



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.952 OF 1989

IN THE MATTER OF THE ESTATE OF ABDALLAH

KAURRAI ALIAS ALBERT KAURRAI - DECEASED

WILLIAM NDICHU KAURRAI (DECEASED)

JOHN SENEWA KAURRAI

DAVID MATHERI KAURRAI

MARIRO KAURRAI.....ADMINISTRATORS

VS.

ELIJAH MUYELELE WEKESA.....1ST OBJECTOR

JOSEPHINE WARAU KARANJA

JOSEPH NJUGUNA WACHIRA & SARAH GATHONI.....2ND OBJECTOR

STEPHEN KIGURU NDEGWA.....3RD OBJECTOR

NICHOLAS SEMPEYO KIMANI.....4TH OBJECTOR

VICTORIA GESARE ANGWENYI.....5TH OBJECTOR

EUNICE MURANGI KAMAU.....6TH OBJECTOR

GRACE W. KINUTHIA.....7TH OBJECTOR

FRANCIS MWEMA NDOME

TIMOTHY NGANGA MUKENDI

SAMUEL NJOROGE MUIRURI (As Trustees of

THAYU WENDANI SELF HELP GROUP).....8TH OBJECTOR

MBURU MUHIA.....9TH OBJECTOR

IRENE MUTHONI WAMUGI.....10TH OBJECTOR

GEORGE MUIGAI MUTURI.....11TH OBJECTOR

OCHIENG DIANGA SAUL OGADA

REGINA WANJIKU MUYA.....12TH OBJECTOR

JANE NYABAGENI OUKO.....13TH OBJECTOR

CHARLES W. MURANGO & 20 OTHERS.....14TH OBJECTOR

RULING

1. The Applications coming for consideration in this Ruling are as follows:

i. Notice of Motion dated 19th June 2019 supported by the Affidavit of HARRISON GATANGA GITU of even date.

ii. Notice of Motion dated 27th June 2019 supported by the Affidavit of JANE NYABAGENI OUKO of even date.

iii. Notice of Motion dated 2.7.2019.

2. The three Applications are seeking for orders that the Applicants in the said Applications be enjoined as parties to this Succession Cause.

3. The Applicants have sworn Affidavits in support of the Applications in which they have stated that they are bona fide purchasers for value of property belonging to the Estate of the Deceased from the Administrators of the Estate.

4. The Applicants also stated in their supporting affidavits that some of the properties were purchased from the deceased ABDALLH KAURRAI at different occasions during his lifetime and some from his sons who are parties to these proceedings.

5. The Applicants in their supporting affidavits also stated that their rights and livelihoods are threatened and it is vital that they be enjoined to these proceedings in order to ventilate any issues arising and to safeguard their interests as far as the purchase of the parcel of land are concerned.

6. Further that without being enjoined to these proceedings the Applicants are apprehensive that the Succession cause herein will be concluded without factoring and safeguarding their legitimate rights, interests and expectations with the resultant effects occasioning a miscarriage of justice and yet the applicants would not occasion any prejudice on the Respondents herein.

7. The Applicants said in their supporting affidavits that they lawfully bought the land from dependents and/or administrators of the estate and the same was transferred to their names by the land Registrar Ngong and that no objections were raised when the properties were being sub-divided and no caveat was put on the titles.

8. They also said they have valid consents of the Control Board which were lawfully obtained and therefore no illegal transactions and/or transfers were done on the subdivision of the properties.

9. The 4th Respondent MARIRO KAURRAI filed a replying affidavit dated 27th June 2019 in which she deposed that the Applicants fell in the hands of fraudsters who were neither administrators of the estate nor did they have legal title to pass to them.

10. The 4th Administrator also stated that STEPHEN SOKORE KAURRAI (now deceased) was not an administrator of the Estate in view of the order of 8.5.2002 which nullified all transactions and titles which was served on the lands office and the said illegal transactions by persons who are not administrators of the estate cannot override or supersede the inalienable inheritance rights of the lawful beneficiaries of the estate.

11. She further deposed that the said transactions took place secretly and the applicants together with the Land Registrar were part and parcel of the irregularities, fraud and illegalities which were meant to defeat the cause of justice.

12. She also deposed that the Applicants who are not lawful dependents/beneficiaries of the Estate of ABDALLAH KAURRAI (Deceased) and did not purchase the properties from the administrators have no locus standi to participate in these proceedings.

13. The parties filed written submissions in the said applications. The Applicants' submissions in summary were as follows;

i. The Applicants in the Application dated 19.6.2019 submitted that administrators never registered or served the order dated 8.5.2002 on the Land registrar and the Applicants have never been informed about the said order and it cannot be used to interfere with the Applicant's rights to the properties.

ii. The Applicants submitted that the action is statute time barred under the limitation of Actions Act Cap 22 Laws of Kenya which states that:

(4) “No action may be brought upon a Judgment after the end of twelve years from the date on which the Judgment was delivered”.

iii. The Applicants submitted that they are innocent purchasers for value who have never been served with any court order restricting transactions on the parcel of land and further that some bought their parcels before Court order was given in 2002.

iv. It was also submitted that some of the administrators and persons from families of the beneficiaries have as recent as 2016 actually participated in the sale of parcels from the title emanating from subdivision of NGONG/NGONG/5861 and now they are seeking an order nullifying every transaction after May 2002 despite their involvement and acquiesce.

v. It was submitted that no beneficiary has raised any issue or interfered with the applicants’ ownership or possession of the properties and that the subdivision took place after the 1st grant and even after the nullification in 2002, it has taken place right under the eyes of the beneficiaries of the estate.

vi. The Applicants submitted that they learnt of the proceedings through the grapevine and they now seek to be enjoined so that they can establish their ownership of the Property.

vii. It was also submitted that the Property in question is contested and it cannot therefore form part of the property of the estate.

viii. Further, that the Respondents are alleging fraud and misrepresentation yet they have never taken any party to court to challenge their titles for the last 17 years.

ix. The Applicants submitted that they have valid titles and they have lived peacefully up till now and the burden of proof under section 107 of Evidence Act is that whoever alleges a fact must prove it.

x. The applicants submitted that NGONG/NGONG/5861 does not exist since it has been subdivided several times to other innocent purchasers and further that article 40 of the Constitution protects rights to property.

14. The Applicants in the Application dated 27.6.2019 also in addition to the above submitted as follows;

i. The said Applicants relied on the case of MOSES WACHIRA VS. NIELS BRUEL & 2 others [2014] eKLR petition and in the case of COMMUNICATION COMMISSION OF KENYA AND 4 OTHERS Vs. ROYAL MEDIA SERVICES LIMITED and 7 OTHERS [2014] eKLR PETITION No. 15 of 2014 where the Supreme Court pronounced itself on who an interested party is as follows: “In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

ii. They further submitted that the said transactions were done openly after due process of law was followed including obtaining valid consent of the land control board, payment of consideration, valid transfer and subdivision as shown by valid copies of green cards attached.

iii. They also submitted that the dependents of the estate were aware of the transactions and STEPHEN SOKORE KAURRAI (now deceased) never disclosed that the grant had been revoked and LUCY NJERI SOKORE the wife of STEPHEN SOKORE KAURRAI (Deceased) has never raised any objection.

iv. The said Applicants raised the issue of adverse possession in their submissions and stated that adverse possession in their submissions and stated that adverse possession is a legal principle colloquially described as squatter’s rights where a person who does not have legal title to a piece of property –usually land (real property) acquires legal possession based on continuous possession or occupation of the land without permission of its owners.

v. It was submitted that the Applicants have acquired possession without interruption from the registered owners and have occupied it continuously for 12 years and further that the Applicants where they reside and have buried their kin.

15. LUCY NJERI SOKORE filed an affidavit dated 30.7.2019 but did not file any submissions. She stated in her affidavit that the deceased subdivided his property and further that it was not 68 acre but 400 acres.

16. LUCY NJERI SOKORE said in her Affidavit that when deceased died in the year 1980, he left 4 wives and children surviving him. Further that everyone in the family has sold land and that even the original owner ABDALLA KAURRAI (Deceased) sold land in the traditional way mostly without due process and that the court should take judicial notice of the same.

17. LUCY SOKORE further stated in her Affidavit that when her husband died in 2013 she took letters of administration based on her husband’s share alone and with the letters, she sold some of their land to some of the objectors.

18. The 4th administrator filed submissions dated 4.9.2019 in which she stated that it is now well settled that the law of Succession proceedings that are intended for the Estate and its lawful beneficiaries and further that the interested parties have no place in these proceedings.

19. The 4th Respondent further submitted that it is an illegality for the interested parties to participate in these proceedings as the agreements, transfers, titles and other documents preserved in their Affidavits on record clearly shows that they allegedly purchased the properties from persons who had no power in law to undertake the proposed sales and accordingly their interests and remedies ought to be agitated in the Environment and Land Court or in a Criminal Court against persons who irregularly, fraudulently and unlawfully purported to subdivide, sell or transfer the portions of land to them.

20. The 4th Respondent relied on the case of the estate of Helena Wangechi Njoroge (Deceased) where Justice William Musyoka said that the infrastructure in the probate process is not ideal for disputes between the estates and 3rd parties.

21. I have considered the submissions filed in the Applications herein seeking joinder of 3rd parties to these proceedings. I find that there is no dispute that there are several 3rd parties who purport to have purchased properties from the estate.

22. The issues for determination in the said applications are as follows:

i. Whether the Applicants should be enjoined to this Succession Cause as interested parties.

ii. Whether this Court has jurisdiction to determine disputes between the Estate and 3rd parties.

iii. Whether the parcels purchased by the 3rd Parties form part of the estate of the deceased.

23. On the issue as to whether the Applicants should be enjoined as interested parties to this case, the Applicants said they purchased their respective parcels of land from Administrators of the Estate. They said they are bona fide purchasers for value and further that the properties were transferred to them by the Registrar of land at Ngong after the necessary consents were obtained.

24. The Respondents opposed the Application for joinder and argued that the Applicants have admitted that they bought the properties from parties who are not administrators of the estate and therefore they should pursue the sellers personally in the Environment and Lands Court or in Criminal Proceedings.

25. The issue for determination is whether the Applicants should be enjoined to this Succession Cause as interested parties. An interested party is one who has a stake in proceedings, though he was not party to the cause ab initio. The **Blacks law Dictionary 9th Edition, page 1232** defines an interested party as:

"A party who has a recognizable stake (and therefore standing) in the matter"

26. In the case of **SKOV ESTATE LIMITED AND 5 OTHERS vs AGRICULTURAL CO-OPERATION & ANOTHER [2015] eKLR**, the Court stated as follows: in dismissing an application for joinder by persons who purchased suit property:

“in my view, for one to convince the Court that he/she needs to be enjoined to the suit as an interested party, such person should demonstrate that it is necessary that he/she be enjoined in the suit, so that the Court may settle all questions involved in the matter”

27. The **Constitution of Kenya** (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as:

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

28. The Applicants in this case are seeking to be enjoined as interested parties on the basis that they purchased the properties of the Estate on various dates from the Administrators of the Estate. Some deposed in their Affidavits that they bought from the deceased in his life time.

29. This Succession Cause relates to the Distribution of the Estate of the Deceased ABDALLA KAURRAI who died on 26th June 1980.

30. One of the beneficiaries of the Estate; STEPHEN SOKORE KAURRAI (now deceased) was issued with Letters of Administration intestate which was confirmed on 19th April 1990.

31. However, on 8th May 2002, the Court revoked the grant and certificate of confirmation and further ordered that any transactions undertaken using the grant issued on 2nd January 1990 and confirmed on 19th April 1990 stand revoked.

32. The Applicants in their Affidavits and submissions stated that they are bonafide purchasers for value and that they did not have notice of the revocation. The mandate of this Court is beneficial interest of the estate and not the Proprietary claims by the applicants.

33. It is not in dispute that after the revocation of the grant and certificate of confirmation, STEPHEN SOKORE KAURRAI (now deceased) continued to sell the properties of the estate using the revoked grants.

34. On the 5th June, 2002 the Court made an order to have the following persons appointed as administrators of the Estate of ABDALLA KAURRAI (Deceased) representing each house.

1. JOHN SENEWA KAURRAI

2. WILLIAM NDICHU KAURRAI

3. DAVID MATHERI KAURRAI

4. MARIRO KAURRAI

35. On 5th February 2016, the grant of Letters of Administration made to the above four administrators was confirmed. Prior to this date, there was no confirmation of grant. It is only the administrators who have authority to deal with the property of the deceased under section 82 of the Law of Succession Act Cap 160 Laws of Kenya.

36. The Law is very clear that it is only personal representatives of the Estate who can sell the properties of the estate and the proviso to **section 82 (b)** states that no immovable property shall be sold before confirmation of the grant.

37. The said Sections provide as follows:

82 (b) (ii) Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that:-

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant:(emphasis added)

38. In the current case, the grant has not yet been confirmed after Sokore's was revoked and there is a dispute as to whether the Applicants purchased the properties from the Administrators of the Estate. I find that the said dispute is beyond the mandate of this Court and the Applicants have to establish their claim first .

39. It was held in ALEXANDER MBAKA Vs. ROYFORD MURIUKI RAUNI AND 7 OTHERS [2016] eKLR as follows:

“It is only where one has established claim against the estate that has already crystalized that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalized. The right must be shown to have crystalized before the Family Court can entertain it.”

40. To reaffirm the above position, the decision in High Court Succession Cause Number 864 of 1996 [2015] eKLR by Musyoka J is apt. In that case the Judge stated;

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

41. I find that the issues before this Court is the administration of the Estate and ownership disputes with 3rd parties do not form part of the mandate of the succession Court. I accordingly find that the enjoinder of the Applicants will not resolve the dispute between the Applicants

and the Sellers of their respective properties.

42. Consequently, it follows that this Court has no jurisdiction to determine the dispute between the Applicants and the Estate. I find that the Applicants have stated in their affidavits and submissions that they are bona fide purchasers for value without notice of defect in Title. The Respondents stated that the Applicants fell victims of fraud.

43. A Bona fide purchaser is one who purchases something for value without notice of another's claim to the property or without actual or constructive notice of any defects in or infirmities claims or equities against the seller. (genuine purchaser)

44. The criteria which a party must satisfy in order to be deemed a bona fide purchaser was substantively assessed in the High Court of **LAWRENCE MUKIRI VS ATTORNEY GENERAL (AG) & 4 OTHERS [2013] eKLR**. The court found in that case that a Bona fide Purchaser is a party who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

45. The Court in the said case of **LAWRENCE MUKIRI VS ATTORNEY GENERAL (AG) (Supra)** went further to establish that a party wishing to rely on Bona fide purchaser Doctrine should prove the following;

- i. THAT he holds the Certificate of Title.**
- ii. THAT he had purchased the property in good faith.**
- iii. THAT he had no knowledge of the fraud**
- iv. THAT the vendors had apparent valid title**
- v. THAT he purchased without notice of any fraud and**
- vi. THAT he was not party to any fraud.**

46. The issue for determination before me is whether the Succession Court is the right forum for determination of the ownership disputes between the Estate and third parties. As I have held, the mandate of the Succession Court is to determine beneficial interest and not proprietary interests.

47. I find that the Current dispute can only be ventilated at the Land and Environment Court which is by law established to handle matters relating to occupancy use and title to lands

48. Article 162 (2) of the Constitution of Kenya 2010 establishes the Environment and Land Court (ELC) to hear and determine disputes relating to "the Environment and the use and occupation of, and title to, land". I accordingly find that the jurisdiction to entertain the dispute between the Applicants and the sellers of the properties they occupy fall within the providence of the ELC Court.

49. Finally on the issue as to whether the parcels of land in dispute forms part of the Estate of the Deceased, I find that the said parcels are not available for distribution until the ownership dispute is heard and determined.

50. The widow of STEPHEN SOKORE KAURRAI (Deceased) swore an affidavit and stated that she is the personal representative of the Estate of her husband. I find that this Succession case will proceed only with respect of the parcels of land which have no dispute. The parcels which have a dispute do not form part of the estate of the deceased.

51. In a nut shell, the Applications seeking enjoinder of the Applicants as interested parties in this Succession cause are all dismissed with costs to the Respondents for the following reasons:

- i. The Applicants have not established that they purchased their respective properties from the Administrators of the estate.**
- ii. The Forum for dissolution of ownership disputes between the estate and 3rd parties is the ELC Court.**
- iii. The Parcels of Land in dispute do not form part of the Estate of the deceased until the ownership is determined.**

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 11TH DAY OF OCTOBER, 2019

ASENATHONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.