



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 134 OF 2014

IN THE MATTER OF THE ESTATE OF SABASTIANO KAGOCHE alias SABASTINO KAGOCHE M'NJAU (DECEASED)

PETER NJERU MUGO.....APPLICANT

VERSUS

TARASISIO NYAGA KAGOCHE.....RESPONDENT

AND

DAVID KIONGO WACHIRA.....INTERESTED PARTY

R U L I N G

A. Introduction

1. This ruling pertains to the application dated 10/12/2018. The applicant seeks the following orders;

a) That the Court be pleased to order director of survey to share plot No. EMBU/MUNICIPALITY/112/508 into two plots for the applicant to get (three quarter) $\frac{3}{4}$ portion and the interested party (one quarter) $\frac{1}{4}$ portion.

b) That applicant $\frac{3}{4}$ share be next to plot No. EMBU/MUNICIPALITY/1112/307.

2. It is the applicant's case that the court in a prior succession matter had shared plot No. EMBU/MUNICIPALITY/112/508 as outlined in the orders he was seeking, however, the Director of survey had wrongly segmented the suit plot into three (3) plots instead of two (2).

3. The respondent, who was the administrator of the deceased's estate, opposed the application vide his replying affidavit sworn on the 11th January 2019 on the ground that it would be tantamount to issuing contradictory orders to the confirmed grant.

4. The interested party also opposed the application vide a replying affidavit sworn on the 16th January 2019 on the ground that he had purchased $\frac{1}{4}$ portion share of the suit property shared to the respondents and his co-beneficiaries for consideration of Kenya Shillings 19 million, with the applicant full knowledge and the transfer completed in the favour of the interested party.

5. The parties disposed of the matter by way of submission.

B. Applicants' Submission

6. The applicant submitted that the High Court had confirmed the grant in the terms that the suit property be shared between the applicant who received $\frac{3}{4}$ portions next positioned to plot No. 1112/307 and the respondent and his relatives got $\frac{1}{4}$ portion. He further submitted that the grant had not been set aside and as such the division by the surveyor to draw 3 portions on the suit property was illegal and against the confirmed grant.

C. Respondents' Submissions

7. The respondent submitted that he had implemented the confirmed grant issued to him in the terms granted by the court. He further submitted that he and other co-beneficiaries had sold their share of the suit property to the interested party with full consent of the applicant. Further, it was his submission that the application dated 10/12/2018 was overtaken by events as it was an afterthought.

D. Interested Party's Submissions

8. The interested party submitted that he was a purchaser for value for the $\frac{1}{4}$ share of the suit property shared to the respondents and his relatives and that the applicant was always involved in all transactions pertaining to the suit property.

9. He further submitted that the only way the suit property could have been subdivided to give effect to the confirmed grant was to divide the plot into the 3 portions. He further submits that he continues to suffer loss as he is not able to renovate his premises as a result of the current application.

E. Analysis & Determination

10. The bone of contention in this matter is the interpretation of the Certificate of Confirmed Grant dated 12/05/2015 issued by this court. The specific part that brings out this contention involves the sharing of Land parcel no. EMBU/TOWNSHIP/1112/508 which was part of the deceased's estate.

11. The aforementioned suit property was shared as follows as provided in the Certificate for Confirmation of Grant dated 12/5/2015;

“a) $\frac{3}{4}$ share of land parcel No. EMBU/TOWNSHIP/ 1112/508 – Peter Njeru Mugo to take two developed mini shops measuring 22 feet next to plot 1112/307

b) $\frac{1}{4}$ share of land parcel No. EMBU/TOWNSHIP/ 1112/508 – to be registered jointly in the names of:

i. Rose Eleniah Gikuu Kagoce

ii. Tarcisio Nyaga Kagoche

iii. Peter Njiru Kagoce

iv. Silvano Njiru Kagoce

v. James Njagi Kagoce

vi. Luke Njue Kagoche

vii. Teresia Muthoni Njagi

viii. Lucy Wawira Gicovi

ix. Cyrus Njeru Kagoche

x. Cecilia Werimab Muriithi

xii. Peter Mucangi Murithi

All the eleven beneficiaries to take three developed mini shops jointly.”

12. The applicant argues that the surveyor in portioning out the suit property above went against the certificate of confirmed grant as cited above as the grant provided only 2 portions to be carved out of the suit property. In response both the respondent and the interested party argue that the only way to share the suit property as set out in the certificate of confirmed grant was to carve out $\frac{1}{4}$ portion at the beginning of the three developed mini shops as share of the respondents and his relatives.

13. It is trite law that court orders must be clear and unambiguous to facilitate implementation. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to complying with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.

14. The certificate of confirmed grant was clear that his $\frac{3}{4}$ share of the suit property included two developed mini shops measuring 22 feet next to plot 1112/307. The respondent and his relative were on their part apportioned $\frac{1}{4}$ share of the suit property inclusive of three developed mini shops jointly.

15. It is my view that the surveyor assignment was to demarcate the two developed mini shops measuring 22 feet next to plot 1112/307 for the applicant, then set out the three developed mini shops for the respondent and his co-beneficiaries and have the shares confirmed as per the grant.

16. The applicant faults the surveyor in that he divided the suit property into 3 portions instead of two. The grant gave the applicant $\frac{3}{4}$ share of the property Plot No. 1112/508 consisting of two developed mini shops measuring 22 feet next to Plot No. 1112/307.

17. It is argued by the interested party that the applicant was given the beacon certificate accompanied by the surveyor's sketch that showed how the shares in the grant were to be carved out. The applicant signed the beacon certificate demonstrating his approval.

18. In my view, the execution of the beacon certificate cannot be used to take away the right for the applicant. The surveyor has the map showing the plots No. 1112/505 and 1112/307 and is not expected to make any mistake.

19. If the applicant was aggrieved by the manner of curving out his share or that of the respondents, he ought to have raised the issue at the time he received the sketch and declined to sign the beacon certificate. It is not denied that the respondent has already sold his share to the interested party for valuable consideration.

20. The applicant does not say that he received a lesser share than the $\frac{3}{4}$ share that this court bequeathed him. However, his contention is that his $\frac{3}{4}$ share is not next to plot No. 1112/307 as the parties had agreed and as the grant spells out.

21. I have looked at the prayers in the application and note that in the event that the court was to grant them, it would be tantamount to duplicating the contents of the grant.

22. For this reason, I will not grant the application but direct that the surveyor complies with the grant to the letter.

23. Each party to meet their own costs,

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Asimwe for P.N. Mugo for Applicant

Ms. Kungu for Muthoni for Respondent

Mr. Eddie Njiru for R. Njeru for Interested Party