



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 534 OF 2017**

**IN THE MATTER OF THE ESTATE OF BENIAH KINGSLEY NYABUL (DECEASED)**

**SUSAN MILLICENT AGAK.....1<sup>ST</sup> PETITIONER**

**ELIZABETH AKINYI NYABUL.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**LYDIA NYABUL.....PROTESTOR**

**RULING**

1. The deceased Beniah Kingsley Nyabul died on 28<sup>th</sup> August 2014. The only estate he left was a house on LR.209.8477 (I.R. 29259). On 8<sup>th</sup> January 2018 a grant was issued to the petitioner Susan Millicent Agak and Elizabeth Akinyi Nyabul who are two of his children. The other children are Jane Oriedo Wamubeyi, Mwanaidi Jaoko Shiundu, the protestor Lydia Nyabul, Clement Nyabul and Daniel Odero Nyabul. He was further survived by grandson Humphrey Oduor Odero and granddaughter Diana Ongoche Odero.

2. The petitioners filed summons on 27<sup>th</sup> June 2018 to confirm the grant. They proposed that the property be registered in the joint names for them to hold it in trust for all the beneficiaries for the purposes of selling the same and sharing the proceeds equally after deducting costs, fees and liabilities to the estate. The protestor opposed the application. She informed court that she had learnt that the property had already been sold to a 3<sup>rd</sup> party following an agreement she was not privy to. She had unsuccessfully sought from the petitioners and their advocate the details of the transaction. She had also found out that the property had already been handed over to the 3<sup>rd</sup> party. She indicated that her concern was that the estate be administered properly and transparently, and not wasted to the prejudice of any beneficiary.

3. Quit surprisingly, the 1<sup>st</sup> petitioner supported the protest. She swore that she knew there were negotiations to sell the property, but that there had been no valuation to determine the market value. She stated that she had not benefitted from the sale.

4. The 2<sup>nd</sup> petitioner produced to court the agreement of sale dated 30<sup>th</sup> October 2017 between the petitioners and the buyers Meshack Ochieng Agina and Emmah Kwamboka Oino. The purchase price was Kshs.15,500,000/=, out of which Kshs.7,750,000/= was paid on the date of agreement. The balance was to be paid on 20<sup>th</sup> December 2017 (Kshs.3,875,000/=) and within seven days upon transfer (Kshs.3,875,000/=). The agreement stated that all the beneficiaries had agreed to the sale. It was also understood that completion was to be upon the conclusion of this succession cause. The 2<sup>nd</sup> petitioner stated that it was the unanimous decision of all the beneficiaries that the property be sold and proceeds shared. But both, the protestor and the 1<sup>st</sup> petitioner, while not denying that there had been agreement to sale, complained that the transaction had been shrouded in mystery; that it was only the 1<sup>st</sup> petitioner who was dealing with the advocates, Namada & Co. Advocates, for the estate. It is admitted that the 2<sup>nd</sup> petitioner signed the agreement of sale. This means she agreed to the purchase price, and therefore cannot turn around to say that the property had not been valued before the agreement.

5. It is material that the protestor had not consented to the application or confirmation. She had all along sought that the property be subjected to valuation before any sale transaction. Her fear was that the estate was being sold off for a price lower than the market price.

6. The beneficiaries may have agreed that the only property of the estate, a house at Kariokor estate in Nairobi, was going to be sold and the proceeds shared equally. The sale, however, could only be legally effected upon the confirmation of the grant. This is because, under **section 82(b)(ii)** of the **Law of Succession Act**:

**“no immovable property shall be sold before confirmation of the grant.” (Jane Kagige Geoffrey & Another –v- Wallace Ireri Njeru & 2 Others [2016]eKLR).**

7. In **Peter Ombui Nyangoto –v- Elizabeth Matundura & Another [2013]eKLR**, the court of appeal at Kisumu was dealing with a case where the appellant and another had sold the transferred part of the estate even before a grant of letters of administration had been applied for, or obtained, and, of course, there was no confirmation. Citing **section 45(1)** of the **Law of Succession Act** an **Section 55** of the **Act**, the court observed as follows:-

**“We think what Daniel and the appellant did amounted to inter meddling with the property of Teresa. Clearly they had no legal right to have the property sold and transferred to the appellant before Letters of Administration intestate were applied for, obtained and confirmed as they did in this matter.”**

8. **Section 45(1)** of the **Act** states that:-

**“45(1) Except so far as expressly authorised 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.”**

9. The petitioners had a grant which had not been confirmed. The grant did not allow them to dispose of the estate of the deceased. There was no other law that allowed the sale before the grant was confirmed. The sale agreement entered into by the petitioners on 30<sup>th</sup> October 2017, before the grant issued to them had been confirmed, amounted to intermeddling with the estate of the deceased.

10. **Section 55** of the **Act** provides that:-

**“55. No grant of representation, whether or not limited in terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.”**

The grant could not allow the petitioners to sell the only property in the estate of the deceased. The grant had not been confirmed as provided under **section 71** of the **Act**. In short, the sale of the property by the petitioner was illegal, null and void. LR No. 209/8477(I.R. 29259) remains the property of the deceased as the grant has not confirmed.

11. In those terms I allow the protest.

12. Regarding the application for confirmation, I consider the deceased had one property, a house. He left six children. The seventh one Daniel Odero Nyabul died leaving two children Humphrey Oduor Odero and Diana Ongeche Odero. Each of the seven children has an equal claim to the estate under **section 38** of the **Act**. The grant shall therefore be confirmed in terms that LR No. 209/8477 (I.R. 29259) Nairobi shall be registered in the joint names of the petitioners to hold in trust for themselves and for Jane Oriedo Wamubeyi, Mwanaidi Jaoko Shiundu, Lydia Nyabul, Clement Nyabul and the deceased Daniel Odero Nyabul (whose share shall go to Humphrey Oduor Odero and Diana Ongeche Odero in equal shares) in equal shares.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2020**

**A.O. MUCHELULE**

**JUDGE**