



**In re Estate of Loise Runji Nthiga (Deceased) (Succession Cause  
331 of 2007) [2022] KEHC 10312 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 331 OF 2007  
LM NJUGUNA, J  
JULY 27, 2022**

**IN THE MATTER OF THE ESTATE OF LOISE RUNJI NTHIGA (DECEASED)**

**BETWEEN**

**FASILIA IRIMBA IRERI ..... 1<sup>ST</sup> PETITIONER**

**NJAGI NJURANO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**WYCLIFFE MWANIKI NJERU ..... 1<sup>ST</sup> PROTESTOR**

**NYAGA NGAI ..... 2<sup>ND</sup> PROTESTOR**

**JUDGMENT**

1. What is before the court are two protests by the 1<sup>st</sup> and the 2<sup>nd</sup> protestors which relate to LR Nthawa/Riandu/3502. The 1<sup>st</sup> protestor filed an affidavit of protest and then proceeded to give viva voce evidence in court where he stated that the petitioners' family member, one Benson Njeru Nthiga (son of the deceased) had sold him land but the 2<sup>nd</sup> protestor is claiming legal interest over the same piece of land. It was his evidence that he has been in possession of the same land and that he has already paid the full amount due in regards to the title.
2. The 2<sup>nd</sup> protestor on the other hand opposed the summons of confirmation of grant dated 09.09.2019 and deposed that the mode of distribution in the confirmation of grant failed to capture his share of land that he previously purchased from the deceased. It was his case that on diverse dates, he paid the purchase price of the suit land at Kshs. 30,000/= and pursuant to that agreement, he has been in occupation of the said land for about 25 years. That previously, the court confirmed a grant dated 30.06.2015 and that in the said grant, the then administrators had taken into account his rightful share of the 2 acres in respect to the land in question. It was deposed that unfortunately, the said grant was revoked following which Benson Njiru Nthiga, a son to the deceased proceeded to sell LR Nthawa/Riandu/3502 to the 1<sup>st</sup> protestor despite knowing that the same piece of land had been sold to the 2<sup>nd</sup>



- protestor. That he has a valid interest in LR Nthawa/Riandu/3502 as he previously bought the same from the deceased herein during her lifetime.
3. Directions were taken that both protests be canvassed by way of viva voce evidence and thereafter parties filed their submissions. The parties adhered to the directions.
  4. The 2<sup>nd</sup> petitioner submitted and further testified that when his late sister passed on, his nephew, Benson Njiru Nthiga and a stranger to the estate, one Benard Macharia Wanjau took out letters of administration. That as a family, they agreed that all those that the deceased had sold land to, were to present their sale agreements for them to verify the claims and then give what rightfully belonged to them. He submitted that the sale agreement produced by the 2<sup>nd</sup> protestor was in relation to Land Parcel No. 94 and that the same does not belong to the deceased herein. That when the 1<sup>st</sup> grant was issued, the family members realized that the two administrators had included people that had not produced their sale agreements as had been advised by the family, and the 2<sup>nd</sup> protestor is one of such persons. It was their case that the alleged sale agreement presented by the 2<sup>nd</sup> protestor was in relation to Land Parcel No. 94 and the same did not form part of the estate of the deceased herein; further that, the alleged sale agreement did not have a thumb print of the deceased and none of the parties had signed it. Reliance was placed on Section 3(3) of the Law of Contract Act and the case of Patrick Tarzan & Another v Nassim Shariff Abdalla & 2 Others [2009] eKLR.
  5. The petitioners stated that the intention of the parties on the land is clearly indicated in both the unattested and unexecuted sale agreements and acknowledgements receipts before this court. In the end, it was prayed that the alleged sale agreement relied on by the 2<sup>nd</sup> protestor between him and the deceased is expressly statutorily barred by the provisions of section 3(3) of the Law of Contract Act. Further that, Land Parcel No. 94 alias land No. 946 was never listed as forming part of the estate of the deceased. In the end, this court was urged to dismiss the 2<sup>nd</sup> protest herein as the same was misplaced.
  6. The 1<sup>st</sup> protestor submitted that he bought land parcel number Nthawa/Riandu/3502 on 2.02.2013 after the 1<sup>st</sup> grant had been confirmed. That before he could get a title of the said land, the 2<sup>nd</sup> protestor started making claims on his piece of land. He submitted that the 2<sup>nd</sup> protestor did not have any claim on the said land and that his recourse lay elsewhere. Further that, the 2<sup>nd</sup> protestor proceeded to file additional documents on 05.05.2022 without giving him a chance to rebut the same and as such, the same should be struck out.
  7. The 2<sup>nd</sup> protestor opposed the summons for confirmation of grant dated 09.12.2019 as the same had not captured the share he obtained from deceased. That out of the deceased's estate LR Nthawa / Riandu/3502, he ought to have got a share of two acres given that he previously bought the same from the deceased herein. He stated that he has been in occupation of the said land since the year 1996 and as such, he is a legal purchaser and hence the two acres ought to have formed part of the deceased estate.
  8. It was submitted that as per the agreement, the 2<sup>nd</sup> protestor paid the purchase consideration to the deceased on diverse dates. Further that, the land was originally known as land LR Nthawa/Riandu/946 and consequently subdivided and new numbers acquired to wit LR Nthawa/ Riandu/2251, 2354, 2688 and 3502. He averred that he deserved the 2 acres of the land.
  9. Reliance was placed on the cases of *Mpatinga Ole Kamuye v Meliyo and Stone Kathuli Muinde v* [2016] eKLR to support the contention that the 2 acres sold to the 1<sup>st</sup> protestor is null as the same offends the rules of succession [See section 45 of the LSA] in that the same was purchased during the pendency of the succession cause herein.



10. I have considered the protests herein together with the viva voce evidence and the submissions by the parties and I form the view that this court has been called upon to determine whether the protests are merited.
11. The petitioners have submitted that the two acre land known as Land Parcel 94 alias 946 does not belong to the estate herein and as such, the court should find that the 2<sup>nd</sup> protestor's pleadings more so the ones filed on 05.05.2022 are misplaced. The petitioner has relied on Section 3(3) of the Contract Act stating that the alleged sale agreement between the deceased and the 2<sup>nd</sup> protestor was void for the reason that the same was not attested to nor executed despite the same having been reduced into writing.
12. The 2<sup>nd</sup> protestor on the hand, submits that he bought the said piece of land from the deceased at an amount of Kenya Shillings 30,000/= and that thereafter, the deceased died before she could execute the transfer to him. That the land was originally known as Nthawa/Riandu/946 and that is the main reason why the sale agreement captured the said number. That the land was consequently subdivided and new numbers issued over a period of time as Nthawa/Riandu/2251, 2354, 2688 and now 3502. He stated that from the first application for confirmation of grant and further, via an amended certificate of confirmation of grant, it was clear that he was to benefit from the said land in question.
13. From the pleadings herein filed, the petitioner has submitted that the alleged sale agreement that the 2<sup>nd</sup> protestor allegedly entered into with the deceased was not clear and it was not attested or executed despite the same having been reduced into writing and as such, the same was vitiated.
14. Section 3 of the *Law of Contract Act* states that:
  3. No suit shall be brought upon a contract for the disposition of an interest in land unless
    - a) the contract upon which the suit is founded -
      - i. is in writing.
      - ii. is signed by all the parties thereto; and
      - iii. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
15. Of importance to note is that the said section requires that parties to such an agreement must execute such instruments. From the record, I have had an opportunity to peruse the said sale agreement and wherein the 2<sup>nd</sup> protestor and the deceased entered into an agreement and it is outright that the parties neither attested nor executed the same despite having reduced it into writing.
16. I therefore agree with the petitioners that the agreement was not properly attested to, or executed and therefore, the question that I need to determine is whether the same affected the alleged legal interest that the 2<sup>nd</sup> protestor is claiming.
17. It is my considered view that even if the agreement is vitiated, the same did not negate the fact that indeed, there was an understanding between the 2<sup>nd</sup> protestor and the deceased. In such circumstances, ordinarily, this court would therefore have to consider the surrounding circumstances and the intention of the parties. In Civil Appeal Number 22 of 2013, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal held that in as much as the sale agreement between the parties was never in writing, the conduct of the parties clearly showed that their minds met and there was a clear intention that the parties desired to enter into a land sale agreement where the appellant sold the suitland to the buyer; further, the court stated that given that the respondent was and had been



living on the suitland from the time the alleged vitiated contract was entered into, that was enough evidence to effectuate the clear intention the parties had in relation to the sale agreement that had been declared null by the High Court.

18. I have considered the viva voce evidence and the documents filed herein, by the 2<sup>nd</sup> protestor and by the petitioners and I note that, indeed, the 2<sup>nd</sup> protestor has been in occupation of the suit land from the year 1996 when he purchased the same from the deceased; I say so for the reason that the same has been buttressed by the amended certificate of confirmation of grant dated 01.07.2015 wherein the 2<sup>nd</sup> protestor had been listed amongst the beneficiaries of the estate herein. No plausible explanation has been given to court why a ‘stranger’ would be included as a beneficiary of an estate that he has not shown or proved interest in.
19. I am of the considered view that in as much as the sale agreement was vitiated, the minds of the 2<sup>nd</sup> protestor and the deceased met and they had only one clear intention of having the suit land transferred to him but unfortunately before all these could crystalize, death struck on the seller, the deceased herein. I, therefore, hold and find the evidence of 2<sup>nd</sup> protestor believable as opposed to that of the the petitioners and the 1<sup>st</sup> protestor. Also see *Anne Jepkemboi Ngeny v Joseph Tireito & Another* [2021] eKLR].
20. It was also submitted by the petitioners that there is a discrepancy in the identification number of one of the witnesses to the alleged agreement between the 2<sup>nd</sup> protestor and the deceased. Be that as it may, if the said sale agreement was forged as alleged by the petitioners, then the same ought to have not only been particularized but also proved. No evidence to support such allegation was presented before this court. The Court of Appeal for *Eastern Africa in R.G. Patel v Lalji Makanji* (1957) EA 314 stated as follows;

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

See also the case of *Koinange & 13 others v Koinange* [1968] KLR 23]. [Also see Section 109 of the *Evidence Act*].
21. Having determined that the 2<sup>nd</sup> protestor had entered into a sale agreement with the deceased, he thus acquired a legal interest on the estate.
22. The other question that this court has to determine is the legality of the agreement entered into between the 1<sup>st</sup> protestor and Benson Njiru Nthiga who is said to be a son of the deceased herein. The alleged sale was done before the grant earlier issued in this case was confirmed. I find guidance in Section 45 of the LSA which stipulates that:

“Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”
23. Further, in the case of *Virginia Mwari Thurania vs. Purity Nkirote Thurania* [2017] eKLR, where Gikonyo, J, observed that;

“The said sale agreement is null and void for violating Section 82 (b) (ii) of the *Law of Succession Act*, as the said Julia Thurania had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests



in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under Section 80 (2) Law of Succession Act, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.”

[Also see Re Estate of Paul M’Maria (Deceased) [2017] eKLR].

24. The transaction that led to the sale of 2 acres to the 1<sup>st</sup> protestor is null and void as the same offends the provisions of the Law of Succession Act in that the same was purchased during the pendency of the succession cause herein and in so doing the said Benson Nthiga did not have legal capacity to sell and was just a intermeddler of the estate of the deceased.
25. It therefore follows that the 2<sup>nd</sup> protestor has established that he has a legal interest in the estate of the deceased and that the alleged Land Parcel 94 alias 946 and the subsequent subdivision does form part of the estate of the deceased herein.
26. In the end, I find and hold that;
  - i. The 2<sup>nd</sup> protestor has a legal interest in the estate herein and in particular the 2 acres that he acquired from the deceased. His protest is hereby allowed.
  - ii. The 1<sup>st</sup> protestor’s protest is hereby dismissed.
  - iii. This being a family matter, each party shall bear its own costs.
27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2022.**

**L. NJUGUNA**

**JUDGE**

..... for the Petitioners

..... for the Protestor

