



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1866 OF 1998

IN THE MATTER OF THE ESTATE OF KAMUYU NJIRI (DECEASED)

RULING

1. Before me is an ex-parte Notice of Motion dated 21st July 2020 filed by Lucy Wambui Waweru a co-administrator of the estate herein under Article 159(2) of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act (*Cap. 21*), as well as the Law of Succession Act (*Cap. 160*), seeking the following orders that:

- 1. The application be certified as urgent and service of the same on the respondent be dispensed with in the first instance due to reasons of urgency.**
- 2. This Honourable Court do hereby make a declaration that land parcels known as DAGORETTI/RIRUTA/5865, and DAGORETTI/RIRUTA/5866 are null and void in view of the judgment delivered by this honourable court on 10th May 2019 and as a result thereof the charge by Unitas Bank be hereby declared null and void.**
- 3. This honourable court do hereby direct the Chief Land Registrar Nairobi to discharge the said charge by Unitas Bank.**
- 4. This honourable court be pleased to issue an order directing the Chief Land Registrar Nairobi to cancel the titles to the land parcels known as DAGORETTI/RIRUTA/5865 and DAGORETTI/RIRUTA/5866.**
- 5. This honourable court be pleased to issue an order directing the Director of Surveys Nairobi to cancel the subdivisions and subsequent mutations to the parcels known as DAGORETTI/RIRUTA/5865 and DAGORETTI/RIRUTA 5866.**
- 6. The costs of the application be in the cause.**

2. The application was filed with a supporting affidavit sworn by the applicant Lucy Wambui Waweru on 21st July 2020, in which she deposed that in a determination by the court made on 10th May 2019, the court set aside the previous orders of the court of 2nd July 2001, cancelled the confirmed grant of letters of administration, and that pursuant to that ruling the land parcels known as DAGORETTI/RIRUTA/5865, and DAGORETTI/RIRUTA/5866 became null and void and therefore did not exist and all subsequent charges in favour of Unitas Bank were thus null and void and that the said charges should be discharged.

3. It was also deposed that after the above court order was extracted and served upon Chief Land Registrar, he only registered a restriction on 12th July 2019, and insisted on a specific order to cancel land titles DAGORETTI/RIRUTA 5865 and DAGORETTI/RIRUTA/5866 and also a similar order directing the Director of Surveys to cancel the sub-divisions and subsequent mutations to the said parcels of land. The applicant also deposed that no prejudice or embarrassment would be suffered by the respondents if the orders sought were granted.

4. No response was filed to the application, and it was not stated even orally by counsel for the applicant that the ex-parte application was served on the respondents, whom I presume to be Unitas Bank. However, Ms. Mwangi and Mr. G. Kimani for the applicant urged this court to grant the prayers sought. Ms. Mwangi for the applicant added that they had also filed a pending application for rectification of confirmed grant of letters of administration which they would pursue later. On the other hand Ms. Purity Makori for an undisclosed interested party stated that the orders sought did not affect her client.

5. Having considered the matter, it is my understanding that this is an application for enforcement of the court's orders in the court ruling delivered on 10th May 2019.

6. I have perused the said ruling of the court. I note that the concluding orders by the court were under paragraph 39, in which the court stated as follows –

“39. In the end I shall dispose of the application dated 30th July 2008 in the following terms –

(a) That I declare that the deceased was married to Agnes Wambui.

(b) That I declare that the deceased had taken in the two children of Agnes Wambui, that is to say Kabui wa Hiuhu and Robert Kabatha Hiuhu, from a previous marriage, as his own children, and the two were children of the deceased for the purpose of succession of his estate;

(c) That applicant herein had the requisite locus to file the application herein for revocation of grant.

(d) That administrator made false statements in his application for the grant and omitted important facts while making the said application therefore the said grant ought to and is hereby revoked.

(e) That as a consequence of the orders herein in (d) above, the orders made on 2nd July 2001 confirming the said grant are hereby set aside and the certificate of confirmation of grant issued upon the said orders is hereby cancelled.

(f) That as a consequence of the order in (d) and (e), above, all transactions carried out on the strength of the said grant and certificate of confirmation of grant are hereby nullified.

(g) That to move the matter forward I hereby appoint Kabui wa Hiuhu and Lucy Wangui Kibatha administrators of the estate of the deceased and a grant for letters of administration intestate shall issue to them accordingly.

(h) That the new administrators shall hereafter move forthwith to apply for confirmation of their grant.

(i) That the applicant shall have the costs of the application.

(j) That any party aggrieved by the orders made herein has a right of appeal to the Court of Appeal within twenty-eight (28) days.”

7. The first issue is whether this court has jurisdiction to hear and determine the application. I note that this application has been brought under Article 159(2) of the Constitution and Section 1A, 1B and 3A of the Civil Procedure Act. In my view, the Civil Procedure Act does not apply to succession proceedings, unless the Law of Succession Act (*Cap. 160*) specifically provides.

8. The above notwithstanding, Section 47 of the Law of Succession Act (*Cap. 160*) confers on this court wide powers. It provides as follows –

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to 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.”

I thus find and hold that this Court has jurisdiction to entertain and

determine the application herein, as the application relates to enforcement of this court’s ruling though wrong sections of the law have been cited by the applicant.

9. However, in my view, the application is defective in substance and is for striking out. This is due to the fact firstly, that it was filed by one administrator without the consent of the second administrator. In my view since there are two appointed administrators, either both had to file the application or the consent of the other administrator obtained in writing and filed. The failure to involve the second administrator without any explanation, in my view was a substantive mistake.

10. Secondly, the application asks for a specific order against Unitas Bank who is neither a party herein, nor were specific orders made against them in the ruling under reference, nor have they been served. This omission by the applicant in my view rendered the application defective in substance, as in my view Article 50 of the Constitution of Kenya 2010 will require that Unitas Bank at least be named as interested parties and served, as the court ruling sought to be enforced above, did not issue any specific order against them.

11. I thus strike out the application dated 21st July 2019, as being defective and incompetent. Liberty to file a proper application for enforcement of the court orders issued in this court’s ruling of 10th May 2019 is hereby granted.

Dated and delivered at Nairobi this 6th day of October, 2020.

George Dulu

JUDGE

Ruling delivered virtually due to COVID-19 pandemic and Kenya Ministry of Health guidelines.