



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.281 OF 2012

JOHN GAITHO WAITITU.....PLAINTIFF

VERSUS

NJUGUNA WAITITUDEFENDANT

JUDGMENT

(Suit to permanently restrain an administrator of an estate of a deceased from proceeding in a manner contrary to what was noted in the confirmed grant; no response filed by respondent; respondent ordered to proceed as directed in the confirmed grant)

1. This suit was commenced through an Originating Summons which was filed on 29 January 2009 and said to have been taken out pursuant to the provisions of the then Order XXXVI Rule 1 (a) (b) (e) and (g) of the Civil Procedure Rules, which were the operative rules before the Civil Procedure Rules of 2010. The respondent did not file a replying affidavit save that he only entered appearance.

2. From the Originating Summons, the supporting affidavit, and the evidence of the applicant, it is apparent that the applicant and the respondent are brothers, both being sons of Gilbert Waititu Kuruma (deceased). The deceased owned the land parcel LR No. 465/18 (Ngorika) (the suit land). Upon the demise of their father in the year 1988, a succession cause was filed being Nairobi High Court, Succession Cause No. 377 of 1990. The joint administrators were the respondent and their mother, Ruth Gathoni Waititu. The latter died on 20 April 2001. The grant was confirmed on 18 July 2001 and the applicant benefited from 5.70 acres of land out of the suit land and a land surveyor was subsequently appointed with instructions to demarcate the land so that each beneficiary got his/her title. On 9 June 2003, the applicant paid Kshs. 37,000/= through counsel for the respondent so that the surveyor may complete the documentation but the applicant avers that he is yet to get title. He further stated that it is the respondent who has the original title deed but he sold his inheritance in the year 2008. In the affidavit, it is deposed that the respondent has now brought in a new surveyor so that the land can be re-surveyed to ensure that the applicant's land and that of the other beneficiaries is reduced and for him to carve out more portions for himself.

3. In this suit he has asked for the determination of the following questions :-

i. Whether or not the defendant has any powers to go beyond the powers conferred on him by the court and allocate or apportion the deceased's land aforesaid over and beyond what the court granted in its certificate of confirmation of grant of letters of administration issued on 18th July 2001 in Nairobi High Court Succession Cause No. 377 of 1990 without the beneficiaries' consent or authority and without any rectifications or amendments in the said certificate.

ii. Is the defendant right in law to alter the boundaries fixed and set by a surveyor pursuant to the terms of the certificate of confirmation of the grant of letters of administration to the prejudice and detriment of the plaintiff and other beneficiaries without recourse to, consent or authority of all the beneficiaries or the orders of the court ?

iii. Are the acts of the defendant affecting the rights or interests of the plaintiffs and other beneficiaries ?

iv. Can the court direct or order the defendant as an administrator of the estate of the late Gilbert Waititu Kuruma to abstain from interfering with the allocation and apportionment of the deceased's property and in particular from altering or interfering with the boundaries as fixed or set by the surveyor pursuant to the certificate of confirmation of the grant ?

v. Are the plaintiff's prayers hereinabove capable of attracting the court's intervention ?

vi. The defendant should pay the costs of this case.

4. He has asked for the following reliefs :-

(a) A permanent injunction to issue against the defendant by himself, his agents or servants restraining him from interfering with, or altering of the boundaries established by the surveyor pursuant to the terms containing (sic) in the certificate of confirmation issued in the Nairobi High Court Succession Cause No. 377 of 2001 on 18th July 2001.

(b) That a declaration be issued to the effect that the acts of the defendant that go against the terms of the certificate of confirmation of grant issued on 18th July 2001 are illegal and wrongful.

(c) Costs of this case to be borne by the defendant.

5. As I mentioned earlier, no response was filed by the respondent and the only averments before me are those tendered by the applicant. Order XXXVI Rules 1 (a) (b) (e) and (g) have been cited by the applicant but I think only (e) and (g) are operative. They provide inter alia that the court has power to determine questions – (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees; and (g) the determination of any question arising directly out of the administration of the estate or trust.

6. In this instance, it appears to me that the applicant is complaining that the respondent, as administrator, is not completing the survey of the land as distributed in the confirmed grant and further contends that the respondent, having sold his share, wants to carve out some additional portions from the same and reduce the acreage to his siblings. To answer the applicant, the respondent cannot go beyond his powers and once the confirmed grant has been made, he cannot without the leave of the court, proceed to distribute the property of the deceased in any other manner. It follows therefore that the acts of the respondent are acts that are not sanctioned by law and thus the applicant is entitled to the prayer to permanently bar the respondent from proceeding in any other way other than the terms contained in the confirmed grant. Any acts outside the terms of the confirmed grant are also illegal and wrongful. The respondent has no option but to proceed as directed in the grant which is to distribute the land to the beneficiaries. I do note that the applicant has already paid the survey fees and ought thus to have received his title by now and the respondent did not appear to explain why he is yet to distribute the land.

7. Given the above, I make the following orders :-

(a) The respondent is barred by a permanent injunction from distributing the suit land, LR No. 465/18 (Ngorika) in any other manner other than that contained in the confirmed grant dated 18 July 2001 issued in Nairobi High Court succession cause No. 377 of 1990.

(b) That the respondent is hereby given 60 days within which to effect the transfer of the applicant's portion into his name and in default, the Deputy Registrar to execute all requisite documents required in order to transfer 5.70 acres of the land parcel LR No. 465/18 (Ngorika) to the applicant.

(c) That the respondent shall shoulder the costs of this suit.

8. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 27th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No appearance on the part of M/s Karanja Mbugua & Co. for the applicant.

No appearance for G.M Muhoro & Co. for the respondent.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU