



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 62 OF 2016

SILVESTER MIGOSI1ST PLAINTIFF

BERNARD NYAMANYA MOGAKA2ND PLAINTIFF

VERSUS

LUCAS SASATI NYARERODEFENDANT

J U D G M E N T

1. The applicants filed the originating summons dated 15th March 2016 seeking the revocation and cancellation of title deeds **Central Kitutu/ Mwamosioma/5019, 5020 and 5021** which are resultant subdivisions from land parcel **Central Kitutu/Mwamosioma/162**. The applicants claim that the defendant, Lucas Sasati Nyareru fraudulently caused the subdivision and distribution of the estate of Augustino Moywaywa Nyabari (deceased) using a fraudulent and forged grant purportedly issued in Kisii HC Succ. Cause No. 216 of 2014.

2. The High Court in Kisii Succession Cause No. 3 of 2015 filed by Bernard Nyamanya Mogaka and Silvester Migori Kenagwe, the plaintiffs in the present suit, in their capacity as the sole dependants of the late Augustino Moywaywa Nyabaro alias Moywaywa Nyaboro held that no grant of letters of administration was issued in HC Succession Cause No. 216 of 2014 for the administration of the estate property i.e land parcel **Kitutu Central/Mwamosioma/162**. The court while holding no grant of letters of administration had been issued in Succession Cause No. 216 of 2014 stated as follows:-

“This court has given due consideration to the application and submissions for and against and with regard to the first prayer for revocation and annulment of the grant issued in Succession Cause No. 216 of 2014, it has already been observed hereinabove that no grant of letters of administration intestate was issued to the applicants therein i.e Lukas Sasati Nyareru and Samuel Ombui Kenagwa. Therefore there is no valid grant for revocation and annulment by this court and if there is a grant dated 11th February 2014, then it is invalid and may have been obtained by unlawful means. Otherwise, the finding of this court is that there exists no grant in this matter for an order of revocation and annulment to issue.”

3. The defendant/respondent was served with the originating summons on 23rd March 2016 as per the affidavit sworn by one Abel Marube a process server on 17th June 2016. The defendant did not appear and/or file any response. The suit was heard by way of formal proof on 13th December 2018 when the 1st plaintiff, Silvester Migosi Kenagwe testified on behalf of himself and on behalf of the 2nd plaintiff who is his brother.

4. The 1st plaintiff testified that the deceased, Moywaywa Nyaboro was their uncle and that he died without leaving any family. He testified that the defendant fraudulently caused his uncle’s land parcel **Central Kitutu/Mwamosioma/162** to be transferred to himself and subdivided without going through the process of Succession. He stated that he and his brother were the persons who were in law entitled to inherit their uncle’s property and not the defendant. He further stated that although their uncle died in 2002, it was only after their father (plaintiffs) died in 2011 that the defendants in 2013 started staking claim to the land belonging to their uncle. The 1st plaintiff asserted that he was the one who was utilizing the land since the 1990’s up to the time the uncle died. He was emphatic that the defendant was not entitled to his uncle’s land and that the defendant had not been utilizing the land and only surfaced after the plaintiffs’ father’s death to lay claim to the land.

5. The evidence by the plaintiffs in the absence of any response from the defendant and/or participation by the defendant in the trial was unchallenged. On the evidence on record, there is evidence that Moywaywa Nyabaro (deceased) was the registered owner of land parcel **Central Kitutu/Mwamosioma/162**. A copy of certificate of official search of the property dated 4th June 2014 annexed to the plaintiffs/applicants supporting affidavit as “SMK001” shows that Moywaywa Nyabaro was registered as the owner of the land on 23rd February 1967. A subsequent copy of certificate of official search on the property dated 4th December 2014 indicates the suit property was transferred and registered in the defendant’s name Lucas Sasati Nyareru on 21st September 2014 pursuant to Succession Cause No. HC 216 of 2014. The record further shows that the DCIO, Kisii Central vide a letter dated 20th December 2014 annexed to the plaintiffs supporting affidavit addressed to the Deputy Registrar sought to know whether HC Succ. Cause No. 216 of 2014 had been finalized and if any orders

had been issued. The Deputy Registrar responded vide a letter dated 21st December 2014 and inter alia stated that:-

“The petition was filed on 4th June 2014 vide receipt No. 0677656, but no orders have been issued in the file by the High Court. So the matter is still pending (case not completed).”

6. Earlier in this ruling the court referred to the ruling by Hon. Justice J. R. Karanja in HC Succession Cause No. 3 of 2015 delivered on 8th March 2016 where he observed and held that no grant of letters of administration to the estate of Moywaywa Nyaribo were issued in HC Succession Cause No. 216 of 2014 which would have enabled the defendant to administer the deceased estate. The defendant, it is evident caused the property of the deceased namely, land parcel/162 to be transferred to his name on the basis of grant purportedly issued in HC Succession Cause No. 216 of 2014. No grant of letters of administration were issued in the said Succession Cause and if the defendant presented to the land registrar any letters of administration purporting to have been issued in HC Succ. Cause No. 216 of 2014 the same must have been forged and fraudulent.

7. The transfer of the property to the name of the defendant was procured illegally and fraudulently and could not therefore be effectual and/or pass any interest to the land to the defendant. The subsequent subdivisions of the deceased land were equally unlawful and illegal and the resultant subtitles issued consequent to the illegal actions and/or transactions of the defendant are null and void and of no effect. The defendant had no legal capacity to deal with the estate of the deceased and the transfer to himself of land parcel **Central Kitutu/Mwamosioma/162** was equally null and void.

8. In the result, the court is satisfied that the plaintiff's have proved and established their case on a balance of probabilities; the evidence clearly establishes that no administrator was ever appointed to administer the estate of the deceased and therefore all the transactions that resulted in the transfer and subdivision of his land were fraudulent and the court cannot allow them to stand. In the premises, judgment is entered in favour of the plaintiffs in the following terms:-

1. That the transfer and subdivision of land parcel Central Kitutu/Mwamosioma/162 owned by Moywaywa Nyabaro (deceased) was unlawful and illegal as no process of succession was undertaken.

2. The land registrar Kisii is directed to cancel the unlawful and illegal transfer and any subdivisions of land parcel Central Kitutu/Mwamosioma/162 and to restore the land to the original title (parcel No. 162) in the name of Moywaywa Nyabaro (deceased) until proper succession proceedings are undertaken.

3. The costs of the suit are awarded to the plaintiffs.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Plaintiffs present in person

N/A for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE