the land reverting to the estate. **Ms. Karuga's** argument is that the subject titles were issued to the respondents pursuant to a sale agreement which occurred during the deceased's lifetime. Counsel argued that the applicants failed to comply with the court's order made by J. Onyancha counsel further submitted that **Section 13 of the ELC Act** grants powers to the court to revoke titles; that **Section 26 and 27 of Land Registration Act** also grants the court power to revoke titles. Counsel justified her submission by the following decisions;

1. **S.K. Macharia & Another vs KCB Ltd Application No. 2 of 2011 (SC)** where the court affirmed the special jurisdiction of different cadres of courts.
2. **Republic vs Karisa Chengo & 2 Others (2017) eKLR** where the Supreme Court reiterated the jurisdiction of the different courts created within the Constitution, and which have to be exercised differently.
3. **Owners of MV Lillian 'S' V. Caltex Oil Kenya Ltd (1989) KLR 1** where the court underscored the need for courts to address the issue of jurisdiction first and if the court has no jurisdiction, it must drop its tools.
4. **Owners of Masters of the Motor Vessel Joey vs Owners and Masters of the Motor Tugs "Barbara" and "Steve B" (2008) 1EA 367**, also emphasized the point that the issue of jurisdiction has to be decided by a Judge at the threshold stage.

On their part, the applicants have submitted that the court has both geographical and pecuniary jurisdiction to hear this matter; that the respondents applied for grant of letters of administration for the deceased's estate as sons of the deceased yet they were purchasers; that the respondents had never cited the deceased's children to take out letters of administration; that respondents failed to disclose that there were deceased's children who ranked first in priority; that this court has powers to cancel titles if it finds that the person transferring the land had no interest in the land. In this case, the respondents were not heirs of the deceased; that due to the fraud, the respondents could not obtain genuine titles. It was counsel's submission that the respondents can not take refuge under **Section 93 of the Law of Succession Act**.

In support of the said submissions; the applicants relied on;

1. **Jane Gachola Gathetha vs Priscilla Nyamira Gitungu & Another (2006) eKLR**.
2. Re-Estate of **Christopher Aide Adela (2009) eKLR**.
3. **Monica Adhiambo vs Maurice Odera Koko (2016) eKLR**.

In the above cases, the courts have held that **Section 93 of the Law of Succession Act** does not validate unlawful acts and that the section was meant to protect a purchaser where a grant was properly and lawfully issued.

As to the competency of the application, it was argued that **R 49 of P&A Rules** allows a party to make any application in relation to a deceased's estate where there is no specific provision for it.

I have considered the submissions and authorities cited by counsel on the preliminary objection. The law pertaining to preliminary objections was settled in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Co. Ltd (1969) EA 696**. The court held that a preliminary objection must raise pure points of law and not general grounds that need to oppose an application on the merits, Law J. A. stated as follows;

"So far as I am aware, a preliminary objection consists of a pure point of the law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court; or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or refer the dispute to arbitration."

When considering the issue of jurisdiction, **Nyarangi J.A. in the M.V. Lillian 's' (1989) KLR** stated as follows;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court

seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there should be no basis for a continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In *Monica Wanjeri Njiri & Another vs Eunice Wanjira Igambe & Another (2016) eKLR*, the court stated that jurisdiction is the authority by which a court has to decide matters that are litigated before it. The question herein is whether this court has jurisdiction to cancel a title upon revocation/annulment of a grant.

It is the respondents' submission that this matter should be heard by the ELC Court which is created under **Article 162 of the Constitution** provides;

- 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2);**
- 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to;**
 - a) Employment and labour relations; and**
 - b) The environment and the use and occupation of, and title to land.**
- 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2);**
- 4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with the Article.**

In compliance with Act 162, Parliament enacted, the **ELC Act 2011** which provides the jurisdiction of the ELC's jurisdiction. **Section 13 of ELC Act** provides;

“Jurisdiction of the Court;

- 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land;**
- 2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes;**
 - a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
 - b) Relating to compulsory acquisition of land;**
 - c) Relating to land administration and management;**
 - d) Relating to public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and**
 - e) Any other dispute relating to environment and land.**

On the other hand, the Law of Succession Act, was enacted to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.

The issues in this matter pertains to the estate of the late **Leah Wangui**. Under **Section 47 of the Law of Succession Act**, the High Court has inherent powers to make appropriate orders in the interest of Justice and for the preservation of the deceased's estate. It reads as follows;

“The High Court shall have 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; provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Rule 73 of the P&A also provides;

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

In this case, the grant had been confirmed to the respondents but was revoked by consent of the parties dated 28/11/2008. I have already set out the reasons underlying the application for revocation; that the grant was obtained fraudulently by the respondents declaring themselves as the sons of the deceased when they were not. Upon revocation, the applicants were then appointed as administrators and were required to make a fresh application showing the totality of the estate. The deceased's estate is part of what had been transferred to the respondents.

Section 45 of the Law of Succession Act prohibits intermeddling with a deceased person's estate. The section provides as follows;

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2. Any person who contravenes the provisions of this section shall;

a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and;

b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administrations."

J. Musyoka in considering the above section stated as follows; in Estate of Veronica Njoki Wakegito (2013) eKLR:

"The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a serious view of intermeddling and makes it a criminal offence."

What the respondents did was intermeddling with the deceased's estate and the law takes a very serious view of intermeddling and goes as far as making it a criminal offence.

In Santuzzablioti alias Mei Santuzza (deceased) vs Giancarlo Felasconi (2014) eKLR, the court said as follows regarding the jurisdiction of the court in succession matters;

"This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of title deed if a deceased's property is being fraudulently taken away by non beneficiaries such as where the property is being sold before a grant is confirmed."

There is a host of decisions where courts have held that the High Court has jurisdiction to order cancellation of a title if a matter is a succession cause and the title has been fraudulently or irregularly transferred.

In Succession Cause 265/2004MunyasyaMuliliv Sammy Muteti Mulili; the court cancelled titles after revoking the grant. The court in the above case relied on the decision of J. Musyoka in Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR where the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction – like the ELC. The Judge said;

"The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

'Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...'

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The

proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

After considering the cases cited herein, it seems there are two schools of thought on which court has jurisdiction to deal with a dispute between the administrators of deceased’s estate and third parties and the line between the differences is very thin.

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.

Dated, Signed and Delivered at NYAHURURU this 19th day of May, 2020.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Parties Absent

Eric – Court Assistant