



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT SUCCESSION NO. 99 OF 2013

JAMES GITARI MITHAMO.....DECEASED

V E R S U S

LUCY NJOKI GACHANJA....RESPONDENT

RULING

There are two applications pending before the court;

The first one is by Lucy Njoki Gachanja the petitioner who filed an application dated 29/09/2016 seeking the following:-

- i. Temporary injunction against the respondents from interfering with her quiet possession INOI/THAITA/531 or the resultant sub-division names Inoi/Thaita/2576 and 2577 pending hearing and determination of the application interparties.
- ii. An order of prohibition to preserve deceased's estate Inoi/Thaita/531 or the resultant sub-division namely Inoi/Thaita/2576 and 2577 be issued pending hearing and determination of the application interparties and pending the substantive succession cause.
- iii. Cancellation of sub-divisions Inoi/Thaita/2576 and 2577 and transfer of Inoi/Thaita/2576 in favour of the 2nd respondent and the Land Registrar to rectify the record and restore the deceased estate back to Inoi/Thaita/531.

The application is supported by the affidavit of the applicant and based on the following grounds:-

1. That the Applicant is the legal Administratrix of the estate of the deceased herein comprised of L.R Inoi/Thaita/531 as per certificate of Grant of Letters of Administration dated 19/7/2011.
2. That the Applicant filed an Application for confirmation of grant dated 13/2/2014 to distribute the estate of the deceased but the Respondents objected by filing the affidavit of protest dated/sworn on 16/1/2015 and a further application for confirmation of grant dated 14/1/2014 by the 1st Respondent and the matter is pending hearing of the protests.
3. That while these proceedings were pending and in very irregular and fraudulent circumstances the Respondent did on 6/9/2016 caused all restrictions, cautions and prohibitory orders registered against the estate lifted and proceeded to register Mutation forms which effectively sub-divided the estate of the deceased comprised on L.R Inoi/Thaita/531 into Inoi/Thaita/2576 and 2577 and the 2nd Respondent caused herself to be registered as the absolute proprietor of L.R Inoi/Thaita/2576 whereas L.R Inoi/Thaita/2577 remained in the names of the deceased herein.
4. That the act of sub-divided the estate into L.R Inoi/Thaita/2576 and 2577 are very irregular, fraudulent and against the law as the proceedings herein are not yet concluded and it amounts into interference with estate of the deceased.
5. That the 2nd Respondent have now moved into the land and intends to evict the Applicant from the land she has always occupied.
6. That there is real danger that the estate herein will be wasted or alienated before proceedings herein are concluded hence the need to preserve the same.
7. That the Respondents should be restrained by way of injunction from committing further waste to the estate which they have never occupied at the detriment of the Applicant.

The court proceeded to issue restriction order on 29/09/2016 to be placed on Inoi/Thaita/531 and all the resultant sub-divisions namely

Inoi/Thaita/2576 and 2577.

In the 2nd application the respondent and Lucy Njoki Thiong'o the respondent filed an application dated 30/01/2017 seeking that the orders given on 29/09/2016 be set aside and the applicant and her son be prevented from entering Inoi/Thaita/2576 or doing anything thereon.

This application is based on the following grounds:

- a. That the applicant herein Lucy Njoki Thiongo purchased the land legally before the death of the original proprietor James Gitari Mithamo and extensively developed the same by planting coffee trees, tea bushes thereon and other crops and trees.
- b. That the Respondent Lucy Njoki Gachanja sued her brother James Gitari Mithamo in Civil Case Number 167/1997 at Kerugoya Resident Magistrate's Court which said suit was later dismissed by the High Court on 21/4/2016.
- c. That James Gitari Mithamo died before the case was finalized but after he had obtained consent of the Land Control Board from the Central Divisional Kirinyaga Land Control Board and signed a valid transfer of the land in favour of Lucy Njoki Thiong'o after she paid full purchase price in the Land Control Board's meeting room.
- d. That the Plaintiff in that case has not caused destruction of the coffee and tea bushes and ordered her son Tito Kirani Gitari to pick coffee berries and pick tea leaf from the coffee and tea planted by the applicant herein.
- e. That the said Tito Karani has now uprooted some coffee trees and tea bushes and started digging foundation trenches with intention to building a house or houses in the land sold to Lucy Njoki Thiong'o. And this is after his Advocate obtained an order of court stopping all activities on the land.
- f. That unless both are stopped by a temporary injunction from any further entries and destruction of properties they are going to cause a lot of irreparable damages to the properties and development now standing on the land.

Applicant's Case.

She states that she was issued with Letters of Administration of the deceased (her brother)'s estate Inoi/Thaita/531 on 18/07/2011. She applied for confirmation of grant but the respondents filed affidavit of protest.

While proceedings were pending, the respondents fraudulently caused cautions and prohibition registered to be lifted and registered mutation form which sub-divided the estate to **Inoi/Thaita/2576** and 2577 and the 2nd respondent got registered as proprietor of **Inoi/Thaita/2576** while **Inoi/Thaita/2577** remained in the names of the deceased. That the 2nd respondent intends to evict the applicant.

Respondent's Case

In her response, she states that the deceased had sold a portion of his land to her husband and made written agreement on 04/06/1999. Her husband passed away before completion and she had to pay the purchase price. She developed the portion by planting coffee trees, tea bushes and other trees.

The deceased was sued by the applicant in Elders tribunal and was forced to transfer a portion of the land to the applicant thus forcing sub-division of the land into 1.3 acres to the respondent and the rest to the applicant.

That the cautions and prohibition were raised by the Court vide **Civil Case No. 167 of 1999**.

The petitioner filed grounds of opposition to the application by the respondent raising the same issues in the grounds in support of the application and stating that the application dated 30/1/17 is meant to delay the final determination of the cause.

In her submissions the petitioner states that she is the administratrix of the estate of the deceased and the respondents filed affidavits of protest. The respondent registered mutation forms and subdivided the estate of the deceased before the grant was confirmed and a certificate issued. That the acts are fraudulent and intermeddling with the estate of the deceased. That is shown by the documents annexed to the affidavit of the 2nd respondent which is evidence of blatant fraud and forgery.

For the respondent in the 1st application who is the applicant in the second application, it is submitted that the grant issued to the applicant was annulled. The record does not however support this assertion.

I have considered the applications, the affidavits and the annexed documents.

Determination:

The deceased died on 14/03/2007 by which time **Civil Case No. 167 of 1999** had been filed by the applicants against the deceased while the respondent was the interested party. Upon the death of the deceased, the matter was marked abated and the prohibitory orders were vacated. We do not have copies of the proceedings to confirm the land in dispute. The annexed order does not offer any help as it does not show why the suit abated and the particulars of the land where the prohibition order was vacated.

The transfer forms and consent form seeking to transfer the land to the 2nd respondent are dated 11/07/2000 and were duly executed by the deceased. However, the same relates to **Inoi/Thaita/1317** and not **Inoi/Thaita/531** which is the suit land and which the 2nd respondent is claiming that she bought from the deceased. As per the green card **Inoi/Thaita/531** was sub-divided into **Inoi/Thaita/2576** and **Inoi/Thaita/2577**. The sub-division Inoi/Thaita was not done during his lifetime and the subdivision done in 2015 long after his death and during the pendency of this case is tainted with fraud.

Though the respondents have attached sale agreement and application for consent the documents relate to Inoi/Thaita/1317 but the respondent is holding a title deed for Inoi/Thaita/2576 processed on 8/9/2016 long after the death of the deceased.

The application for consent in respect of Inoi/Thaita/1317 is for transfer of the whole parcel by way of sale. In addition, the transfer forms and letter of consent duly issued was in respect of Inoi/Thaita/1317. Therefore this means that the deceased had intention to transfer Inoi/Thaita/1317 and not Inoi/Thaita/531 to the 2nd respondent. Therefore respondents have not proven their case and their application should be dismissed. The applicant has proved that the 2nd respondent fraudulently transferred to herself Inoi/Thaita/2576 without necessary documentation.

The applicant has proved that the 2nd respondent has intermeddled with the estate of the deceased. The interim order which was issued was to ensure that the estate is preserved pending the hearing and determination of the cause. The 2nd protestors' application cannot be allowed as she is guilty of intermeddling with the estate during the pendency of the succession cause. She has not come to court with clean hands and she cannot therefore get injunctive orders.

In Conclusion:

1. The petitioner's application dated 29/9/2016 has merits.
2. The interim orders issued on 29/9/16 are confirmed and shall be in force pending the hearing and determination of this cause.
3. The 2nd protestors' application is without merits and is dismissed with costs.
4. Costs to the applicant.

Dated at Kerugoya this 11th day of October 2018.

L. W. GITARI

JUDGE