



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 243 OF 2017

IN THE MATTER OF THE ESTATE OF MARY WANJIRU KARIUKI alias WANJIRU JACKSON (DECEASED)

PETER NDUNGI GICHERU

SARAH NDIKO MUCHENE

STEPHEN GICOYA GICHERU.....APPLICANTS

VERSUS

EDWARD KIBUI KARIUKI.....RESPONDENT

RULING

1. Before this Court is the Notice of the Preliminary Objection dated **23rd July 2021** filed by the Respondent **EDWARD KIBUI KARIUKI** challenging the summons for Revocation and Annulment of Grant dated **4th May 2021**. The Preliminary Objection is premised upon the following grounds: -

- “1. The application as drawn, filed and taken out is fatally defective in form and substance and the same ought to be struck out with costs.**
- 2. The applicants lack locus standi to bring the application.**
- 3. The applicants did not enter into any sale agreement with the deceased.**
- 4. The substantive issue in the application is the interpretation of an alleged sale agreement which is outside the purview of Family Division of the High Court.**
- 5. The applicants are not children of the deceased and they are not related to him in any way and accordingly the applicants are not and cannot be beneficiaries of the estate of the deceased by any stretch of the imagination.**
- 6. The issues arising out of the application are not for determination by the Family Division of the High Court which thus lacks the jurisdiction to entertain the same.**
- 7. The application is an abuse of the process of court.**
- 8. The application ought to be struck out with costs.”**

2. The Preliminary Objection was opposed was canvassed by way of written submissions. The Petitioner filed the written submissions dated **9th September 2021**. The Applicant/Purchasers filed written submission dated **28th September 2021**.

BACKGROUND

3. This Succession Cause relates to the estate of **Mary Wanjiru Kariuki** alias **Wanjiru Jackson** (hereinafter ‘the **Deceased**’) who died intestate on **27th May 1999**. The Deceased was survived by the following:-

(a) Apollo Njoroge Jackson – Son (Deceased)

(b) Ernest Bacha Kariuki – son (Deceased)

(c) Edward Kibui Kariuki - son (Deceased)

(d) Jane Wambui Jackson – Daughter (Deceased)

(e) Damaris Njoki Kariuki – Daughter (Deceased)

(f) Nelson Mungai Kariuki – son (Deceased)

4. The estate of the Deceased comprised of only **one** asset – the parcel of Land – **L.R. No. DAGORETTI/UTHIRU/1244** which was valued at **Kshs 2,000,000/-**.

5. Following the demise of the Deceased one **Edward Kibui Kariuki** a son of the Deceased petitioned the court for letters of Administration. On **20th December 2018** letters of Administration were issued to the Administrator. The Grant is yet to be confirmed.

6. The Applicants in this matter **PETER NDUNGI GICHERU, SARAH NDIKO MUCHENE, STEPHEN GICOYA GICHERU**, are the children and heirs of one **STANLEY WAMWEA GICHERU** who died in the year **1994**. The Applicants claim that their late father purchased a portion of land measuring **0.51 Hectares** which was carved out of **L.R. No DAGORETTI/UTHIRU/1244** from the Deceased **Wanjiru Jackson**. The Applicants claim that to date they occupy that portion of land and have put up permanent houses thereon.

7. The Applicants further allege that this succession cause was filed without their knowledge. That they are apprehensive that unless the Administrator is directed to excise the portion of land, which had been sold to their late father, they stand to lose the same as the proposed mode of distribution excludes them. The Applicants therefore filed a summons for revocation and/or annulment of Grant dated **4th May 2021**. In opposition to this summons for revocation of Grant the Administrator filed this Notice of Preliminary Objection.

ANALYSIS AND DETERMINATION

8. I have considered this Preliminary Objection the facts of this case as well as the written submission filed by both parties. From the Preliminary Objection filed two issues arise for determination:-

(1) Whether this court has jurisdiction to determine the dispute between the parties.

(2) Whether the Applicants have *locus standi* in this Succession Cause.

(1) Jurisdiction

9. Jurisdiction it is said is everything. Without requisite jurisdiction a court must immediately down its tools. In **THE MOTOR VESSEL “LILLIAN SS” VS CALTEX MOTOR OIL (K) LTD (1989) KLR**, the court held that:-

“Jurisdiction is everything, without it the court has no power to make one more step. A court lays down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The Respondent submits that that the claim which the Applicants have is a civil claim as purchasers of land from the Deceased. As such, the Applicants ought to have filed their suit in the **Environment and Land Court**, which has the sole constitutional mandate to handle disputes over ownership of land.

11. The Applicants on the other hand submit that they are properly in the **Family Court** as they are seeking to claim their late fathers share of the estate of the Deceased. The Applicants insist that this court has the jurisdiction to handle claims of creditors of the estate. They assert that they have been in occupation of the suit land for over **fifty (50) years** and that they have erected permanent buildings thereon. They have annexed a copy of a sale Agreement dated **13th January 1969** (Annexure ‘PN-3’ to the supporting affidavit dated **4th May 2021**) by which the Deceased confirmed having sold **50 Hectares** of **F.ROT 164 Uthiru** to **Stanley Gicheru**.

12. The primary duty of court sitting as a **Probate Court** is to oversee the distribution of the estate of a Deceased person to the genuine beneficiaries. In **RE ESTATE OF G.K.K. (Deceased) [2017] eKLR** it was held that:-

“The primary function of a probate court is distribution of the estate of a dead person”.

13. The Applicants are **not** beneficiaries to the estate of the Deceased **Mary Wanjiru Kariuki**. The Applicants claim is based on a sale agreement between the Deceased and their father one **Stanley Wamwea Gicheru** (also now deceased) who himself was **not** a beneficiary to the estate of the Deceased. The Applicants therefore base their claim to a share of the estate of the Deceased on the sale Agreement dated **13th January 1969** which sale transaction was completed **before** the Deceased herein passed away.

14. In **RE ESTATE OF STONE KATHULI MUINDE (Deceased) [2016] eKLR Hon Justice William Musyoka** hold as follows:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)

15. Therefore the Applicants must first prosecute their claim in a civil court and if they succeed thereafter present their Decree to this Probate court to be given effect.

16. This is a dispute which relates to ownership of the **50 Hectares** allegedly sold to **Stanley Gicheru**. Matter concerning disputes over are ownership and occupation of land are now vide **Article 62** of the **Constitution of Kenya 2010**, the exclusive domain of the **Environment and Land Courts**. The Applicants are therefore free to pursue their claim to ownership of the said land in the **ELC Court**. If and when the **ELC Court** pronounces the Applicants as the owners of the land then they can present that evidence of ownership to this court.

17. Accordingly, I find that at the present time this court does not have jurisdiction to hear and determine the dispute between the Applicants and the estate of the Deceased.

(2) **Locus Standi**

18. ‘**Locus Standi**’ is a legal term which literally means ‘**place of standing**’ and refers to the right of a party to be involved in a particular suit. In **Black Law Dictionary Tenth Edition** the term ‘**Locus Standi**’ is defined as:-

“The right to bring an action or to be heard in a given forum”.

19. In Succession matters **locus standi** is acquired by obtaining a Grant of letters of Administration. In the case of **OTIENO – VS – OUGO [1986-1987] EALR** it was stated that:-

“An administrator is not entitled to bring any action as an administrator before he has taken out letters of administration. If he does the actions is incompetent as of the date of inception.”

20. The Applicants herein have stated that they are bringing this suit on behalf of the estate of their late father **Stanley Wamwea Gicheru**. However, none of the Applicants have demonstrated that they hold **Letters of Administration Ad Litem** in respect of the estate of their late father which would entitle them to bring the suit. All that has been annexed to their supporting Affidavit is a Gazette Notice No. **2998 of 2003** indicating that a Petition for Grant of letters of Administration Interstate had been made. However, there is no evidence that letters of Administration in respect of the estate of **Stanley Wamwea Gicheru** were ever issued and/or confirmed.

21. The Applicants herein were **not** the purchasers of the land in question. It was their father who allegedly purchased the land. He is now Deceased. Only the estate of **Stanley Wamwea Gicheru** (through its Administrators) have requisite **locus standi** to apply for revocation of the Grant issued to the Respondents. Thus, I find that the Applicants have no **Locus standi** in this matter.

22. **Rules 41(3) and 42(2) of the probate and Administration Rules** allows the **Probate Court** to remove any contested property form the schedule of assets of a Deceased’s estate and to have the same determined separately. When and if the contested property is found to form part of the estate then the same will be restored back to the schedule of assets and made available for distribution amongst the beneficiaries.

23. In this case the estate of the Deceased consisted of only one property being **L.R. No. Dagoretti/Uthiru/244**. In the circumstances, it makes more sense to stay the summons for confirmation of Grant pending determination of this dispute. To that end the Applicants are given **six (6) months** to put their house in order and to file the relevant suit in the **ELC court**. If they fail to do so then this court will proceed to hear and determine the Summons for confirmation of Grant.

24. Finally this Preliminary Objection succeeds. The summons dated **4th May 2021** is hereby struck out. Each side to meet its own costs.

DATED IN NAIROBI THIS 26TH DAY OF NOVEMBER 2021.

.....

MAUREEN A. ODERO

JUDGE