



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 113 OF 2006

IN THE MATTER OF THE ESTATE OF M'THURANIRA M'RIMBERIA

alias THURANIRA RIMBERIA (DECEASED)

RAZARO MURIUKI M'THURANIRAPETITIONER

V E R S U S -

JULIUS MBAABU MUKANGU 1ST RESPONDENT

GILBERT KIRIMI MUGAMBI2ND RESPONDENT

TARACILA MAITI M'THURANIRA3RD RESPONDENT

RULING

1. The petitioner/applicant Razaro Muriuki M'thuranira through an application dated 10th December 2014 brought pursuant to section 47 and 74 of the Law of Succession Act and Rule 43 (I) of the Probate and Administration Rules seeks the following orders;-

(a) That the grant confirmed on 9th December 2008 be rectified as to the mode of distribution as per paragraph 9 of the supporting affidavit.

(b) The prohibition already placed on land parcel Abogeta/L-Chure/448 be confirmed by the court to avoid fraudsters taking away the deceased family land.

(c) Costs be paid by the respondent

2. The application is based on the grounds on the face of the application interalia; that the estate was distributed to people who are not related to the deceased and who were never dependants of the deceased but who pretended that after distribution they would buy the land from the dependants; that the fraudsters purported to be the petitioner and engaged the surveyor to sub divide the land and drew a mutation which they even thumb printed pretending to be the petitioner; and that the fraudsters went ahead and made an application to lift a caution to enable them fraudulently take the petitioner's land.

3. The application is further supported by petitioner's affidavit dated 10th December, 2014 in which he deponed inter alia; that respondents have not been truthful by pretending that they are dependants and that they tricked the petitioner and others to accept them as dependants; that the 1st and the 2nd respondents are not related to the deceased but the buyers who wanted to use the confirmed grant to defraud the petitioner and his family members; that the petitioner did not file any application dated 7th April 2014 nor did he swear the annexed affidavit but it was sworn by the 2nd respondent purporting to be the petitioner; that the petitioner had agreed to sell part of family land to the respondents; that Michael Riungu; Julius Mbaabu Mukangu and Gilbert Kirimi have no relation to the petitioner; and they had promised to buy land from the petitioner but once grant was confirmed as in the nature it is stated in court, the said persons turned round and wanted petitioner's family land without paying claiming court awarded them the same; that the respondent drew mutation and forged petitioner's thumb print and he came to discover it when one Isabella Kagendo placed a caution; that it is in the best interest that each dependant get his portion and deal with the buyers individually; that the rightful dependants are as follows:

- (a) **Taracia Maiti M'mthuranira to get 1 acre**
- (b) **Razaro Muriuki Thurunira to get 1 acre**
- (c) **Phillip Kithaka Thurunira to get 1 acre**
- (d) **Michael Riungu Thurunira to get 1 acre**

as the previous confirmation was done through pretence and fraudulent means by the respondents and misrepresentation of their advocates. That unless the application is allowed the whole family of the deceased would suffer great injustice.

4. The respondents are opposed to the application for rectification of grant. They filed a replying affidavit dated 27th January 2015 through the 2nd respondent Gilbert Kirimi Mugambi avering inter alia; that the applicant is a liar and the contents of his affidavit is false; that the 2nd respondent purchased one (1) acre from the petitioner and that is why he was included in the succession case as per agreement annexure "ak3". That the 1st respondent purchased one (1) acre from Philip Kithaka as per annexed "ak2" that consequently the applicant's name and that of his brother were omitted from certificate of confirmation of grant as they had already sold their portions; that upon purchasing their portions they took possession and have intensively and extensively developed their portions; that the suitland has been sub-divided as per the certificate of confirmation; that on 3rd April 2007 the applicant and all members of family entered into consent on the mode of distribution of the estate and on 9th December 2008 the court confirmed grant as per the consent; that the applicant attended the sub-division Board at Abogeta Land Control Board and consent to the subdivision of the land; that the applicant hired Kamuge Land Surveyors to carry out the registration and the mutation which the applicant duly executed; that the applicant and his brother decided to sell their share; that It is wrong for the applicant to refer to the respondents as fraudsters; and that there is no problem if the rectification on the part of Taracilla Maiti's share is carried out as she is the widow to the deceased herein.

5. I have carefully considered the pleadings and parties rival affidavits in support of their opposing petitions and counsel submissions which reiterated the contents of parties respective affidavits. The issue for consideration are as follows:-

- 1. **whether there are errors or sufficient grounds to warrant rectification of the grant confirmed on 9th December 2008?**
- 2. **whether inhibition placed on L.R. Abogeto/L-Chure/448 can be confirmed by the court to avoid the fraudsters taking away the deceased family land?**

3. Whether the court can grant further orders for the ends of justice

6. Section 74 of the Law of Succession Act provides:-

“74, Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

7. Further Rule 43(1) of the Probate and Administration Rules provides:-

“Rule 43 (1). where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as the time or place of the death of the deceased or, in the case of a limited grant, the purpose from which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.”

8. The grant in this cause was confirmed on 9th December 2008 on the basis of an affidavit dated 12th April 2008 purportedly made by the petitioner/applicant herein and also in a purported consent dated 30th April 2007 and filed on 4th June 2007. The applicant in the instant application has deponed in the aforesaid application that the respondents made false declarations by purporting to be dependants to the deceased estate and tricked the applicant and their family to accept them when the 1st and 2nd respondents have no relationship whatsoever with the deceased. That the two are buyers whose intention is to use confirmed grant to defraud the deceased family. The applicant further contended that he did not file an application dated 7th April 2014 nor did he swear the affidavit annexed thereto but contended it was sworn by the 2nd respondent purporting to be the applicant. The applicant deponed that he has no relationship with Michael Riungu, Julius Mbaabu Mukangu and Gilbert Kirimi Mugambi who had promised to buy their land but upon confirmation of the grant they turned round and started claiming the family land which court awarded them. That they even drew mutation forms, and forged the applicant's thumb print.
9. The respondents have not controverted the contents of the applicant's affidavit which is specific on his allegations. The application for confirmation of the grant under paragraph 2 of the supporting affidavit names the properties and the deceased dependants and further indicates the names of the purchasers. The affidavit is purportedly signed by the applicant. The applicant denied signing the said affidavit dated 4th April 2014. The Respondents did not contest the applicant's assertion that he did not sign the affidavit. Infact all other documents purportedly made by the petitioner/applicant are not signed but thumb printed. The respondents did not explain why the affidavit of 4th April 2014 is signed and not thumb printed if it was made by the same person. The respondents similarly did not counter the petitioner's allegation that the mutation Form has a forged thumb print purported to be that of the petitioner/applicant. Similarly the respondents did not respond on the allegation that they are out to defraud the deceased family of their land simply because the grant was made awarding them portion of the deceased estate.
10. I have carefully considered the contents of the parties affidavits and I am of the view that the respondents misrepresented themselves as deceased dependants when that was not the case. The respondents have no relationship with the deceased and should have stated so. I am also in view of the previous thumb printed documents by the petitioner doubtful whether he could sign and even signed the affidavit dated 7^h April 2014. I also doubt whether the petitioner also signed mutation Form or thumb printed the same. The respondents did not challenge the contents of the applicants affidavit dated 10th December 2014.
11. I am therefore satisfied that the grant issued to the petitioner has an error in the names and description of the respondents who misrepresented themselves as dependants to the deceased and purchasers. The respondents did not buy any land from the deceased but from some of the beneficiaries. The respondents are therefore strangers to the deceased estate. That if the

respondents have any claim it is not against the deceased estate but the two beneficiaries who sold portions of the deceased estate to them. The sellers claim they have not been paid fully the purchase price; however as the case may be the parties can settle their dispute at another forum but not in this succession cause.

12. The petitioner sought the inhibition already put on Abogeta/L-Chuire/448 confirmed by the court to avoid fraudsters taking away the deceased family land. The respondents made an application to lift an inhibitor through an application dated 6th October 2014 under certificate of urgency but the court declined to certify it urgent, which application has today not been prosecuted but the said parties had the application dated 10th December, 2014 heard first.

13. I have considered the parties affidavits which I have taken a lot of pain to reproduce in this ruling and I am satisfied in the interest of justice and in conclusion I have come to in interest of the respondents pending application to have the inhibition placed in land parcel Abogeta/L-Chure 448 not to be confirmed so as to protect the interest of all parties in this matter, pending hearing of all pending applications.

14. **Rule 73 of the Probate and Administration Rules** provides:-

“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 abuse of the process of the court.”

15. On considering whether the court should grant further orders for the end of justice the court is guided by Rule 73 of the Probate and Administration Rules. The petitioner has raised the issue of forgery in respect of the application dated 7th April 2014 and having not sworn the affidavit dated 4th April 2014 claiming the same was sworn by Gilbert Kirimi Mugambi. He further alleged that his thumb print as appears in the mutation Form for District Licenced Surveyor dated 2nd August 2011 is not his but a forgery. His Counsel submitted that the petitioner had complained to the DCIO Meru Central Division of the forgery. I have considered the parties counsel submissions and affidavits in support and in opposition of the application and it appears that an offence might have been committed by either the respondents in the alleged documents or by the petitioner in his affidavit in support of his application. The offence maybe of forgery or perjury. This court at this stage cannot be able to know between the two sides who might have committed the offence (if any). In the interest of justice this matter ought to be investigated by the DCIO and culprits charged accordingly. (if any)

16. The upshot is that having considered the petitioner/applicant application dated 10th December 2014, I make orders as follows:

(a) The rectification of the confirmed grant dated 9th December 2008 do await the investigation report by the DCIO, Meru Police Station before the confirmed grant can be rectified or refused as prayed by the petitioner.

(b) The respondents Julius Mbaabu Mukangu and Gilbert Kirimi Mugambi were and are not dependants nor creditors to the deceased estate as they are purchasers from Razaro Muriuki Thurania and Phillip Kithaka Thurania but as there are questioned documents purportedly executed by the sellers and who have objected to the same their claim should await the outcome of (a) above.

(c) The inhibition already placed on land parcel Abogeta/L-Chure/448 to remain in force till the report is received.

(d) The D.C.I.0 Meru, to investigate the petitioner's complaint over the affidavit dated 4th April 2014. The mutation Form and any other relevant document referred to in this ruling and if any

offence is disclosed to prefer a charge against any party that he may have reasonable belief that he has committed an offence.

(e) The Deputy Registrar to supply the DCIO Meru police station with copies of all affidavits by the parties herein, mutation Form and any other relevant documents that the DCIO may require for the purposes of investigating this matter.

(f) The DCIO Meru Police Station to file his report with the court within 30 days from the date of this ruling. Mention on 6th July 2015.

(g) The Petitioner and all parties in his matter to appear before DCIO Meru police station within a week from the date of the ruling to record statements.

(h) Costs shall be in the cause.

DATED and signed at Meru this 4th day of June 2015.

J.A. MAKAU

JUDGE

4.6.2015

Delivered in open court in presence of;

Mr. Kirima for petitioner/applicant

Mr. L. Kimathi for respondents

Court clerk – Penina/Mwenda

J.A. MAKAU

JUDGE

4.6.2015