



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 197 OF 1997

In the Matter of the Estate of M' Twerandu M' Irungu (Deceased)

RUKARIA M' TWERANDU.....PETITIONER

-VS-

LEONARD KIMEU MWANTHI.....OBJECTOR

RULING

Rectification of Land Register

[1] By Summons dated 10th December 2010, brought under Rule 73 and 46 of the Probate and Administration Rules and Section 47 of the Law of Succession Act and Section 1A and 1B of the Civil Procedure Act the Petitioner has sought the following orders:

1.spent

2. That this court be pleased to order that the register in respect of LR NO. Ntima/Igoki/3183 be rectified to reflect only the names of the deceased M' Twerandu M' Iriungu to enable the estate to be finally distributed to its lawful dependants.

3. The court do order that production of title deed be dispensed with.

4. The court do issue such further orders for ends of justice.

5. That costs be provided for.

[2] The said application is premised on the following grounds:

1. The applicant was issued with a certificate of search at the time of filling this cause and which clearly showed the names of the deceased only.

2. The estate was later distributed as per the certificate of grant issued on 12th June 1998.

3. The respondent later filed an application dated 6th July 1998 for revocation of grant which was dismissed on 4th July 2002.

4. In the application dated 6th July 1998 the respondent introduced another green card which showed that he owned the land jointly with the deceased.

5. The ruling of the court dated 4th July 2002 while dismissing respondent's application dated 6th July 1998 did place inhibition orders and allowed respondent to bring a claim against the estate.
6. In obedience to the ruling of 4th July 2002 the respondent filed Meru CMCC NO. 119 of 2003 against the administrator alleging that he had shares but the suit was dismissed on 29th July 2010.
7. The applicant after the lower courts judgment and this courts latest ruling of 19th November 2011 went to land offices to effect the certificate of grant but was surprised to be told that the land must be rectified so that distribution can be done in accordance with the grant.
8. That the respondent has the title to the land which he has declined to hand over to the lands offices.

[3] Briefly the Petitioner reiterated the contents in the body of his application by deposing inter alia that at the time of filing this cause he had been issued with a document from lands offices which showed that the suit property was absolutely owned and registered in the names of the deceased and that the estate was later distributed to its bonafide beneficiaries as per the grant issued on 12th June 1998. It was his case that the respondent made an application for revocation of grant which application was later dismissed on 4th July 2002 but the court placed an inhibition until the respondent brought a proper case against the estate which suit was later dismissed on 29th July 2010 after the respondent failed to prove that he held the alleged shares with his deceased father. He further contended that after judgment of the court on 19th November 2010, he presented the orders to the land registry whereupon he was advised to seek an order rectifying the register as the land is reflected to be owned by both the deceased and the respondent. Consequently he urged the court to order that the register be rectified by deleting the name of the Respondent to enable him fully distribute the estate and further dispense with the production of the title deed since the Respondent had declined to surrender the same.

[4] When the matter came up for hearing on 22nd March 2016, Mr. Kioga for the Respondent intimated to court that the instant application had been objected to through a Preliminary Objection by the Respondent who was then acting in person but that now they had filled grounds of objection. Mr. Kioga articulated the contentions by the Respondent and especially termed prayer number 2 of the instant application "to rectify the land register" in order to remove the name of a registered proprietor from the register to be tantamount to asking the court to commit monumental illegality in favour of the Applicant. He further stated that the application itself was not based on any proper rule of law or procedure and that the rules purported to be relied upon cannot support an application of this nature. But Mr. Mutungawas of a contrary view; he submitted that this application is merited and that the Respondent's objections had been dismissed on 4th July 2002 whereupon he was asked to file a separate suit which he filed but was also subsequently dismissed. The Petitioner, then, moved the court to have the orders of inhibition issued removed and the application was allowed on 19th November 2010 and the court directed the estate to be distributed as per the grant. The Respondent was also aggrieved by this order and appealed to the Court of Appeal; again the appeal was dismissed on 10th December 2013.

[5] Mr. Kioga made his rejoinder on behalf of the Respondent and emphasized that the application was defective in law as it was asking for rectification of the register which was not a record of this court and that further rectification of the register should be done under section 143 of the Registered Land Act Cap 300 (repealed). In reply Mr. Mutunga for the Petitioner submitted that their application was not defective as they had cited unlimited jurisdiction of this court to make orders in succession matters which was equivalent to the oxygen principle in civil cases.

DETERMINATION

[6] I have carefully considered this application and the rival submissions by the parties. I take this view of the matter. Quite nascent arguments have been advanced by the parties and especially Mr. Kioga. But while I ponder over those arguments, I keep on asking myself the real worth in Rule 73 and 46 of the

Probate and Administration Rules and Section 47 of Law of Succession Act CAP 160 of the Laws of Kenya under which this application has been brought. I will set out these sections and Rules for emphasis. Section 47 of the Law of Succession Act provides as follows:

47. Jurisdiction of High Court 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:(Emphasis mine)

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice

Rule 73 of the Probate and Administration Rules provides as follows:

73. Saving of inherent powers of court Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

[7] I turn to the facts of the case to which I shall apply the above law. Doubtless, this dispute has had a long history running through this succession cause to civil suit filed to establish the claim of ownership by the Respondent to appeal in the Court of Appeal. Yet, despite the result of those judicial processes, there has been no end of litigation in this matter. The Petitioner has given a chronological detail of the motions that have been taken in this matter which culminated in the dismissal of the Respondent's appeal by the Court of Appeal on 10th December 2013. I do not wish to set out those motions, except I am content to cite the decision of the Court of Appeal in dismissing the Respondent's Appeal in which it rendered itself inter alia thus:

“That civil claim was filed in a civil court. He however, sought to revoke the grant of letter of administration issued to the respondent on the same grounds and in our respectful view, Kasanga Mulwa J rightly observed that a defined share and registered interest of a proprietors rights to a title of land cannot be taken away through a confirmed grant of letters of administration. The administrator can only administer that which belonged to the deceased. The dispute of the appellant's share was before a civil court that made a finding either rightly or wrongly that the appellant's claim was without basis. The appellant's claim in the civil suit dismissed; this attempt to revoke the grant in the succession matter also revoked what was left in the judge in a succession cause to hear. The High Court is given the following powers under section 47 of the Law of Succession Act;

“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” emphasis ours

Rule 73

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the ends of justice or to prevent abuse of the process of the court.”

The learned judge was well aware of the above provisions and indeed invoked the same provisions in arriving at the decision as she did and the orders made there under. The question we have posed to ourselves is whether this caused any prejudice to the appellant as he claims he was denied a hearing. We have pointed out that the appellant's application for grant for revocation of grant was dismissed; he was not claiming as a beneficiary of the deceased's estate but as an owner of a defined and registered portion of the land. The civil claim was also dismissed, considering the matter had been in court for many years, we are satisfied that the judge properly exercised her discretion and made the orders that she made.”

[8] The exposition of the law by the Court of Appeal on the purport and meaning of section 47 and Rule 73 of the Law of Succession Act and Probate and Administration Rules is clear. Accordingly, the Respondent's argument that the application before me was not based on any proper rule of law and procedure is completely indefensible. This court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties. Section 47 and Rule 73 of the Law of Succession Act and Probate and Administration Rules respectively are tailored exactly for that purpose. I should also state that, failure to cite section 143 of the now repealed Registered Land Act in this application for rectification of register does not hold much weight in the face of the elegant provisions of article 159(2) (d) of the Constitution of Kenya, 2010 which completely diminished such technical objections in favour of substantive justice. In any event, this application clearly seeks for rectification of register which is sufficient request for purposes of section 143 of the repealed RLA; the section deals with "Rectification by court". Accordingly, the objection by Mr. Kioga does not help his client's case; in fact it aids the application for an order of rectification of the register especially now that there are no proceedings pending on the ownership squabble herein. Under the new land laws- particularly section 80 of the Land Registration Act, 2012, No 3 of 2010- rectification of register by order of court is permitted in the following terms:-

Rectification by order of Court

80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

[9] On the basis of the above analysis, this court has power to order rectification of title of the estate property in order to give effect to its orders of confirmation of grant. The question, however, is whether the orders of rectification are merited in this cause? In this case, the Respondent took numerous legal journeys on this issue and went up to the Court of Appeal. Nevertheless, as I have said in great number of cases, a party should not be prejudiced because he set out on numerous judicial journeys as long as those journeys were bona fide quest for justice. I do not blame the Respondent for the litigation he has had to endure over this matter; it is his right. Except, however, as a tenet of justice, every litigation must have an end. The Respondent's appeal was dismissed by the Court of Appeal on 10th December 2013. Similarly the Respondent's claim that he owned the estate property together with the deceased was determined in a civil suit filed for that purpose; it was dismissed. The final judgment of the trial court on that issue has not been overturned or set aside or varied or reviewed- in short it still stands and is decisive on the ownership claims being put forth by the Respondent on the estate property. Accordingly, I do not think the Respondent could have any further claim over this land especially within this cause; the property is, therefore, the estate property which should be administered in accordance with the confirmed grant herein. Fraud has been argued herein especially on how the Respondent got himself registered in the land. But considering all factors, justice of this case has been revealed by the facts of the case. In the absence of any other material, the Respondent is merely an intermeddler in the estate property and is a stumbling block to the implementation of the confirmed grant herein. If matters are allowed to remain the way they are, it would mean that the estate and the beneficiaries herein will holders of barren or worthless judgment as the estate cannot be administered. In such circumstances, the ends of justice would demand that the impediment or mistake herein should be removed immediately and allow the grant to be implemented. I am also acutely aware that the state of affairs in this case is quite unsatisfactory and the Respondent seems to be abusing court process to stake a claim he cannot legally show he has. Accordingly, and I stated this earlier; to prevent abuse of the court process; avert the orders herein to have been made in vain; on the basis of the principle of law that litigation must come to an end; and accord substance to the old-age adage that justice delayed is justice denied, I allow the application dated 10th December 2010. The said application is meritorious and upon which a court properly exercising its mind would exercise

inherent jurisdiction pursuant to Rule 73 of the Probate and Administration Rules. But for avoidance of doubt, I make the following specific orders:

- 1. That the register in respect of LR NO. Ntima/Igoki/3138 shall be rectified to reflect only the name of the deceased namely; M' Twerandu M' Iriungu as the registered owner.***
- 2. That the relevant land registrar shall dispense with the production of the original title number LR NO. Ntima/Igoki/3138.***
- 3. That the confirmed grant shall be accordingly implements as by law required upon LR NO. Ntima/Igoki/3183.***
- 4. That as I said earlier that a party shall not be punished for his quest for justice, I am satisfied that the Respondent was bona fide in his quest for justice and I will not condemn him to costs. Instead I will order that each party shall bear own costs of the application.***

[10] I hope this brings closure to this cause.

Dated, signed and delivered in open court at Meru this 5th day of September 2016

F. GIKONYO

JUDGE

In the presence:

M/s. Njenga advocate for Mr.Kiogo advocate for respondent

Mr.Munene Kirimi advocate for Mr. Mutunga advocate for petitioner

F. GIKONYO

JUDGE