



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL CASE NO. 255 B OF 2009 (OS)

BETWEEN

TABITHA BONARERI MATOYA.....1ST PLAINTIFF

BEATRICE MATOYA.....2ND PLAINTIFF

AND

HENRY MATOYA MANYANGE

***alias* HENRY MATONYA MANAYANGE.....1ST DEFENDANT**

TERESA KEMUNTO OBIRI.....2ND DEFENDANT

RULING

1. The plaintiffs in this matter are co-administrators in the estate of the late Walter Otworu Matoya (“Walter”). They commenced this suit against the respondents by way of an Originating Summons dated 24th November 2009 (“the OS”).

2. The 1st respondent is sued in his capacity as the administrator of the Estate of the late Francis Obaga Matoya (“Francis”) whereas the 2nd defendant is sued in her capacity as the widow of the late Zecharia Obiri Matoya (“Zecharia”). The OS sought to annul the grant issued to the 1st defendant in **Kisii Succession Cause No. 290 of 2000** on the grounds that the 1st defendant had included 1/3 share of **KISII TOWN/BLOCK III /140** (“Plot 140”) as the property of Francis yet it belonged to Walter. The plaintiffs also alleged that the 1st and the 2nd respondent’s family had encroached onto **CENTRAL KITUTU/DARAJA MBILI/508** (“Plot 508”) which also belonged to Walter.

3. Simultaneously with the OS, the plaintiffs filed a Chamber Summons seeking orders to compel the District Land Registrar to include Walter’s name which was inadvertently omitted during registration of lease to Plot 140 and cause the lease to be renewed by including his name.

4. The matter was set down for formal proof on 1st March 2011 before Makhandia J. At the hearing, the learned judge observed as follows:

From the prayers sought and evidence led, it is not possible to grant the prayers in the Originating Summons. The plaintiffs are well advised to seek the revocation of the grant issued to the 1st defendant. It is that Succession Cause that all the issues raised in this Originating Summons can be canvassed and redressed.

5. Following the suggestion by the learned Judge, the 1st plaintiff then sought leave to withdraw the OS and the learned Judge marked the OS as withdrawn with no orders as to costs. It is this order marking the suit as withdrawn that the plaintiffs’ seek to set aside by the Notice of Motion dated 1st December 2017 in which they pray for, inter alia, the following orders:

i. ... (spent)

ii. Reinstatement of pleadings in HCCC 255B of 2009 and Misc Application 272 of 2013;

iii. Consolidation of HCCC 255B of 2009 with Succession Cause 290 of 2000, Misc. Application 124 of 2014, ELC 272 of 2013 and Misc Application 272 of 2013;

iv. *Enjoinment of the Attorney General; Land Registrar, Kisii; County Surveyor, Kisii; Director of Public Roads, Kisii and James Manyange Obiri;*

v. *Transfer of the consolidated bundle of files to a court with jurisdiction;*

vi. *The court deem the proceedings, pleadings and submissions in the consolidated bundle of files sufficient record for determination or judicial review whichever the court finds applicable.*

6. The plaintiffs' application was supported by 15 grounds on the face of the Notice of Motion and the 1st plaintiff's supporting affidavit sworn on 1st December 2017. She claimed that by reinstating **HCCC 255B of 2009**, there would be a platform for the court to review the issues raised in **Succession Cause 290 of 2000** which were left undetermined when the court referred the matter to the Environment and Land Court ("ELC") for lack of jurisdiction. She contended that the issues raised in **Succession Cause 290 of 2000, Misc. Application 124 of 2014** are similar to those raised in this suit and reinstatement of **Misc. Application 272 of 2013** would shed light on the new developments in Plot 508.

7. The 1st plaintiff stated that she wished to rely on documents filed by the County Government of Kisii, the Commissioner of Lands and the Attorney General, in **Succession Cause 290 of 2000** and **ELC No. 272 of 2013** as they prove that plaintiffs had discharged the burden of proof by showing that 1/3 of Plot 140 belonged to Walter. She further contended that the confirmation of the grant dated 2nd May 2002 in the **Succession Cause 290 of 2000**, had robbed the plaintiffs of their identity, ground, peace and investments. She argued that the name "Otwori" was used by the estate of Francis to deprive the beneficiaries of Walter of their inheritance. The plaintiffs averred that Sitati J., had ordered consolidation of **HCCC 255B of 2009** with **Succession Cause 290 of 2000**. On the issue of joinder, the plaintiffs state that joinder will enable the court determine the issues raised in the suits which touch on offices that they seek to enjoin. They further state that the transfer of the consolidated files would save the plaintiffs costs and enable the court reach a final determination on the issues raised.

8. The 1st respondent objected to the application through his replying affidavit sworn on 10th December 2018. He stated that the plaintiff had filed an objection to the grant issued to him and the objection was heard and determined. He contended that issues raised were *res judicata* as they are similar to those raised in the objection proceedings in **Succession Cause 209 of 2000**. He also contended that this court lacked jurisdiction to hear and determine issues relating to land.

9. The position taken by the County Government in this matter is that the plaintiff did not appeal against the decision of the court in **Succession Cause 209 of 2000** and after dismissal of that suit, the administrators of the Estate of Francis proceeded to subdivide the estate among the beneficiaries of the estate. Counsel for the interested party contended that the decision in **ELC 272 of 2013** was not appealed against hence this court is *functus officio* as far as the proceedings in those two matters were concerned. He argued that litigation must come to an end and in case a party is dissatisfied he has a right to appeal to the Court of Appeal. He urged the court to find that the County Land Registrar did not commit any wrong by executing the certificate of confirmation of grant issued by the court.

10. This matter came up for hearing on 18th February, 2019, counsel for the plaintiffs relied on the supporting affidavits filed by the 1st plaintiff. Counsel for the respondent opposed the application and relied on the replying affidavit of the 1st defendant and the interested party's affidavit and adopted the written submissions in response to the application. In order to determine this matter, I find it is necessary to give a background to the facts that led to the issues raised by the parties.

11. During their lifetime, Francis, Walter and Zecharia formed a partnership known as Kisii Vegetables and Fruit Suppliers Store (herein "KVFSS") in 1961. KVFSS was granted a lease over Plot 140 for a term of 33 years on 1st May 1967. The plaintiffs claim that when the lease was issued, the name of Walter was for unknown reasons left out of the title document. Walter wrote to the Commissioner of Lands seeking to have his name included in the lease as he was a partner of KVFSS without success. Until the death of Francis and Zecharia on 30th April 2000 and 15th October 2001 respectively, Walter's request to be included in the lease had not been granted.

12. The 1st respondent took out succession proceedings for the estate of his father, the late Francis in **Succession Cause 290 of 2000** and included Plot 140 as part of the estate. Walter filed objection proceedings in that Cause for revocation of the grant and further orders that the confirmed grant be restricted to the Late Francis 1/3 share of Plot 140.

13. When Walter died, 1st plaintiff took over the matter. She filed a summons for revocation of grant on 7th December 2012. At her instance Sitati J., issued directions on 10th December 2012 that the files **HCCC 255 B of 2009** and **HCCC 54 of 2004** be brought before the court for directions in accordance with **rule 44 (3)** of the **Probate & Administration Rules**. Contrary to the plaintiffs' assertions, the court did not order for a consolidation of the **Succession Cause 290 of 2000** with **HCCC 255B and HCCC 54 of 2004**. The court found that **HCCC 255 B of 2009** had been withdrawn with no orders as to costs and that **HCCC 54 of 2004** was still pending as there was an application to substitute Walter's name with that of the plaintiffs. The court asked the 1st plaintiff whether she wished to serve additional parties with her application for revocation of grant and ordered that the application be heard by oral evidence.

14. By a judgment dated 7th December 2016, Okwany J., heard and determined the plaintiffs' application for revocation in **Succession Cause 290 of 2000**. She found that the plaintiffs had not established any ground within the ambit of **section 76** of the **Law of Succession Act** to warrant the revocation of the grant issued to the 1st defendant. She also held that the issues raised by the plaintiff concerned the use, occupation and title of land which fell under the jurisdiction of the ELC as it was the court with the mandate to determine under **Article 162 (2)(b)** of the **Constitution** and **section 13** of the **Environment and Land Court Act**.

15. The plaintiffs then filed **ELC 272 of 2013**. They subsequently filed **Misc. Application No. 272 of 2013** in the same suit and **Misc. Application No. 124 of 2014** separately. In **ELC 272 of 2013**, the plaintiffs sought orders against the Land Registrar, Kisii to re-beacon Plot 508 and issue a permanent injunction against the defendants, David Nyakeriga Bosire and Elizabeth Omwenga from interfering, wasting or

encroaching on Plot 508. The plaintiffs had also sought orders against the Attorney General, Director of Public Roads – Kisii County, District Land Registrar – Kisii County and County Surveyor Kisii who were not parties to the suit. In his ruling dated 29th September 2017, Mutungi J., found that the plaintiffs had not sought leave to enjoin the Attorney General, Director of Public Roads – Kisii County, District Land Registrar – Kisii County and County Surveyor Kisii to the suit and could not seek orders against them without seeking leave to enjoin them as parties to the suit. As regards the prayer for a rectification of the register in accordance with **Section 80** of the **Land Registration Act**, the court found that the order could not be granted at interlocutory stage without hearing the parties. In dismissing **Misc. 272 of 2013**, the court advised the plaintiffs to prepare their case for trial and analyse their pleadings to determine whether they would need to amend them. The court also pointed out that having commenced proceedings by way of plaint, the plaintiffs could not convert the suit into a miscellaneous application.

16. The plaintiff has not availed to this court the pleadings in **Misc. 124 of 2014**. Based on the letter annexed and marked as exhibit “BM 2” in her further affidavit and the submissions filed by the plaintiffs in that suit, which are part of the plaintiffs’ bundle of documents, the plaintiffs moved the ELC through **Misc. Application No. 124 of 2014** for a determination on issues with respect to Plot 508.

17. The plaintiffs have annexed the proceedings of the Land Disputes Tribunal in **Case No. 9 of 2011**, where the 1st plaintiff claimed that the family of the 1st respondent, who own Plot 507 and the family of the 2nd respondent who own Plot 2031 and had both encroached onto Plot 508. She stated that Plot 507, 508 and 2031 were an inheritance to Francis, Walter and Zecharia respectively from their father. The Tribunal heard the matter and recommended that a surveyor from the District Surveyor’s Office visit the disputed plots and make its report. The Surveyor visited the land on 1st November 2011. Each party had their own private surveyor as an observer of the process. After the Surveyor had made its report, the 1st plaintiff was dissatisfied by the findings of the surveyor and requested the forwarding of the file to court for further directions which the Land Disputes Tribunal, Kisii did. The status of this case is not clear from the proceedings.

18. Having considered the matter, the various suits between the parties and the submissions, I am unable to grant the orders sought in the matter for the following reasons. First, this suit, **HCCC 255B of 2009 (OS)**, was marked as withdrawn by the court at the instance of the 1st plaintiff after the court observed that it could not deal with matters which would be dealt with in a proper application for revocation of a grant issued to the 1st respondent.

19. Second, it is clear that the matters that are being raised by the plaintiffs in regard to Plot 140 have been resolved by other courts or are pending determination. The succession court heard and dismissed the plaintiff’s objection proceedings in **Succession Cause 290 of 2000** and the ELC similarly dismissed **Misc. Application 272 of 2013**. Those decisions were final in nature and if the plaintiffs were dissatisfied with the decisions, they ought to have exercised their undoubted right of appeal.

20. Since the plaintiffs did not prefer any appeal from the ruling of Okwany J., and Mutungi J., in **Succession Cause 290 of 2000** and **Misc. Application 272 of 2013** respectively, this court cannot purport to review or appeal the decisions of those courts by re-opening these proceedings.

21. Thirdly, the issues raised by the plaintiffs relate to title in respect of Plots 140 and 508. As regards Plot 140, Okwany J., in **Succession Cause 290 of 2000**, advised them to file a suit in the ELC. In relation to Plot 580, the plaintiffs should take the advice of Mutungi J., and set down **ELC 272 of 2013** for hearing. This suit was withdrawn, the file must now be closed and sent to the archives.

22. For the reasons I have set out, I dismiss the application dated 1st December 2017 with costs to the defendant.

DATED and DELIVERED at KISII this 10th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr. Nyagwencha instructed by J.M. Nyagwencha & Company. Advocates for the plaintiff

Mr. Nyasimi instructed by Nyamori Nyasimi & Company Advocates for the respondents

Mr Kaburi, Advocate instructed by the Kisii County Attorney’s Chambers for the interested party.