



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 361 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE CHARO NGUMA KALAMA

DONALD CHARO NGUMAAPPLICANT

VERSUS

SAMUEL KARISA NGUMAH

JULIUS CHARO NGUMA

ERICK KAINGU CHARORESPONDENTS

RULING

1. The deceased herein died intestate on 27th July, 2000. On 5th September, 2020 Donald Charo Nguma the respondent herein, petitioned for a grant of representation. According to form P&A 5, the deceased was survived by 3 widows, two daughters and 6 sons. The only asset listed as comprising the estate was Kilifi /Mtwapa/558.

2. A grant of letters of administration was issued to the petitioner on 21st September, 2012 and the grant confirmed on 14th February, 2013 with the estate being distributed equally. Later, Samuel Karisa Nguma, Julius Charo Nguma and Erick Kaingu Charo all beneficiaries to the estate filed a summons for revocation or annulment of the grant on grounds that the grant was fraudulently obtained through concealment and non-disclosure of material facts.

3. It was alleged that the deceased had disappeared sometime 1997 and his whereabouts was unknown hence the date of death given was false. They also claimed that the deceased was survived by 4 widows, 8 daughters and 7 sons hence necessary consents were not given by all beneficiaries. They also stated that the administrator had embarked on sub division of the subject property without the consent of other beneficiaries.

4. After hearing the revocation application ex parte owing to non-attendance of the respondents, the court pronounced itself through a ruling delivered on 6th April 2018 thus revoking the grant. It was further ordered that status quo to be restored and title No Kilifi/Mtwapa/558 do revert to the deceased Charo Nguma Karisa.

5. However, vide the application dated 5th June, 2018, one Eliud Mburu Kariuki an interested party claiming to have bought a portion of the subject land sought orders to set aside the ruling of 6th April, 2018 and review its orders in his favour on grounds that he was condemned unheard. At the same time, Donald Charo Nguma filed an application dated 18th June, 2018 seeking also to set aside the impugned ruling and also a declaration on the deceased's presumption of death who disappeared without trace.

6. After hearing the two applications, the court delivered its ruling on 19th October, 2018 thus dismissing the same. The court found that an illegally obtained grant in respect of an estate of a person who had disappeared but not died was a nullity and void ab initio hence any sale of the subject land would not be legitimized.

7. Aggrieved by these orders, Eliud Mburu Kariuki filed an appeal to the court of appeal challenging the said ruling. By its judgment delivered on 5th July, 2021 in civil appeal No 161/2018, the said appeal was dismissed thus confirming the high court finding. The court of appeal concurred that the sale of the subject land by Donald Charo without a valid title was irregular and that the only remedy to the interested party was to claim for a refund from Donald.

8. Despite service of all these court orders upon the Land Registrar Kilifi to cancel all dealings of land transfers in respect of the said land, the Land Registrar has been adamant.

9. Aggrieved by the land registrar's refusal to honour the court order, the applicants through a notice of motion dated 30th July, 2021 filed in person moved this court pursuant to Section 1A, 1B and 3 of the Civil Procedure Act and order 40 Rules 3 of the Civil Procedure Rules seeking orders;

a. That this application be certified as urgent and be heard on a priority basis and service be dispensed with in the 1st instance.

b. That this honourable court be pleased to order that summons do issue to the Land Registrar Kilifi Ms Stella Gaturi Kinyua to appear before this honourable court and show cause why she has refused and /or declined to obey the court order issued on 10th April, 2018 directing her to revert title No Kilifi/Mtwapa/558 to the deceased Charo Nguma Kalama.

c. That this honourable court be pleased to order that the District Land Registrar Kilifi Ms Stella Gaturi Kinyua be compelled to obey the court order issued on the 10th April 2021 and revert Title No Kilifi/Mtwapa/558 to the deceased Charo Nguma Kalama.

d. That this honourable court do find the district Land Registrar Kilifi Ms Stella Gaturi Kinyua in contempt of court.

e. That costs be provided for.

10. The application is anchored on the grounds stated on the face of it and averments contained in the affidavit in support sworn on 30th July, 2021 by Samuel Karisa Nguma in which they gave a brief history on the events preceding the filing of the instant application which facts I have already outlined herein above.

11. In reply, the Land Registrar Kilifi filed a replying affidavit sworn on 25th October, 2021 by one Stella G Kinyua. She averred that on 8th July, 2012 forms LR 19 and RL7 (repealed) were registered in favour of Donald Charo Nguma as the administrator and beneficiary of the subject land. That on the strength of succession case No 361/91 confirmed grant, a title deed was issued.

12. That on 31st July, 2013 the land was subdivided into Nos 4211,4212,4213,4214 4723 and 4724. She further stated that green cards in respect of these portions cannot be traced in the land registry.

13. She averred that the revocation orders cannot be implemented until the green cards are reconstructed. In her view, the land might have been subdivided further thus affecting several innocent persons whose records should not be cancelled without due notice or being offered a chance to be heard. She contended that the court does issue orders directing restoration of the relevant records without gazettelement.

14. In his rejoinder, Samuel Karisa filed a further affidavit on 15th November, 2021. He averred that, the disappearance of green cards was stage managed as the land registrar has not shown any efforts made to reconstruct the green card despite admitting that their office was served with revocation of the grant orders. Regarding the issue of innocent purchasers, he retorted that it was for the court to determine and not the land registrar.

15. When the matter came up for hearing, the applicant submitted orally thus reiterating the averments contained in the affidavit in

support and a further affidavit. Equally, Mr Waga state counsel representing Attorney General on behalf of the respondent, adopted fully the content contained in the replying affidavit.

16. I have considered the application herein, response thereto and oral submissions by both parties. The application is seeking summons to compel the Land Registrar to appear before court to show cause why she should not obey the court order and also an order directing that the land registrar in contempt of court.

17. There is no dispute that a lawful court order issued by the high court and confirmed by the court of appeal has not been honoured by the land registrar Kilifi. Among the grounds advanced for non-compliance is that, green cards disappeared from the land registry; that she needs time to reconstruct the green cards ; that innocent buyers will suffer if the order is implemented; the court should direct cancellation of title deeds already issued without gazettelement.

18. It is trite law that unless set aside or reviewed, a court order must at all times be obeyed or complied with. Equally, court orders are not made in vain lest the dignity and authority of the court be subjected to ridicule or a laughing stoke. See **B vs Attorney General (2004) e KLR 43** where the court held that;

“ The court does not, and ought not to be seen to make orders, in vain,; otherwise the court will be exposed to ridicule and no agency of the constitutional order would then be left in place to serve as aguarantee for legality, and for the rights of all people”

19. In **Hadkinson vs Hadkinson (1992) 2 all EA 567** Romer L.J had this to say;

“it is the plain and unqualified obligation of every person, against , or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”.

20. In the instant case, the Land Registrar does not deny knowledge of the orders in question. She is simply giving conditions to justify her failure to comply. I must make it clear that, it is not the duty of the court to order reconstruction of Land Registry records. If the registry by omission or commission caused disappearance of land registry documents, it is their duty to use their powers or legally bestowed mandate to reconstruct their records.

21. Therefore, this court has no business issuing orders without a specific application being filed before the court. Orders do not issue through pleas made in a replying affidavit. The registrar knows better on what to do to maintain the integrity and safe custody of land records.

22. Regarding innocent purchasers, that is not her duty. Those affected will move the court for appropriate orders. The registrar should have been more informed if she read through court documents where one of the purchaser’s claim one Eliud Mburu was dismissed and advised to direct his claim against the person who sold him the land illegally.

23. The Land Registrar cannot play the role of a lawyer of unknown purchasers. If any, they shall wake up when they become aware and then seek appropriate remedy. That excuse is therefore misplaced to that extent. The land registrar has not sufficiently shown to the satisfaction of the court that she had good reason not to obey the court order. In any event, it is more than two years since she became aware of the court orders yet no action taken. These time was sufficient to reconstruct records but she chose not to.

24. Having held that the land registrar had no reason not to implement the court order, I am left with the issue whether she should be punished for contempt or not. In the case of **Samuel M. N Mweru &others vs National Land Commission &2 others (2020)e KLR** Mativo J highlighted four elements which must be established before finding a person cited for contempt guilty. The elements are; the terms of the order must clear or unambiguous and binding on the defendant/respondent; the respondent/defendant must have knowledge of the terms of the order; the defendant/respondent must have acted in breach of the order and that the defendant’s / respondent’s conduct was deliberate.

25. In the instant case, the land registrar was aware of the clear terms of the order, had proper notice of the order and she acted in breach of the order and the disobedience was deliberate. The purpose of issuing a court order is to ensure compliance failure to which punishment comes in the place to safeguard the rule of law See **Teachers service commission vs Kenya National Union**

of Teachers & 2 others (2013) e KLR

26. In view of the above holding, I am satisfied that the application is merited and that the respondent is in contempt of the court order herein to which she is liable to punishment. However, I will give a widow of 90 days within which the order requiring cancellation of all transfers and any dealings affecting the original L.R No Kilifi/Mtwapa/558 is effected so as the land to revert to the original owner. In default, the land registrar the respondent herein shall be condemned to serve four months imprisonment in jail upon expiry of the said 90 days. Costs of the application are awarded to the applicant.

Dated, signed and delivered virtually at Mombasa this 25th day of March, 2022

J. N. ONYIEGO

JUDGE



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