



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL MISCELLANEOUS NO. 44 OF 2015

IN THE MATTER OF THE ESTATE OF NJOROGE KAMAU (DECEASED)

HANNAH MUTHONI KAMAU.....APPLICANT

VERSUS

NYAKIO NYAINI.....1ST RESPONDENT

JANE WANJIKU MUTHEE.....2ND RESPONDENT

STANLEY KINYANJUI GATARA...3RD RESPONDENT

RULING

1. This ruling relates to the Summons filed by the Objector **Hannah Muthoni Kamau** on 18th May, 2017. Prayer 1, 2 and 5 are spent. The remaining prayers seek:-

“1) Spent

2) Spent

3) That this Honourable Court be pleased to order the cancellation of the titles issued to the 2nd and 3rd Respondents and the proposed Respondents herein by virtue of the fraudulent dealings and subdivision and transfer of the parcels of land known as NAIVASHA/MARAIGUSHU BLOCK 2/2285 and 2286 and especially title numbers NAIVASHA/MARAIGUSHU BLOCK 2/2371, 2372, 2376, 2538, 2539, 2796, 2797, 2798 and 2799.

4. That this Honourable Court be pleased to order the consolidation of the land comprised in titles number NAIVASHA/MARAIGUSHU BLOCK 2/2371, 2372, 2376, 2538, 2539, 2796, 2797, 2798 and 2799 and distribution of the same to the two branches of the family of the late PETER KAMAU NJOROGE in two equal shares who may then proceed to share out the land amongst the members of each branch.

5) Spent.”

2. The Summons is supported by an affidavit sworn by the Objector. Perhaps, before setting out the substance of the affidavit, it is well to restate the background to this Summons. On 20th May 2016, this court revoked a confirmed Grant of Letters of Administration that had been issued to **Nyakio Nyaini** and **Jane Wanjiku Muthee** (the 1st and 2nd Respondents), and who are the daughter-in-law and grand daughter to the deceased herein, respectively. The former was a wife to **Nyaini Njoroge**, now deceased, who was a son to the deceased. The latter (Jane Wanjiku Muthee) is a daughter to the 1st wife (**Rahab Mugure**, deceased) of another son of the deceased, namely **Peter Kamau** (also deceased).

3. **Hannah Muthoni**, the Objector was the 2nd wife of **Peter Kamau**. Both widows of **Peter Kamau** had several children by him. Having revoked the previous confirmed grant, the court directed that a fresh grant be issued in the name of the Objector and the two Petitioners (now Respondents) and that an application be filed after 2 months for its confirmation.

4. The court declined a prayer then sought by the Objector for the cancellation of titles obtained by the Respondents via subdivision of parcels of land which comprised the estate. The court observed:-

“.....despite the malfeasance on the part of the Petitioners, an order nullifying their respective titles would not be proportionate in the circumstance of this case. Therefore, in lieu of an order directing the cancellation of the Petitioners' respective titles, I will extend the conservatory order issued on 31st July, 2016 in respect of the parcels numbers MWICHIRINGIRI/BLOCK 2/2284, 2285 and 2286 which are the subdivisions of the mother title MWICHIRINGIRI/BLOCK 2/68 comprising the estate of the deceased herein. This order will remain in place until further orders of the court in the matter.”

5. The court also stated that the purported sale of parcel number 2286 measuring 1 acre to one **Stanley Kinyanjui Gatara** (3rd Respondent) was illegal having been concluded prior to the confirmation of the grant.

6. According to the affidavit of the Objector supporting the present Summons, she moved the court upon the discovery that parcel number 2285 had subsequent to the court's ruling been severally subdivided and transferred to third parties, including **James Ndungu Kamau, Daniel Mburu Kamau, John Wakarumu Kamau, Haron Njoroge Kamau, Samuel Wanjema Wanjiru, James Muthui Maina** and **Dangara Investment Company Limited** enjoined as the 4th to 10th Respondents.

7. The Applicant complained that the illegal subdivision and transfer was intended to defeat the orders of the court, the ultimate result being the disinheriting of the Applicant and other beneficiaries. The Applicant complained of harassment by the Respondents. Annexed to the Applicant's affidavit were copies of green cards reflecting the various subdivisions and transfers which were effected between August and December 2016.

8. In answer to the Summons, the 2nd Respondent merely re-swore and filed on 14th June, 2017 the same affidavit previously filed by her in opposition to the application for revocation of the confirmed grant. For his part, the 3rd Respondent swore an affidavit, filed on 19th June, 2017 restating the fact that he had purchased land parcel number **NAIVASHA/MWICHIRINGIRI BLOCK 2/2286** for value from the 2nd Respondent. He seeks to retain the stated land parcel, stating he was unaware of the family disputes at the time of the sale.

9. The 4th, 5th and 6th Respondents who were enjoined alongside the 7th to 10th Respondents under the instant Summons are siblings of the 2nd Respondent. They also swore affidavits. They support the Summons before the court, and while admitting that they were beneficiaries of the impugned succession and subdivisions, deny that they gave the 2nd Respondent the authority to engage in the alleged unlawful acts, and clarifying that in the initial proceedings, they believed the 2nd Respondent was acting in good faith. They blame the 1st and 2nd Respondents for the current confusion and assert their desire for the families to distribute the estate land upon the consolidation of the subdivisions.

10. During the hearing of the application, another sibling **Haron Njoroge Kamau** (7th Respondent) adopted affidavits filed by the 4th to 6th Respondents. **Samuel Wanjema**, the 8th Respondent filed an affidavit on 17th July, 2017 asserting that he transacted with the 2nd Respondent and her siblings and paid a sum of Kshs 2.7 million less Kshs160,000/= to the 2nd Respondent for the purchase of 1.467Ha out of land parcel **MWICHIRINGIRI/BLOCK 2/2285**. Therefore, he is an innocent purchaser for value. The period of the events is stated to be the year 2015.

11. The 10th Respondent through its Chairman **John Gikonyo Gitahi** filed an affidavit asserting that it purchased from the 5th and 6th Respondents the subdivision land parcels number **NAIVASHA/MWICHIRINGIRI BLOCK 2/2798** and **2796** at a sum of Kshs 3.8 million and obtained the two annexed titles in January 2017. The 9th Respondent **James Muthii Maina** despite being granted leave on 16th October, 2017 did not file any affidavit to the Summons.

12. A day to the hearing of the Summons, the 2nd Respondent filed a second so-called Replying affidavit. Therein the 2nd Respondent raises issues related to the distribution of the estate to the listed beneficiaries including herself, the 4th to 7th Respondents and her 3 sisters, all the children of the first house of **Peter Njoroge Kamau**. She asserts that while pursuing the succession cause, her interest was the property she believed fell to be inherited by that house and not the second house.

13. That the distribution and subdivisions subsequent to the court's conservatory orders was carried out on that basis. She justifies the sale of one acre of the land to finance the subdivision, asserting that some of her male siblings sold off their parcels. She takes issue therefore with the replying affidavits by the said siblings (4th to 7th Respondent). She opposes that the cancellation of titles stating that it would lead to unnecessary financial losses. She urged that the court considers the mode of distribution before making such an order.

14. At the hearing of the application on 22nd November, 2017, Mr. Njuguna for the Applicant restated the history of this matter and the previous orders of the court. He submitted that the family of **Rahab Mugure** had, despite the said orders proceeded with distribution and even sale of parts of the subject land parcel to the exclusion of other beneficiaries. Mr. Njuguna described these actions as fraudulent and in contempt of the court. In his view, the only solution was the cancellation of the subdivisions of the suit land and reconsolidation as the purchase and transfer of the estate property prior to the confirmation of the grant cannot be allowed to stand. He argued that the purchasers did not receive a good title and can recover the purchase price from the purported vendors.

15. Mr. Mboga for the 2nd Respondent submitted that cancellation of the titles will be costly. He submitted that there was no fraud citing the explanation in the affidavit of the 2nd Respondent to the effect that the subdivisions were done in the belief that the parcel in question belonged to the house of the 2nd Respondent. In his view, the purchasers of the subdivisions from **parcel number 2371** should be allowed to keep their land so that the balance of the land will be shared between the 2nd Respondent and her siblings.

16. Mr. Kimani for the 3rd Respondent adopted the foregoing submissions and asserted that the 3rd Respondent is a bonafide purchaser of the shares due to a beneficiary. He urged the court to consider the cost of cancellation of titles in light of the family relationship between the parties.

17. The 4th, 5th and 7th Respondents relied on their affidavits. The 8th to 10th Respondents opposed the application emphasizing their status as *bonafide* purchasers.

18. For the 8th Respondent, Mr. Ng'ang'a submitted as follows. Relying on Section 93 of the Laws of Succession Act, he urged that the court considers the circumstances of the purchase and protect the 8th Respondent's interest. He took issue with the fact that the matter before the court was a miscellaneous application and appeared to suggest that the orders sought cannot issue in such proceedings. Counsel for the 9th Respondent did not attend the hearing. The 10th Respondent relied on the affidavit filed and highlighted the fact that they were innocent purchasers for value.

19. The court has considered the material canvassed in respect of the instant application. Certain key facts are not in dispute. These include the fact that the 1st to 4th Respondents and other beneficiaries of the estate participated in the proceedings brought by the Applicant/Objector for the revocation of a grant issued to the 1st and 2nd Respondent. Then, as now, the 2nd Respondent (2nd Petitioner), was a key player in the events leading up to the revocation and to the present application.

20. Certain portions of this court's ruling of 20th May, 2016 bear repeating:

“9. The 2nd petitioner's (now 2nd Respondent) claim that the deceased herein bequeathed the larger portion of the estate to her mother's house alone has no legal backing. The deceased died intestate. Thus the Objector as a surviving wife of the deceased's son Peter Kamau Njoroge was entitled to claim as a beneficiary of the estate of his father.

10. On the face of it the 2nd Petitioner got the entire parcel of land measuring 13.1 acres registered in her name as her siblings were not included in the distribution. Neither were their shares and those of the children of the 1st Petitioner identified. The summons for confirmation of the grant in the lower court indicates that one Stanley Kinyanjui Gatara, described as a buyer would get one acre. This was included in the confirmed grant.

11. The Objector was entitled to be involved in the succession cause relating to her deceased father in law. Evidently, she was not. Rule 26 (1) of the Probate and Administration Rules states that:

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant”.

I agree with the statement by Wendo J in Alice Mugo alias Muthoni Paul & Another -Vs- Grace Waruguru Njagi (sued as the administrator of the estate of the late Welson Njagi Mugo (deceased) (2015)eKLR, that the failure by a petitioner to comply with this rule renders a grant in her favor liable for revocation.

11. The petition in the lower court was based on the chief's introduction letter dated 25/2/2014 (in annexure H.M.K. 3 of the applicant's affidavit). The same is authored by a chief in Naivasha who may not have known about the existence of the Objector and her children as likely beneficiaries as the said Objector lives in Kinangop.

12. Her own letter from the chief Kinangop dated 29/6/15 lists the entire and undisputed family of Peter Kamau Njoroge. I am satisfied that the petitioners in the impugned succession cause concealed material facts from the chief in Naivasha and the court, through deliberate failure to disclose the existence of the Objector and her children.

13. Besides, the proceedings were defective for several reasons, including the failure to obtain the Objector's consent and at confirmation, the failure to identify the shares in respect of all the children in the houses of the petitioners as required under Section 71 of the Law of Succession Act. The grant issued and confirmed in the lower court cannot stand and is hereby revoked.

14. The grant having been revoked, the 2nd petitioner cannot be heard to say that she should be allowed to hold onto what she has received through it. The grant was tainted and could only result in a tainted title to the property acquired thereby. That notwithstanding, I have borne in mind that there seems to be no dispute that the family of the first son, Nyaini Njoroge was entitled to get a smaller portion of the land while that of Peter Kamau Njoroge got the larger portion of the Mwichiringiri property.

15. It appears to me that the parties herein including the Objector are willing to go by that arrangement. Thus, I think that despite the malfeasance on the part of the petitioners, an order nullifying their respective titles would not be proportionate in the circumstances of this case. Therefore, in lieu of an order directing the cancellation of the petitioners' respective titles I will extend the conservatory order issued on 31/7/16 in respect of the parcel numbers MWICHIRINGIRI/BLOCK 2/2284, 2285 AND 2286 which are the subdivisions of the mother title MWICHIRINGIRI/BLOCK 2/68 comprising the estate of the deceased herein. This order will remain in place until further orders of this court in the matter.

16. With regard to the 3rd Respondent and alleged purchaser Stanley Kinyanjui Gatara, he has no legal standing before this court as he bought the property of the estate namely sub division No. 2286 before the grant was confirmed , an illegality. The fate of said one acre of land will await the final orders of this court. A fresh grant will forthwith issue in the names of the Objector and the two petitioners. An application to confirm the said grant, can be filed

after 2 months of today's date and should be accompanied by affidavits of the 3 administrators herein appointed, proposing the mode of distribution."

21. There is no dispute that despite the conservatory orders issued by this court, a series of subdivisions were carried out in respect of Land Parcel No. **NAIVASHA/MARAIGUSHU/BLOCK 2/2285**. The 2nd Respondent admits, albeit obliquely, to the subdivisions and does not in any way deny the contents of paragraphs 8 – 11 of the affidavit supporting the instant application. The subsequent transfers of the resulting subdivisions to third parties and some of the beneficiaries is equally admitted. The green card copies attached to the application indicate clearly that the subdivisions and transfers were done subsequent to the court's ruling.

22. As I noted in that ruling, the entire parcel number **2285** was transferred to the 1st and 2nd Respondents in June 2015. The subdivisions of the parcel facilitated subsequent transfer to the 3rd to 10th Respondents. An earlier purchase was alleged to have been transacted between the 1st and 2nd Respondents and the 3rd Respondent. This court made certain adverse comments regarding the said purchase as it was transacted before the grant to the purported vendors could be confirmed.

23. The male beneficiaries (4th to 7th Respondents) of the house of **Rahab Mugure** (4th to 7th Respondents) benefited from the subdivisions and now claim that the architect of the subsequent sale to 3rd parties is the 2nd Respondent. The 3rd and 8th Respondents state that they transacted with the second Respondent. There is no however no evidence, despite the transfer of the subdivisions to 3rd parties of payment of the purchase price alleged in the purchasers' affidavit. Nor are any sale agreements attached. Of course the subdivisions, sale and subsequent transfers could not have taken place without the involvement of the 2nd Respondent in whose name the land parcel number **2285** was registered as at 20th May, 2016 (see paragraph 10 of ruling and the copy of green card in respect of **NAIVASHA/MARAIGUSHU/2285** annexed to the affidavit in support of the instant motion).

24. What I hear the 2nd Respondent say in her affidavit and submissions is that the court should accept the subdivision, sale and transfer of the parcels in question as a *fait accompli* and to not disturb that eventuality. Never mind that the female children in the house of **Rahab Mugure** did not receive any share. Never mind that the grant had not been confirmed. Never mind that the subdivisions and subsequent transfers were effected in flagrant disregard of the express orders of this court issued on 20th May, 2016.

25. The conduct of the 2nd Respondent and the conniving beneficiaries amounts to intermeddling with the estate of the deceased. The case of **Charles Kyathe Ndeke** cited by the 3rd Respondent was not a succession cause and no firm findings were made as to whether the sale of the subject property occurred before or after confirmation of the grant. The court struck out an application brought in that suit *inter alia* because it ought to have been filed in the related succession cause.

26. Section 83 of the Law of Succession Act forbids the distribution of immovable property prior to the confirmation of a grant. Thus, neither the 2nd Respondent nor any other person had authority to conduct subdivisions or to enter into any transaction leading to the transfer, hence dissipation of the key estate asset prior to the confirmation of the grant. Moreso because the court had expressly forbidden such actions.

27. At paragraph 14 of the ruling of 20th May, 2016, the court observed that;

"The grant having been revoked, the 2nd Petitioner cannot be heard to say that she should be allowed to hold onto what she has received through it. The grant was tainted and could only result in a tainted title to the property acquired thereby. That notwithstanding, I have borne in mind that there seems to be no dispute that the family of the first son Nyaini Njoroge was entitled to get a smaller portion of the land while that of Peter Kamau Njoroge got the larger portion of the Mwachiringiri property."

28. The subdivision, sale and transfer of the land parcel number **2285** to 3rd parties as well as some beneficiaries is tainted with illegality, fraud and misrepresentation as the 2nd Respondent had no authority to transact in the property. She neither held a good title to the property nor a confirmed grant in her favor. The purported purchasers of some of the subdivisions herein have been loud in asserting that they are innocent purchasers for value. However, none of them considered it necessary to attach a modicum of evidence of the consideration that allegedly passed. Not even copies of sale agreements were proffered.

29. I agree with the observation by **Sila Munyao J** in **Alice Chemutai Too -Vs- Nickson Kipkurui Korir & 2 Others [2015] eKLR** where the Judge stated:

"12. Having acquired title by way of fraud, can the title of the 1st respondent be protected? My short answer is a resounding NO! The applicable law is Section 26 of the Land Registration Act which provides as follows:-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2.....

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

14. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara -Vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows :-

"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

I stand by the above words and I am unable to put it better than I did in the said dictum."

30 **Mutungi J.** confronted with a challenge to a title acquired by the plaintiffs in *Esther Ndegi Njiru & Another -Vs- Leonard Gatei [2014] eKLR* agreed with the reasoning of **Munyao J.** in *Elijah Makeri Nyang'wara -Vs- Stephen Mungai Njuguna & Another [2013] eKLR* which echoed the judge's sentiments in *Alice Chemutai Too*. **Mutungi J** expressed himself as follows:-

"The situation that Munyao, Judge faced in the above referred to case is some what similar as in the present case before me. I am in agreement with his interpretation and application of Section 26 1(a) & (b) of the Land Registration Act.

In the present case the plaintiffs cannot shield themselves with the title that they hold though without any doubt they were bonafide and innocent purchasers from the 2nd Defendant. The acts of the 2nd Defendant of processing the title to his name using fake or forged documents were patently illegal and the 2nd Defendant must have known they were. The processing of the title in his name and thereafter selling the parcel of land to the unsuspecting plaintiffs was illegal and unprocedural. The 2nd Defendant must have known what he was doing. He was simply a conman otherwise he would have appeared to defend and/or clear his name. While it is clear the title held by the plaintiffs cannot be impugned under section 26(1) (a) of the Act as they were not party to any fraud or misrepresentation the title is nonetheless impeachable under section 26(1) (b) as the title transferred to them by the 2nd defendant was obtained illegally and unprocedurally.

Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the Constitution coupled with the provisions of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility on purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as "grabbed public lands" it is essential to endeavour to ascertain the history and/or root of the tile."

31. This court associates fully with the above sentiments. Here too, it is not necessary to show that the alleged purchasers and beneficiaries to the subdivision titles were party to the illegality attending the creation of the subdivisions and irregular dealings in regard of them. Secondly, it is not enough for the purchasers to assert that they conducted a registry search. The 2nd Respondent could not pass a good title to the purchasers and beneficiaries of the subdivisions, as she herself had no title in the property; indeed, her purported dealings in the subject property were in flagrant disobedience of a court order barring any dealings in the subject matter. The court rejects the entreaties of a party who has acted in contempt of its orders to accept the *fact accompli*, and to do the best it can to accommodate the illegal outcome.

32. Any losses occasioned by the reversal of the 2nd Respondent's illegal actions will fall where due. More importantly, the imbroglio created by the 2nd Respondent with the aim to defeat the orders of this court must first be undone so that the entire estate of the deceased can be distributed among all the entitled beneficiaries.

33. In the circumstances, I hereby grant prayer 3 of the Summons filed on 18th May 2017. Prayer 4 therein is also granted but limited only to the consolidation of the land parcels stated therein. The question of distribution will be determined during the confirmation of the grant issued herein. The resulting orders in respect of Prayers 3 and 4 shall be effected within 3 (three) months of this Ruling. The 1st and 2nd Respondents, having contributed to a great extent to the events leading to the present orders, will take full responsibility to ensure compliance therewith. Any costs attendant to the effectuation of the orders issued in regard to prayer 3 and 4 will be borne by the 2nd Respondent **Jane Wanjiku Muthee**. She will also bear all the costs occasioned by this application.

Dated and signed this 6th day of July, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha this 31st day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

For Objector/Applicant : Ms Kithinji holding brief for P. K. Njuguna

For the Respondents : Ms Amboko holding brief for Mboga for 2nd Respondent

Court Assistant : Quinter