



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 92 'B' OF 2007

IN THE MATTER OF THE ESTATE OF SIRIMANI BLASIO MATARA.....DECEASED

BETWEEN

JAMES N. SIRIMANI

ESTHER K. SIRIMANI.....PETITIONERS

VERSUS

KENGERE MAGETO.....1ST RESPONDENT

PRISCAH BONARERI KENGERE....2ND RESPONDENT

RULING

Background

1. Sirimani Blasio Matara (hereinafter “the deceased”) died intestate on 30th November 2006. The deceased was, prior to his death the registered owner of Land Parcel No. Nyaribari Chache/Nyanturago/24 (hereinafter “the suit land”). He was survived by the following beneficiaries:

- a) James N. Sirimani – son (the 1st petitioner herein)**
- b) Esther K. Sirimani – widow (the 2nd petitioner herein)**
- c) John O. Sirimani – son**
- d) Peter O. Sirimani – son**
- e) Stephen Sirimani – son**
- f) Omwenga Sirimani- son**

2. On 5th June 2007, the 1st and 2nd petitioners herein petitioned for grant of letters of administration in respect to the estate of the deceased and on 1st November 2007, this court issued grant of letters of administration to the petitioners which grant is yet to be confirmed as the application for confirmation of grant dated 8th May 2008 has not been determined to date as no sooner had the said application for confirmation of grant been fixed for hearing than the objectors herein filed an application dated 5th June 2008 seeking the extension of time to file an objection to the confirmation of grant of letters of administration issued to the Petitioners which application was allowed by Musinga J. (as he then was) on 13th March 2009.

3. Following the said orders of 13th March 2009, the objectors, on 24th March 2009, filed the application that is the subject of this ruling.

The application

4. On 24th March 2009, the objectors herein, filed an objection to making of grant under **Order 17 (1) of Probate and Administration Rules**. The objectors outlined their interest in the deceased estate as follows:

- a) **The objectors have a lien on land parcel known as NYARIBARI CHACHE/NYANTURAGO/24 part of the estate the petitioners intends to administer and subdivide.**
- b) **The objectors bought part of the land constituting the estate way back in 1984 from the original owner called MABUKA MOYAYE now deceased.**
- c) **The objectors have lived, occupied and cultivated almost 1 acre of land constituting part of the estate since 1984.**
- d) **The fraudulent registration of land parcel known as NYARIBARI CHACHE/NYANTURANGO/24 in its entirety including almost 1 acre of land belonging to the objectors.**

5. Concurrently with the objection to the making of grant the Objectors filed a petition by way of cross-application for a grant, (under rule 17 (5) of Probate and Administration Rules in which they petitioned for grant of letters of administration intestate in respect to the deceased estate on the grounds that they were beneficiaries to the said estate by virtue of the fact that they have a lien to the suit land and therefore have equal or prior right to grant of representation.

6. The application was supported by the 1st objector's affidavit sworn on 24th March 2009 in which he avers that he purchased a piece of land from one Moyaye Mabuya who died on 1st June 1984 and that the said Moyaye Mabuya died before transferring the said piece of land to him. He attached a copy of the land sale agreement as an annexure "KMP"

7. He further avers that the deceased filed a succession cause in Kisii High Court being succession cause No. 139 of 1993 after which he fraudulently transferred the suit land into his name.

8. He further states that upon realizing the fraud, he placed a restriction on the suit land as shown in the annexure marked "KM2". It was therefore the objectors case that the deceased herein held the suit land in trust for him and that he was therefore entitled to file the instant objection.

9. The petitioners opposed the application through grounds of opposition dated 14th April 2009 in which they listed the following grounds:

- a) **THAT the objection has no merit and should be dismissed with costs.**
- b) **THAT the objectors cannot claim land parcel No. Nyaribari Chache/Nyanturango/24 which was awarded to Sirimani Blasio Matara (deceased) in Kisii Chief Magistrate Civil Suit No. 810 of 2002 (formally Kisii HCCC NO. 184 of 1997) whose judgment still stands.**
- c) **THAT the objectors are not beneficiaries of the estate of Sirimani Blasio Matara (Deceased).**
- d) **THAT the objectors have not set out particulars of fraud.**

10. The petitioners also filed an objection to cross application for a grant of letters of administration on the grounds that:

1. **The objectors are strangers to the estate of the above named Sirimani Blasio Matara (Deceased).**
2. **THAT the objectors are not beneficiaries of the estate of the above name deceased.**
3. **THAT the objectors have no right to the estate of the deceased.**
4. **THAT the land in question namely land parcel No. Nyaribari Chache/Nyanturago/24 was awarded to the deceased person vide award filed in court through arbitration and confirmed as judgment of the court on 14th August 2003 which judgment has never been set aside and still stands in case No. Kisii CMCCC 810 of 2002.**
5. **THAT in the said case No. Kisii CMCCC 810 of 2002 a Decree was issued as provided under order O.XLV r' 17 (2) of the Civil Procedure Rules.**
6. **THAT the award was never set aside under O.XLV r 15 of the Civil Procedure Rules.**
7. **THAT there should be no appeal or any other application of any nature to the high court challenging the Decree in the civil Suit No. Kisii CMCCC 810 of 2002 under order O.XLV r' 17 (2).**
8. **THAT the jurat to the answer to the petition is on a separate page contrary to law.**
9. **THAT the cross-petition and answer to petition and the entire objection to the petition by the objectors have no merit and should be dismissed with costs.**

11. The petitioners further filed identical replying affidavits in which they repeated the grounds set out in their objection to cross application for a grant of letters of administration and reiterated that the suit land in question was awarded to the deceased vide Kisii CMCC 810 of 2002, formerly Kisii HCCC No. 184 of 1997. They attached a copy of a decree, eviction order and an application for execution to the replying affidavit which they marked as JS1, 2, 3 and 4 respectively.

12. It was the petitioners case that the judgment and decree entered in Kisii CMCC 810 of 2002 in favour of the deceased has not been set aside, varied or appealed against.

13. When the objection came up for directions on 25th September 2009, directions were taken that the objection be heard by way of viva voce evidence.

The Hearing

14. The objectors presented oral evidence as follows:

15. PW Nemwel Nyasa Etamba testified that as a retired teacher and area chief, he knew both the petitioners and the objectors and that each one of them occupied a portion of the suit land having purchased it from one Obonyo Oyayo. He added that both parties had occupied the land for a long time. He added that the deceased obtained title to the whole land when each party has been cultivating their portion of the suit land.

16. PW2 was Priscah Bonareri Kengere the 2nd objector herein. Her testimony was that the petitioners were her neighbours having bought the land from one Oyayo Mabuga. She later discovered that the deceased herein had secured title to the entire suit land and it is upon this realization that she placed a caveat on the said land pending the determination of the case by the court. She added that many people had bought the suit land namely Magere, Sirimani and Samuel.

17. On cross examination she stated that she bought land from one Moyaye Mabuya and that at the time she bought the land, the deceased was already living on a portion of land. She also stated that she was aware that the deceased sued them in court over the suit land and sought orders for their eviction.

18. PW3 Samuel Kengere testified that he bought land from one Moyaye Mabuya many years back and that the deceased was also a purchaser of the suit land. He confirmed that they made a written agreement that was signed by many witnesses. He added that Obonyo Moyaye was already dead by the time he bought land from Moyaye Mabuya and that Obonyo Moyaye was the son to Moyaye Mabuya. He confirmed that the deceased bought a portion of the suit land before he bought his, and that he did not know how the deceased secured a title to the suit land. He claimed that the deceased did not consult him when he filed a succession cause in the estate of Obonyo Moyaye.

19. On cross examination he stated that the deceased bought the suit land earlier than him and that the person who sold the land to the deceased was Obonyo while Moyaye Mabuya sold land to him. He confirmed that the deceased sued him in court over the suit land and that later the police came to evict him from the said land. He confirmed that he did not make a counter claim in the suit filed against him by the deceased.

20. PW4 was Motenu Gesicho. He testified that he knew the 2nd petitioner and the 2nd objector and that he was aware that the 1st objector bought land from Moyaya who was the father of Obonyo.

21. On cross examination he explained that the deceased had his own land and that he had come to court to ensure that his neighbours get their own share of the land. He added that he was aware that D.O. tried to solve the land dispute between the deceased and the 1st objector and the D.O. determined that since the deceased had the title deed to the suit land, he should get the whole land.

22. PW5 was Joseph Morema the executive officer of the judiciary in charge of the High Court. He produced as an exhibit, the court file in respect to HC. Succession Cause No. 139 of 1993 filed by the deceased herein in respect to the estate of Obonyo Moyaye. He stated that there was a letter from the chief in the court file confirming that the deceased bought land from Obonyo.

Petitioners Case

23. DW1 was Joan Nyabuto Sirimani, the daughter of the 2nd petitioner. She stated that the deceased herein, who was the registered owner of the suit land, was her father. She added that the deceased had a land case against the 1st objector in which an eviction order was issued against the 1st objector which order was yet to be executed. She explained that the deceased, bought the suit land from one Obonyo Moyaye (also deceased).

24. DW2 was Esther Kwamboka, the 2nd petitioner herein and the deceased's widow. Her testimony was that the deceased bought the suit land from one Obonyo Moyaye who died before transferring the suit land to him and that the deceased filed a succession cause in respect to the estate of the late Obonyo Moyaye after which the suit land was transferred to him. She further stated that the deceased sued the 1st objector before the High Court and obtained an order of eviction against him after which the 1st Objector left the suit land but that he later returned to the land. She maintained that the objectors were not the beneficiaries of the deceased estate and neither did they object to the issuance of grant to the deceased in respect to the estate of Obonyo Moyaye.

25. On cross examination, she conceded that the respondents have been occupying part of the suit land and that they purchased their portion in 1985.

26. DW3 Stephen Sirimani testified that the suit land belonged to the deceased herein who was his father having obtained the same after filing a succession cause in respect to the estate of one Obonyo Moyaye. She further stated that the deceased sued the 1st objector in Kisii CMCC 810 of 2002 and obtained on order of eviction the 1st objector from the suit land. She produced a copy of the decree as D exhibit 1. She added that the objectors did not appeal against the said judgment or filed an application seeking its setting aside. She maintained that the objectors were not the beneficiaries of the estate of the deceased.

27. On cross examination she stated that the objectors do not live on the suit land but that they till and work on it. He also maintained that the objector was not entitled to a portion of the suit land as he was not a beneficiary of the estate of the deceased.

28. At the close of the petitioners' case parties agreed to file written submission before judgment which submissions I have perused.

Analysis and determination

29. Upon considering the application dated 24th March 2009, the petition by way of cross application for grant, the statement and affidavits in its support, the petitioners' replying affidavits, the grounds of opposition, the evidence tendered during the hearing and the parties written submissions. I note that the issues for determination are:

a) **Whether the objectors are beneficiaries of the estate of the deceased herein and whether they are entitled to the orders sought.**

30. **Rule 17 (5) of the Probate and Administration Rules** (hereinafter "the rules") under which the instant application was filed stipulates as follows;

"(5) Where —

(a) a will appears to have been executed —

(i) by a blind or illiterate person; or

(ii) by another person at the direction and in the presence of the testator; or

(b) there is any other reason to raise doubt as to the testator having had knowledge of the contents of the will, the Registrar must satisfy himself that the testator had such knowledge."

31. In the instant case the petitioners had as at the time the application was filed already obtained the grant of letters of administration in respect to the estate of the deceased and therefore the above provision of Rule 17 (5) of the Rules was not applicable in this case and the correct procedure for challenging the grant issued to the petitioners should have been Section 76 of the Law of Succession Act (hereinafter "the Act") and rule 45 of the Rules.

32. Be that as it may, and without placing much emphasis on the sections of the Act and the Rules under which the objectors initiated the objection proceedings, this court will in the interest of justice and in the spirit of dispensing substantive justice to the parties still consider the merits of the objection proceedings.

33. As a starting point, it is worthy to note that the estate that is the subject of these proceedings is the estate of Sirimani Blasio Matara (the deceased). It was not disputed that the objector's herein are not family members or beneficiaries of the state of the deceased herein and on that basis alone, I find that the objection proceedings are misconceived and misplaced.

34. The 1st objector's case is that he bought a portion of land from one Moyaye Mabuya who was the father of one Obonyo Moyaye. The deceased herein, on the other hand, bought the suit land from the said Obonyo Moyaye who died before he transferred the suit land to him thereby prompting him to file a succession cause in respect to the estate of the said Obonyo Moyaye after which he obtained the grant of letters of administration which grant was later confirmed and the suit land transferred to him.

35. It was not disputed that the deceased sued the 1st objector before Kisii CMCC 810 of 2002 and judgment and decree was issued in his favour in the following terms as shown in the copy of decree attached to the petitioners' replying affidavits to the instant application.

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE COURT AT KISII

CIVIL SUIT NO. 810 OF 2002

SIRIMANI BLASIO MATARAPLAINTIFF

VERSUS

KENGERE MAGETO.....DEFENDANT

DECREE

CLAIM

- a) Recovery of 0.5 acres
- b) Permanent injunction restraining the defendant from trespassing into plaintiff's said land, namely Nyaribari Chache/Nyanturago/24.
- c) General damages for trespass
- d) Costs of this suit.
- e) Interest at Court rates.

This suit having been transferred from the Kisii High Court in original file No. Kisii H.C.C.C No. 184 of 1997 to the Chief Magistrate's Court Kisii and given the new No. as Kisii C.M.C.C.C No. 810 of 2002 and the same having been referred for arbitration award as finding or judgment of the Court on 14th August, 2003. It is hereby ordered that:

- a) The plaintiff Sirimani Blasio Matara is the registered owner of land parcel No. Nyaribari/Nyanturiago/24 and this includes the section in dispute measuring 0.5 acres.
- b) The defendant do move out of the disputed parcel of land.
- c) The defendants continued stay on the disputed portion is trespass on the plaintiff's property.

GIVEN UNDER my hand and the seal of the Court this 10th day of Feb 2004.

ISSUED at Kisii this 10th day of FEB 2005.

SENIOR RESIDENT MAGISTRATE

KISII

36. From the above decree, I find that the issue ownership of the suit land was resolved by a court of competent jurisdiction way back in 2004 in which case the dispute between the deceased and the objectors over ownership of the suit land is res judicata, having been determined by a court of competent jurisdiction.

37. My finding is that the instant application is res judicata to the extent that a similar issue had already been resolved by the court when the said court went further to order for the objector's eviction from the suit land.

38. My humble view is that the objectors cannot seek to revive a matter that had already been determined with finality, by a court of competent jurisdiction whose orders were not appealed against, varied or set aside.

39. My take is that if it is true that the objectors bought the land from one Moyaye Mabuya, then the correct cause of action would have been for them to pursue the said Moyaye Mabuya for the said land or the specific performance of the land sale agreement instead of dragging the estate of the deceased into the dispute yet the deceased had no dealings with them.

40. For the above reasons and findings, I find that the instant application is not merited and I therefore dismiss it with costs to the petitioners.

Dated, signed and delivered in open court this 7th day of March, 2018

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Okenye for the Petitioner
- N/A Ogari for the Respondent
- Omwoyo: Court Clerk