



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 539 OF 2014
IN THE MATTER OF THE ESTATE OF JULIUS KYALE (DECEASED)
ROSAITA MBITHE KYALEAPPLICANT
VERSUS
JACKSON KIILU MUTISYA.....RESPONDENT
RULING

The Summons

The Applicant is the Petitioner in this succession cause, and was issued with a grant of letter of administration intestate on 15th December 2014 in respect of the estate of the deceased Julius Kyale Kyungu. The Applicant has filed an application by way of summons dated 9th April 2015 pursuant to the provisions of section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules, and is seeking the following orders therein:

- (a) That the agreement made on 8.10.2007 between Justina Waeni Kyale and the Respondent over the sale of parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 to the Respondent be declared null and void.
- (b) That the Respondent be directed to demolish all the houses and structures erected on the said land title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 and vacate from the subject parcel of land within 30 days or any other specified period deemed fit by the court.
- (c) That the Respondent be directed to surrender the original title deed for land title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 to the Petitioner unconditionally within 30 days.

The Applicant in her supporting affidavit sworn on 9th April 2015 averred that that prior to filing the petition herein, the Respondent had filed citation proceedings against her, Justina W. Kyale and Ponciano Kyale in Machakos H.C.S.C. No. 351/2014, with respect to the estate of the deceased. The Petitioner annexed a copy of the said citation. Further, that the Respondent in the said citation alleged that he had entered into an agreement dated 8.10.2007 with the Justina W. Kyale for the purchase of the parcel of land known as title no. ATHI RIVER/ATHIRIVER BLOCK 5/133 which comprises the estate of the deceased. He sought to compel the citees to obtain grant of letters of administration in respect of the estate of the deceased so as to facilitate the eventual transmission of the said property to himself.

The Respondent pursuant to the said sale transaction took possession of the subject parcel of land and constructed a permanent stone house and other structures thereon, and the Petitioner states that on

28/1/2015 she issued him with notice requiring him to demolish the permanent houses and remove all other structures thereon, and vacate from the subject parcel of land. However, that the Respondent in response indicated that he was not willing to demolish the permanent house and vacate from the subject land parcel.

The Petitioner contends that the sale transaction was unlawful and enforceable in law by operation of the Law of Succession Act, as it was made on 8/10/2007 after the deceased's death on 20/5/2006, and that the Respondent's actions of occupation, construction and continued stay on the subject parcel of land constitutes the offence of intermeddling with the estate of the deceased. Further, that she had been informed by Justina Waeni Kyale who is the wife/widow of the deceased, that the subject title deed is in the possession of the Respondent, who ought to surrender the same to the Petitioner who as the administrator of the estate is entitled to the custody of all the property documents relating to the estate of the deceased.

The Response

The Respondent filed a replying affidavit sworn on 20th July 2015 in opposition to the Applicant's application. The Respondent stated that he cannot be compelled to surrender the original title deed for the land title No. ATHI RIVER /ATHIRIVER BLOCK 5/133 because he is the sole purchaser of the said land parcel. Further, that the sale agreement between him and the Petitioner's mother is valid and has to be acknowledged. He stated that evicting him will subject him to physical and emotional torture as he has developed the said land, and he annexed copies of photographs of the permanent houses and crops he has put on the said land.

It is also the Respondent's contention that the said grant was obtained fraudulently by the concealment of a material fact that the deceased's wife who is the Petitioner's mother, Justina Waeni Kyale had sold a portion of the land making up the estate of the deceased to the Respondent, which fact the Petitioner was aware of at the time of petitioning for the grant of the letters of administration intestate and also while fixing this application for hearing.

The Submissions

The parties were directed by the Court to file and serve submissions on the Applicant's summons. The submissions by the Applicant's counsel Nduva Kitonga & Company Advocates are dated 25th November 2015. It is argued therein that it is not disputed that the subject land is registered in the name of the deceased; that the Respondent purchased the same on 8/10/2007 after the demise of the deceased; that the original title deed is in the custody of the Respondent; that the Respondent is in occupation and use of the subject land; and that the grant made to the Petitioner in this matter is yet to be confirmed.

It was further submitted that section 45(1) and 82(B) (II) of the Law of Succession Act prohibits the sale of any immovable property before confirmation of a grant, and therefore that the sale transaction involving the Respondent was unlawful. Various judicial authorities were relied on in this regard by the Applicant including Machakos High Court Succession Cause No 164 of 2006, Machakos High Court Succession Cause No 403 of 2003, Machakos High Court Succession Cause No 503 of 2006, and Machakos High Court ELC No 276 of 2010.

The Respondent's counsel, J. M. Muinde & Company Advocates, filed submissions dated 11th December 2015, wherein he argued that the issues raised by the Petitioner can only be competently adjudicated in an ordinary civil suit and not in these succession proceedings. It was argued that Article 40 of the Constitution protects the right to acquire property, and that under section 28 of the Land Registration Act all registered land is subject to overriding interests. It was contended that the Respondent has such an overriding interest, as the Petitioner's family received the purchase price for the subject land and allowed him to be in possession of and develop the same.

It was also submitted that the Petitioner's family has for the same reason not come to Court with clean hands and reliance was placed on the decision in **Francis Musyoki Kilonzo & Another vs Vincent**

Mutua Mutiso (2013) e KLR in this regard.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the mandatory injunction orders sought herein are available to the Applicant. The sections of the law relied on by the Applicant in this regard is section 47 of the Law of Succession Act, which gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. The Applicant also relied on Rule 49 of the Probate and Administration Rules which states that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit.

These provisions give wide discretion to the Court as to the orders it can make, however the Court is still obliged to observe settled principles of law and equity that may be applicable. In the present application the orders sought are in the nature of final orders seeking the Respondent to undertake or refrain from undertaking certain actions. They are essentially therefore orders for mandatory injunctions.

The principles that are applicable for the grant of such mandatory injunctions were set out by the Court of Appeal in Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109, wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Applying these principles to the instant application, it is not disputed that the Applicant is the Administrator of the estate of the deceased Julius Kyale Kyungu. The grant of letters of administration was issued to the Applicant on 15th December 2014. It is also not disputed that the deceased died on 20th May 2006, and that the property known as No. ATHI RIVER/ATHI RIVER BLOCK 5/133 is alleged to have been sold to the Respondent by way of a sale agreement he entered with Justina Kyale dated 8th October 2007 which was produced as evidence.

I have perused the said agreement that was annexed by both the Applicant and Respondent, and note that the Respondent purchased a property from Justina Waeni Kyale for Kshs 200,000/=. The said agreement however does not give the details of the property is the subject of the sale, which is described by Justina Waeni Kyale in Kikamba language as translated into English language as “my shamba which is at Lukenya”. However, the Respondent claims that the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 is the subject of the said agreement, and states that he cannot be compelled to release the original title thereto which is in his possession.

I also note in this regard that copies of the title to No. ATHI RIVER/ATHI RIVER BLOCK 5/133 on the court record and official search certificates that was attached by the Applicant show that the said land is registered in the name of the deceased Julius Kyale Kyungu.

I am mindful that the law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant

has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant. The Respondent did not bring any evidence to show that the said Justina Waeni Kyale with whom he entered into a sale agreement had a confirmed grant of representation with respect to the Deceased's estate at the time of the alleged sale of the land on 8th October 2007. In addition the grant issued to the Applicant on 15th December 2014 is yet to be confirmed and was issued after the said sale.

There is therefore no possibility of the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 being legally sold to the Respondent either by the said Justina Kyale or the Applicant on 8th October 2007. Any purported sale of the said land on the said date is thus of no legal effect, and the said property therefore still forms part of the estate of the deceased Julius Kyale Kyungu. Furthermore, this legal defect is incurable and the Applicant has therefore not only shown a *prima facie* case, but also a clear case which merits the appropriate final orders at this stage.

An additional provision of the law that supports this position is section 45 of the Law of Succession Act, the operative law when seeking to stop intermeddling with a deceased's estate, and which provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

These findings notwithstanding, this Court notes that the grant issued to the Applicant is yet to be confirmed. There is thus still a possibility of accommodating the Respondent after confirmation of the said grant, and it may be premature to grant the orders sought by the Applicant for demolition of the permanent house and structures erected on title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 by the Respondent at this stage. In addition, in the interests of justice and equity, there is need to avail the Respondent appropriate notice to remove his moveable structure and crops from the said property.

Arising from the foregoing, I accordingly order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. That the agreement made on 8th October 2007 between Justina Waeni Kyale and the Respondent in so far as it relates to the sale of the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 is hereby declared null and void.
2. That the Respondent shall vacate the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 within 90 days of the date of this ruling, failing which eviction orders shall issue.
3. That the Respondent shall forthwith surrender the original title deed for land title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 to the Petitioner herein within 30 days of the date of this ruling.
4. That the prayers seeking orders of demolition of all the houses and structures erected by the Respondent on the parcel of land known as title No. ATHI RIVER/ATHI RIVER BLOCK 5/133 are hereby denied.
5. Each party shall meet their respective costs of the Applicant's summons dated 9th April 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 9th day of February 2016.

P. NYAMWEYA

JUDGE