



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 319 OF 2011

IN THE MATTER OF THE ESTATE OF KARONGI CHOMBA (DECEASED)

SALAVINAH MUTHONI KAROGOI.....ADMINSTRATOR/APPLICANT

VERSUS

JOEL NJOGU GITHINJI.....RESPONDENT

RULING

A. Introduction

1. This ruling is on the applicant's summons dated 31st August 2015 brought under **Rule 73 of the Probate and Administration Rules** seeking the orders that: -

- a) *The Land Registrar Kirinyaga County be ordered to restore land parcel LR. No. Mwea/Tebere/B2192 to the names of the deceased Karogoi Chomba.*
- b) *That the respondent herein be held guilty of intermeddling with the estate of KAROGOI CHOMBA (deceased) and be punished accordingly*
- c) *That the respondent be ordered to give vacant possession of Land Parcel No. Mwea/Tabere/B12192 to the applicant forthwith failing which he be evicted by Ms. Giant Auctioneers.*

2. The grounds relied on by the applicant are as follows: -

- a) *That deceased was the registered owner of Land Parcel No. Mwea/Tebere/B2192 among others.*
- b) *The grant was confirmed on the 12/11/2014 and a certificate issued accordingly in which land parcel No. Mwea/Tebere/B2192 was confirmed in favour of the applicant.*
- c) *The applicant moved to Kirinyaga Land Office to register the RL 7 and RL 19 only to be advised that the respondent transferred the Land Parcel No. Mwea/Tebere/B2192 on 10/4/2014 over 41 months from the date of the deceased's death.*
- d) *The respondent's action of transferring the land into his names amounts to intermeddling under the Section 45 of the Law Succession Act Cap. 160 Sec 45 Sub 2 (a) which is punishable by law.*
- e) *The respondent has further unlawfully taken possession and occupation of the estate.*
- f) *The respondent is not among my beneficiaries and/or the beneficiary of the estate thus he should not be allowed to continue enjoying the fruits of belongings.*
- g) *The transfer of the land to the respondent after the death of the registered owner and during the currency of this cause is a nullity ab initio.*

B. The Response

3. The respondent in his replying affidavit opposes the application on grounds that he is the registered owner of LR. Mwea/Tebere/ B2192.

C. Submissions

4. The respondent in his replying affidavit sworn on 5/10/2014 deposes that on the 16/04/2018 that they were the registered owner of the parcel **Mwea/Tebere/B/2192** having bought the same in the year 2005 from the deceased.
5. The respondent states that on the 6/05/2010, the Mwea Land Control Board granted them consent to transfer the suit property, the deceased and the respondent having made the application to the board on the 2/04/2010 and as such it was submitted on behalf of the respondent that the suit property ceased to be deceased on the 6/05/2010.
6. It was further submitted for the respondent that the suit property was currently charged to Mwea Rice farmers Sacco Society through a charge dated 14/08/2014, a charge he alleges was prepared by counsel for the applicant herein and as such it is his submission that said counsel should not be on record for the estate of the deceased as this amounted to an abuse of the court process, advocates act and breach of advocate-client confidentiality.
7. The respondent further submitted that the suit property was not originally identified by the applicant herein as part of the deceased's estate and only came to be part of the deceased's estate vide an amended confirmation of grant by the applicant herein dated 12.11.2014, a time when the said suit property was already charged to the aforementioned Sacco for Kshs. 1.3 million.
8. Both parties filed submissions in support of the its dispositions which this court has considered in this ruling.

D. The Determination

9. The applicant herein seeks this court's intervention in having the title over the suit property issued to the respondent revoked. It is the applicant's contention that the suit property belonged to the estate of her deceased husband. It is noteworthy that in the initial confirmation of grant application, the suit property was not listed as part of the deceased estate.
10. The respondent stated that the suit property belongs to him and attaches a title deed to the suit property issued on the 10/04/2014 approximately 4 years after the deceased passed on. In justification, the respondent states that all the transactions to transfer the suit property to himself from the deceased were completed prior to the deceased passing, the only thing remaining was lodging the documents in the land registry for issue of a title deed.
11. I do note that there is an application for consent of Land Control Board and subsequently Letter of consent to transfer the suit property on court record annexed by the respondent. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court is the court which is constitutionally mandated to determine such matters.
12. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why **Rule 41(3) of the Probate and Administration Rules** was enacted so that claims which *prima facie* valid should be determined before confirmation. See **Rule 41(3)** below: -

41. (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.[Underlining mine for emphasis]

13. For better appreciation of the effect of the determination of ownership under Order 37 of the Civil Procedure Rules on a succession cause, this Court in **High Court Succession Cause Number 864 of 1996 [2015] eKLR** by *Musyoka J* had this to say on the issue of a probate court's jurisdiction to resolve a claim based on land held in trust (and in our case purchase or transfer of land);

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

14. It is my opinion that the action of the applicant in failing to list the suit property herein in the initial application for grant and seeking its inclusion in the amended confirmed grant is suspect especially because it is on court record that the reason the applicant sought amendment of the grant to include the suit property is because the applicant was unable to register the certificate of confirmation as the suit property was in the middle of the deceased estate.

15. The Applicant, in my opinion, has failed to convince this Court to issue the orders sought. That is not to say, however, that she cannot file her claim in the Environment and Land Court. The findings of this Court are not in regard to whether she is the rightful owner or not and the Applicant retains the right to pursue his claim before the relevant Court. However, at this point it is my opinion that this court ought to find that she has not laid sufficient basis to satisfy this Court that the property did constitute the net estate of the deceased, which should accordingly, be excluded from these proceedings until the question of title is ascertained.

16. I feel it is the duty of this court to echo the words of Gikonyo J in Re Estate Of Julius Ndubi Javan (Deceased) [2018] eKLR where he stated;

“But before I close, the facts of this case bring me to the point where I feel I should state, albeit in passing, that, where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased. In my experience as a judge, I have seen dishonest parties seeking to defraud bona fide claimants especially in land transactions which the deceased did not complete due to his death, in the pretext of preserving the estate-and what they mostly cite is section 45 of the Law of Succession Act even where it is inapplicable. Circumstances of this case should be distinguished from a situation where the sale of land is done after the death of the deceased and before confirmation of grant.”

17. I have considered the issues raised in this application and the responses. The respondent has produced documents to show that the transaction between him and the deceased had been concluded before the death of the deceased.

18. If the applicant challenges the existence of the alleged transaction or its validity, she ought to fil a suit in the Environment and land Court for determination of the issue relating to ownership.

19. It is my finding that the application lacks merit and it is hereby dismissed with no orders as to costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the absence of the parties.