



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
SUCCESSION CAUSE NO. 347 OF 2013

IN THE MATTER OF THE ESTATE OF NDEGWA WARUI (DECEASED)

AND

MICHAEL MUTHIKE NDEGWA.....PETITIONER/APPLICANT

AND

BARNABAS NDONGA.....1ST INTERESTED PARTY

ANN NYAGUTHII.....2ND INTERESTED PARTY

JOHN KAMAU.....3RD INTERESTED PARTY

C.W.A. MWEA CATHOLIC PARISH.....4TH INTERESTED PARTY

RULING

1. Michael Muthike Ndegwa, the petitioner/applicant herein has moved this court through summons dated 17th May, 2011 and headed amendment and rectification of the schedule of assets has sought for the following orders under **Section 47, 94** and **95** of the **Law of Succession Act** and rule 49 of the Law of Succession rules:

i. That that property known as L.R. MWEA/TEBERE/B/199 belonged to Ndegwa Warui the deceased herein as at the time of his death (2nd March, 1989) and that the same forms part and parcel of his estate.

ii. A declaration that the subdivision of L.R. MWEA/TEBERE/B/199 by Alfred Warui Ndegwa and the subsequent transfer of the parcels into his own name on 25th May, 1993 without the knowledge of the family members and without a Grant of Letters of Administration of the estate of Ndegwa Warui was null and void.

iii. That the Kirinyaga District Land Registrar be and is hereby ordered to rectify the land Register in respect of L.R. MWEA/TEBERE/B/199 to reflect the name of Ndegwa Warui as the rightful registered proprietor and a title deed in his name be issued forthwith.

iv. That the applicant herein be granted leave to amend the schedule of assets in the petition herein to include the property MWEA/TEBERE/B/199 as part of the estate of the late Ndegwa Warui.

v. Costs of the application.

2. The grounds upon which the application is made as listed on the said application are that the property known as **MWEA/TEBERE/B/199** (and hereinafter to be referred to as the disputed parcel for ease of reference) belonged to the deceased prior to his death on 2nd March, 1989 and that Alfred Warui Ndegwa transferred it to himself and subdivided it illegally and/or irregularly without first obtaining letters of administration.

3. When the matter was brought to this Court the court directed that Alfred Warui Ndegwa and all the parties who had purchased some interests on the disputed parcel be served and 14 parties entered appearance claiming purchaser's interests on the disputed parcel with some claiming that they had already obtained either titles or letters of allotment in respect to resultant parcels that arose out of the subdivision carried out by Alfred Warui Ndegwa – the first interested party in this application.

4. This Court gave directions on the mode of disposal of the application that the same be disposed of by way of oral evidence. The petitioner herein gave evidence and called the Land Registrar and the District Surveyor as witnesses in support of his application and it was at the close of the petitioner's case that questions arose from this court as to whether this Court was properly seized with the jurisdiction to entertain the matter and determine it given the circumstances which clearly indicated that the disputed parcel ceased to exist in 1993 upon sub division into land parcels Nos. 600, 601, 602, 603 and 604 some of which (Plot Nos. 600 and 603) had since been further sub divided and transferred to other third parties named as interested parties herein. The issue at hand then was whether without going further into details this Court could properly be called upon to:

- i. Declare that all sub divisions carried out in regard to parent parcel in dispute were null and void.
- ii. Cancel all the resultant title deeds and restore the disputed parcel back to the name of the deceased for purposes of distribution in accordance with the Law of succession Act.

5. Mr. Muindi for the petitioner contended that this Court is seized with the jurisdiction to grant the reliefs sought. In his view there was no dispute that the late Ndegwa Warui died on 2nd March, 1989 as per the death certificate exhibited in this Court and that he left behind 3 properties as follows:

- i. The disputed parcel.
- ii. Kirinyaga/Kathigiriri/300.
- iii. Mwea/Mwarurumo/90

It is his contention that at the time of his death, the 3 named assets were all registered in his name and as per Section 2 of the Law of succession Act (Cap 160) any dealings on the property belonging to a deceased person should be in accordance with the Law of Succession Act and hence the reason why he felt this Court is the right court to deal with the reliefs sought.

6. It is further contended that as per Section 3 of Law of Succession Act the listed assets all fitted the description assigned by the law and that as per Section 47 of the Law of Succession Act this Court is empowered to entertain this matter and grant the reliefs sought in this application as the parcel in dispute belongs to the deceased person according to him. His contention was that the reference of ownership should be at the time of his death rather than at the time the petition was filed in 1999 by which time the property comprising the parcel in dispute had changed hands. Mr. Muindi agreed with Mr. Cosmas Mugo another interested party in this application that the act of sub division by Alfred Warui Ndegwa amounted to intermeddling of an estate of deceased person which is a crime punishable in law. This they argued showed that this Court is seized with the jurisdiction to entertain the matter. It is contended that this Court should interrogate the time when the intermeddling began and in their view the intermeddling started in 1993. They urged this Court to find that it has jurisdiction to make a finding on the intermeddling and order restitution of the disputed parcel back to the deceased person.

7. The Applicant is further contending that under **Section 47** of the **Law of Succession Act** this Court is empowered to entertain any matter that touches on the property of a deceased person and in his view the disputed parcel comprised the properties belonging to Ndegwa Warui the deceased in this cause.

8. Mr. Muchiri, learned counsel appearing for the 2nd, 5th, 7th, 8th and 9th interested parties contends that the reference point in terms of ownership of the dispute parcel should be in 1999 when the petition for letters of administration for the estate of Ndegwa Warui (deceased) was filed. In his view the petitioner left out the disputed parcel in the list of assets belonging to the deceased for good reason and the reason in his view was that the disputed parcel did not form part of the estate in the petition. It is contended that whatever happened to disputed parcel in 1993 should be a subject of civil suit separate from the cause in the petition herein. Mr. Muchiri opined that the administrator should sue whoever wronged the estate in a civil court arguing that when the petition for letters of administration in this cause was presented, the interested parties had already acquired interests on the disputed parcel.

9. It is further contended that there is a danger in proceedings to entertain this matter in view of the findings made vide civil suit No. 123 of 2009 which in his view dealt with the issues in this matter.

10. It is also contended that under **Article 162** of the **Constitution** land matters are vested in Environment and Land Court and that issues to do with ownership and compulsory acquisition which have featured in the application are addressed under **Section 13** of **Environment and Land Court Act** which was enacted by Parliament to empower Environment and Land Court to hear and determine such disputes. Mr. Muchiri argued that as at 1999, the disputed parcel was not there and that the administrator should sue whoever took it away in a proper court seized with the requisite jurisdiction which in his view is the Environment and Land Court. He contended that this Court's powers under **Section 47** of the **Law of Succession Act** is restricted to **Law of Succession Act** and that this Court can only pronounce itself only on matters relating to properties or assets belonging to a deceased person and specifically properties registered in the name of a deceased person.

11. Mr. Ndege learned counsel for the 6th interested party associated himself to Mr. Muchiri's submissions and wondered why it took more than 30 years for the Applicant to make the present application. He faulted him for indolence contending that equity does not aid the indolent. He further added that the disputed parcel as described does not exist and wondered how this Court was being asked to give what was not there.

12. Mr. Ali learned counsel for Ismael Bakiti the 3rd interested party also associated himself with the sentiments expressed by Mr. Muchiri and sought to distinguish the authority cited by the Applicant (Simiyu -Vs-Wabala [1985] eKLR) with this case stating that the Court of Appeal's decision in the cited case was based on the fact that a consent from Land Control Board had not been sought which was different issue with what is at hand herein. Mr. Ali submitted that they had filed a preliminary objection to the application herein where he had contended that the suit property was non existent and did not form part of the estate in this cause. He also contended that the issue in his view had been dealt with by Justice Wanjiru where a finding was made to the effect that the disputed parcel was no longer in existence and drew this Court's attention to the ruling of the Hon. Judge (as she then was) dated 22nd June, 2010. Mr. Ali contended that the Applicant ought to have moved the Court vide **form 86** pursuant to **rules 7** and **12** of **Probate and Administration Rules**. He further opined that the petitioner should have sought damages under **Section 82** of the **Law of Succession Act** if he felt aggrieved. It is further contended that the interested parties have a right to object to the administration of an estate if the administration will affect their rights envisaged under **Article 64** of the **Constitution**.

13. The 3rd interested party further contends that this Court lacks jurisdiction to entertain the dispute because the interested parties hold titles to the disputed parcel and that Environment and Land Court is properly vested with the jurisdiction to entertain and determine the dispute.

14. Mr. Gitonga learned counsel for the 7th and 12th interested parties (Barnabas Ndonga and Registered Trustees of the Catholic Dioceses of Muranga) associated himself with the submissions made by Mr.

Muchiri Ndege and Mr. Ali and added that this Court lacks jurisdiction to entertain the application in its current form because the issues before court were issues to do with titles to land and that the only court mandated to deal with the dispute is Environment and Land Court.

15. Mr. Gitonga further contends that the jurisdiction of this Court under **Section 47 of Law of Succession Act** falls on intestate and testamentary estates of deceased persons as per **Law of Succession Act**. It is argued that this Court is not mandated to dig deeper into the issues of ownership or title to land. In his view the petitioner should have filed a case before an Environment and Land Court and if that court finds that the property formed part of the estate, he would then move this Court to distribute it or amend the list of assets as sought in the application.

16. Mr. Gitonga faulted the Applicant for looking for loopholes to get back the disputed parcel submitting that a civil court had already determined that the disputed parcel was not available for distribution. He also drew the Court's attention to a finding made by Court through a criminal revision over the same issue.

17. Mr. Gitonga contended that the disputed parcel was sold by a personal representative at a time he had letters of administration to deal with the estate of the late Ndegwa Warui and urged this Court to dismiss the application on both grounds of jurisdiction and *res judicata*.

18. I have considered the two points of law that have arisen in this matter which made it necessary at a preliminary stage to make a finding on them before determining whether it is necessary to proceed with the matter or not. In view of the fact that the two issues namely:-

i. Jurisdiction of this Court to entertain the application dated 17th May, 2011; and

ii. Whether the issues raised in the application have been canvassed before and a decision rendered over the same rendering the application dated 17th May, 2011 *res judicata*; are points of law this Court will as much as possible restrict itself to the points of law. Besides that it would be unfair to interrogate the facts since the court has only heard the Applicant's side with the other parties yet to give their side of the case. It is proper and imperative therefore not to delve on the merits of the application at this stage as doing so would not only be premature but unfair as well as all the parties in the application deserve a chance to be heard.

19. I must state from the onset that the two issues of law that cropped up have caused this Court quite some anxiety because of the complexity of the circumstances obtaining in this cause. A cursory look at the facts of this application in regard to the jurisdiction of this court to entertain it may appear simple and clear but a deeper examination of the same presents problematic legal questions which this Court has been called upon to determine.

20. The petition in this cause is in relation to the estate of the late Ndegwa Warui who died on 2nd of march, 1989 domiciled in Ndindiruku/Kiarukungu within Kirinyaga County. He died leaving behind six (6) children as dependants namely:

i. Alfred Warui

ii. Michael Muthike

iii. Joseph Karuga

iv. Simon Ndambiri

v. Margaret Wanjiku (now deceased)

vi. John Guciru; and

vii. Stephen Ngige

21. The uncontested facts are that at the time of his death, he left behind the following properties that then comprised the estate

i. Kirinyaga/Mwarurumo/90

ii. Kirinyaga/Gathigiriri/300; and

iii. Mwea/Tebere/B/199

22. The evidence adduced so far indicates that sometime in 1993 and the 25th May, 1993 to be specific, Alfred Warui Ndegwa, the first son to the deceased caused the property or the parcel in dispute to be transferred to his name and immediately thereafter caused the property to be sub divided into 5 parcels to wit, **Mwea/Tebere (B)/600, 601, 602, 603 and 604**. It is alleged that the said Alfred Warui Ndegwa then disposed of some of the resultant parcels to 3rd parties who are variously described as interested parties in this application. The interested parties then took possession and started developments on their respective plots whose details I do not find it necessary to go into at this stage.

23. The Applicant/petitioner is contending that Alfred Warui Ndegwa who is wrongly described in this application as the interested party (He should be a respondent in the application because he is the cause of all the mess in this cause) irregularly and fraudulently transferred the property belonging to the deceased without involving other family members and without first obtaining the letters of administration. The Applicant has therefore challenged the legality of the transfer and the subsequent sub division and wants this court to annul it and reverse the transaction.

24. On the other hand the interested parties save for Mr. Cosmas Mugo the 14th interested party contend that they properly obtained ownership of their respective parcels and that in any event, issues or disputes to do with title to land can only be entertained and determined by the Environment and Land Court pursuant to **Article 162 (2)** of the **Constitution and Environment and Land Court Act** (Cap 12A Laws of Kenya) which vest the said court with the requisite jurisdiction to deal with the issue and that this Court is not clothed with the said jurisdiction. It is true that **Article 162 (2)** of the **Constitution 2010** establishes specialized courts operationalized through legislation (Environment and Land Court Act Cap. 12A Laws of Kenya) that set up Environment and Land Court to specifically deal with disputes relating to the environment and the use and occupation of and title to land. On the basis of this, the interested parties save for Cosmas Mugo have urged this Court to find that this Court lacks jurisdiction to dig deeper into ownership disputes over the disputed parcel. That in my considered view presents a simple question on the face of it.

25. But Mr. Cosmas Mugo raised what I consider a legitimate question which is in regard to the actions of Alfred Warui Ndegwa. He contended that Mr. Alfred Warui Ndegwa intermeddled with the estate and breached **Section 45** of the **Law of Succession Act** by purporting to deal with the property of a deceased person without authority. The Applicant through Mr. Muindi added more weight to this assertion by pointing out that the disputed parcel formed part of the “free property” of the deceased person herein as described under **Section 3** of **Law of Succession Act**.

Section 3 of the **Law of Succession Act** on the relevant part defines free property as follows:

“In relation to a deceased person, means 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”.

Section 2 (1) of the Law of Succession Act provides as follows:

“Except as otherwise expressly provided in this Act or any other written law the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all

cases of intestate and testamentary succession to the estate of deceased persons dying after commencement of this Act and to the administration of estates of those persons”.

My reading of the above sections clearly show that this Court is competent to interrogate and entertain this matter in order to determine whether or not the disputed parcel comprised “free property” as defined under the cited section. My finding is anchored on the provisions of **Section 45 (1)** and **47** of the **Law of Succession Act (Cap. 160)**. **Section 45 (1)** provides as follows:-

“Except so far as expressly authorized by this Act, or by any written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person” (emphasis added)

This Court in my considered view is the proper court seized with the jurisdiction to determine whether the actions by Alfred Warui Ndegwa on 25th May, 1993 in transferring the property to himself and subdividing and/or disposing it were;

- i. Expressly authorized by the Law of Succession Act or any other written law; or whether
- ii. The actions amounted to intermeddling with the property of a deceased person.

The provisions of Section 47 of the Law of Succession Act is clear on jurisdiction. It provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

26. I have considered the issues in controversy in this cause and it revolves around the action taken by one beneficiary in exclusion of the other beneficiaries and further on the allegations that he acted on the estate of the deceased in this cause without letters of administration. If the dispute exclusively involved 3rd parties and the deceased or his personal representative over ownership or title to any property forming the estate in this cause, then, I could have been persuaded that the jurisdiction to deal with the matter or the dispute squarely lay with the Environment and Land Court but in this instance, the Applicant is accusing his elder brother of an illegality and impropriety in dealing with the property belonging to their late father. Mr. Gitonga for the 2nd and 6th interested party contends that Alfred Warui Ndegwa acted in accordance with the law because in his view he had letters of administration. That in my view is a matter of evidence to be interrogated further at the hearing of this matter and so at this stage I will not make any finding on the merits or otherwise of such assertions for the reasons aforesaid.

27. Mr. Ndege did submit that the disputed parcel is no longer available for distribution because the evidence adduced indicates that the property ceased to exist and therefore the Applicant cannot ask to be given what was not there. This contention in my view touches on the merits of the application which as I have stated above cannot be subject of this ruling at this preliminary stage. That issue shall be considered when all the parties have been given an opportunity to be heard. Mr. Muchiri urged this Court to find that when Alfred Warui Ndegwa petitioned for letters of administration in Senior Resident Magistrate’s Court No. 2 of 1999, the disputed parcel had ceased to exist but I agree with Mr. Muindi that the point of reference in so far as the jurisdiction of this Court to entertain this matter is concerned is 1993 when Alfred Warui Ndegwa is purported to have intermeddled with the property of a deceased person.

28. Now I will address the 2nd point raised by Mr. Ali and Mr. Gitonga Advocates which was that the issues raised by the application herein are *res judicata* as a court of competent jurisdiction have already rendered a decision over the same. I have considered the ruling delivered by Hon. Justice (as she then was) Wanjiru Karanja dated 22nd June, 2010 vide Embu High Court Civil Suit No. 123 of 2009 and noted that the hon. judge made a finding on the capacity or *locus standi* of the plaintiff in the suit as well as whether the suit was time barred by operation of Section 3 (1) of the Limitations of Actions Act. Those

issues in my view are not the issues raised in the application dated 17th May, 2011 now before court. This Court cannot therefore say at this stage that the application before court is *res judicata*. I further, do not agree with Cosmas Mugo that the doctrine of *res judicata* does not apply in succession matters because it does apply. It is a universal principle of law that litigation must come to end.

29. I have also looked at the decision of the court in Embu High Court Misc. Criminal application No. 22 of 2010 and find that the court was clearly dealing with a revision of a decision of a criminal court that had acted beyond its criminal jurisdiction to issue civil orders of cancelling titles. Although the judge mentioned that cancellation of titles was illegal, unlawful, null and void, the same was done in a different context. The decision was not based on a civil action brought by the parties herein therefore *res judicata* cannot apply. The other issue raised by Ali about how the Applicant should have moved this Court under **rules 7 and 12 Probate and Administration Rules** is an issue that touches on the merits of the application which as I have said can be addressed a later stage after hearing all the parties in this application

30. The long and short of this is that this Court finds that the Law of Succession Act recognizes the issues raised by this application and vests jurisdiction to this Court to entertain and deal with the same. I therefore find that this Court is properly seized with the requisite jurisdiction to continue entertaining the matter and thereafter render a decision on the same. I rule that the matter shall continue for further hearing of the interested parties' cases. That is the finding of this Court and it is so directed.

Dated and delivered at Kerugoya this 7th day of September, 2016.

R. K. LIMO

JUDGE