



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2730 OF 2008

IN THE MATTER OF THE ESTATE OF JOYCE RONNIE WAIGANJO (DECEASED)

JUST CHICKEN LTD.....APPLICANT

-VERSUS-

KIRAN MANUBHAI PATEL.....1ST EXECUTOR

ANNE KIBUTU.....2ND EXECUTRIX

RULING

1. So that the court is not made to deal with peripheral issues, let me state what this dispute is all about. The deceased Joyce Ronnie Waiganjo was the administratrix of the estate of the late Fred Waiganjo. On 17th December 2002 she entered into an agreement in which she was selling Plot No. LR 13797/1 Karen, Nairobi to Just Chicken Limited (the applicant). The parcel measured about 0.5523 Ha. and the purchase price was Ksh.3,000,000/=. A deposit of Kshs.500,000/= was paid on the date of the agreement. The balance of Kshs,2,500,000/= was to be paid within 180 days from the date of the completion of registration of the instrument of transfer in favour of the purchaser. The sale was subject to the **Law Society Conditions of Sale (1989 Edition)**.

2. There was a dispute between the deceased and the applicant which led the applicant to file **HC Misc. Application No. 7 of 2007** at Nairobi. The dispute was heard by the late Justice O.K. Mutungi. The court rendered a judgment on 13th March 2007 in which it was held that there was breach of the condition of sale, namely that the applicant had failed to deposit the whole of the purchase price with the deceased's advocates before completion. The court found that this failure had terminated the agreement. The applicant had registered a caveat against the title to the suit property, and had brought the matter to seek the extension of the caveat beyond 45 days in the notice of motion of 9th October 2006 posted on 18th December 2006. It was found that the purported registration of the caveat against the title to the suit property was without any legal basis, and the prayer to extend the caveat was dismissed with costs.

3. The deceased died on 18th August 2007. She left a Will whose executors were Kiran Manubhai Patel and Ann Kibutu. A grant of probate was issued to the executors on 11th December 2009, and confirmed on 29th November 2010.

4. On 28th February 2018 the applicant brought an application seeking to be joined as an interested party in LR. No. 13797/1 and to have the grant issued to the executors revoked. There were prayers to review and set aside the orders issued on 18th January 2018 and, in the interim, to stay the eviction orders issued on 18th January 2018. The application was heard by Judge Farah S.M. Amin and dismissed with costs.

5. The applicant then filed the present application dated 6th April 2018 seeking that it be enjoined as an interested party in LR No. 13797/1; the process server in the matter be cross-examined on his affidavits of service; the letters of administration issued to the executors be revoked; the orders issued on 18th January 2018 be reviewed and set aside; and, significantly, that LR No. 13797/1 be excluded from the grant.

6. In the Will left by the deceased, LR No. 13797, which had been registered in the name of Boffar Limited, was given to her son Ted Waiganjo absolutely. This is the parcel which she had, before death, subdivided into LR No. 13797/1 and LR No. 13797/2. LR No. 13797/1 was the one she was selling to the applicant. It does not appear disputed that subsequent to the sale agreement the applicant occupied and begun to develop the property. It further appears that the applicant has been in possession of the property and is being evicted from it.

7. The substantial ground on which the application was brought was that there was gross concealment to the court of the fact that LR No.

13797/1 was the subject of the sale agreement dated 17th December 2002 between the deceased and the applicant in which the purchase price was substantially paid, and that the applicant had gone into occupation and substantially developed the property. It was therefore not right, according to the applicant, that the deceased bequeathed the property to her son Ted Waiganjo, or that the property was made part of the estate of the deceased and distributed in accordance with the Will. It was stated, in support of the application, that the application dated 27th February 2018 was determined without affording the applicant an opportunity to be heard.

8. The executors responded to the application through the affidavit sworn by Ted Waiganjo. The substance of the response was that the issue of the purchase of LR No. 13797/1 by the applicant from the deceased was determined in **HC Misc. Appl. No. 7 of 2007**, the sale agreement was terminated and property ordered to be reverted back to the deceased; therefore, that the issue was *res judicata* and could not be the basis of the present application, or raised again by the applicant in these proceedings. Secondly, that the applicant had since been evicted from the suit property, and therefore the application had been overtaken by events.

9. Lastly, it was the submission of counsel for the executors that this was a succession court that had no jurisdiction to deal with the ownership of the suit property; that the court had no jurisdiction to determine issues relating to the sale agreement, and whether or not terminated. The executors' case was that the dispute belonged to the Environment and Land Court.

10. In response, the applicant's advocates submitted that the judgment of Justice O.K. Mutungi did not determine that issue of ownership of LR No. 13797/1; that the issue for determination was the extension of the caveat on the property beyond 45 days.

11. It is clear from the foregoing that in the judgment delivered on 13th March 2017 it was found that the applicant had breached a condition of the sale agreement when he failed to deposit the whole of the purchase price with the deceased's advocates before completion. It was found that the failure terminated the agreement. It was for that reason that the application for extension of the caveat was declined. This was because the registration of the caveat in the first place was, on the basis of the terminated agreement, without legal basis. There was no evidence to show that the decision has been reviewed or set aside, by the same court or on appeal. For the applicant to claim that the issue regarding that sale agreement had not been determined cannot be true. Infact, and I find that, the issue regarding the development of LR No. 13797/1 as between the deceased and the applicant was determined by a competent court and was *res judicata* (**IEBC –v- Maina Kiai & 5 Others, Nairobi Civil Appeal No. 105 of 2017**). The doctrine of *res judicata* is aimed at bringing finality to litigation, and affords parties closure in regard to the dispute between them, or between parties litigating under their title.

12. If that is the case, the claim by the applicant over the suit property, which claim was founded on the sale agreement, ended on the day the agreement was terminated on 13th March 2017. Any continued claim or occupation of the suit premises was without any legal basis or foundation. It is notable that the applicant is, through the present application, still laying claim to the suit property. I reiterate that such claim has no legal basis. The quest to call and question the process server and the prayer to revoke the grant to the executors, both of which are based on the false claim to the suit property, cannot therefore be granted.

13. The other important issue relates to the jurisdiction of this court *vis a vis* that of the Environment and Land Court. This succession court derives its jurisdiction from the **Law of Succession Act (Cap 160)**. It deals with issues relating to testate and intestate succession. It deals with the identification of estates of deceased persons, the determination of beneficiaries and dependants of such estates, and the distribution of the respective shares to them. Under **section 13** of the **Environment and Land Act, No. 19 of 2011**, the question relating to the ownership of LR No. 13797/1 between the deceased and the applicant, arising from the sale agreement entered into on 17th December 2002 between them, can only be determined by the court created under the **Act**. This is the Environment and Land court. It follows that this court lacks the jurisdiction to determine the rights and obligations of the deceased and the applicant arising from the sale agreement they entered into on 17th December 2002.

14. In conclusion, the application dated 6th April 2018 by the applicant is without merits and is dismissed with costs.

DATED and DELIVERED at NAIROBI this 14TH NOVEMBER 2018

A.O. MUCHELULE

JUDGE