



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 52 OF 1990

IN THE MATTER OF THE ESTATE OF THE LATE AMOS NJAU NG'ANG'A

(DECEASED)

ZABLON NGONTHO ISAAC.....INTERESTED PARTY/APPLICANT

RULING

1. By way of summons taken out on the 12/5/2016, Zablou Isaac Ngotho (Applicant) seeks orders;
 1. **THAT** the Certificate of Confirmation of Grant or representation of the Estate of the late Amos Njau Ng'ang'a issued to Winnie Wanjiru Njau on the 27.9.1994 be set aside or amended.
 2. **THAT** the costs of this application be borne by the administrator herein.
2. The Application is premised on affidavit sworn on the 12/5/2016 on grounds;
 - a) **THAT** the Certificate of Confirmation of Grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
 - b) **THAT** the confirmation dispossessed the Interested Party/Applicant his portion of all that property known as L.R. NO. 3777/323 – I.R. No. 8471 situate east of Gilgil in Nakuru County.
3. The gist of the application, the supporting affidavit and the grounds relied upon is that the certificate of confirmation of grant issued in this matter was obtained fraudulently by making a false statement or by concealment of something material to the case and the Applicant was dispossessed of his portion from L.R. NO. 3777/323 – I.R. No. 8471 situate East of Gilgil in Nakuru County.
4. It is the Applicant's case that the deceased herein was his brother and he is a brother in law to the Administrator of the estate of Winnie Wanjiru Njau.
5. A grant of letters of administration intestate of the said estate was made to Winnie Wanjiru Njau on 7/6/1990 and a certificate of confirmation issued on 27/9/1994.
6. It is averred that the deceased, Amos Njau Ng'ang'a, Winnie Wanjiru Njau and the Applicant were the registered tenants in common in equal shares of all that property known as L. R. No. 3777/323 – I.R. No. 8471 measuring 50 acres. A copy of official search is annexed in evidence.
7. Upon the demise of the deceased, it was agreed between Winnie Wanjiru Njau and the Applicant that the said property be subdivided into 3 portions measuring 5.444 Ha, 6.721 Ha and 8.097 Ha to enable the administrator distribute the estate of the deceased. The deceased estate was to take the 8.097 Ha, Winnie 5.444 Ha and the 1st interested party 6.721 Ha.
8. The resultant parcels were LR 3777/871 (8.097 ha), 3777/873 (5.444 Ha) and 3777/872 (6.721 Ha). A deed plan is annexed.
9. Efforts by the 1st interested party to obtain his individual certificate of title were frustrated by the fact that the Applicant was not listed as a beneficiary as per the confirmation of grant. It is only after rejection by the Land Registrar of the 1st interested party's application that the Applicant learnt that the Administrator had distributed all the property known as L.R.NO. 3777/323 I.R. 8471 to herself and the deceased's beneficiaries. The confirmed grant is exhibited.

10. It is urged that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case and it deprived the applicant of his 6.721 Ha and should therefore be set aside.
11. The application is opposed and Winnie Wanjiru Njau (The Respondent) relies on 19 grounds of opposition and her replying affidavit.
12. It is the Respondent's case that L.R.NO. 3777/323 was acquired solely by the deceased from a white settler known as Alexander Cosby Fishburn Jackson in 1968. The deceased paid a deposit of Kshs. 3,000/= and thereafter raised Kshs. 12,000/= from the sale of his motor vehicle registration No. KHA 530. He subsequently secured a loan of Kshs. 30,000/= from Barclays Bank of Kenya.
13. It is averred that the names of the Respondent and the Applicant were not supposed to appear on the title as the two were guarantors and not tenants. The Respondent was not aware that the names appeared on the title until she saw the title after the death of her husband. The Respondent and the Applicant contributed no money towards the purchase of the land. The Respondent confirms that she knows the property is registered in the names of Amos Njau (deceased), Winnie Wanjiru (herself) and Zablon Ngotho (Applicant).
14. The Respondent maintains that she obtained the grant regularly and the Applicant was all along aware of the process. The Applicant was not entitled to any share of the said property and he has only recently become greedy and intends to disposes his brother's children 26 years down the line after the confirmation of grant.
15. The Respondent avers that on 24/4/1998 the Applicant and herself agreed to dispose off 20 acres of the suit property in equal share (sic) to a third party one Peter Njihia Koigi. This was to assist one of Respondent's son who who was in a predicament and as such the 20 acres would emanate from our share of the suit property (sic). She states that the aforesaid sale did not affect the deceased share of the suit property.
16. It is the Respondent's case that no titles have been issued in respect of the alleged subdivisions and no agreement has been reached on any new registrations to take place.
17. In regard to the exhibited partition and assent, the Respondent avers that she was not given proper counsel as to the meaning and effect of the documents presented to her and as such she did not know what she was signing. The Court ought to ignore the documents completely.
18. Vide an application dated 19/7/2016, James Ng'ang'a Njau, Monica Muthoni, Beatrice Njeri and Eunice Wambui sought to be enjoined in this matter as interested parties. By consent of the parties recorded on the 29/9/2016, the 4 Applicants were enjoined in these proceedings.
19. On their part and through an affidavit sworn by James Ng'anga njau with the authority of the 3rd to 5th interested parties, the interested parties have stated that L.R. No. 3777/323 has been their home for the last forty eight (48) years.
20. The said property was registered in the names of Amos Njau Ng'ang'a (deceased), Winnie Wanjiru and Zablon Ngotho as tenants in common in equal share. The deceased therefore had a right to 1/3 of the property.
21. It is averred that the deceased procured the property solely as he paid the full purchase price by himself. The 2 other co-owners were guarantors to a loan from Barclays Bank which was to purchase the said property.
22. In 1998, 20 acres was sold off to one Peter Njihia Koigi by both Winnie and Zablon. It follows therefore that the 2 co-owners sold off their share of the property. The deceased's share is intact and should devolve to his rightful beneficiaries.
23. The interested parties further aver that they are not opposed to the rectification of grant but it should be done in accordance with the true facts on the ground.
24. The matter was canvassed by way of written submissions following the direction of Court on the 2/2/2017.
25. I have had occasion to consider the application and the opposition thereto. I have had regard to the submissions of learned counsel.
26. In a nutshell, the applicant's claim is for his alleged share in all that property known as LR 3777/323.
27. No doubt exists in my mind based on the official search exhibited and the acknowledgment by the Respondent and the interested parties that LR No. 3777/323 – I.R. 8471 situate East of Gilgil in Nakuru County measuring approximately 50 acres was registered in the names of Amos Njau Ng'ang'a (deceased), Winnie Wanjiru Njau and Zablon Ngotho (the Applicant) as tenants in common in equal shares.
28. The averments that the deceased paid the full purchase price and that Winnie Wanjiru and Zablon ngotho were just guarantors have no place in law as the title document is crystal clear that the 3 were tenants in common in equal shares.
29. It is noteworthy that the Applicant has no issue with the grant held by Winnie Wanjiru Njau. His grouse, as I understand it, is that the administrator had dealt with the subject property in disregard of the applicant's share as a tenant in common in equal share. He claims his 1/3 share.
30. The deceased died on 3/8/1988. The grant issued to the Respondent was confirmed on 27/9/1994.
31. The duty of the administrator was to transmit the estate of the deceased to the rightful heirs. This, certainly, would be confined to the free property of the deceased as at the time of his death. **Section 3(1) of the Law of Succession Act (Cap 160 Laws of Kenya)** defines free

property as;

“ 'free property' in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by death.”

32. As alluded to earlier, it is borne out of record that the deceased's share in LR No. 3777/323 was 1/3.

33. The summons for confirmation of grant filed in Court on 27/11/1990 did not provide a schedule of the assets of the deceased. By a further affidavit sworn on 12/4/1993, the administrator at paragraph 3 thereof stated;

3. That L.R. No. 3777/323 which measures 50 acres is to be divided thus:-

(a) 20 acres thereof to James Nganga Njau absolutely,

(b) 5 acres thereof to Monica Muthoni absolutely,

(c) 5 acres thereof to Beatrice Njeri absolutely,

(d) 5 acres to Eunice Wambui absolutely,

(e) 2½ acres to Timothy Njau S/O Monica Muthoni absolutely,

(f) 2½ acres to Antony Nganga absolutely,

(g) 10 acres to myself absolutely.

34. This deposition is curious. Why? Firstly, in the affidavit in support of petition for letters of administration sworn on 23/2/1990, the Petitioner depones at paragraph 6 that the inventory of all the assets of the deceased was as follows;

1. LR No. 1317/132 Gilgil Township.

2. LR No. 1317/190 Gilgil Township.

3. LR. No. 1317/190 Gilgil East.

L.R. No. 3777/323 is not included as part of the assets. A logical inference can be drawn that the administrator knew that the said property did not form part of the estate of the deceased in its entirety, as if that would have been the case, nothing would have been easier than to include same in the inventory.

35. Secondly, the above deposition purports to distribute the entire 50 acres comprising LR No. 3777/323 yet the title document is clear that the deceased share therefore was a 1/3.

36. To that extent therefore, much as the grant of letters of administration was regular and to the right person and the rightful beneficiaries, at the confirmation stage an irregularity occurred whereby there was a purported distribution of property that was not the free property of the deceased at the time of his death.

37. As held by *Khamoni J* in **RE ESTATE OF NGUGI (DECEASED) [2002] 2 KLR 434**, where the complaint of a person applying for revocation relates to what happened during confirmation process, revocation or annulment should not be sought as the certificate of confirmation can be dealt with without having to cancel the grant of representation.

38. The Applicant therefore has made the right approach by anchoring his application under **Section 47 of the Law of Succession Act and Rules 49, 63 and 73 of the Probate and Administration Rules.**

39. I cannot agree more with the 2nd to 5th interested parties when they state that they are not opposed to the rectification of the grant but it should be done in accordance with the true facts on the ground.

40. And what are the true facts? The true facts are that the deceased was entitled to a 1/3 share at LR No. 3777/323 and in addition to any other properties that he may have had. That 1/3 share is what is available to all his beneficiaries

41. At this juncture I need to mention something about the sale of 20 acres excised from LR No. 3777/323. This sale is purportedly done in 1998 by Winnie Wanjiru (administrator) and Zablon Ngotho (the Applicant).

42. Suffice it to note that neither the administrator, nor Zablon had the legal right to dispose of any part of the estate of the deceased contrary to the terms of the confirmed grant. Therefore, any purported transfer of 20 acres by the two for whatever reason could only have come from their respective share in LR 3777/323 and the 1/3 share of the deceased must be left intact and available to his rightful heirs.

43. The Applicant cannot be heard to state that his 1/3 portion of 16.6 acres remained intact having admitted that he participated in the sale of 20 acres excised from LR No. 3777/323 the parcel of land that was held by the 3 tenants in common in equal shares.

44. Should there arise a dispute between the administrator and the Applicant herein over their shares in LR No. 3777/323, such a dispute must be removed from the affairs of the estate of the deceased herein.

45. Guided by the decision of *Waweru J* in the matter of the **ESTATE OF JUSTUS WANGARI MUTHIRU (DECEASED) NAIROBI HIGH COURT SUCCESSION CAUSE NO. 1949 OF 2001**, I am persuaded that the application herein is meritable as the complaint by the Applicant is on distribution only and an application for revocation would be inappropriate in the circumstances. See also in **RE ESTATE OF GITAU (DECEASED) [2002] 2 KLR 430**.

46. The only defect in the confirmed grant is that it includes property that was not free property of the deceased at the time of his death. This defect can be remedied by removing the same and allowing the grant to be confirmed based on the free property of the deceased (i.e. the 1/3 share from LR No. 3777/323) and other listed properties that are not in dispute.

47. The certificate of confirmation of grant dated 27/9/1994 is amended by removing therefrom asset described as LR No. 3777/323 and substituting in lieu thereof 1/3 share of LR No. 3777/323. The administrator can proceed to share out the 1/3 share to the rightful heirs of the deceased. Each party to bear its own costs.

Dated and Signed at Nakuru this 10th day of May, 2018.

A. K. NDUNG'U

JUDGE