



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO 15 OF 2019

KERUBO MANDI MOCHACHE.....APPLICANT

VERSUS

JOSEPH OIRONO MOCHACHE.....RESPONDENT

RULING

1. The application before this court is a preliminary objection dated 17th June 2021. A brief background to the application is that **Land Succession Cause No 30 of 1980** was filed before the Kisii District Magistrate court relating to the estate of Moraa Nyamari ('the deceased'). The respondent and Jackson Sitati Nyamari were issued with a certificate of succession.

2. The applicant has alleged that the certificate of succession was obtained by fraud and concealment of material facts. The applicant her summons for revocation of grant dated 19th February 2019 seeks the following orders:

2.) Pending the hearing and determination of the summons herein, the honourable court be pleased to issue prohibitionary order of injunction and/or conservatory order, restraining the respondent from disposing off, alienating, selling and/or appropriating the assets of the deceased person herein particularly LR NOS CENTRAL KITUTU/MWAMOSIOMA/847, 848, 1002, 1003, 1004, 1005, 1006, 1788, 1789, 1790, 1791, 1792, 2180, 2181, 2182, 2183, 1037, 1038, 2679 and 2680.

3.) The grant of letters of administration and/or order herein be revoked and/or annulled.

4.) The land register in respect of the said parcel number CENTRAL KITUTU/MWAMOSIOMA/847, 848, 1002, 1003, 1004, 1005, 1006, 1788, 1789, 1790, 1791, 1792, 2180, 2181, 2182, 2183, 1037, 1038, 2679 and 2680 be rectified and the names of the respondent and other persons who have been registered be rescinded and/or deleted therefrom and same de revert to the name of MORAA NYAMARI the deceased person herein.

5.) In the alternative, the register in respect of LR NO. CENTRAL KITUTU/MWAMOSIOMA/847, 848, 1002, 1003, 1004, 1005, 1006, 1788, 1789, 1790, 1791, 1792, 2180, 2181, 2182, 2183, 1037, 1038, 2679 and 2680 respectively be nullified and original parcel number CENTRAL KITUTU/MWAMOSIOMA/580 be restored and the name of the deceased be-reinstated, to facilitate fresh administration.

3. The respondent filed a preliminary objection dated 17th June 2021 against the application dated 19th February 2018, on the grounds that: -

1. This court does not have jurisdiction to hear and determine the application dated 19th February 2018.

2. This court cannot revoke and/or annul the judgment which was entered as confirmation on 18/6/1980 about 41 years ago.

3. This Honourable court does not have the necessary constitutional mandate to order rectification of registers in respect of the suit properties.

4. This Honourable court does not have the necessary constitutional mandate to nullify the registers of the suit parcels of land and restore the original title to the deceased's name.

5. Revocation and/annulment of grant under section 76 of Cap 160 Laws of Kenya has time limitation.

4. In considering the preliminary objection, I am guided by the well laid principles that a preliminary objection shall only consist of pure points of law as was observed in **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**. The court in **Mukisa Biscuit Manufacturing Company Limited (supra)** held that:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. Subsequently, in the case of **Oraro v Mbaja [2005] 1 KLR 141** the court further elaborated the rule by stating:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

6. The preliminary objection raises two issues touching on the jurisdiction of this court:

a) **Whether this court has jurisdiction to hear an application for revocation of Certificate of Succession.**

b) **Whether the succession court has jurisdiction to nullify or rectify registers or does the nullification or rectification of registers that fall within the purview of the Environment and Land Court.**

7. The pertinent issue raised by the preliminary objection revolves around jurisdiction. The *locus classicus* on jurisdiction is the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989)**:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

8. On whether the court has jurisdiction to hear an application for revocation of a certificate of succession, the respondent submitted that the commencement date for the **Law of Succession Act (the Act)** was 1st July 1981. The applicable laws that governed succession before commencement of *the Act* were repealed by **section 99 of the Act**. They advanced that the certificate of succession (which is equivalent to a certificate of confirmation) having been issued meant that this court cannot cause the same to be revoked. It was advanced that **section 76 of the Act** talks of revocation of grant but not revocation of certificate of confirmation.

9. The applicant on the other hand submitted that they have a right to be heard under **Article 50 of the Constitution**. She cited the case of **Joel Omondi Ondu v Eng David Onyango Kisumu HCCA No 5 of 2018** and **the Constitutional Pet. No 8 of 2010 Andrew Nthiwa Mutuku v the Court of Appeal**.

10. It is not in dispute that the deceased died before the commencement of *the Act* in 1977 and the succession process was commenced before the District Magistrate Court and concluded upon issuance of the Certificate of Succession.

11. *The Act* under **section (2) (2)** provides that ‘the estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act’.

12. This provision in my view, allows the administration of estates of deceased persons who died before 1st July, 1981 to apply the procedure as laid down under *the Act*. However, distribution of such estates shall be subject to customary law. In such cases therefore since the procedure followed is as laid down under *the Act* the court will appoint administrators of the estate and thus have jurisdiction by virtue of **section 76 of the Act** to revoke any grant of representation whether confirmed or not.

13. In this instant case, the contrary exists. The deceased died in 1977 and the administration of her estate concluded in 1980 upon issuance of the certificate of succession.

14. Although the respondent submitted that a certificate of succession was equivalent to a certificate of confirmed grant, I find the same not to be true. I agree with the court in **Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR** where Musyoka J found that a certificate of succession issued under **section 120 of the Registered Land Act** did not appoint a personal representative or the administrator of the estate of the deceased and thus was not equivalent to a grant of representation. The court in **Re Estate of Nduati Mbuthia (supra)** also found that it lacked jurisdiction to revoke a certificate of succession and held that:

“38. Section 76 of the Law of Succession Act falls in Part VII of the Act, and, by virtue of Section 2(2) of the Act, it applies to proceedings in respect of estates of persons who died before the Act commenced, such as that of the deceased herein, Nduati Mbuthia. However, it applies only in respect of grants of representation. As the certificate of succession envisaged in Section 120 of the Registered Land Act is not a grant of representation, Section 76 of the Law of Succession Act does not apply to it. Consequently, I have no jurisdiction under Section 76 of the Law of Succession Act to revoke or annul the said certificate of succession.”

15. From the proceedings, I note that the respondent and Jackson Sasati Nyamara were notified on 10th May 1980 to apply to the District

Magistrate court at Kisii so that the heirs of the deceased who owned CENTRAL KITUTU/MWAMOSIOMA/847 could be determined. A hearing notice was issued on 13th May 1980 for purposes of hearing the application for determining of the deceased heirs and any person claiming interest on the property were invited to attend. Service of the hearing notice was effected in compliance of section 21 of the Civil Procedure Act Cap 5 (now repealed). An affidavit of service was also filed before the court. After the issuance of the certificate of succession to the respondent and Jackson Sasati Nyamara no appeal was preferred. In my view, this marked the end of the succession process and I find that this court therefore has no jurisdiction to entertain application for revocation of grant as none was issued.

16. While I agree with the applicant that the right to be heard is guaranteed in **Article 50 of the Constitution of Kenya** it can only be exercised where the court has jurisdiction, but the moment it is established that the court lacks jurisdiction it must down its tools in respect of the matter.

17. Although the succession court has powers to counsel titles and have them revert back to the deceased in any event that the deceased property is being wasted. The court in **Santuzzabilioti alias Mei Santuzza (deceased) vs Giancarlo Felasconi (2014) eKLR**, observed that:

“This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancelation of the title deed. Further, a succession court can order a cancelation of title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

18. However as already noted, this court has no jurisdiction to revoke the certificate of succession as the same is not a grant of representation. In sum, the preliminary objection is meritorious and the summons for revocation of grant dated 19th February 2019 is hereby struck out.

19. This being a family matter, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF DECEMBER, 2021.

R. E. OUGO

JUDGE

In the presence of: -

Applicant Absent

Mr. Momanyi For the Respondent

Kevin Isindu Court Assistant