



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 546 OF 2013**

**IN THE MATTER OF THE ESTATE OF: LARRY GREGORY KISWILI DECEASED**

**AGATHA NDUKU KAKINDU)**

**MARTIN KYALO KISWILI).....PETITIONERS**

**AND**

**JOEL MBATARU KANYOKO.....PROTESTER**

**RULING**

1. The protester herein filed an affidavit of protest dated 6-10-2016 against confirmation of grant on the following grounds:

(i) That the **land parcel Reference Number 209/7383/205- LR 40803/1** situated within Nairobi belongs to him having entrusted to his wife Lucy Wambui Kariuki.

(ii) That he later instructed a civil suit against the said Lucy Wambui Kariuki vide **NAIROBI HIGH COURT CIVIL CASE NUMBER 974 OF 1990** and while the case was pending in court the said Lucy Wambui Kariuki fraudulently sold the property to deceased herein Larry Gregory Kiswili Ngutter.

(iii) That he later enjoined the deceased as a second Defendant in the Civil Case which was subsequently dismissed.

(iv) That he has since lodged an appeal to the Court of Appeal vide **CIVIL APPEAL NO. 255 OF 2011** which is now pending determination.

(v) That due to the doctrine of lis pendens the grant herein should not be confirmed as the appeal will be rendered nugatory should he succeed eventually as it would be difficult for him to pursue his claim for the suit land.

2. The protest was strenuously opposed by the petitioners herein who filed an affidavit of reply sworn on the 5-11-2016 and raised the following grounds of opposition:

(i) That the property namely **LR 209/7383/205 and IR 40803/1** legally passed to the deceased herein as the sale was above board.

(ii) That the protester has never bothered to substitute the deceased in the civil appeal case and hence the appeal against him stood abated by operation of law upon the lapse of one year after the deceased's death.

(iii) The petitioners have not been enjoined in the appeal case and they are therefore strangers to the said case.

(iv) The protest against the confirmation of grant is in bad faith aimed at frustrating the beneficiaries of the deceased and the same should be dismissed with costs to the petitioners.

3. Parties agreed to canvass the protest by way of written submissions.

**Protester's Submissions**

It was submitted for the protester that the protester has a legal and beneficial interest to the suit property which is subject to an ongoing dispute pending before the Court of Appeal being **CIVIL APPEAL NO. 255 OF 2011**. It was also submitted that the impugned transfer of the land to the deceased during the pendency of the dispute in court as well as a caveat lodged against the property implied that the deceased

was not an innocent purchaser for value without notice and therefore Section 52 of the Transfer of Property Act 1882 became applicable through the doctrine by Lis Pendens. It was further submitted for the protestor that the civil appeal is meritorious and hence this court should not allow the grant to be confirmed as the protestor's interest would be prejudiced. Reliance was placed in the case of **ROSE WAKANYI KARANJA & OTHERS -VS- CHEGE KIRUNDA & ANOTHER, C.A NO. 172 OF 2010**, where the court held that the doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if the alienation pendent lite were permitted to prevail.

#### **Petitioner's Submissions**

It was submitted for the petitioner's that the property in question legally passed to the deceased since the transfer first started from the protestor to his estranged wife Lucy Wambui Kariuki who in turn transferred to the deceased. Further it was submitted that the protestor has not presented evidence to the effect that the judgment in **HCC No. 511 of 2005** has ever been stayed since the protestor's claim had been dismissed. It was also submitted that the protestor failed to enjoin the legal representatives of the deceased within one year after his death and hence the appeal abated with the consequence that the suit property still belongs to the deceased and which should form part of the estate for distribution.

It was finally submitted that the grant be confirmed subject to the suit property 209/7383/205-IR 40803/1 being vested in the petitioner's to hold on trust pending the determination of ownership of the suit property by the Court of Appeal. The case of **BENEDICT NDUNGE MBOLE -VS- CHRISTOPHER MUSYOKA MUSAU [2017] eKLR** was relied upon where the court allowed a grant to be confirmed subject to the suit property being vested in the petitioner to hold in trust pending the determination of the ownership of the suit property.

4. I have considered the protestor's protest as well as the rival affidavits and submissions by the learned counsels for the parties. It is not in dispute that parties herein entered into a consent whereby the petitioners were granted partial certificate of confirmation of grant whereby parcel number Nairobi Block 209/7383/205-IR 40803/1 was left out of distribution. The said partial certificate of confirmation of grant is dated 10/10/2016. It is also not in dispute that the property namely 209/7383/205-IR 40803/1 had been a subject of a dispute vides number **HCC NO. 511 OF 2005** which later culminated in a Court of Appeal **Civil Appeal number 255 of 2011** that is now pending for determination. It is also not in dispute that the said property, initially belonged to the protestor's herein and who later transferred to his estranged wife Lucy Wambui Kariuki who in turn transferred to the deceased herein. The issue for determination is whether the full grant should be confirmed.

The protestor has urged this court not to confirm the grant as he is likely to suffer great prejudice should the pending civil appeal succeed in the end because by then the suit property will have been distributed and out of his reach. The basis of the protestor's appeal is that the deceased was not an innocent purchaser for value without notice since he had been alerted in time at the time of filing the suit and further by the placement of a caveat on the property.

The dispute as to the ownership will be the subject of the civil appeal and therefore the Court of Appeal will deal with the same. As the civil appeal is still pending for determination I find the doctrine of Lis Pendens as provided under section 52 of the Transfer of Property Act 1882 is applicable in the circumstances I find it is fair and just to allow the protestor ventilate his appeal. To deny him such an opportunity would go against the tenets of justice whereby every litigant who approaches the courts should be given his or her day in court. In any event the petitioners have already been granted partial certificate of confirmation of grant and that the other assets of the deceased except the suit property are free for distribution. However, as the appeal might take time to conclude, this court will be guided by the decisions in **Benedict Ndunge Mbole -VS- Christopher Musyoka Musau [2017] eKLR** where Hon. justice E. O. Ogola held that the objector should be given a forum to ventilate his claim and that the grant could be confirmed subject to the suit property being vested in the Petitioner to hold in trust pending the determination of the ownership of the suit property. Indeed the learned counsel for the Petitioner in his submissions appear to agree to such an arrangement. I find the same quite appropriate in the circumstances in that the Petitioners shall hold the property in trust pending the determination of the civil appeal which shall dwell on the issue of ownership of the suit property. If the protestor succeeds in the end, the Petitioners would do the needful by ensuring that he gets the property transferred back to him and if he loses in the appeal, then the petitioners shall proceed to distribute the property to the rightful beneficiaries. My finding herein aptly resonates with the parties earlier intention to enter into a consent for the Petitioners to obtain partial certificate of confirmation of grant as the issue of the ownership of the disputed property is addressed.

In the result it is the finding of this court that the protest lacks merit and is rejected. The following orders are hereby made:-

*(a) The grant herein is confirmed.*

*(b) The property namely Nairobi Block 209/7383/205 – IR 40803/1 shall be distributed to the Petitioners who shall hold in trust pending the outcome of Nairobi Court of Appeal Civil Appeal No. 255 of 2011.*

*(c) The costs hereof shall be in the cause.*

It is so ordered.

**Dated and delivered at Machakos this 20<sup>th</sup> day of July, 2018.**

**D. K. KEMEI**

**JUDGE**

In the presence of:-

Mutinda Kimeu - for the Petitioners

No appearance for Kirundi - for the Protestors

Josephine - Court Assistant