REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

IN THE MATTER OF THE ESTATE OF JOHN MARAGA GWAKO (DECEASED)

SUCCESSION CAUSE 596 OF 1980

RULING

BACKGROUND:

John Maraga Gwako died intestate on 4th April 1973. Alfred Gwako Maranga, Mark Maranga and Margaret Maranga, the Applicants filed on 20th June 2014 the application dated 23rd May 2014 against the Public Trustee.

The Applicants sought the grant of letters of administration of 31st May 1984 to the deceased's widow Julia Maranga be revoked; subsequent transfer of suit property L.R.Nyaribari Chache/B/B/Boburia/3241 to Julia Maranga by Public Trustee declared irregular and any other transfer of the suit property by Julia Maranga to 3rd parties namely Machogu Davis Maraga who allegedly sold the suit property to 9 Purchasers and Interested parties instead of beneficiaries of the deceased's estate as shown in the confirmed grant. Therefore these transfers be declared irregular.

The hearing of this application was conducted in this Court on 3rd and 24th November 2014 *exparte* as despite service, the Public Trustee did not appear in Court , file any documents or offer any explanation.

This Court delivered **Ruling on 29th January 2015** in a nutshell maintained the confirmation of grant to Public Trustee as regular and valid order of this Court. The Court considered and confirmed from Court record that ;

The confirmed grant of 1st March 1985 to Public Trustee enabled registration of Public Trustee as trustee to the suit property on behalf of widow and children of the deceased. The children were minors at the time and did not provide consents. On 22nd May 1986 Public trustee transferred L.R. Nyaribari Chache/B/B/Boburia/3241to surviving widow of deceased Julia Maraga. What is not clear or apparent to this Court is why and how transfer of the suit property L.R. Nyaribari Chache/B/B/Boburia/3241 was made by Julia Maraga to Machogu Davis Maraga both of whom did not appear in Court or provide any information of evidence to this Court. Suffice to say that he is not a beneficiary of deceased's estate and therefore such transfer was illegal, invalid and irregular. Consequently the subsequent subdivision, registration and/or transfer to 3rd parties were declared irregular and invalid. Cautions filed by Applicants were to remain in force and the suit property remains property of the deceased transferred to widow and children of the deceased as per confirmed grant issued by this Court. This Court intimated anyone who wanted to contest this grant and transfer of beneficial interest to the widow and children of the deceased who include the Applicants ought to establish their claim.

PLEADINGS

On 12th August 2016; Counsel on behalf of 3rd parties, purchasers/ interested parties filed Notice of Preliminary Objection that the application of 23rd May 2014 is incurably defective bad in law and the same ought to be struck out. That this Court lacks jurisdiction under **Article 165(5) COK 2010** to entertain a claim touching on use, occupation and title to land.

That this Court is bound by **Articles 1(1&2) & 3(1) of COK 2010** and cannot assume jurisdiction in matters where it is specifically prohibited from doing so.

This Court was rendered ***functus officio*** upon issuance of confirmation of grant and therefore cannot entertain any further application such as the one mounted by Applicants herein.

That the certificate of confirmation of grant being a decree in Probate and Administration, applicants are barred under **Section 4(4) of the Limitation of Actions Act** from enforcing the same 32 years after the grant was issued.

The jurisdiction of the court having expressly been ousted by the Constitution, the same Court cannot assume jurisdiction either by craft or invention. The said application is an abuse of Court process.

On 12th April 2016, the 3rd Parties; Purchasers/Interested parties filed Replying Affidavit and claimed to be owners of L.R. Nyaribari Chache/B/B/Boburia/9200,9201,9202,9203, 9204,9564,9565,9566 & 9567.They were not served with the application of 23rd May 2014 so as to attend Court proceedings but they got wind of it. As purchasers of the suit property L.R. Nyaribari Chache/B/B/Boburia/3241; they have not been involved in any wrongdoing but are *bonafide* purchasers for value without notice of any defect or undeclared interests over the suit properties. They were of the view that the High Court sitting as Probate & Succession Court has no jurisdiction to hear and determine their claim and right over the suit property as prescribed by **Article 165 & 162 (2) (b)COK 2010.** The appropriate forum is the Environment and Lands Court. They alleged after the Family Court granted confirmation of grant to the estate of the deceased , it amounted to a decree which cannot be challenged under **Section 4(4) of Limitation of Actions** as it was statutorily barred. The Court is bound by **Article 2(1&2) 7 Article 3(1) COK 2010.**

The Objectors/Applicants filed written submissions on 28th September 2016 and confirmed that the Public Trustee obtained grant to the deceased's estate on 31st May 1984 which was confirmed on 1st March 1985.

The properties that comprised the deceased's estate are;

a) Terminal dues from Ministry of Health

b) Household goods, motor vehicles, jewellery, clothes etc

c) Immovable properties;

i. Kisii Town block II/72 (1/5 share)

ii. Kisii Town Block II/77 (1/5 share)

iii. Kisii Town Block III/88 (1/5 Share)

iv. Nyaribari Masaba Boguche /607

The suit property L.R. Nyaribari Chache/B/B/Boburia/3241 was not amongst the properties that were listed as part of the grant issued and confirmed for the deceased's estate. In spite of this omission, the Kisii Land's Office records confirm that the suit property was transferred in the Public trustee's name as trustee on 16th May 1986. On 22nd May 1986; Julie Maraga widow of the deceased was registered as proprietor of the said properties jointly with children of the deceased jointly. The land certificate of

ownership was issued to widow of the deceased on 30th September in 1986.

On 14th September 2010, the said property was transferred by way of gift to Machogu Davis Maraga who thereafter transferred and subdivided into L.R. 9200-9567. The Objectors/Applicants learnt of this, reported the matter to the Police Station and Machogu Davis Maraga was arrested and charged in **Kisii Chief Magistrates Court Criminal Case No 398 of 2013** which is pending**.** The Applicants/Objectors objected to the Preliminary Objection by Purchasers/interested parties that they did not seek leave from Court to be joined as parties to the proceedings. The Applicants/Objectors objected to 3rd Parties inclusion as they lack capacity they are not beneficiaries under **Section 26 of Law of Succession Act.**

The Public Trustee filed Replying Affidavit on 4th February 2016 in a nutshell confirmed that the Court issued grant of letters of administration to Public Trustee on 31st may 1984 and confirmed on 1st March 1985. Then the Public Trustee transferred the suit property among other properties to the widow of the deceased as a beneficiary and also in trust for the Children of the deceased who were young at the time. This is confirmed by copy of green card from the Kisii Lands Office attached to the affidavit. The Public Trustee fulfilled the statutory mandate and acted in line with the Court order. The Public Trustee administered the estate diligently and was not privy to subsequent transfer of land in question to 3rd parties. Therefore, the Public Trustee is wrongfully enjoined to these proceedings.

All parties filed written submissions with regard to the application filed on 23rd May 2014 and filed on 20th June 2014 and the notice of Preliminary Objection raised to hearing and determination of the application.

ISSUES

1. Does this Court have jurisdiction to hear and determine the application of 23rd May 2014 as challenged by the Notice of Preliminary Objection filed on 12th August 2016?

2. Is the Court *functus officio* once confirmation of grant is issued by Court 32 years ago?

3. Is the Court barred by Limitation of Actions Act from hearing and determining the application?

4. Is the Public Trustee rightfully or wrongfully joined to these proceedings?

5. Should the grant issued on 31st May 1984 and confirmed on 1st March 1985 revoked and annulled or not?

DETERMINATION;

First, the Court record confirms that the application filed on 23rd May 2014 was heard and determined *exparte* and Ruling delivered on 29th January 2015 which remains a valid , regular and lawful determination of the Court in the absence of a review or appeal.

Secondly, the parties through Counsel in formed Court that they filed written submissions on Preliminary Objection but turned out to be against the application already heard and determined.

Be that as it may this Court shall determine the issues raised in the Preliminary Objection as set out on merits .

The issue of jurisdiction as extrapolated by the Purchasers/interested parties is that this Court derives jurisdiction from **Article 165 (3) COK 2010 and by Section 47 of Law of Succession Act .** The jurisdiction does not include determination on matters touching on use, occupation or title to land as such jurisdiction is vested in the Environment and Land Division of the High Court by virtue of **Article 162 (2) (b) of COK 2010.**

They further stated that the Court is bound by **Article 2 (1& 2) & 3(1) of COK 2010** and cannot claim or

exercise state authority or usurp jurisdiction except as authorized under the Constitution.

At the same time the interested parties did not seek leave to be joined as parties to these proceedings instead they filed notice of the preliminary objection that the court lacked jurisdiction and in the same breath stated that they got wind of these proceedings and were not served with notice to appear and file their pleadings.

This Court has jurisdiction as Family Court to hear and determine among other related cases, those of Succession proceedings as prescribed under Law of Succession Act Cap 160. In the instant case, the succession proceedings relate to the deceased John Maraga Gwako who upon reference to the copy of greencard from Kisii Lands Office confirms that L.R. Nyaribari Chache/B/B/Boburia/3241, the suit property was registered in the name of the deceased from 1973. Therefore after his death , this property constituted one of the assets that comprised his estate available for distribution to the beneficiaries. The grant issued on 31st May 1984 and confirmed on 1st March 1985 to Public Trustee facilitated transfer of the suit property. It was transferred to the widow of the deceased in life interest and in trust for the children of the deceased 4 sons and 7 daughters half of whom were minors at the time; in determined shares. It is within the purview of Family Court to ensure transmission of beneficial interest from the deceased's estate to the deceased's beneficiaries. From the record , this is exactly what happened.

What is curious is that on 22nd May 1986; after the deceased's widow was registered as trustee of 12 heirs therein mentioned as per the confirmed grant of the suit property; the next entry on the green card is that on 14th September 2010, the suit property was transferred to one Davis Machogu Maranga ID 22386175 P.O. Box 251 Gilgil as a gift. Seemingly thereafter the suit property was subdivided presumably after sale and held by the interested parties.

Clearly, from the above facts set out , the Court has jurisdiction to facilitate the beneficial interest of the said property (ies) to the beneficiaries. The Applicants herein are children of the deceased and beneficiaries of his estate and if they lodge an application seeking their rightful beneficial share from the deceased's estate, it is within their right and this Court ought to exercise its jurisdiction to hear and determine the application in form of revocation of grant. Suffice is to state that the Court has jurisdiction to determine the beneficiaries rightful share of the deceased's estate.

On the other hand it is conceded that the Environment and Lands Division is clothed with jurisdiction to hear and determine matters use, occupation or title to land as stipulated in **Article 162(2) (b) COK2010 and Section 13 of the Environment & Land Court Act**. The interested parties relied on the following cases on the issue of jurisdiction of the Court;

1) ***ENVIRONMENT & LAND COURT (ELDORET) 22 OF 2015 BEATRICE WANGUI KAMAU vs JOHN KARIUKI KAMAU***

The applicant raised preliminary objection that the ELC lacked jurisdiction to hear and determine a matter after grant was confirmed and the respondent refused to sign transfer documents. Court held after confirmation of grant it is ELC that has jurisdiction to determine disputes therein.

2) ***KARISA CHENGO & 2 OTHERS vs REPUBLIC CRIMINAL APPEAL 44 45 & 76 OF 2014 COURT OF APPEAL MALINDI***

The Court held that a court must operate within its Constitutional limits and the judicial officer to preside over what he was appointed to do and to hold otherwise would be absurd and defeat the essence and spirit of **Articles 162 (2) , 165 (3) and 166 COK 2010**.

The application herein filed on 23rd May 2014 is about revocation of grant and this Court has jurisdiction to hear and determine the same without joining the interested parties.

However, in light of the fact that the application was heard *exparte*, despite service, the widow of the deceased and/or representative did not offer any evidence on the transfer of the suit property as gift to

Davis Machogu Maranga and conversely, the said new owner did not shed light on how he obtained beneficial interest over the suit property and he is not beneficiary of the deceased's estate. This Court retained the grant and confirmed grant as it was lawfully granted to Public Trustee who diligently administered the deceased's estate and distributed the same to all beneficiaries through the widow as trustee until it is explained how and why the beneficiaries did not obtain their rightful share of the suit property. It is to that extent that this Court preserved the Cautions filed until there is evidence from widow , children , giftee and possibly 3rd parties on how they obtained land that is part of the deceased's estate bequeathed to his family; widow and children. This Court will hear and determine beneficial interest while the Environment and Land Court may hear and determine proprietary and /or possessory rights over the same suit property.

The next related issue is that once the grant was confirmed , in this case 32 years ago, the Court is *functus officio*. The interested parties cited the following cases;

1) ***SUCCESSION CAUSE 40 OF 2012 HCT MURANGA IN THE MATTER OF THE ESTATE OF DEDAN MWAURA KIARII (DCD)***

In an application brought under Rule 73 of Probate & Administration Rules, the applicant sought the court to cancel and reverse registration .The court held that once the grant was confirmed, the court was *functus officio* and any further issue is within the domain of the Environment and Land court.

4) ***PETER MUCHIRI KAMIRI & ANOTHER vs DAVID KABUGO KAMIRI [2005] eKLR***

The Court held that once the confirmation of grant is duly certified it is a decree absolute which is final order of the court in respect of administration of the estate. The court is not *functus officio*, unlike the cited cases, the application at hand is one of revocation of grant that ought to be heard and determined by the High Court under Law of Succession Act.

This court is guided by the following principles;

Section 76 of Law of Succession Cap 160 Laws of Kenya that provides

> ***A grant of representation, <u>whether or not confirmed, may at any</u> time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion.***

The Court has jurisdiction to hear and determine an application for summons of revocation and annulment of grant as prescribed under the Law of Succession Act which is not within the purview of the Environment and Lands Court.

Secondly, the summons for revocation are not time bound or limited by Limitation of Actions Act. **Section 4(1) (e)** provides that:

> ***"The following actions may not be brought after the end of six years <u>from the date on which the cause of action accrued</u>...actions, <u>including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."</u>***
>
> **Section 42 of Law of limitations Act exempts;**
>
> > ***a) Criminal proceedings***
> >
> > ***b) Matrimonial proceedings***
> >
> > ***c) <u>Actions to recover possession of trust land.</u>***

The suit property is one of the assets that comprised of the deceased's estate and was bequeathed to the deceased's widow in trust for herself and children of the deceased. She was registered as trustee according

to the green card. **Section 37 of Law of Succession Act** provides that the surviving spouse in exercising life interest over property cannot sell [dispose or transfer] without consents of co trustees and beneficiaries and where it is immovable property seek Court's consent. Hence the claim or action is one of recovering possession of trust land in form of the suit property bequeathed to beneficiaries of deceased's estate as there is no evidence the widow sold or transferred the land to the 3rd party. Instead, there is the letter dated 10th June 2013 from Kisii Lands Office that insinuates that it was through an error to transfer the suit property to a 3rd party and the matter is the subject of **Criminal Case 398 of 2013** in Kisii Court involving the 3rd party, Davis Machogu Maranga awaiting determination. The applicants rights as beneficiaries of the suit property cannot be preempted by limitation to deprive them of their beneficial interest on the trust land based on possible fraud.

Although the grant was confirmed 32 years ago and that it is a decree, in light of the fact that the Applicants were minors and could not pursue their beneficial interest in the deceased's estate , they cannot be deprived of their right to pursue to logical conclusion their right over the property by virtue of the fact that the matter is moot before the Family Court and going forward ought to be canvassed before the ELC Court.

The next issue is with regard to Applicants joining the Public Trustee to these proceedings; the Public trustee objected to being part of the proceedings as they transferred the properties to the beneficiaries of the estate of the deceased. The fact of the matter is that from the beginning, the grant was issued and confirmed to Public Trustee. Even if the public Trustee was not privy to transfer of the suit property to a 3rd party, due to the fact that the instant application is based on the revocation of grant issued to Public Trustee they are rightfully enjoined to these proceedings.

Finally, should the grant issued on 31st May 1984 and confirmed on 1st March 1985 be revoked or annulled or not?

The matter was canvassed during the *exparte* hearing of the application of 23rd May 2014, relevant parties were served and did not attend Court or file documents or offer any explanation or circumstances for the Court to consider. Thereafter, the public trustee filed Replying affidavit and written submissions, the interested parties also filed notice of Preliminary Objection and submissions. This would be appropriate if there was an application for review of the Court Ruling of 29th January 2015. This Court has heard and determined the said application and in light of the considerations of the pleaded facts and submissions confirms the orders of the Ruling of 29th January 2015 as follows;

1) The grant issued on 31st May 1984 and confirmed on 1st March 1985 are valid , regular and legal orders of the Court and were regularly granted. This Court found no basis to revoke the grant under **Section 76 of Law of Succession Act**. The Applicants, widow of the deceased and other siblings are the beneficiaries of the estate of the deceased including the suit property L.R. Nyaribari Chache/B/B/Boburia/3241.

2) The transfer of the suit property by Kisii Lands Office personnel as confirmed by letter dated 10th June 2013 from Julia Maranga widow of the deceased to Davis Machogu Maranga is declared , irregular , unlawful, illegal null and void, as he is not one of the beneficiaries of the deceased's estate.

3) All and any subdivisions and transfers of the suit property L.R. Nyaribari Chache/B/B/Boburia/3241 to 9201,9202,9203,9204,9564,9565,9566 and 9567 are stayed and halted until outcome of **Criminal Case 398 of 2013.**

4) The Chief Land Registrar Kisii Land Office shall preserve the cautions filed by the Applicants with regard to L.R. Nyaribari Chache/B/B/Boburia/3241 to 9201,9202,9203,9204,9564,9565,9566 and 9567 until hearing and determination of interested parties claim over the suit property from the Seller Davis Machogu Maranga by the Environment and Lands Court .

5) The Public Trustee is hereby discharged from these proceedings and any liability as it is

confirmed from the record that the Public Trustee transferred all properties as per the confirmed grant to the widow as trustee for herself and the 11 children of the deceased way before the transfer of the suit property as a gift to a 3rd party.

6) Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT IN NAIROBI ON 13TH JULY 2017

M.W.MUIGAI

JUDGE