



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 278 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL MUNDATI KAMAU (DECEASED)**

EVANS WARUINGE MWANIKI.....1<sup>ST</sup> APPLICANT

MBUGUA KARANJA KIARIE.....2<sup>ND</sup> APPLICANT

VERSUS

JOHN MACHARIA NJOKI.....1<sup>ST</sup> RESPONDENT

NAHASHON WAWERU KAMAU.....2<sup>ND</sup> RESPONDENT

**RULING**

1. By Summons dated 15<sup>th</sup> May, 2014 brought under **Section 47 & 76 of the Law of Succession Act Cap 160, Rules 44(1),49 & 73 of the Probate and Administration Rules**, the Applicants seeks for Orders: -

(A) Spent

(B) Spent

(C) *THAT the letters of Administration issued to the respondents in NAKURU SUCCESSION CAUSE NO. 506 OF 2013 be revoked and / annulled.*

(D) *THAT the Honorable court does order that this matter be consolidated with NAKURU SUCCESSION CAUSE NO. 506 OF 2013.*

(E) *THAT this Honourable Court do declare that all that parcel of Land Known as BAHATI/WENDO BLOCK 3/376 (LIMURKO) does not form part of the free properties forming part of the estate of the deceased herein.*

(F) *THAT the Honorable Court be pleased to rectify the grant herein by substituting the name PAUL KARUNGO KAMAU as the administrator of the deceased estate with those of EVANS WARUINGI MWANIKI and MBUGUA KARANJA KIARIE as the joint administrators of the estate of the late SAMUEL MUNDATI KAMAU (DECEASED).*

(G) *THAT the costs of this Application be provided for.*

2. The Application is supported by grounds on its face as well as the Affidavit of Evans Waruingi Mwaniki sworn on 15<sup>th</sup> May, 2014. He deponed that the deceased herein died on or around 24<sup>th</sup> August, 2005 and that proceedings in this cause were filed by one **James Wamagata** sometimes in the year 2009 and the grant issued on 26<sup>th</sup> April, 2012.

3. That one Paul Karungo Kamau filed objection proceedings thereon after realizing that the said James Wamagata had already obtained Letters of Administration and confirmed the same without his consent and that prior to the confirmation of grant, on or around 10<sup>th</sup> July, 2010 the court advised the said Paul Karungo Kamau to petition for letters of administration within three months.

4. That the court revoked the letters of administration and the grant issued to the said James Wamagata and directed Paul Karungo Kamau to be the administrator of the deceased estate. That the said Paul Karungo Kamau is dead and therefore the estate of the deceased herein lacks

an administrator since time of his death.

5. He deposed that Paul Karungo Kamau was the beneficial or rightful owner of all that parcel of land known as Bahati/Wendo Block 3/376 (Limurko) having been bequeathed the same as a gift by the deceased herein during his lifetime and therefore the property is unavailable for distribution as it does not form part of the deceased estate.

6. He averred that he purchased three (3) acres out of that parcel of land known as Bahati/Wendo Block 3/376 (Limurko) from Paul Karungo Kamau at a total costs of Kshs. one million and three thousand shillings only while the 2<sup>nd</sup> applicant bought the remaining share measuring ½ acre at a costs of Kshs. 220,000/= (two hundred and twenty thousand shillings only). That Paul Karungo Kamau commenced subdivision process for the suit parcel of land to convey original title deed to him and the 2<sup>nd</sup> applicant herein but unfortunately he passed on before the property could devolve to them.

7. He averred that the deceased herein was his neighbor since the year 1994 till his death and he neither had a wife nor children known to him or to his co-applicant. That the 1<sup>st</sup> respondent herein wrote to him on 17<sup>th</sup> January, 2014 ordering him to exit the suit land claiming that he was the dependent of the deceased in his capacity as a son.

8. He reported the matter to the area chief at Wendo Location and the District Officer Bahati District who denied knowledge of existence of any beneficiaries claiming interest in the deceased estate in such capacity as the deceased children and later on he learned that the respondents had clandestinely filed **Nakuru Succession Cause Number 506 of 2013** despite their knowledge of the existence of the instant cause.

9. That the legal provision guiding the filing of Succession Causes does not allow the filing of two succession causes in respect of sole estate of any deceased person and any person aggrieved by any issue touching on the estate of the deceased person should always raise the same through the existing succession cause and thus the proceedings in **Nakuru Succession Cause No. 506 of 2013** are irregular, null and void *ab initio*, fraudulent and defective because the same were filed falsely and by concealment of material facts from the court.

10. He prayed that his application be allowed in the interests of Justice.

11. The summons is opposed by the respondents. **John Macharia Njoki** filed a Replying Affidavit on his behalf and on behalf of the co-respondent on 25<sup>th</sup> November 2014. He deposed that the applicants have not exhibited any proper documentation to prove they purchased property Bahati/Wendo Block 3/376 from the deceased and that they have no relations with the deceased so as to be entitled to apply for letters of administration.

12. That under **Section 29 of the Law of Succession Act** they are not dependants as the Act does not recognize that purchasers can become administrators when the deceased has immediate family members. He stated that he was a brother in law to the deceased Samuel Mundati Kamau, whereas the 2<sup>nd</sup> respondent is a blood brother to the deceased and in their respective capacities they made an application for grant in the **Nakuru H.C.C. Succession Cause No.506 of 2013**.

13. THAT the wife to the deceased Samuel Mundati Kamau named Mary Muthoni Mundati went to Saudi Arabia in 2007 after the death of the deceased in 2005 and left behind two minor children of the deceased who are still under his care and maintenance.

14. He averred that deceased had other brothers and that one of his brother one Paul Karungo Kamau died on 10<sup>th</sup> June, 2013 had no powers to administrate and or distribute the estate of the deceased herein and that this succession cause was filed by the Applicants without their knowledge otherwise they may have never filled the **Nakuru H.C.C. Succession Cause No. 506 of 2013** in respect of the deceased's estate.

15. He deposed that the Applicants herein have no *locus standi* to petition for letters of administration of the deceased's estate and that they are intermeddlers as per the provisions of **Section 45 of the Law of Succession Act**. That the applicants' annexure marked as E.W.M.2 alleged to be a will is invalid as it is unattested and that the late Paul Karungo never mentioned that the property therein had been granted to him as a gift by the deceased herein in his Affidavit of Protest.

16. THAT the applicants' letter of consent from the Land Control Board for disposal of property Bahati Wendo Block 3/376 (Limurko) dated 29<sup>th</sup> March 2008 shows that the deceased granted the consent yet by then he was dead and that further the applicants annexed a fraudulent transfer documents for sub divisions of Bahati Wendo Block 3/376 (Limurko) purportedly signed by the deceased herein in favour of the 1<sup>st</sup> Applicant whereas the said transfer documents i.e. copies of passport size photographs PIN certificate, ID number and appended signature therein belonged to the deceased Paul Karungo Kamau and not the deceased herein.

17. That the Sale Agreement dated 25<sup>th</sup> June, 2008 marked as "E.W.M.5" is fraudulent and unenforceable as it was signed by the late Paul Karungo Kamau for the property in question Bahati Wendo Block 3/376 (Limurko) which belonged to the deceased. That the said Paul Karungo Kamau lacked capacity to sell the deceased's property.

18. He averred that the Applicants claim should be against the estate of the late Paul Karungo Kamau since he is the one who fraudulently sold land to them. He therefore prayed that the instant application be dismissed and the succession cause herein be struck out since there is another succession cause being Nakuru H.C.C. Succession Cause No. 506 of 2013 which is legitimate

19. On 27<sup>th</sup> November 2014 parties took directions for matter to proceed by way of *viva voce* evidence.

#### **APPLICANTS' CASE**

20. **PW1, Evans Warungi Mwaniki**, testified that the deceased herein Samuel Mundati Kamau was his neighbor at Kabatini. He did not know the 1<sup>st</sup> respondent herein and that after the demise of the deceased herein he learnt that the 2<sup>nd</sup> respondent herein was his brother. That since the year 1993 he knew about the deceased brothers Paul Karungo Kamau & Joseph Wangu.

21. He said he purchased 1 ½ acres out of that parcel of land known as Bahati/Wendo Block 3/376 (Limurko) from Paul Karungo Kamau in 2012. At the time of purchase the vendor Paul Karungo informed him that he had been granted letters of administration to the deceased estate and showed him a copy of the *will agreement* dated 12<sup>th</sup> May, 2004 signed by the deceased herein indicating that the land in question had been gifted to him.

22. He said after demise of Paul Karungo Kamau his son gave him an original title deed and therefore he has a right to possess the property. On cross examination he confirmed that the property in question Bahati Wendo Block 3/376 Limurko is registered under the deceased's name and that there was no transfer of this land to Paul Karungo, the *will* dated 12<sup>th</sup> May, 2004 was unattested and that Paul Karungo Kamau did not show him Letters of Administration at the time of sale.

23. **PW2 Ngugi Mbugua**, son to the 2<sup>nd</sup> Respondent, testified that his late father bought ½ acres of land out of that parcel of land known as Bahati/Wendo Block 3/376 (Limurko) from Paul Karungo. That at the time of sale his late father was shown a title deed and a copy of gift document dated 12<sup>th</sup> May, 2004. He witnessed a Sale Agreement dated 25<sup>th</sup> June 2008 between his father and Paul Karungo and he prayed he be given ½ acres from Bahati Wendo Block 3/376 Limurko so that he can have a home.

24. On cross examination he confirmed the land in question is registered in deceased's name and the gift agreement was unattested to.

### **RESPONDENTS' CASE**

25. The second respondent Nahashon Waweru Kamau adopted the averments contained in the Replying Affidavit sworn on 25<sup>th</sup> November 2014 and the annexures as exhibits as his evidence in this case. These included Paul Karungo's entry of appearance in this cause as an objector dated 13<sup>th</sup> July 2009, his Affidavit sworn on the 13<sup>th</sup> July 2009 showing that the deceased herein was survived by other people, Paul Karungo's Certificate of Death and a copy of the title deed of the property herein.

26. On cross examination he stated that he Paul was compelled to seek Letters of Administration but he never did become the administrator of the deceased's estate, that the wife to the deceased left for Dubai in 2007 leaving behind two children who were minors but are now adults. That in 2014 they were minors aged 12 and 14 years but they are aware of these proceedings. He said he had not attempted to contact the widow of his brother.

27. He further stated that he learnt from the citation that deceased Paul Karungo was said to have sold the land in question to the Applicants herein. He said that the family of Kiarie occupied part of the land in question while the 2<sup>nd</sup> applicant utilized about 2 acres of the said land. He also said that the deceased herein had a stone house on the same land but the same was demolished by people unknown to him. He said one of the deceased's children was born on the land and the other in Kiambu County. It was his view that the persons beneficially entitled in the property were the children and widow of the deceased.

28. On re-examination he stated he was unaware of this proceedings otherwise he may not have filed Succession Cause No. 506 of 2013 and that the deceased herein had not transferred the suit land to Paul Karungo Kamau before his death.

29. During the hearing the respondents objected to the production of the alleged will marked as PMFI dated 12<sup>th</sup> May 2004. Counsel Mr. Chege for the applicants argued that both the parties to the document were deceased. He relied on **sections 33 and 33(b) of the Evidence Act** urging that this court had the power to allow the document to be produced

30. Mr. Kanyi Nguni for the respondents pointed out that the document was headed *Will Agreement*. That under **Section 11 of the Law of Succession Act** it did not qualify to be a will. The document was not attested, it did not mention the parties before this court, and the only other party mentioned in the document had not signed it. There were no witnesses and there was no one to authenticate the document, those seeking to produce it were not there when it was allegedly made and they did not sign it.

31. In a rejoinder Mr. Chege submitted that this was not a will but a document whose maker was deceased.

32. The court gave a date for the Ruling and for parties to file Written Submissions.

33. Parties did not file submissions.

### **ISSUES FOR DETERMINATION**

34. The following issues fall for determination:-

*i. Whether the Applicants herein have locus to be appointed as joint administrators of the deceased's estate;*

*ii. Whether the document headed Will Agreement dated 12.5.2004 is a valid will;*

*iii. Whether the applicants can produce the said document under s. 33 of the Evidence Act;*

iv. Whether the late PAUL KARUNGO KAMAU had locus to dispose off the land parcel BAHATI WENDO BLOCK 3/376 LIMURKO to the Applicants;

v. Whether this succession suit should be struck out.

### **ANALYSIS & DETERMINATION**

#### **Whether the Applicants herein have locus to be appointed as joint administrators of the deceased's estate:**

35. The Applicants herein are not dependants/beneficiaries of the deceased Samuel Mundati Kamau. Their claim to the Estate of the deceased herein is not based on their dependancy but rather on a cause of action against the ownership of the parcel Bahati /Wendo Block 3/376 (Limurko) which they contend was sold to them by the late Paul Karungo Kamau and thus cannot form part of the free properties of the estate of Samuel Mundati Kamau (deceased)

36. It is common ground that Paul Karungo was not the registered owner of the property. He was not the administrator of the estate of the deceased herein. He did not have any proprietary interest he could pass on to the applicants.

37. Section 66 of the Law of Succession Act sets out the *Preference to be given to certain persons to administer where deceased died intestate:*

*“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors:*

*Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”*

38. The applicants do not fall in any of the categories set herein above. They have not established they are creditors of the estate.

39. Hence they can only raise an objection with regards to the distribution of the deceased's estate but cannot seek to be appointed administrators so that they can transfer the estate's properties to themselves.

40. The applicants are seeking the revocation of the grant in **Succession Cause 506 of 2013**. However, that cause has been brought by a brother of the deceased on behalf of the children of the deceased. The applicants cannot legally beat that.

41. The prayer therefore by the applicants to be appointed as joint administrators is untenable in law.

#### **Whether the document headed will agreement dated 12<sup>th</sup> May 2004 was valid, and whether it can be produced under Section 33(g) of the Evidence Act Cap 80 Laws of Kenya**

42. The document states;

*“A WILL AGREEMENT*

*12/05/2004*

*Today, day of 12<sup>th</sup> May 2004, I Mr. Samuel Mundati Kamau ID. No. 1334294 have entered into a will agreement with my order brother MR. PAUL KARUNGO KAMAU:-*

- 1. My brother has been taking care of me whenever am sick and given me all my requirements during all these time.*
- 2. On date 19/11/2003, I sold my two acres of land to Ruth Wangari and one of my brother borrowed me the money which he have not yet given back the same.*
- 3. I have given Karungo my two acres of land which belongs to me, Bahati/Wendo Block 3/376. I have done that without being forced or seduced.*

Yours faithfully,

SAMUEL MUNDATI KAMAU

ID. No. 1334294

Date 15/5/2004”

43. **Section 33 states: Statement by deceased person, etc.,**

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

...

(g) relating to a transaction creating or asserting, etc., a custom

when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);

**Section 13 (a) provides:**

**Facts affecting existence of right or custom**

Where the **existence of any right or custom** is in question, the following facts are relevant—

(a) any **transaction** by which the right or custom in question was **created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;** or (emphasis added)”

44. The applicants’ argument that the document is admissible under **section 33** as a relevant fact is tenable. However, they first contended it is a will through which the deceased herein bequeathed his land to his brother Karungo. There after they changed their mind and said it was just a document that shows there was a transaction that created a right for the respondents.

45. On the contention that it was a will left by Samuel Mundati (deceased) it dawned on them that that document could not pass the legal tests of a valid will.

46. On the second contention that this court had the power to admit the document because it is evidence of a transaction that creates a right with respect to the applicants, the question is where is the evidence? The applicants were obligated to avail the evidence to support their claim to the alleged right. The evidence placed before me is clear that the person they claim conferred rights to them was Paul Karungo. The said Paul Karungo had no interests that he could pass over to them. That document is inadmissible on so many fronts. There is no mention of the claimants herein in that document. There is nothing in that document that one can say creates a right for the applicants. The person named in the agreement denies any sale of land and hence it being a highly contested document it cannot be admissible in the manner envisaged by the applicants.

47. My position is buttressed by the fact that the alleged gift to Paul Karungo was not perfected. There is nothing in that document that shows with certainty that the parcel of land was indeed bequeathed to him. In **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, it was stated as follows:

“...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

48. In **Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67** it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

49. Hence even if this court was to consider this as a gift it is evident that the same was incomplete. The same could have been perfected if the deceased transferred the property in question to Paul Karungo Kamau.

50. Further the said Paul Karungo Kamau did not mention in his aforementioned Affidavit of Protest that the deceased had gifted him the said property.

51. Therefore, the alleged gift though the 'will agreement' dated 12<sup>th</sup> May, 2004 is invalid. Hence it is neither a will nor admissible under **Section 33 of the Evidence Act**.

**Whether the late PAUL KARUNGO KAMAU had locus to dispose off the land parcel BAHATI WENDO BLOCK 3/376 LIMURKO to the Applicants:**

52. The title to land parcel Bahati /Wendo Block 3/376 (Limurko) is registered in the deceased names. The applicants were aware of this position.

53. There are no documents on record to prove that this parcel of land was legally and successfully transferred to the Late Paul Karungo Kamau by the deceased herein before his death. From the record his late brother Paul Karungo Kamau was never appointed as such and Letters of Administration was never issued to him by this Honourable Court.

54. The position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In **Otieno vs Ougo [1986-1989] EALR 468**, the Court rendered itself thus:

***"... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."***

55. In **Re Estate of Wilfred Ntarangwi Succession Cause No. 223 of 2008 (UR)** and In **Re Katumo and Another EALE (2003) 2 EA 502 at Pg 510 with regards to locus standi in succession matters the court stated that:**

***"It is clear that what gives locus to a party on matters touching on the estate of a deceased person is a grant of Letters of Administration. The Act contains elaborate provisions on how one can be empowered to protect the estate"***

56. Land parcel Bahati /Wendo Block 3/376 (Limurko) forms part of the deceased estate and Paul Karungo did not have a legal authority to sell it to the applicants if at all he did so. Therefore, any alleged Sale Agreement with respect to LR Bahati /Wendo Block 3/376 (Limurko) allegedly entered into between Paul Karungo Kamau and the Applicants were a nullity *ab initio*.

**Whether this succession suit should be struck out**

57. No Letters of Administration have been issued in this matter and there is no evidence that the Respondents herein were aware of this cause suit.

58. There is no dispute that respondents herein have filed **Succession Cause No. 506 of 2013** in which they have since obtained Letters of Administration. The 2<sup>nd</sup> respondent in this matter is a brother to the deceased herein and by dint of **Section 66 of the Law of Succession Act** he is the right party to petition for letters of administration.

59. The Succession cause herein is a nullity *ab initio* as it was commenced by applicants who lacked the requisite *locus standi* to bring a succession cause. The only proper Cause is number 506 of 2013.

60. In the ultimate I find that the Summons dated 15<sup>th</sup> May 2014 has no merit. The same is dismissed with costs.

61. Accordingly, this cause is struck out for want of *locus standi* by the applicants with costs to the respondents.

**Dated, Signed and delivered virtually this 31<sup>st</sup> day of March 2022.**

**Mumbua T Matheka**

**Judge**

**In the presence of:**

CA Edna

Ms. Odhiambo holding brief for Mr. Chege for objector/ applicant

Kanyi Ngure for the Petitioner N/A