



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 302 OF 2012

IN THE MATTER OF THE ESTATE OF M'ITIRAI KAMAKIA alias ITIRAI KAMAKIA (DECEASED)

STEPHEN MARANGU M'ITIRAI.....PETITIONER

Versus

SILVERIA NCECE M'IRURA.....1ST OBJECTOR

SARAH NAITORE.....2ND OBJECTOR

MARIETA NDURU MWIRIGI.....3RD OBJECTOR

BEATRICE MWARI.....4TH OBJECTOR

ELIZABETH MUGURE..... 5TH OBJECTOR

JUDGMENT

Two applications

[1] Before me are two application. One by Sarah Naitore which is dated 29th January 2018 and the other by the petitioner which is dated 30th January 2018. I will begin with the latter one for it involves more complex issues.

Application by petitioner

[2] The following details are relevant in appreciating this application. The deceased herein, **M'ITIRAI KAMAKIA alias ITIRAI KAMAKIA** ("the deceased") died on 7th February 1986. He is survived by:

1. Jericah Kathiku M'Itirai- Widow (deceased)
2. Silveria Ncece - Daughter
3. Marieta Nduru Mwirigi - Daughter
4. Sarah Naitore - Daughter
5. Veronicah Kiende - Daughter (deceased)
6. Beatrice Mwari - Daughter (deceased)
7. Elizabeth Mugure - Daughter
8. Joseph Kaaria - Son (deceased)
9. Stephen Marangu - Son

His assets comprise of **Abothuguchi/L-Kaongo/32, Abothuguchi/Kiija/68 and Abothuguchi/Kiigia/190.**

[3] The petitioner petitioned for grant letters of administration intestate which were issued to him on 3rd October 2012 and confirmed on 29th October 2013. However, by the judgment delivered on 30th April 2015 the said grant was revoked. Fresh grant was then issued jointly to Stephen Marangu M'Itirai and Sarah Naitore and was confirmed on 4th October 2017.

[4] The Petitioner filed summons dated 30th January 2018 under **Section 73 of P & A and all other enabling rules, regulations and provisions of the law** seeking amongst other orders review and/or rectification and/or setting aside of the orders issued on 4th October 2017. He requested the court to order that Doris Karimi Kaaria, Gatwiri Rose Kaaria, Fridah Mukiri Kaaria, Moses Murithi Kiara, Gilbert Murithi Mucheke, Muthuri John Mucheke and Francis Munyau Mutua to be joined as the 1st – 7th interested parties respectively.

[5] The grounds upon which the application is premised as stated in application and the supporting affidavit of Stephen Marangu M'Itirai sworn on 30th January 2018 are:

- (1) That the court was not aware that some of the properties had been legally sold and subdivided under the previous grant issued on 3rd October, 2012 and confirmed on 29th October, 2013 and fresh titles were issued to the intended interested parties.
- (2) That the said intended interested parties were not made aware of the judgment dated 30th April 2015 that revoked the grant and issuance of fresh titles.
- (3) That by the confirmation of the grant on 4th October 2017 gross errors and mistakes are apparent on the record which are prejudicial and will cause great injustice.

[6] The application was further supported by the supporting affidavit of Gatwiri Rose Kaaria sworn on 30th January 2018 and on behalf of the other purchasers. She avowed that they entered into legally binding agreements with the petitioner on various dates where they purchased parcels of land of which the petitioner had sought consent from his siblings prior to initiating the sales. Due process was followed that resulted in them getting titles. They have been in possession of the land parcels since the completion of the sale and transfer. Notices or orders as result of the judgment revoking their titles was not served on them neither were they summoned before the court.

[7] The objectors opposed the application and argued that the application does not seek to correct an error on the document but rather to alter the order of distribution which goes beyond the scope of **Section 74 of the Law of Succession Act** and **Rule 43 of the Probate and Administration Rules**. They posit that the petitioner though being one of the administrators does not have power to bring in a new list of beneficiaries in the guise of the interested parties in a matter which is long settled.

Submissions

[8] The application was heard by way of written submissions. The petitioner submitted that the application is properly grounded as the interested parties were not a party to the suit before judgment of 30th April 2015 was delivered. The intended interested parties have a stake in and right to defend in this cause under **Section 76 (a) and 93 (1) of the Law of Succession Act CAP 160**. According to the petitioner, mistakes of the previous counsel on record should not be visited upon an innocent litigant. He however stated that these mistakes contributed immensely in making the proceedings to obtain the confirmed grant defective.

[9] The objectors submitted that the summons do not meet the threshold for review. They argued that review ought to be sought only under **Order 45 of the Civil Procedure Rules 2010** which has been imported into succession practice by **Rule 63 of the Probate and Administration Rules**. To them, there is nothing material presented that shows there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge when the orders were made. In addition, nothing shows any error on the face of the record.

ANALYSIS AND DETERMINATION

[10] Although the request herein seems to be one of review, a variety of remedies have been sought namely; (1) revocation of grant; (2) joinder of proposed 1st and 7th Interested Parties; and (3) rectification of the confirmed grant issued on 4th October 2017.

Of joinder

[11] Should the 1st - 7th Interested Parties be joined to the cause? These are third parties and their claims should be determined in the appropriate court which is the Environment and Land Court. As the grant has been confirmed, such claims may not be entertained in these proceedings. On this I am content to cite *in extenso* the rendition by Musyoka J in the case of **Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** where the good judge expressed himself as follows:

“The Law of Succession Act, and the Rules made thereunder, 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.

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....

*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*

Of section 93 of Act

[12] In taking the foregoing position, the court is not oblivious of section 93 of the Law of Succession Act which provides protection to purchasers of the estate property after confirmation of grant. The 1st – 7th interested parties are said to be purchasers who bought land from the petitioner through the previous grant issued on 3rd October, 2012 and confirmed on 29th October, 2013. Of importance, however is that courts have subjected section 93 of the Act to judicial scrutiny and the jurisprudence that has emerged therefrom is that the protection does not extend to acquisition made pursuant to a grant that has been obtained fraudulently or in total violation of the law. The Court of Appeal has settled this issue. But for the comfort of the reader, I will refer to some cases below.

[13] For instance, the case of **In Re-Estate of Christopher Aide Adela (Deceased) (2009) e KLR** where Rawal J (as she was then) held:-

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

[14] See also the case of **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Another (2014) e KLR** where it was stated:-

“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where one has not obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

[15] The judgment of 30th April, 2015 revoked the previous grant and stated the reasons for revoking to be; that the proceedings to obtain the grant were defective in substance; that the grant was fraudulently obtained by making of a false statement or by the concealment from the court of something material to the case; and the grant was further obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

[16] Therefore, the acquisitions by the interested parties cannot enjoy the protection provided in section 93 of the Law of Succession Act. Their remedy may lie elsewhere.

[17] In the upshot, the 1st - 7th interested parties cannot be joined in this cause.

On review

[18] Review herein was based on the claim by the interested parties. The petitioner seems to blame his former counsel of failure to disclose the interest of the third parties and for abandoning his interest. He was of the view that these interests would have affected court's decision to confirm the grant.

[19] In light of my decision above, the heaving of blame upon former legal counsel does not satisfy the requirements for review. Such are not errors envisaged under the regime of review. In any case what Kimaru J stated in the case of **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002** stands true that:-

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

[20] Accordingly, reasons advanced cannot found a remedy in review or setting aside or rectification of orders of confirmation of grant herein. The petitioner has not established discovery of new and important matter or evidence for which review would issue.

Nkirote: Share indicated exceed land size

[21] Before I close, one matter is crying for resolution; aligning the grant to the size of the land. This can be done under **Section 74 of the Law of Succession Act** which states as below:

“Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

[22] It is not in dispute that the shares allocated to beneficiaries exceed the size of the land. This is an obvious error. Sarah Nairote in the application dated 29th January 2018 sets out clear distribution of this estate. Accordingly, I grant the application.

[23] Consequently, I make the following orders:

a) Application dated 30th January 2018 is dismissed with no orders as to costs.

b) Application dated 29th January 2018 is allowed with no orders as to costs but in the following specific terms. The grant confirmed on 4th October 2017 shall be rectified as follows:

i. Land Parcel No. ABothuguchi/ L- Kaong/32

1. Marieta Nduru Mwirigi - 0.65 Acres
2. Sarah Naitore - 0.65 Acres
3. James Mutwiri & Charles Murangiri - 0.65 Acres
4. Beatrice Nthuni Rimiri - 0.65 Acres
5. Silveria Ncece - 0.65 Acres
6. Elizabeth Mugure - 0.65 Acres
7. Michael Robert - 1.0 Acres
8. Stephen Marangu - 1.0 Acres
9. Evangeline Kaimenyi - 1.0 Acres

ii. Land Parcel No. Abothuguchi/Kiija/68

1. Marieta Nduru Mwirigi - 0.53 Acres
2. Sarah Naitore - 0.53 Acres
3. James Mutwiri & Charles Murangiri - 0.53 Acres
4. Beatrice Nthuni Rimiri - 0.53 Acres
5. Silveria Ncece - 0.53 Acres

- 6. Elizabeth Mugure - 0.53 Acres
- 7. Michael Robert - 0.75 Acres
- 8. Stephen Marangu - 0.75 Acres
- 9. Evangeline Kaimenyi - 0.75 Acres

iii. Land Parcel No. Abothuguchi/L-Kijja/190

- 1. Marieta Nduru Mwirigi - 0.23 Acres
- 2. Sarah Naitore - 0.23 Acres
- 3. James Mutwiri & Charles Murangiri - 0.23 Acres
- 4. Beatrice Nthuni Rimiri - 0.23 Acres
- 5. Silveria Ncece - 0.23 Acres
- 6. Elizabeth Mugure - 0.23 Acres
- 7. Michael Robert - 0.45 Acres
- 8. Stephen Marangu - 0.45 Acres
- 9. Evangeline Kaimenyi - 0.45 Acres

[24] No order as to costs.

Dated Signed and delivered at Meru this 2nd day of May 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Kirimi for Petitioners

M/s Nyagah for Riungu for Objectors

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F. GIKONYO

JUDGE