



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 544 OF 2003 (O.S.)

ANDREW OLEA (Suing as the attorney for

EDMUND HERNANDEZ).....PLAINTIFF/RESPONDENT

VERSUS

MINNEH WANJIRU also MINNEH WANJIRU SLADEK

(Suing as the legal representative of the estate of KAMIL SLADEK-Deceased).....DEFENDANT/APPLICANT

RULING

1. This ruling is the product of the Notice of Motion dated 30th June, 2010 brought by the defendant/applicant. The Motion is supported by the grounds set out on its face and the facts deponed to in the affidavit sworn by the applicant herself. Therein, the applicant is seeking the orders hereunder:

i) THAT this Honourable Court be pleased to empower the Deputy Registrar, High Court, to execute, sign and seal all the necessary documents to effect transfer of the property known as LR NO. 209/6496/4 to the defendant/applicant.

ii) THAT the costs of the application be provided for.

2. In her affidavit, the applicant being the legal representative of the estate of Kamil Sladek (*“the deceased”*) stated that the plaintiff/respondent had instituted the suit against the deceased on behalf of Edmund Hernandez under the authority of a power of attorney in respect to the property known as LR NO. 209/6496/4 (*“the subject property”*) and that judgment was entered in favour of the respondent.

3. The applicant then asserted that soon thereafter, the deceased passed away and she was appointed as the legal representative to his estate and executor of his will. She explained that under her said capacity, she engaged in negotiations with the respondent and which negotiations culminated in the recording of a consent order on 13th July, 2014; the terms of which were that she would purchase from the plaintiff 62 ½ in shares/interest in the subject property at the consideration of Kshs.9,825,000/=.

4. It was the applicant’s averment that she has since paid the above amount in full, adding that her advocates ensured the transfer was drafted for execution by the respondent but that such execution has not been undertaken, with the respondent claiming that there exists an unresolved caveat on the subject property in respect to a successions case; which the applicant deems as irrelevant.

5. From the foregoing and given that it is apparent the respondent is not willing to effect the transfer, the applicant urges this court to grant the order being sought.

6. The respondent swore the replying affidavit on 30th June, 2011 stating that he is opposed to the order sought being granted at this stage for the reason that the grant of probate is yet to be confirmed and that a beneficiary to the estate of the deceased namely Kamila Sladek, is equally claiming rights to the subject property and has filed a caveat to that effect in the succession matter. The respondent thus urges that the probate proceedings be determined first before any other steps can be taken in the matter.

7. The applicant responded with a supplementary affidavit sworn on 13th February, 2019 averring that the grant of probate was confirmed on 22nd February, 2017 and hence there is basis for granting the order sought.

8. The Motion was argued orally before this court. *Mr. Mworira* counsel for the applicant reiterated the contents of the application and supporting affidavit, save to add that any pending issues in respect to the estate of the deceased have since been resolved and hence there is really nothing hindering the transfer of the subject property to his client. The advocate went ahead to argue that the respondent’s rights or interest in the subject property were extinguished upon payment of the consideration by the applicant.

9. Mr. Kanjama advocate for the respondent contended that following the consent entered into between the parties herein, a caveat was lodged by Kamila Sladek, the only daughter of the deceased, claiming a right to the subject property and that the grant was confirmed without notification to the said Kamila, adding that Kamila is intent on annulling the grant. The advocate urges this court to dismiss the application so that the parties can address the issue of whether the will can be challenged.

10. Mr. Mworira rejoined by arguing *inter alia*, that the applicant cannot be faulted if the caveator was not give notice of the confirmation of the grant, going further to submit that in any event, the caveat was lodged over 10 years before the grant was confirmed and no application has been made to challenge the same.

11. I have considered the grounds laid out on the face of the Motion; the affidavits in support of and in opposition thereto and the rival oral arguments by the respective counsels.

12. I have seen from the record that the parties had entered into a consent regarding purchase of the respondent's 62 ½ shares in the subject property by the applicant. It is not disputed that the same was paid to the respondent. In actual fact, the position as it stands is that the consent has not been set aside, neither has there been any evident attempt to have it set aside.

13. Further to the above and contrary to the respondent's position, I have established from the evidence on record that the grant of probate was confirmed way back in 2017 and the respondent has not provided any evidence to show that any application was or has been filed with the aim of challenging and ultimately annulling the grant. It therefore follows that the succession proceedings having long been concluded, there would be no basis for this court to stay the proceedings.

14. In view of the foregoing, I am of the reasoned view that the respondent has not offered any sufficient reason as to why this court should not grant the order being sought.

15. Consequently, the Motion is allowed on merit and the following orders made:

a. The Deputy Registrar –Civil Division, is empowered to execute, sign and seal all the necessary documents to effect transfer of the property known as LR. No. 209/6496/4 to the defendant/applicant

b. The defendant/applicant shall have costs of the application.

Dated, signed and delivered at NAIROBI this 2ND of OCTOBER, 2019

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant