



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 255 OF 2004

In the matter of the Estate of SAMUEL NDWIGA M'THARA (Deceased)

FREDRICK NJIRU NDWIGA.....PETITIONER/APPLICANT

V E R S U S

JUSTUS NYAGA NDWIGA.....RESPONDENT

R U L I N G

1. This is a ruling on two applications which the parties agreed to dispose of by way of written submissions. The first one is the application dated 16/9/2015 brought by the petitioner/applicant Fredrick Njiru Ndwiga seeking that the court be pleased to review, vacate, set aside, remove LR. No. Ngandori/Kiriari/4008 from the amended grant dated 19/5/2015. The application is supported by the applicant's affidavit.

2. The applicant states that as the administrator of their father's estate distributed land to his brothers who were beneficiaries. This included Ngandori/Kiriari/4008 which was registered in the respondent's name. In the year 2000 the respondent offered to sell the said land to the applicant which the applicant accepted. The Land Control Board gave a consent for the transfer and the applicant was given a title deed. The applicant paid consideration for the same and took possession. He planted 300 stems of coffee and tea which he has been harvesting.

3. The applicant stated that during the confirmation of the grant, the suit land was erroneously included in the property due for distribution. He urges the court to order that the grant should be amended and the land returned to him. In the review, the court should re-transfer to him the land which measures the land 0.185 Ha. in paragraph 7 from Ngandori /Kiriari/1222 which is what the respondent sold to him.

4. The respondent in the replying affidavit to the first application stated that the motion incompetent as the applicant cannot move the court by way of notice of motion in a succession cause. He further states that the amended certificate of grant dated 19/5/2015 does not include Ngandori/Kiriari/4008. The respondent has never sold his inheritance to the applicant and no agreement has been attached to prove the sale. The certificate of confirmation of grant dated 19/5/15 was issued after the application by the applicant and therefore the applicant cannot alleged that the respondent is not entitled to a share in the original parcel LR. No. Ngandori/Kiriari/1222.

5. The applicant on 26/8/2015 signed RL No. 7 for transfer of land parcel Ngandori/Kiriari/4008 from himself as the legal representative to the respondent as the person entitled but later refused to release the title. The applicant has been attempting to alter the amended certificate of grant dated 19/5/2015 which

has resulted to a dispute before the Sub County Commissioner Manyatta Division who directed him to implement the grant without altering it and thereafter pursue any personal claim which he may have against the beneficiaries.

6. The second application brought by the Respondent Justin Nyaga Ndwiga and is dated 1/10/2015. It seeks for orders seeking that the Deputy Registrar be authorized to execute all necessary transmission documents for the transfer of parcel Ngandori/Kiriari/4008 to the applicant in place of the respondent. The applicant also seeks that the land registrar dispenses with production of the respondent's national identity card, PIN certificate, passport and the title deed issued to the respondent in registering the transmission.

7. In the supporting affidavit sworn by Justus Nyaga Ndwiga, it is stated that he was awarded three portions of land in the amended certificate of confirmation of grant dated 19/5/2015. LR. No. Ngandori/Kiriari/1222 which was one of the deceased's assets was subdivided into several portions. It was agreed that the respondent/applicant was to get parcel Ngandori/Kiriari/4008 measuring 0.185 Ha. after sub-division. The administrator/respondent has failed to complete the transmission into the applicant's name despite receiving numerous demands by registration of form RL7 and 19. The administrator has failed in his duties of executing the grant.

8. The petitioner/applicant did not file a replying affidavit to this application of the respondent.

9. The petitioner/applicant in his submissions stated that after the death of their father the respondent was given Ngandori/Kiriari/4008 after the death of their father. Thereafter the respondent sold the said parcel of land to the applicant. The respondent then applied to the Land Control Board to transfer the said land to the petitioner/applicant. The consent was granted on 15/11/2000 and letter of consent dated 8/11/2000 annexed to the application.

10. The petitioner further states that the respondent sold the suit land to him after distribution in the succession matter. This is the reason why the family members met and agreed to adjust the sizes of the land. The suit land was erroneously included after the boundary correction agreement reached by the family where the land was minuted as having been given to the respondent. He adds that it is clear from the green card that the applicant signed Form LR 7 to transfer the land to the respondent.

11. It is further argued that distribution would not have been possible without the applicant signing LR 7. The Land Board application form shows that the intended transfer was by way of sale. The petitioner/applicant has been occupying the suit land since the year 2000 and is the absolute owner as the title deed is in his name.

12. The respondent in his submissions stated that the application dated 16/9/2015 is misconceived as Ngandori/ Kiriari/4008 is not listed in the list of deceased's assets. It was not also listed in the amended certificate of confirmation dated 19/5/2015. The amended certificate included only three parcels of land namely Mbeti/Kiamuringa/7, Ngandori/Kiriari/1222 and Mbeti/ Kiamuringa/2138. There is therefore nothing to be amended in the certificate. Ngandori/Kiriari/ 4008 is a resultant parcel from the subdivision of Ngandori/ Kiriari/1222 as indicated in the certificate of confirmation of grant dated 19/5/2015.

13. The application dated 1/10/2015 seeks to have the court authorize the Deputy Registrar to sign all necessary documents to facilitate the transfer of Ngandori/Kiriari/ 4008 to the petitioner/applicant. The respondent submitted that the respondent submitted land was registered in the petitioner's name because he was the personal representative of the estate. He then proceeded to obtain a title in his name yet the title was held by him pursuant to the registration of LR 19 (application to be registered as a proprietor by transmission). The petitioner is under a duty to complete the transmission process by registering RL 7 (transfer by personal representative to person entitled under a will or interest).

14. It was further agreed that the application dated 1/10/2015 should be allowed so that the DR can sign RL 7 in place of the applicant herein. If the petitioner has a claim in Ngandori/Kiriari/4008 he should first transmit ownership to the respondent then file a claim against him in the ELC court.

15. The respondent raised issues in the manner in which the application dated 16/10/2015 is brought, by way of notice of motion instead of by way of summons general as provided by the Law of Succession Act and Rules. In this regard, Article 159(2) of the Constitution is the saving provision in that it calls on courts not to pay undue regard to procedural technicalities. The court should focus on the substance rather than in form of any pleading. I find no basis in this argument on procedure and hold that the application is properly before the court.

16. The applicant alleges that the said parcel of land was erroneously included in the list of property for distribution as it belonged to him having brought it from the respondent.

17. In the supporting affidavit he has attached a copy of the Land Control Board application form and a letter of consent. This shows that the respondent applied for transfer of LR. Ngandori/Kiriari/4008 to the applicant by way of sale in favour of the respondent and that the board gave consent of transfer. The applicant also annexed a title deed issued on 22/7/2015 showing that he is the registered owner of Ngandori/Kiriari/4008.

18. It is not in dispute that Ngandori/Kiriari/4008 resulted from the sub-division of the original parcel Ngandori/Kiriari/1222 which was one of the assets of the deceased.

19. There is no title deed or even a copy of official search in the court record indicating that the respondent was ever registered as the registered owner of Ngandori/Kiriari/4008 as alleged by the applicant. The copy of the title produced by the applicant shows that the name of the applicant was presented to the land office in the year 2000 and the title issued on 22/7/2015 which was 15 years later. The succession cause was filed in 1998 in the Principal Magistrate's court and transferred to High Court in 2004.

20. The applicant is the administrator of the estate of the deceased and he had the upper hand in dealing with the land's office. At the time the title was issued, the succession process was on going. The amended grant was only issued on 19th May, 2015.

21. The grant was rectified or re-issued on 7/3/2001 as shown by the record. A further rectification was done to correct the acreage of the beneficiaries shares in LR. No. Ngandori/Kiriari/1222 which was found to be smaller on the ground than the acreage captured in the title deed and reflected in the original grant issued on 19/10/1999.

22. It is important to note that the amended grant distributes only three parcels of land to the beneficiaries namely Mbeti/Kiamuringa/7, Mbeti/Kiamuringa/2138 and Ngandori/ Kiriari/1222. The disputed parcel Ngandori/Kiriari/4008 resulted from sub-division of LR. Ngandori/Kiriari/1222. It is the share of the respondent Justus Nyaga Ndwiga in this parcel No. LR. No.1222. Other beneficiaries have their shares across the board in the three assets of the deceased as shown in the grant. There has not been any dispute in the family as to the entitlement of the respondent.

23. The respondent is said to have sold his share to the petitioner/applicant before the succession case was concluded. The respondent's share had been identified in the original grant issued in 1999. The Land Board application form and letter of consent were processed in the year 2000. This grant was later rectified in 2015 for correction of acreage of LR. 1222. The amended grant did not affect the shares of the beneficiaries in LR. Mbeti/ Kiamuringa/7 and Mbeti/Kiamuringa/2138. The amended grant is what represents the final determination of this succession cause.

24. However, the grant does not include LR. No. Ngandori/Kiriari/4008. The title deed issued to the petitioner in 2015 is subject to interrogation by another court and so are the consent documents and the sale agreement. The applicant claims he occupies the land LR. 4008 and has extensively developed it. The applicant should pursue his claim in the Environment and Land Court. As for the succession cause, the grant rectified in 2015 is valid and shall guide the Lands office in execution of the grant.

25. It is my finding that the application dated 16/9/2015 to amend, review or vacate or set aside LR. No.

4008 from the amended grant is misconceived and must fail.

26. As for the second application, the respondent seeks for orders for execution of the grant in respect of parcel No.LR. 4008 which is already registered in the name of the petitioner. The respondent alleges that the land was registered in his name on 26/08/2015 through execution of grant by the petitioner and that the petitioner refused to release the title. The respondent did not attach any document to show that the land was ever registered in his name.

27. It is not in dispute that the grant has been partly executed in that all the other beneficiaries have received their shares by way of transmission. The respective shares are in the names of the beneficiaries. It is only the respondent who is yet to receive his share for it is disputed as between him and the petitioner.

28. If I was to grant the orders sought in the respondent's application, it would be in vain since the parcel LR.4008 is already registered in the name of the petitioner. It is trite law that a court will not issue orders in vain. The respondent would only get his share in LR. Ngandori/Kiriari/1222 after cancellation of the existent title. This court has no powers to cancel title or to resolve disputes of land ownership.

29. The parties herein must resolve the existing dispute in the relevant court before the orders sought herein are considered.

30. The application dated 1/10/2015 also fails.

31. The two applications herein are accordingly dismissed. Each party to meet their own costs of this application.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF APRIL, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Muriuki for P.N. Mugo for Applicant/Administrator

Respondent present in person