



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of M'Mwongo Kichiu (Deceased) (Succession Cause
335 of 2014) [2024] KEHC 7724 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 335 OF 2014
EM MURIITHI, J
JUNE 27, 2024**

BETWEEN

ROSALIA WAIRIMU MAINA PETITIONER

AND

DIANA NYANGUTHII MAINA OBJECTOR

AND

JOSHUA KIRAI INOTI INTERESTED PARTY

AND

DAVID IKUNDA MUGUNA APPLICANT

RULING

1. By chamber summons under certificate of urgency dated 20/12/2022 pursuant to section 73 of the [Law of Succession Act](#), section 3, 3A and 63 of the [Civil Procedure Act](#), the Applicant seeks that:
 1. Spent
 2. The court be pleased to grant temporary orders staying execution of grant herein pending hearing and determination of this application.
 3. The court be pleased to issue temporary orders of inhibition in respect Nkuene/Nkumari/656 and its resultant subdivisions preventing any dealing on its register until this application is heard and determined.
 4. The court be pleased to annul, revoke or review the grant herein.
 5. Costs of this application be in the cause.



2. The application is premised on the grounds on the face of it and supporting affidavit of the Applicant sworn on even date. He avers that he bought a parcel of land from the Petitioner measuring $\frac{1}{2}$ acre out of the suit land and paid all the consideration. Around 2019, the Petitioner changed her mind and stopped answering his calls. He has been in occupation of the portion of land he bought since 2014 and he has done extensive developments thereon. The Petitioner opted to dispose of the matter by way of a consent in order to defeat his claim, which is a serious fraud and misrepresentation since she needed to inform his advocate and the court about his claim. Joshua Kirai bought a part of the suit land much later after him and he has colluded with the Petitioner in order to take his share. The Petitioner has tactfully not given herself a share of the suit land since she knows she has sold land to him and other people who will follow her. The grant needs to be set aside, annulled and reviewed so that they do not suffer irreparable loss.
3. The Petitioner opposed the application vide her replying affidavit sworn on 7/3/2023. She laments that the suit land was distributed without giving her a share, thus completely disinheriting her. She and Mathenge Muguongo had agreed to sell 1 acre of the suit land to the Applicant to facilitate the filing of this cause, entered into an agreement to that effect and the Applicant took possession thereof. The alleged consent filed in court on 23/11/2022 does not reflect her wishes since she was misadvised as she was told to just sign a document so that this old cause could come to an end. She proposes that the suit land be distributed equally between her and Mathenge so that they can excise the Applicant's share.
4. The Objector opposed the application by her replying affidavit sworn on 7/7/2023. She avers that she has never been a party to the agreement between the Applicant and the Petitioner, and the Applicant has never been in occupation of any part of the suit land. The Applicant should pursue his vendors to fulfill the agreement without involving her. The Applicant is a stranger in this cause with no legal basis because he has not sought leave to be enjoined in the proceedings, and thus his application ought to be dismissed with costs. This court, having distributed the suit land, has no powers to entertain claims of land sale and breach of contract. In light of the admitted facts by the Applicant that the alleged sale agreement was breached in 2019 and that he was aware that the objection proceedings were ongoing in this matter, but he never took any action, it is an admission of indolence and an afterthought which should not be entertained by this court.
5. The Interested Party herein, Joshua Kirai Inoti opposed the application vide his replying affidavit sworn on 3/3/2023. He avers that the application is incompetent as the Applicant is a stranger to the proceedings since he has not sought leave to be so enjoined. The court has no jurisdiction to determine the issues raised by the Applicant in light of Section 13 of the *Environment and Land Court Act*, the *Law of Contract Act*, the *Land Act* and the *Limitation of Actions Act*. The annexed sale agreement relates to parties who have already been given their respective shares in the estate and the Applicant should pursue them without dragging all the beneficiaries into their feud. He has been in occupation of his land since 2017 and the Applicant or his agents have never taken possession or occupied any part of the suit land. Recently, the firm of M.G. Kaume & Co. Advocates up until 1/2/2021 was on record for the Petitioner. It is very astounding, unlawful and a professional misconduct for that firm of Advocates which was representing the Petitioner to now represent the Applicant. The application is made in utter breach of confidentiality and conflict of interest which greatly prejudices the Petitioner and him. This court is functus officio having determined this cause and distributed the estate. The issues raised by the Applicant are subject to *Land Control Act* which matter is subject to Environment and Land Court. Unless the Applicant formally moves this court to be made party to the suit, the Applicant is a stranger herein and his application ought to be dismissed with costs.



Submissions

6. The Applicant and the Petitioner did not file any submissions.
7. The Objector, Interested Party and beneficiaries Joshua Kirai Inoti and beneficiary/representative of the Estate of Beneficiary Mathenge Muguongo urge that the Applicant is a 3rd party in this matter as he was neither a party herein nor a beneficiary and thus, the application is defective because no leave to be so enjoined was sought. He urges that the move to seek to now disturb the finalized state of the this cause is unfair, vexatious and malicious. He faults the Applicant for failing to prove fraud, misrepresentation and concealment of fact or any illegality, to warrant the grant being revoked. He urges the court to reject and frown upon the Applicant's move to be represented by the firm of M/S M.G KAUME & CO. ADVOCATES, which was formally on record for the Petitioner.

Analysis and Determination

8. The issues for determination are whether the court can entertain an application filed by an Applicant who was not a party herein, whether the representation of the Applicant by the firm of advocates which formally represented the Petitioner is conflict of interest and whether this is a land issue outside the realm of a succession court.
9. The Applicant is clearly a stranger to these proceedings as he does not have the locus standi to file the instant application.
10. The significance of locus standi in a matter was discussed by the Supreme Court of Kenya in *Law Society of Kenya v Communications Authority of Kenya* SC Petition No 8 of 2020 [2023] eKLR, as follows:

“Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”
11. There is a spectre of abuse of the court process by the Applicant and the Petitioner in this matter. The record shows that the firm of M.G. KAUME & Co. Advocates formally represented the Petitioner before shifting midway to represent the Applicant herein. That equally amounts to conflict of interest and may result in breach of confidentiality, as urged by counsel for the Interested Party.
12. The Applicant contends that he purchased ½ acre of the suit land from the Petitioner and took occupation in 2014. The said sale agreement, though said to have been annexed to the instant application and marked DM 1, is not in the court file, and the court therefore does not have the benefit of evaluating its contents. The confirmation herein was done on 25/11/2022 while the Applicant is said to have bought his part of the suit land and taken occupation thereof in 2014. Evidently, the alleged sale of part of the suit land by the Petitioner to the Applicant was done before the confirmation of the grant, and therefore, the purported sale thereof was a nullity and of no legal basis.
13. Faced with this reality and convinced that the Petitioner had nothing to sell to the Applicant because the property in question was not hers, as at that time, this court must find that the purported sale was void ab initio.



14. This court respectfully notes the case of *re Estate of M' Ajogi M' Ikiugu (Deceased)* [2017] eKLR where the court, (F. Gikonyo J) stated as follows:

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property.”

15. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at page 1172, Lord Denning stated that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

16. The Applicant is a total stranger to these proceedings and his purported claim in the suit land is hinged on an alleged purchase of part thereof from the Petitioner way before the grant had been confirmed. Such a dispute is not to be resolved by this court.

17. I respectfully agree with the Court in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, (W. Musyoka J) held that:-

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes, of course, do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

18. This court finds that the Applicant has no locus standi to file the instant application, and his claim falls outside the ambit of a succession court. How then can the confirmed grant herein be revoked at the instance of such a stranger?



Orders

19. Accordingly, for the reasons set out above, the court finds that the Applicant's application for revocation of Grant dated 20/12/2022 is without merit and it is dismissed.

20. Each party shall bear its own costs.

Order accordingly.

DATED AND DELIVERED ON THIS 27TH DAY OF JUNE 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Rosaliana Wairimu Maina Petitioner.

Mr. Kithinji Kirigia for the Petitioner.

Mr. Muriira of M.G. KAUME & Co. Advocates for the applicant.

Mr. Thangicia for the Objector and the Interested Party.

