



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO.47 OF 2015**

**IN THE MATTER OF THE ESTATE OF KAIPON KORUTA TASIEKU (DECEASED)**

**JACKSON KITUKU MUSIKALI & 8 OTHERS.....APPLICANTS**

**VERSUS**

**1. PENINA MUENI KAIPON**

**2. JONATHAN KORUTA KAIPON.....  
ADMINISTRATORS/RESPONDENTS**

**RULING**

The applicants who are 9 in number filed a notice of motion dated 29/10/2015 under the provisions of Section 73 of the Probate and Administration Rules seeking the following orders;

1. To be enjoined to these succession proceedings as creditors/interested parties to the Estate of KAIPON KORUTA deceased hereinafter referred as the deceased.
2. That the interested parties/creditors have interests as purchasers from the deceased property known as KAJIADO/KAPUTIEI CENTRAL/4451/4454 which are subdivisions of land parcel formerly known as KAJIADO/KAPUTIEI CENTRAL/452 be factored in the distribution of the deceased's estate upon confirmation of grant and that the same be confirmed in favour of the creditors/interested parties.
3. That the costs of this application be in the cause.

The grounds in support of the application are stated on the face of the application. In essence the applicants are contending that they are purchaser's for value without notice of any defect of title No. KAJIADO/KAPUTIEI CENTRAL/BLOCK 452.

In support of the application was an affidavit sworn by Joseph Kamula Kamwathi one of the applicants who deponed also on behalf of others. That they had purchased portions of the said parcel of land from the deceased. That the applicants are apprehensive of the fact of them not being included in the succession cause seeking Letters of Administration confirmation. There is possibility that the transactions entered into over the parcels of land which were sold to them by the deceased will be vitiated. That by them being enjoined in those proceedings involving the estate of the deceased as creditors they would protect their interests.

The application is opposed by a replying affidavit sworn by the respondents dated 17/11/2015. The deponent stated that the application is incompetent for not complying with the Probate and Administration Rules in filing the application vide notice of motion instead of summons general.

They further stated that the applicants claim is a non-starter on the basis of the claim being purchaser's interest in land reference KAJIADO/KAPUTIEI CENTRAL/452. That they further stated during the petition for Letters of Administration the land parcel KAJIADO/KAPUTIEI CENTRAL/452 was not part of the deceased's free estate.

It was further in their affidavit the respondents stated that the properties subject to the petition for Letters of Administration were:

- a. LR NO. KAJD/KAPUTIEI/CENTRAL 4451
- b. LR NO. KAJD/KAPUTIEI/CENTRAL 4452 (89.78 HA)
- c. LR NO. KJD/KAPUTIEI-CENTRAL/4453 (0.81 HA)
- d. LR NO. KJD/KAPUTIEI CENTRAL 4454 (4.86 HA)

It was further their contention that the three parcels of land have never been a subject of any District Land Disputes Tribunal or the Kajiado Senior Resident Magistrate Court.

The applicants also according to the respondents' affidavit they do not fall under the category of dependants of the deceased provided for under Section 26, 27, 28 and 29 of the law of Succession Act.

In his oral submissions counsel for the applicants Mr. Olonde submitted that the applicants are creditors to the deceased's estate. This was as a result of the sale agreement to purchase various portions entered between each one of them and the deceased. The said agreements were made during the life time of the deceased.

He further submitted that at all material times the deceased was the registered proprietor of LR KAJIADO/KAPUTIEI CENTRAL/452 consequently the land became a subject of proceedings before the District Land Disputes Tribunal and later Senior Resident Magistrate Court at Kajiado.

The SRMCC No. 32 of 2006 was heard and determined in favour of the applicants vide order dated 2/7/2007. The orders issued by the trial court according to Mr. Olonde include inter alia that the land LR KAJIADO/KAPUTIEI/452 be subdivided. The claimants' portions be excised and transfer documents be endorsed in their favour.

In the event the objector who was the deceased herein declines to sign the transfer, the same be excited by the executive officer of the court. In support of his submissions he invited the court to the annexures marked as JKK4, JKK5 and JKK6.

He further submitted that the original title herein referred as LR KAJIADO/KAPUTIEI-CENTRAL/452 was subdivided by the deceased to give rise to LR KJD/KAPUTIEI CENTRAL/4451 – 4454.

The deceased during his life time according to the applicants did not factor their interest as purchasers of value. Their interest could only be taken care of if enjoined in this succession cause involving the petitioners.

Learned counsel Mr. Wachira for the Administrators/Respondents submitted that the applicants have no locus to be enjoined as creditors/interested parties to the succession cause proceedings.

The parcel of land LR KAJIADO/KAPUTIEI CENTRAL/452 according to his submissions was not part of the free estate of the deceased upon his demise. He further submitted that the applicants did not comply with the orders issued by the Senior Resident Magistrate Court at Kajiado in 2007. It was also his contention that the purported sale of land between the applicants and deceased was not subject of the Land Control Board Consents.

He submitted that the applicants have not come to court with clean hands for this court to grant the prayers sought. He took issue with the inordinate delay from the alleged transactions and execution of the court orders alluded to by the applicants.

I have carefully perused the application and affidavit in support together with annexures. The replying affidavit by the respondents has also been scrutinized. The learned counsels for both parties made submissions before me regarding the issues touching on the application.

The following issues emerge in determining this application:

**Whether the suit originally registered and known by the applicants do exist?**

The applicants' affidavit and record reveals that the suit property subject matter in dispute is LR. KAJIADO/KAPUTIEI-CENTRAL/452. The land as per the entries in the Green Card opened on 4.10.95 was registered in the name of IMMAREN GROUP RANCH.

The group ranch effected a transfer in favour of the deceased KAIPHOON KORUTA TASIEKU on the same date and title duly issued. The record further reveals that the deceased registered proprietor during his lifetime on 21.8.2014 applied for subdivision of LR. KAJIADO/KAPUTIEI-CENTRAL/452 into four portions.

As evidenced by annexed Green Card placed before me as annexed JKK4. The creation of new numbers referenced KAJIADO/KAPUTIEI-CENTRAL/4451 - 4454 gave rise to new titles extracting the original title LR. KAJIADO/KAPUTIEI-CENTRAL/452. It is also clear from the annexures that on 19.9.2014 restriction vide a court order was entered on all the four parcels of land.

It is further not disputed that on 18/11/2011 pursuant to a court order the Executive Officer Kajiado signed a mutation form on subdivision of LR. KAJIADO/KAPUTIEI-CENTRAL/452. This mutation relied upon by the applicants in this succession cause subdivided the suit land into nine portions with new allocation of numbers referenced as LR. KAJIADO/KAPUTIEI-CENTRAL/2262 – 2268.

The applicants mutation was never registered and would not be registered because LR. KAJIADO/KAPUTIEI-CENTRAL/452 was already subdivided into four portions namely KAJIADO/KAPUTIEI-CENTRAL/4451 – 4454. The character and nature of the suit property changed.

It is also clear from documentary evidence that the four subdivisions KAJIADO/KAPUTIEI-CENTRAL/4451 – 4454 had been encumbered vide a restriction order of the court.

Section 69 of the Land Registration Act provides that so long as an inhibition remains registered, any instrument that is inconsistent with the inhibition shall not be registered.

In the absence of a court order nullifying the first subdivision the surveyor had no right to issue new numbers in respect of the same parcel of land.

The second subdivision an instrument relied upon by the applicants in my view was null and void. The failure to register the mutation dated 18.11.2011 extinguished the rights of the applicants. There was no evidence that the applicants were in actual physical possession and occupation of the parcels of land in question.

The transfer documents exhibited by the applicants were never registered and given effect by the Land Registrar to create an interest in their favour. Under section 41 of the Physical Planning Act provides that any such subdivision of land requires that the Subdivision Scheme Plan be approved by the Physical Planner before a surveyor issues any new numbers to a parcel of land.

In the application before me to recognize the registrable interest in accordance with the requirement of a

Local Physical Development Plan in relation to that area was not annexed in support of the documents.

The deceased died on 16.3.2015. The suit land LR. KAJIADO/KAPUTIEI-CENTRAL/452 was registered in the name of the deceased on 4.10.1995. The land was later subdivided into four portions by the deceased before his death. The original parcel measuring 99.1 hectares is no longer in existence.

By the time the deceased passed on, applicants mutations to excise land from parcel No. LR. KAJIADO/KAPUTIEI-CENTRAL/452 had not been registered.

I am of the considered view that the court orders obtained by the applicants ought to have complied with the Land Control Act. The evidence deduced from the record and affidavit clearly demonstrates inordinate delay on the part of the applicants to enforce the orders issued in 2007. The delay and lapse of time led to a first mutation registered by Land Registrar changing the character and interest in LR. KAJIADO/KAPUTIEI-CENTRAL/452.

## **2. Was consent validly obtained by the applicants?**

Under section 6(1) of the Land Control Act provides as follows:

**“Each of the following transactions**

**a. The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area;**

**b. The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of Land Planning Regulations, 1961 for the time being apply;**

**c. The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in Private Company or Co-operative Society which for the time being owns agricultural land situated within a Land Control area, is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

**2. For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).”**

Section (7):

**“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void, under this Act, the money shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to section 22.”**

With regard to the key question of consent the Court of Appeal has addressed the issue severally in various case law: In the case of **ONYANGO & ANOTHER Vs. LUWAYI 1986 KLR 513** Nyarangi, JA as he then was held:

**“The appellant admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional Land Control Board. The transaction was therefore void for all purposes under section 6(1) of the Land Control Act Cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate land control board within six months of the making of agreement between SAMSON LUWAYI and JAVANS BUTEMI, NO such application was made. That agreement therefore is of no effect**

**and no question of specific performance can lawfully arise.”**

In the case of **HIRANI NGAITHE GITHURE Vs. WANJIKU MUNGE 1979 KLR 50** Cheson, J as he then was held thus:

**“The position is simple and clear, section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision and no principle of equity can soften or change it. The courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes, including the purpose of specific performance at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a Land Control area unless the consent of Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”**

The applicants were not in possession of the suit property. This court cannot therefore rely on the doctrine of constructive trust in their favour as against the respondents.

Section 22 of the Land Control Act is therefore not available to secure rights under the sale agreement. It is not disputed that each applicant herein filed several civil suit against the deceased referenced as: - Dorcas Nzula Kanze - SRMCC No. 31 of 2004, Andriano Wambua Kenzi; SRMCC No. 32 of 2006, Paul Mutunga Muteto; SRMCC No. 33 of 2006, Mutisya Vuyu; SRMCC No. 34 of 2006, Mwololo; SRMCC No. 35 of 2006.

According to the orders by the learned trial magistrate the applicants: **were to pay the balance of the purchase price; the Land Board to give consent for subdivision to an equivalent portion each claimant was alluding to; the District Surveyor to enter LR. KAJIADO/KAPUTIEI-CENTRAL/452 and excise the acreage in favour of each claimant as per the agreement; that the District Land Registrar to register transfer documents and issue title deeds; that in the event the defendant refuses to sign all the relevant forms of transfer the executive officer of the court to sign on his behalf.**

The trial court issued the orders on 2.8.2007. There are no execution of the orders by either parties.

This court was presented with authorities constituting a mutation, application for transfer and consent by the Land Control Board dated 18.11.2011.

From the annexures in court, it is not disputed that they were never lodged before the Land Registrar for registration. That the land subject matter of the sale agreement being one which falls under agricultural land. The provisions of Land Registration Act were to be complied by the parties.

Section 6(1) of the Land Control Act stipulates that **transactions in respect of sale, transfer, lease, mortgage, partition or other disposal in any agricultural land in a controlled area consent be obtained.** The Land Control Board consent must be registered with the Land Registrar to give it legal effect. That was not the case before me by the applicants seeking to be enjoined in these succession proceedings against the intended administrator of the estate of the deceased.

The applicants are claiming ownership by virtue of purchasers' interest. The contract of sale of land must have been commenced before 2007 civil cases were filed at Senior Resident Magistrate Court. The agreements of sale would not be saved on the basis of the court orders.

Since there are very clear mandatory statutory provisions to be followed by either party to register rights and interest over land. That omission by the applicants not to register the instruments on subdivision and transfer with the Land Registrar occasioned an illegality. The transaction was therefore null and void for

want of consent and registration of entries in the green card. That remedy cannot be availed through the succession cause window. The dispute between the applicants and estate of the deceased can only be entertained by the Environment and Land Court. This would be by way of suing the administrator of the deceased estate.

Having reached this conclusion, I find no indentifiable legal interest to enjoin the applicants to this Succession Cause No. 47 of 2015. The application dated 29<sup>th</sup> October 2015 lacks merit and the same is hereby dismissed. Each party to bear their own cost.

It is so ordered.

*Dated, delivered and signed at Kajiado on 3/2/2016.*

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Ms Mutuku holding brief for Wachira for Respondent

Mr. Olonde for appellant/present

Mr. Mateli Court Assistant