



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND CASE NO. 56 OF 2014

DOLLY WANJA NGITI (suing as the representative

of the Estate of GEORGE GATOBU

M'MBOROKI – Deceased.....PLAINTIFF

VERSUS

JENNIFER CHURI GATOBU.....1ST DEFENDANT

PENINAH KINYA.....2ND DEFENDANT

TITUS KINOTI K. MAGANA MBURUGU.....3RD DEFENDANT

ZAVERIO KITUKA.....4TH DEFENDANT

GEMOR INVESTMENTS COMPANY.....5TH DEFENDANT

SUSAN KAJUJU KINOTI.....6TH DEFENDANT

MOSES MBURUGU M'RIMBERIA.....7TH DEFENDANT

GITONGA MUGAMBI MUKETHA.....8TH DEFENDANT

RULING

1. This ruling is in respect of the 1st defendant's **Preliminary Objection dated 20/6/2014**. The same is to the effect that the suit should be struck off on the ground that the plaintiff lacks the locus standi to institute the suit.

2. On 22/4/14, Dolly Wanja Ngiti filed the plaint herein against the defendants praying for a declaration that all the transactions in the original land parcel no. NKUENE/L.MIKUMBUNE/593 were illegal and fraudulent and that the titles arising from the subsequent subdivisions should be canceled and that the original title (593) should be reinstated. Plaintiff also prays for a permanent injunction against all the 8 defendants from transferring,or in any other manner dealing with the original parcel no. 593.

3. In her statement also filed on 22/4/14, plaintiff states that on 5/10/1993, her husband **GEORGE GATOBU MBOROKI** and one **CYPRIANO KINOTI J.** also deceased (and who was husband to 1st defendant) entered into an agreement whereby they exchanged their parcels

of land with **GEORGE GATOBU MBOROKI** giving to **CYPRIANO KINOTI J.** parcel No. **ABOTHUGUCHI/KARIENE/2482** while **CYPRIANO KINOTI J.** gave **GEORGE GATOBU MBOROKI** parcel No. **NKUENE/L.MIKUMBUNE/593**. Plaintiff was to discover that the parcel No. **NKUENE/L.MIKUMBUNE/593** was subdivided into 4 new portions, of which the titles are **NKUENE/L.MIKUMBUNE/2047,2048,2949** and **2050**.

4. Plaintiff then filed this suit in her capacity as the legal representative of the estate of the late **GEORGE GATOBU M'MBOROKI**. She identifies herself in the plaint as a **wife** of deceased. Apparently she had obtained a grant to that effect on 10/2/05.

5. Earlier on in year 2004, the plaintiff had filed Succession cause No.537 of 2004 in respect of the estate of **GEORGE GATOBU** who had died on 25/10/2004. The Judgment in the succession cause was delivered on 22/5/2014. Its clear that it is this judgment which triggered the birth of the P.O. which was filed hardly a month there after on 25/6/2014.

6. The record of the court shows that the P.O has remained unprosecuted for quite a long time. The delay,primarily occasioned by none compliance of the directions given by the court. On 7/7/2014 directions were given for the P.O to be canvassed by way of written submissions. There after an application to have the plaint amended was filed. It has never been prosecuted to date. More than a year down the line. On 1/10/15, the issue of submissions on the P.O was revisited. The counsels for 3rd, 4th,5th,6th, 7th, and 8th defendants told the court that they would be supporting the submissions of the 1st defendant and they would therefore not file any submissions. Mr. Gitonga holding brief for Mr. Otieno had requested for three weeks to file submissions of 2nd defendant. The request was granted but was never complied with.

7. It is against this back ground that this court handled the matter for the first time on 13/3/17. By then only the plaintiffs side and 1st defendant had filed submissions. The ruling on the P.O is therefore based on the submissions on record.

8. It came to be that there were objections lodged in the succession cause no.537 of 2004, culminating in a Judgment delivered on 22/5/2014. The main question that was before the court in the succession cause was “whether Dolly Wanja Ngiti was a spouse of the deceased.....”.The holding was as follows;

“ The upshot is that I find and hold that the petitioner Dolly Wanja Ngiti was not a spouse of the deceased George Gatobu and is not entitled to be the Petitioner in respect of the deceased estate.”

9. The 1st defendant states that since the grant was annulled via the aforementioned holding in the succession matter, the plaintiff no longer has the locus to proceed with this suit and that is evident from her attempt to introduce two other plaintiffs via her application of 4/3/2015 (un prosecuted). The court has been urged to strike out the suit with costs to 1st defendant.

10. The plaintiff in response to the P.O states that the grant issued on 10/2/2005 was never revoked or annulled and that the Judgment in succession cause No.537 of 2004 only declared that plaintiff was not a spouse of the deceased. Plaintiff makes reference to section 3 of the Law of succession act where the definition of **who an administrator** is, is to be found. ***Its “ a person whom a grant of letters of administration has been made under the act”***. Plaintiff further states that she has since obtained another grant with two other persons hence the pending application of 4/3/2015. Finally the plaintiff states that under section 19 of the Environment and land court act, the court is called upon to do substantive justice without undue regard to technicalities.

11. What is the import of the Judgment in the succession cause?;Did the judgment have the effect of annulling the grant dated 10/2/2005?. These appear to be the issues for

determination.

12. The determination in the succession cause was that plaintiff was not a wife of the deceased and hence could not be a petitioner. The Judgment made no reference to the grant of 10/2/2005. The petition was dismissed.

13. In absence of express provision in the Succession Cause No. 537/2004, It is not for this court to make a finding that the grant of 10/2/2005 stands as annulled. As correctly stated by the plaintiff the interpretation of who is an administrator of an estate is to be found in section 3 of the Law of succession act. The setback is that plaintiff cannot refer the deceased as her husband and perhaps her proposed amendment to the pleadings would take care of that issue.

14. An issue of great concern though is the fact that the estate of deceased appears to have no definite administrator at the moment. It appears that none was appointed in the succession cause . If this court was to allow the Preliminary Objection, the net effect would be to **dismiss the suit**. A look at the pleadings indicate that serious issues of fraud and illegality have been raised in respect several parcels of land. It follows that those issues will remain buried!!. Who then will look after the interests of the deceased?.

15. The court has to look at the bigger picture ,ensuring that substantive justice is not sacrificed at the alter of procedural technicalities- see **article 2 d of the constitution and section 19 of the Environment and Land court act**.

16. Unless and until there is another administrator of the estate of deceased, this court will be hesitant to make a declaration that plaintiff has no locus standi to proceed with the suit. I find that plaintiff had lawfully filed this suit pursuant to the grant dated 10/2/2005, but she lost her capacity to proceed as a petitioner in the succession cause, as she is not a wife of deceased (GEORGE GATOBU M'MBOROKI)

17. The upshot of this is that the P.O is dismissed. Since it's the Judgment in succession cause No.537/2004 which is not clear on the fate of the grant of 10/2/2005, then each party is to bear their own costs of the Preliminary Objection.

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 5TH DAY OF APRIL, 2017 IN PRESENCE OF:-

CA: Janet

Kariuki for Plaintiff

Murango Mwenda h/b for Muriuki for 1st Defendant

Miss Wanjohi for 7th & 8th defendant

Kitingi for Gichunge for 2rd Defendant.

Maruti for Otieno for 2nd Defendant

HON. L.N. MBUGUA

JUDGE