



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 54 OF 2010

IN THE MATTER OF THE ESTATE OF KAKUA KIOKO (DECEASED)

KANINI KAKUA.....PETITIONER

AND

JOSEPH NTHENGE KAKUA.....APPLICANT

VERSUS

KENNETH ONSARE MAINA.....RESPONDENT

YES HOUSING CO-OPERATIVE.....INTERESTED PARTY

RULING

1. Kakua Kioko (deceased) died on the 16th day of December 1996. His wife one Kanini Kakua petitioned for letters of administration intestate which were duly issued to her on 8-3-2010. The said grant was confirmed on the 11-5-2015 and a certificate of confirmation of grant issued on the 3-7-2015. The certificate of confirmation clearly indicated the properties due to each of the beneficiaries.

2. On the 14-7-2017 Joseph Nthenge Kakua the applicant herein and who is one of the beneficiaries filed the present application seeking the following reliefs:

i. That pending the determination of this application an order of inhibition be issued restraining the respondent from dealing and or transacting in any manner whatsoever with land title No. Donyo Sabuk Komarock Block 1/65002.

ii. That the transfer of land title No. Donyo Sabuk Komarock Block 1/65002 made to the respondent Kenneth Onsare Maina on 15-7-2010 be declared unlawful.

iii. That the Applicant Joseph Nthenge Kakua be declared the beneficial owner of land title No. Donyo Sabuk Komarock Block 1/65002.

iv. That the Machakos County Land Registrar be directed to register land title No. Donyo Sabuk Komarock Block 1/65002 in the names of the Applicant.

v. That the costs of the application be awarded to the Applicant.

3. Joseph Nthenge Kakua deponed in his affidavit that the grant issued to the administrator who was his mother was confirmed on the 11-5-2015 and subsequently the administrator had the mother title Donyo Sabuk Komarock Block 1/356 sub divided pursuant to the confirmation whereby six titles were prepared and his entitlement as per the certificate of confirmation and mutation forms was Donyo Sabuk Komarock Block 1/65002, measuring 15 acres. He went on to depone that the administrator died on 25-4-2016 before the titles came out and he was later shocked to discover that the respondent had been registered as owner of parcel Donyo Sabuk Komarock Block 1/65002. yet he was not a beneficiary of the estate of the deceased. The applicant further contends that the registration of the respondent as owner of that particular land was fraudulent in the extreme as he has been denied his entitlement in the estate and now seeks that the same should be cancelled and the property restored to him.

4. The respondent Kenneth Onsare Maina filed a replying affidavit dated 15-9-2017 in which he strenuously opposed the applicant's application. He deponed that he together with his business partners had entered into a sale agreement on the 18-9-2010 with three of the

beneficiaries namely Joseph Mutuku Kakua, Athanas Nzioka Kakua and Esther Loko Kakua over five acres of land contained in No. Donyo Sabuk/Komarock Block 1/356 at the price of Kshs. 1.5 million and that the transfer was later executed and he now has the title deed. The respondent further deponed that he is now the absolute and indefeasible proprietor of parcel No. Donyo Sabuk Komarock Block 1/65002 measuring 6.2 Hectares or thereabouts. The respondent further averred that he stands to suffer prejudice if the orders sought are granted as he has already concluded contracts in which he has disposed interests over the suit property to third parties. The respondent contends that the applicant has no locus standi to file the application as he is not the administrator of the estate of the deceased. The respondent further contends that this court does not have the requisite jurisdiction to adjudicate on land matters as they are the preserve of the Environment and Land Court.

5. An interested party namely Yes Housing Co-operative filed an application dated 19-9-2017 seeking to be enjoined into the proceedings. Their request was allowed by the parties herein. The interested party thereafter filed a replying affidavit through its administrator Ephantus Gitahi sworn on 12-2-2018 in which they strenuously opposed the applicant's application herein. He deponed that the interested party purchased plot number Donyo Sabuk/Komarock Block 1/65002 from the respondent herein Kenneth Onsare Maina for a sum of Kshs. 40,164,000/= on the 29-12-2016 and have so far paid a sum of Kshs. 26,500,000/=. The deponent further avers that the interested party is an innocent purchaser for value without notice of any defect in the title and should not suffer for the mistakes of others. He further deponed that at the time of the sale transaction, the title was clean with no encumbrances and therefore the application herein is meant to frustrate the interested party from completing the sale and purchase yet the applicant does not even have locus standi as he is not an administrator of the estate since the relevant administrator has since died. He finally deponed that the applicant's application should be dismissed and the restrictions placed on the title Donyo Sabuk/Komarock Block 1/65002 should be removed.

6. Parties agreed to canvass the application by way of written submissions.

Applicant's Submissions

The submissions by the applicant's counsel Nduva Kitonga & Company Advocates are dated 12-2-2018. It was submitted that the applicant herein is a son of the deceased Kakua Kioko and hence a beneficiary who was entitled to parcel Donyo Sabuk/Komarock Block 1/65002 after same had been subdivided from the mother title Donyo Sabuk/Komarock Block 1/356 as per the grant dated 11-5-2015 issued to the administrator Kanini Kakua. It was submitted further for the applicant that the registration of the respondent as owner of parcel 1/65002 is not only suspect but fraudulent in the extreme since the respondent was not a beneficiary and had not bought the land from the applicant herein. It was further submitted that the purported sale of the deceased's land in September 2010 before the grant was confirmed was illegal as it went against the clear provisions of Section 45 and 82 of the Law Succession Act and further the alleged vendors were not the administrators of the estate of the deceased. It was also submitted that the fraud committed by the respondent can be seen from the alleged sale agreements which showed only five acres had been sold and yet the respondent is now claiming 15 acres and has not explained as to how and where the extra ten acres came from. Learned counsel for the applicant urged this court to order the cancellation of land title Donyo Sabuk/Komarock Block 1/65002 held in the name of Kenneth Onsare Maina as it has been obtained fraudulently and relied on the case of **Madison Maroko Nyamweya -VS- Benard Ngara maroko & Another [2016] eKLR** adopted with approval in the case of **Santuzza Billoti alias Mei Santuzza -VS- Gacanria Balasconi [2014]eKLR** on powers of succession court to order a cancellation of a title deed if the deceased's property is being fraudulently taken away by non beneficiaries such as where the property is being sold before the grant is confirmed. It was finally submitted for the applicant that the interested party Yes Housing Co-operative's claim ought to be addressed against the respondent in another forum.

Interested Party's Submissions

It was submitted that since the administrator of the estate of the deceased has died, the applicant lacks the locus standi to file proceedings on behalf of the estate as he had not sought leave of court upon agreement with the other beneficiaries and therefore the application dated 14-7-2017 is premature since the new administrator has not been appointed. It was also submitted that the interested party bought property which at the time was not part of the estate of the deceased and that the interested party is an innocent purchaser for value without notice and thus the application has been brought purely to frustrate the purchase of the suit property by the interested party who has already made substantial payments to the respondent.

Determination

7. I have considered the pleadings and the submissions made herein. It is not in dispute that the applicant herein is a beneficiary to the estate of Kakua Kioko (deceased). It is also not in dispute that the grant was issued to Kanini Kakua which was confirmed on 11-5-2015. It is also not in dispute that the respondent entered into two sale agreements for five acres forming part of the deceased's land Donyo Sabuk/Komarock Block 1/356 with three beneficiaries namely Esther Loko Kakua, Joseph Mutuku Kakua and Athanas Nzioka Kakua on the 18-9-2010 prior to the confirmation of the grant. It is also not in dispute that the administrator upon confirmation of grant proceeded to sub divide the parcel Donyo Sabuk/Komarock Block 1/356 into six portions as per mutation forms dated 19-12-2015 wherein the administrator was to hold parcels 64998,65001 and 65003 while Esther Loko Kakua was to hold 65000 and the applicant herein Joseph Nthenge Kakua was to hold 65002. It is also not in dispute that the administrator Kanini Kakua died on the 25-4-2016 before titles to the above properties were issued. It is also not in dispute that the respondent has since been registered as owner of parcel Donyo Sabuk/Komarock Block 1/65002 which was meant for Joseph Nthenge Kakua, the applicant herein. It is also not in dispute that the respondent has since entered into a sale agreement over the suit property with the interested party herein. That being the position I find the issue for determination is whether the orders sought herein are available to the applicant.

8. The applicant herein in his application has sought reliance under section 47 of the Law of Succession Act and Rule 49 of the probate and Administration Rules which gives this court jurisdiction to entertain any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice as follows:

S.47 "The high court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient".

Rule 49 “ A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”.

Even though the respondent and interested party have claimed that the applicant does not have locus standi to file the application, I find that the applicant being a bonafide beneficiary to the estate of the deceased is perfectly entitled to approach this court for redress. He has a right to do so even though the administrator has died and he is not obliged to wait until a new administrator is appointed as long as his rights under the estate are being violated or infringed upon. In any event he has not brought the application on behalf of the estate but for his own interests as a beneficiary. He has come to this court pursuant to section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. I find therefore that the applicant has locus standi to approach this court for redress. He duly entered an appearance pursuant to Rule 60 of the Probate and Administration Rule and subsequently filed the present application.

It is noted that the prayers sought in the applicant's application appear to be final in nature targeted at the respondent who has since obtained registration of parcel number Donyo Sabuk/Komarock Block 1/65002 and that the applicant seeks orders disentitling the respondent of the same on the ground that the said property had been earmarked for him in the scheme of distribution of the estate. The applicant therefore was under obligation to establish that he has an arguable and genuine case. The parties herein opted to canvass the application by way of affidavit evidence and therefore there was no viva voce evidence adduced and the court has to rely on the information gleaned from the rival affidavits. The Court of Appeal in the case of **Mrao Ltd -VS- First American Bank of Kenya Ltd & 2 Others [2003] eKLR** held as follows:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

The applicant has maintained that the process leading to the registration of the respondent as owner of parcel number 65002 is fraudulent in that the sale had been conducted way before the grant was confirmed and further the acreage on the agreement does not tally with what was eventually taken up by respondent who has not explained how he obtained another extra ten acres. I have perused the two sale agreements dated 18-9-2010 and note that the same was done prior to the confirmation of the grant. The grant was confirmed on the 11-5-2015 and which implies that the purported sale was entered into about seven years before the grant was confirmed. This clearly was in violation of the provisions of Section 82 (b) of the Law of Succession Act. The same provides thus:

“No immovable property shall be sold before confirmation of grant”.

Again section 45 (1) of the Law of Succession Act forbids any person from inter meddling with the property of a deceased person as follows:

“Except so far as expressly authorized by this Act, or by any Written Law or by a grant of representation under this Act no person shall for any purpose take possession or dispose off or otherwise meddle with any free property of a deceased person”.

The respondent in his replying affidavit readily admits that he took possession of the land in December 2010 long before the grant was confirmed in 2015. The purported sellers in the first place had no permission to purport to sell the deceased's land to the respondent before the confirmation of the grant. Hence the alleged sale was tainted with illegality. Further, the sale agreement talked of five acres in total and it is now astonishing for the respondent to now claim that he had bought 15 acres. The respondent failed to explain how he obtained the extra ten acres as there was no document over the additional acreage was availed. This then lends credence to the applicant's claim that his rightful entitlement under the estate had been fraudulently acquired by the respondent. The applicant annexed the certificate of confirmation of grant which clearly indicated that he was entitled to 15 acres from the deceased's land parcel Donyo Sabuk/Komarock Block 1/356.

The applicant also annexed copies of mutation forms showing that the administrator only had the land sub divided among the beneficiaries and that the applicant was earmarked to get parcel **Donyo Sabuk/Komarock Block 1/65002**. The copies of green cards showed that the other beneficiaries duly secured their respective title deeds to their portions and it was therefore quite baffling that the respondent ended up acquiring the applicant's parcel of land yet he had never entered into an agreement with him. One of the beneficiaries namely **Esther Loko Kakua** has sworn an affidavit in support of the respondent and interested party to the effect that the parcel to the effect that the parcel number 65002 had been sold to the respondent. This was obviously not correct for the reason that the Respondent had allegedly bought only five acres and not fifteen acres as claimed. This therefore does not add up at all. It is to be noted that the said Esther Loko Kakua is one of the beneficiaries who had purportedly sold land to the respondent seven years before the grant was confirmed and she had deliberately avoided explaining how the alleged five acres mutated to fifteen acres. From the schedule of distribution and the subsequent mutation and sub division, it is evident that the applicant has been disinherited from his rightful entitlement under the estate. This court being a court of equity will not shut its eyes but must come to the aid of the applicant who is a bonafide beneficiary of the estate of the deceased. The respondent is not a beneficiary of the deceased and that if he has any genuine claim then he should pursue the beneficiaries who had purported to sell him land belonging to the deceased before confirmation of the grant. As the respondent had purportedly purchased property of a deceased person before the grant was confirmed, I find his claim that the title he subsequently obtained is unimpeachable not convincing at all since the process of acquisition was flawed and tainted with illegality. The respondent therefore cannot pass any good title to the interested party. The interested party's claim that he is an innocent purchaser for value without notice cannot be sustained and the only recourse is for them to pursue the respondent through another forum.

The authority cited by counsel for the applicant regarding cancellation of titled deeds improperly obtained is persuasive and applicable in the circumstances of this case. The court in the said cases of Madison **Maroko Nyamweya -VS- Benard Magara Maroko & Another [2016] eKLR** and **Santuzza Billoti alias Meisantuzza (deceased) -VS- Giacania Balasconi [2014] eKLR** held as follows:

“Further s succession court can order a cancellation of a title deed if the deceased's property is being fraudulently taken

away by non beneficiaries such as where the property is being sold before the grant is confirmed”.

The above authority appears to be on all fours with the present circumstances of this case. The initial purported sale agreement entered into between some beneficiaries and the respondent took place seven years before the grant was confirmed. Again the purported agreement was for sale of five acres only whereas the eventual acreage improperly acquired by respondent has shot to fifteen acres without any explanation as to how the extra acreage came about to be. The respondent is not a beneficiary of the estate of the deceased. I am persuaded that the acquisition of the title deed to LR Donyo Sabuk/Komarock Block 1/65002 was fraudulent and that no cogent explanation has been offered by the respondent as to how he ended up snatching a parcel of land lawfully belonging to the applicant under the estate of the deceased. The property of the deceased should not be distributed to non beneficiaries especially when those persons had not purchased the land from the deceased himself and further had purported to have bought land from beneficiaries before the grant was confirmed. Any titles obtained under those circumstances are amenable to cancellation by a succession court. To this end therefore, I find the sale agreements made on the 18-9-2010 between Esther Loko Kakua, Joseph Mutuku Kakua and Athanas Nzioka Kakua and the respondent in so far as it relates to the sale of the deceased's parcel of land known as Donyo Sabuk/Komarock Block 1/356 before confirmation of grant to be illegal and is hereby declared null and void. As the sale agreement now impugned is being relied upon by the respondent to facilitate his acquisition of title to LR Donyo Sabuk/Komarock Block 1/65002, I find the said title improperly acquired and is hereby ordered cancelled.

It has transpired that the administrator Kanini Kakua died on the 25-4-2016 after she had already obtained the certificate of confirmation of grant and had distributed the estate to the beneficiaries and more specifically on parcel Donyo Sabuk/Komarock Block 1/136 in which six portions had been created and each beneficiary had identified their rightful portions and some had already collected their title deeds. That being the position, I find the said administrator had accomplished her duties under the estate as none of the beneficiaries have raised any concerns thereof except the applicant herein. As the applicant has indicated that he was waiting to collect his title deed for parcel Donyo Sabuk/ Komarock Block 1/65002 only to learn of these new developments, I find it would not be prudent to order the said title to revert back to the deceased to await a new administrator to be appointed and who is to transfer to the applicant but to order that the said title upon cancellation, the applicant herein be registered as the proprietor and to be issued with the title thereto.

As regards, the interested party's claim, I find in view of the above observations, their claim lies with the respondent to address it in a different forum. Their claim against the estate of the deceased is misplaced and lacks merit.

9. In the result, it is the finding of this court that the applicant's application dated 14th July, 2017 has merit. The same is allowed in terms of **prayers 4, 5, 6, and 7**. Each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this **18th** day of **July, 2018**.

D. K. KEMEI

JUDGE

In the presence of:

Kamanda for Kitonga -for the Applicant

Ayora for Odongo -for the Respondent

Akinyi for Muturi - for the interested party

Josephine – Court Assistant