



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO.75 OF 2015

IN THE MATTER OF THE ESTATE OF NKUTOTO ENE SARINKE (DECEASED)

MUNTELEU MARDADI SARINKE.....CITOR

VERSUS

LAMO OLE MARDADI & OTHERS.....CITEES

RULING

The citor Munteleu Mardadi Sarinke through a citation to accept or refuse probate to the citees Lamo Ole Mardadi, Morisiet Ene Maridadi and Yiai Ene Mardadi dated 8 May 2014, sought that the deceased Nkutoto Ene Sarinke who died intestate on 17th June 1988 left an estate and survived with dependants.

That in his affidavit the citor deponed that upon his death deceased was survived of the following children;

Lamo Ole Mardadi

Morisiet Ene Mardadi

Yiai Ene Mardadi and

Citor himself. (Munteleu Mardadi Sarinke).

That the said surviving children/beneficiaries to the estate of the deceased have not taken out Letters of Administration of the estate. That the notice therein was to the citee's to show cause why Letters of Administration should not be granted to Munteleu Mardadi Sarinke as the son of the deceased.

The citee upon service with the citation filed a replying affidavit dated 9th September 2014. In his affidavit the citee Lamo Ole Mardadi deponed and objected to the grant of Letters of Administration to the citor.

He premised the reasons in his affidavit that there is no free estate in terms of assets and liabilities left by the deceased to be distributed. That their deceased father was a member of Oloyian Kalani Group Ranch during his lifetime. That the deceased died before his specific shares were determined and allocated. That he further stated in his affidavit, following the deceased death the group ranch identified and allocated two shares equivalent to two portions of parcel of land. That the said parcels of land according to the distribution in the affidavit paragraph 13 were allocated LR KAJIADO/ILDAMAT/312 and KAJIADO/ILDAMAT 313 respectively.

In accordance to the discussion and agreement reached with the group ranch and family members the two parcels of land were distributed to the citor Munteleu Mardadi and citee Lamo Mardadi. He annexed a copy of official search and title to parcel No. KAJIADO/ILDAMAT/313 registered in his own name absolute interest.

The citor on his part deponed and strongly objected and challenged the validity of the purported title deed by the citee. He averred that the title deed KAJIADO/ILDAMAT was fraudulently obtained aimed at discriminating the dependants of the property left behind by the deceased. He also challenged the citee on the purported agreements between the family and group ranch officials in distributing the properties. He denied existence of any such agreements.

He further averred that the citee has conveyed the property of the deceased without existence of Letters of Administration. He also averred that if action by the citee is allowed it will disinherit the beneficiaries of the estate including his sisters.

The citor's sisters Morisiet Ene Murunya and Yiai Ene Mardadi filed replying affidavit supporting citation proceedings for grant of Letters of Administration to the applicant. In their affidavit they averred that LR KAJIADO/ILDAMAT/313 was property left by the estate of the deceased. That upon death they are entitled to a share of the portions of the parcels of land.

Before the determination of the citor proceedings an application under certificate of urgency dated 16/10/2015 was filed under Section 42 of the Succession Act. The chamber summons application by the citor sought for the following orders:

That the citee Lamo Ole Mardadi be ordered to stop any alienation or attempted alienation of LR NO. KAJIADO/ILDAMAT 6156 and KAJIADO/ILDAMAT 6159 that formed the original property KAJIADO/ILDAMAT/313.

That the citee Lamo Ole Mardadi be ordered not to further intermeddle with the estate of the deceased more specifically the subject suit land LR NO. KAJIADO/ILDAMAT/6156 and KAJIADO/ILDAMAT/6159 till these succession proceedings are determined.

The application is supported by grounds in the face of the chamber summons and an affidavit by the applicant/citor.

I have carefully considered the application, affidavit in support, annexures and replying affidavit raising counter objections to the orders sought.

From the record and affidavit evidence it is not in dispute that the deceased Nkutoto Sarinke died intestate on 17/6/1988. During his lifetime he was a member of Olingarani Group Ranch. This is confirmed by a letter from Location Chief dated 14/4/2014.

The deceased passed away before subdivision of the land. It is deduced from the record that subdivision took place and group ranch allotted two parcels of land to the widow of the deceased and another portion to the son by the name SAYIAN OLE MARDADI. The two Nkutoto Mardadi and Sayian passed away leaving their other children who included the following:

Lamo Mardadi

Munteleu Ole Mardadi

Morisiet Ene Mardadi

Yiai Ene Mardadi.

According to the letter by the chief a discussion between the family and group ranch officials agreed to

pass on the property to the surviving sons. The parcels of land referenced LR. KAJIADO/ILDAMAT/312 and 313 were allocated to Munteleu and Lamo respectively.

The evidence provided shows that KAJIADO/ILDAMAT/313 is registered in the name of Lamo Mardadi having been subdivided and new numbers issued. The documents in respect of KAJIADO/ILDAMAT/312 were not annexed to these proceedings.

The first question which begs to answer is whether objections made by the citee for making of grant and citor taking out Letters of Administration should be upheld.

The applicable law on citations proceedings are governed by part VI of the Probate and Administration Rules. The relevant provisions being Rule (21) and (22) 1-7. Under these provisions it is provided that a person may take a citation on any person, who would himself be entitled to a grant. This is in the event of the person cited renouncing his right to apply for grant.

The objections for making of a grant are provided for under Section 67, 68, 69 and 70 of the Laws of Kenya. It is clear from the reply by the citee that he is not interested at all in taking out Letters of Grant Administration to the estate of the deceased.

He has argued before this court that the available property of the deceased was distributed by the group ranch officials in agreement with family members. The citor and chief's letters have particularized the surviving dependants.

The other beneficiaries entitled to on intestacy have filed a replying affidavit to be considered in the distribution. Their beneficial interest is not a matter for this court at this stage.

The law of succession under Section 66 recognizes various class interests to the estate of the deceased. It provides as thus:

“When a deceased has died intestate, the court shall save as preference to be otherwise expressly provided, have a final discretion as to the person given to a certain or persons to whom a grant of Letters of Administration shall, in the best interests of the concerned, be made, best shall, without prejudice to that administer where discretion, accept as a general guide the following order of prejudice – deceased died intestate.

(1) Surviving spouse or spouses, with or without association of other beneficiaries.

(2) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest as provided by part V

(3) The public trustee and

(4) Creditors.”

The applicant in the present case is a son of the deceased. He has intimated his intention to be issued with Letters of Grant of Administration. The citee has objected to the making of the grant in favour of the citor.

His main ground anchored on non-availability of the assets or liabilities to the estate of the deceased. What does the law in Section 34 of the Succession Act provide on free property.

Section 34:

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

Section 3 defines free property the relation to a deceased person as:

“The property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

The initial parcels of land referenced LR KAJIADO/ILDAMAT/312 & 313 were in the names of the deceased persons. During their lifetime they were legal owners of rights and interests over the portions of land subject matter of this application.

The issue to be determined in another forum relates how title was passed to the citor and citee without going through succession proceedings. The property parcel No. KAJIADO/ILDAMAT/313 is registered in the name of the citee. The documents presented to court and annexed show that a subdivision has taken place. The original title deed LR. KAJIADO/ILDAMAT/313 has given rise to two portions.

The disputed title deeds KAJIADO/ILDAMAT/6156 and 6159 are absolutely owned by Lamo Ole Mardadi and Sarinke Lamo Sarinke respectively. The transactions on subdivision and transfer to third parties has definitely altered original title LR KAJIADO/ILDAMAT/313. This brings the court to the second contention in these proceedings whether an order of injunction against the citee to stop alienation of attempted alienation of LR NO. KAJIADO/ILDAMAT/6156 and 6159 is sustainable till the determination of the succession proceedings.

I have carefully considered the rival submissions by counsels and affidavits by applicant and respondent. I make the following observations:

The succession cause is filed against the estate of Nkutoto Ene Sarinke.

The death certificate show deceased died on 17/6/1988.

A certificate of search filed together shows that KAJIADO/ILDAMAT/313 was the registered proprietor on 30/12/94.

The ownership was absolute title.

The Olingarani Group Ranch register bears the names of Lamo – Mardadi Ole Sarinke for parcel No. LR 313.

There are no documents annexed to proof ownership and extent of rights to the deceased. We are not told about the parcel of land originally referenced as KAJIADO/ILDAMAT/312.

It is not known when succession proceedings were filed and determined for the purposes of administration or the part of the applicant. The land subject of this application is registered in the name of the respondent. There is no evidence adduced that the suit land was family land and that the respondent held in trust for the beneficiaries or dependants of the estate.

I agree with the respondent submissions on the principle of indefeasibility of title. Under section 25(1) of the Land Registration Act 2012; once a certificate of title is issued to a person, that person becomes the absolute registered proprietor of the parcel of land with exclusive indefeasibility rights to title and interest.

The respondent referred this court to a number of authorities where the High Court was held a certificate of title is conclusive evidence of proprietorship. See **CHRISTOPHER KITUR KIPWAMBOK VS. VIPULRATILAL DODHIA & 3 OTHERS ELC KLR 65 OF 2013, VICTORIA DISTRIBUTORS VS. JOSEPH ABWAO NYAWIR KLR ELC 222 OF 2015.**

Whether the title deed KAJIADO/ILDAMAT/313 and subsequent subdivision to LR 6156 and 6159 was secured fraudulently or mistake cannot be determined by a probate court at this stage.

As the application stands one has to establish the claim to title KAJIADO/ILDAMAT/313 whether it is

available for distribution before the orders sought would be granted. This issue relating to indefeasibility of title is squarely under the jurisdiction of Environment and Land Court. The provisions of Article 165 (5) of the Constitution restrains this court to trespass into the jurisdiction of court's contemplated in Article 162(2) of the Constitution.

The application for grant of injunctive orders has to be considered in light of the principles. In the case of **GIELLA Vs. CASSMAN BROWN LTD 1923 EA 358**. The applicant must satisfy the court that:

- (1) That he has a prima facie case with a probability of success**
- (2) That he will otherwise suffer irreparable injury which is uncompensatable in damages should the order sought not be granted and**
- (3) If in doubt the court should determine the application on a balance of evidence.”**

It is important to note that injunctions being an equitable remedy, the applicant must approach the court with clean hands. The applicant in this matter has not availed all the material in respect of the suit property and chronology of events how it became to be acquired by the respondent.

The facts and evidence on how the respondent has mismanaged the estate of the deceased. As a matter of fact no Letters of Grant of Administration have been applied for or issued to the respondent. The register from the Olingarani Group Ranch indicates respondent as registered owner. The certificate of title subsequently issued on his own name if the respondent obtained and secured registration of the suit land by fraud as stipulated under Section 76 of the Law of Succession, then he will be intermeddling with the estate of deceased.

The applicant had a duty to present evidence that registered property belonged to the deceased in her own name before issuance of title to the respondent. That evidence was not forthcoming at the affidavit evidence. At the conclusion of this chamber summons and citor hearing these issues remain outstanding

- (a) Whether the suit land before demise of the deceased was registered in her name.**
- (b) Whether the respondent owned the disputed suit property in trust for the dependants and beneficiaries to the deceased estate.**
- (c) Whether the registration of title and subsequently subdivision creating new titles LR 6156 and 6159 from LR. KAJIADO/ILDAMAT/313 was fraudulently obtained.**

In the premises as earlier established this can only be canvassed in proceedings before ELC Court.

The upshot and on consideration of the matters before me. I order as follows:

- (i) The application for injunction fails.**
- (ii) That the Letters of Administration be issued to both the citor and citee to the estate of the deceased.**
- (iii) That in the event the citee declines the citor be at liberty to be issued with Letters of Grant of Administration.**
- (iv) That the said application for grant of Letters be issued within 30 days from today's date.**
- (v) I make no orders as to costs in these proceedings.**

It is so orderd.

Dated, delivered, signed on 8th February, 2016 at Kajiado.

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R. NYAKUNDI

JUDGE

Representation

Mr. Onchiri for Pareno for Applicant

Mr. Larapi for Naikuni for the Respondent present

Mr. Mateli Court Assistant