



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 630 OF 2009**

***In the matter of the estate of:***

***M'Ruuti M'Mwirichia Mutuera alias Mwirichia Mutuera alias Mutuera Mukuri***

**NELSON MUGAMBI MWIRICHIA..... 1<sup>ST</sup> APPLICANT**

**Versus**

**SESINTA MUKAMI .....1<sup>ST</sup> PETITIONER/RESPONDENT**

**GILBERT KIOGORA MWIRICHIA.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**JUDSON MWENDA GITUNGA.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

**Inhibition and injunction**

[1] I am considering a chamber summons application dated 18<sup>th</sup> November 2015 and which is expressed to be brought under rules 49 and 73 of the Probate and Administration Rules, section 47 of the Law of Succession Act, section 68 and 69 of the Land Registration Act and all other enabling provisions of the law. The significant orders sought in this application are:-

- (a) Temporary inhibition inhibiting the registration of any dispositions, transactions, transfers or any entries whatsoever in L.R NO ABOGETA/U-KITHANGARI/123
- (b) A temporary injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from entering upon, fencing off, invading, cultivation, trespassing, constructing, taking possession or in any manner whatsoever or howsoever interfering with the Applicant's portion of land measuring 4 acres previously demarcated within L.R NO ABOGETA/U-KITHANGARI/123.
- (c) A permanent injunction against the 3<sup>rd</sup> Respondent restraining him from intermeddling with the estate property specifically L.R NO ABOGETA/U-KITHANGARI/123; and
- (d) The court to be pleased to call for the entire court file for NKUBUPMCC NO 95 OF 2015 for purposes of setting aside and quashing of orders made therein for being irregular as they disturbed the distribution of this estate and having been made without jurisdiction.

[2] The application is supported by the affidavit by the Applicant, the grounds set out in the application

and the submissions filed herein. In a nutshell, the Applicant argued that he is the son of the deceased and according to the Certificate of Confirmation of Grant he is entitled to 4 acres of land from the estate property. That pursuant to the schedule of distribution issued by the court herein, the estate property was thereafter demarcated and boundaries marked for each portion due to each beneficiary. They agreed as a family to pay up the survey fees so that titles could be obtained in line with the grant. But while the said process was going on, the 3<sup>rd</sup> Respondent filed the case at Nkubu against the 2<sup>nd</sup> Respondent claiming 3 acres of the estate property he had purchased from the 2<sup>nd</sup> Respondent. He argued that the said agreement dated 3<sup>rd</sup> September 2010 was null and void *ab initio* as at the time of the purported sale, the 2<sup>nd</sup> Respondent did not have legal capacity to transact on the estate property. Accordingly, the NKUBU COURT did not have jurisdiction over the estate property and thus, the order therein in so far as it related to excision of 3 acres out of the estate property herein is null and void as the estate property is subject of these proceedings and is yet to be distributed to the respective beneficiaries. He also contended that the Nkubu court's proceedings were irregular, un-procedural and a nullity which this court should set aside through its inherent powers in section 47 of the Law of Succession Act. He asserted that the 3<sup>rd</sup> Respondent is not a beneficiary of the estate herein. In any case, he argued that if there be any legitimate dispute then it ought to be between the 3<sup>rd</sup> and 2<sup>nd</sup> Respondents without involving the estate. Accordingly, the order by the Nkubu court should be quashed. The Applicant did not end before stating that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent disowned the affidavits allegedly sworn by them on 4<sup>th</sup> November 2015. They cited the following cases in support of their case: **MUSA NYABARI GEKONE vs. PETER MIYIENDA [2015] eKLR**, **MONICA ACHIENG AKUMU vs. DISHON OMINDI [2013] eKLR**, **RAMADHAN MUSUMBA CHEMIETI vs. JAMIN WASIKE CHEMIETI [2015] eKLR** and **DAVID SIRONGA OLE TUKAI vs. FRANCIS ARAP MUGE [2014] eKLR**.

[3] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are the joint administrators of this estate filed their submissions. They denied the replying affidavits allegedly sworn by them and categorically stated that they supported this application. They denied any knowledge of the sale agreement herein and said that any such sale of the estate property before confirmation would be a nullity. They advised the 3<sup>rd</sup> Respondent to seek for remedy elsewhere.

### **3<sup>rd</sup> Respondent opposed the application**

[4] The 3<sup>rd</sup> Respondent opposed the application through Replying affidavit sworn on 19<sup>th</sup> April 2016 and his submission filed herein on 10<sup>th</sup> June 2015. He accused the 2<sup>nd</sup> Respondent of being economical with the truth because he had sworn affidavit on 4<sup>th</sup> January 2015 and again swore another one on 23<sup>rd</sup> February 2015 contradicting the earlier one. He took issue with prayer 2 of the application for it will impede the implementation of the grant herein and it should not be granted. He further argued that the Applicant has averred at paragraph 15 of the Supporting affidavit that the distribution was done in 2008. He also took issue with paragraph 13 of the Applicant's supplementary affidavit in which it was deposed that the Applicant is not concerned with the share of the 2<sup>nd</sup> Respondent so long as there is a title in his name.

[5] The 3<sup>rd</sup> Respondent submitted more especially on prayer 4 which he opined should not be granted because the Applicant invoked the wrong procedure in an attempt to quash the a consent order in Nkubu case. He proffered that the said order can only be challenged through judicial review to quash it or an application before the lower court to set it aside; a third party cannot so apply in other proceedings such as these. He insisted that the said case was commenced after confirmation of the grant. Again, the said order does not divert the implementation of the grant herein. According to the 3<sup>rd</sup> Respondent, no fraud has been investigated and confirmed as such on the execution of the consent filed in the Nkubu case. In fact the court record at Nkubu shows that the 2<sup>nd</sup> Respondent freely signed the consent. Therefore, the allegations herein in respect of the alleged fraud should be treated as mere allegations. See the case of **WASIKE vs. WAMBOKO [1988] KLR** and **MARY WAMBUI MUGADDE vs. ECO BANK LTD [2009] eKLR** on the threshold of setting aside a consent judgment.

[7] On prayer 5 the 3<sup>rd</sup> Respondent urged the court not to grant it as it would permanently hurt his right to pursue the 3<sup>rd</sup> Respondent.

## **DETERMINATION**

### **Issues**

[8] A variety of issues have arisen in this matter but I can cast them in broad terms as follows:

**(a) Whether immovable property of the deceased could be sold before confirmation of the grant;**

**(b) Whether this court can set aside the consent judgment entered in NKUBUPMCC NO 95 OF 2015; and**

**(c) What are the appropriate orders that the court should make in these proceedings?**

### **Sale of immovable before confirmation prohibited**

[9] This issue is fairly straight-forward. Courts have stated time and again that, as a general rule of law, sale or disposition of immovable property of the deceased before confirmation of the Grant is prohibited by the Law of Succession Act. I wish to state quite categorically that, not even the beneficiaries or the administrator of the estate or any person has the power to sell or dispose of the estate property before confirmation of grant. The basis for this approach of the law is that, it is at confirmation that the identities of the beneficiaries and their respective shares is ascertained and thereafter registered to their names. I need not state that beneficial interest can only be charged or transferred if it is defined and registrable or registered. For further elucidation see sections 55 and 82 of the Law of succession Act. Accordingly, any sale of the immovable property of the deceased's estate before confirmation is null and void and cannot derive from or confer any right or proprietary interest in the estate property in issue. The grant herein was made to the Administrators on 3<sup>rd</sup> September 2010 and confirmed on 28<sup>th</sup> April, 2015. Therefore, in so far as these proceedings are concerned, the alleged agreement made between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 3<sup>rd</sup> September 2010 is of no legal effect and should never affect the administration of this cause. I so hold.

### **Quashing Nkubu proceedings**

[10] But, in light of the view expressed by the court on the sale herein, can this court call for the NKUBU Court file and quash it? This court has supervisory jurisdiction to call up for any proceedings before the lower court and quash it especially if the propriety, legality and correctness of those proceedings has been questioned. See article 165(7) of the Constitution on this. But, I am alive to the fact that such course should be prompted through a proper application for judicial review in order that the person applying shall discern all the issues involved and also give the other parties an opportunity to ventilate their positions on those issues. The manner in which such certiorari relief has been sought by the Applicant is not the best way of laying information before court on such matter of significant public interest; I note that judicial review is public remedy except it is sought by a person at the instance of the Republic. Therefore, I agree with the 3<sup>rd</sup> Respondent that a proper judicial application is needed with all parties on board. I am also acutely aware that where complete irregularity, impropriety or lack of jurisdiction on the part of the subordinate court is raised, the aggrieved party should apply to the court which made the order and have it set aside *ex debito justitiae* by that court as a matter of judicial duty to uphold the integrity of the judicial process itself. This latter procedure obviates delay as it ensures that no time is wasted on appealing or seeking review of the impugned order from the appellate court. And, adherence to this procedural rectitude is important and highly recommended as it enables access to justice and expeditious disposal of cases. This principle was well enunciated by Green MR in the case of **CRAIG vs. KANSEE [1943] 1 All ER 108 at 113** and there are ample judicial authorities on this matter which I do not wish to multiply except I am content to cite the case of **ISAACS vs. ROBERTSON**

[1984] 3 All ER 140 that;

*If an order is regular it can only be set aside by an appellate court; if it is irregular it can be set aside by the court that made it on application being made to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warrant (e.g. where there has been a breach of the rules of natural justice)*

[11] It is not also lost to the court that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are equally violators of the law in respect of the impugned sale of the estate property and I would rather leave them to fight their battles by following the laid down procedures. Again, other than the arguments herein, the jurisprudence coming through on the jurisdiction of magistrates' court over land matters will have a bearing on the lower court decision. Therefore, I will refer the matter to the magistrate who made the order for appropriate judicial action. But, for now I will fashion appropriate order in this case.

### **Appropriate orders**

[12] I have held that the order made in NKUBU PMCC NO 95 OF 2015 is of no legal effect in so far as it sought to confer proprietary or beneficial rights in this estate upon the 3<sup>rd</sup> Respondent. Accordingly, the said order cannot be executed against the estate herein whatsoever. It does not affect the implementation of the confirmed grant herein. As such, I direct the administrators to complete distribution of the estate as per the confirmed grant within 60 days from today. And, the 3<sup>rd</sup> Respondent should not interfere with the administration of the estate as I have ordered. I will not issue any inhibition orders as that would impede the implementation of the confirmed herein. I also direct the Land Registrar to register the confirmed and all the resultant subdivision parcels in accordance with the confirmed grant. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall pay costs of the application dated 18<sup>th</sup> November 2015 to the Applicant. It is so ordered.

**Dated, signed and delivered in open court at Meru this 15<sup>th</sup> day of**

**November 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kimaita advocate for applicant

Applicant – present

Mr. Kimaita advocate holding brief for Mr. Momanyi advocate for 1<sup>st</sup> and 2<sup>nd</sup> respondents.

2<sup>nd</sup> respondent – present

Mr. Kabarua advocate for 3<sup>rd</sup> respondents – absent

3<sup>rd</sup> respondent present.

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**F. GIKONYO**

**JUDGE**