



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION NO. 640 OF 2015

NYAGA WARUI.....DECEASED

V E R S U S

WARUI NYAGA.....PETITIONER

RULING

This matter relates to the estate of Nyaga Warui, deceased, who died on 22/6/1997. Letters of Administration were issued to Pauline Muthoni Nyaga and Wakaria Nyaga and a certificate of confirmation of grant was issued on 13/2/2002. The estate of the deceased was ordered to be distributed as follows:-

1. Baragwe/Kariru/439:

- a. Wakaria Nyaga 1/3 to be registered jointly with her two sons.
- b. Pauline Muthoni 2/3 to be registered jointly with her four sons.

2. Plot No. DI Kianyaga:

- a) Pauline Muthoni Nyaga and Wakaria Nyaga to be registered jointly.

What is now pending before this court is an application dated 8/12/2015 where the applicant, Warui Nyaga who claims to be a beneficiary of the estate of the deceased seeks orders that the Land Registrar Kirinyaga County do rectify the title deed to Baragwe/Kariru/956 to include his name.

That the court be pleased to issue an order to dispense with the production of the original title deed, the respondents passport, photographs, Kenya Revenue Authority Pin and National Identity Card and for the Deputy Registrar to sign all the relevant documents to have the name of the applicant included in the title.

The application is based on the ground that he is a beneficiary of the estate of the deceased and that after the grant was confirmed in Kerugoya Lower Court Succession Cause No. 148/1999 the same was not executed as required. That he is a son of Pauline Muthoni who was to be registered jointly with her four sons. He was however not registered and his name was left out. That after sub-division the resultant parcel Number Baragwe/Kariru/1956 was registered in the name of Pauline Muthoni Nyaga, John Gatimu Njuki, Zakayo Kariuki Nyaga and Muchiri Nyaga. His name was left out.

The respondents on their part state that the applicant is their eldest brother. That the land was sub-divided as stated by the applicant after the confirmation of grant but the name of the applicant was omitted by consent of all the family members including the applicant since he had another family land Baragwi/Kariru/608. That the said Baragwe/Kariru/1956 was the subject of Succession Cause No. 729/2013 and has already passed to National Irrigation Board who is not a party in this case where upon they have already been compensated.

The National Irrigation Board as interested parties filed their response stating that they have already compensated the respondents for the said parcel of land. I have considered the application. The certificate of confirmation of grant which I have referred was clear on the distribution of the estate of the deceased. The land parcel Baragwe/Kariru/439, the applicant's mother was to get 2/3 to be registered jointly with her four sons including the applicant. The parties are in agreement that the resultant parcel was No. Baragwe/Kariru/1956. Though the respondents aver that there was a consent to exclude the applicant, no application was made in court to have the name of the applicant excluded.

The applicants and the respondents are in agreement that the confirmation of grant was clear on the distribution of land Parcel No. Baragwe/Kariru/439 whereby the parties' mother was to have her portion of 2/3 registered between herself and her four sons who include the applicant herein. As such, if for any reason the parties agreed that the applicant was not to get a portion of the land of the said land parcel, an application ought to have been filed in court to have the name of the applicant excluded from the list of beneficiaries entitled to get a portion. By excluding the applicant, the respondents violated and disobeyed the orders of the court.

Though the respondent's state that the applicant was left out during registration because he had another land parcel Baragwi/Kariru/608, this was not brought to the attention of the court at the time the grant was confirmed. As submitted by counsel for the applicant, the issue of the applicant having another land parcel has been overtaken by events as it was not considered at the time of confirmation of the grant. The respondents had an obligation to comply with the order of the court.

The National Irrigation Board joined in as an Interested Party. A Replying Affidavit was filed by Denis Aroka and he depones that the Land Parcel Nos. Baragwi/Kariru/1956 & 1057 are to be acquired by the Interested Party for Rukenya Thiba Dam project. That the Interested Party will acquire 1.1070 acres out of land parcel No. Baragwe/Kariru/1956 for the purpose of Rukenya Thiba Dam. The registered beneficiaries of land parcel No. Baragwe/Kariru/1956 were compensated.

The applicant did not inform the Interested Party's Officials of his interest when they were conducting the valuations. The Interested Party conducted a search as part of its due diligence. A sale agreement was entered. Succession was done in the estate of Pauline Muthoni who had passed away at the time. The compensation monies was then released to the beneficiaries. The applicant never alerted the Interested Party that he had been left out.

The Interested Party has annexed documents to show that he followed due process and did not commit any illegality.

As submitted by the counsel for the Interested Party, the **Law of Succession Act** protects a purchaser for value, section 93(1) provides:

“A transfer of any interest in immovable or moveable property made to a purchaser, either before or after the commencement of this Act by a person to whom representation has been granted, shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

The grant herein was confirmed in 2002. The Dam project was conducted in 2012. It is unlikely that the applicant was not aware of the registration of the respondent's and the National Irrigation Board. He is precluded from raising the issue at this time. The legal purchaser ought to be protected by this court. The authority cited by Justice Khamoni in **Re-Estate of Gitau (deceased) 2002(2) eKLR** where it was held:

“Once administrators of a deceased's estate have completed their work and where part of the estate have been sold to a purchaser for value, the court becomes functus officio so that if the parties have any issues arising out of the succession, those issues must be ventilated elsewhere -----“.

The decision is persuasive. I am of the same view in the circumstances of this case. The right of the Interested Party who has bought a portion of the land should not be affected. Though the applicant submits that the **Law of Succession Act** provides for alteration and revocation of grant, the application before court is not for revocation nor is it for rectification. It is summons general under Rules 49 & 73 of the probate and Administration Rules.

Rule 49 provides:-

“A person desiring to make an application to 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.”

Rule 73.

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of court process.”

Secondary the applicant has not brought the application within the ambit of section 74 of the **Law of Succession Act**. Which provides:

“Errors in names and descriptions or in setting forth the time and place of the deceased's death, or the purpose in a limited grant may be rectified by court and the grant of representation whether before or after confirmation maybe altered and amended accordingly.”

The rectification of grant can only be done to correct errors in names-, description and so on. It is meant to correct minor errors and descriptions which may not affect the substance of the grant. The applicant has not challenged the grant. He is replying on it fully. The remedy of rectification of grant is not available to the applicant. Where the grant of letters of administration was confirmed by the court and distribution ordered is not challenged, the court is **'functus officio'** as the administration of the estate has been completed. The land was sold to the Interested Party long after the confirmation of the grant herein. The applicant's claim which arises from the succession cause where the grant as confirmed is not challenged lies elsewhere.

The Interested Party acquired the land in dispute and paid compensation to the respondents. My view is that since there is no dispute that the

applicant was supposed to be registered with the respondents on land parcel No. Baragwi/Kariru/1956 and would have been entitled to compensation when the land was acquired by the Interested Party, the applicant ought to claim a share of the compensation money which he would have been entitled to.

The application by the applicant is without merits. At the time of filing the application the dealings the applicant was seeking to injunct had been concluded and only registration of the documents was remaining. The Interested Party followed all the processes and did not commit any illegality.

I find that the application is without merits and is not properly before this court. I dismiss it with costs to the respondents and the Interested Party.

I order that:

- 1) The prayer for a temporary injunction is without merits.
- 2) The Interim order of injunction is vacated.
- 3) Prayer 3 of the application is declined.
- 4) The applicant to pay costs to the respondents and the Interested Party.

Dated and delivered at Kerugoya this 12th July 2018.

L. W. GITARI

JUDGE

12/7/18

Read out in Open court.

Mrs. Muthike for the applicant present,

C/A – Naomi.

L. W. GITARI

JUDGE