



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 292 OF 2010

IN THE MATTER OF THE ESTATE OF M'RUTERE KARACHI (DECEASED)

HENRY MUGABI.....PETITIONER/RESPONDENT

VERSUS

RAEL KOORU NDEGE.....INTERESTED PARTY/APPLICANT

JOSECK MUTHURI MWARANIA.....INTERESTED PARTY

J U D G M E N T

1. **M'Rutere Karachi** ("the deceased") died on 20/12/2009. He is said to have left behind **Nkuene/Taita/2390, 2389 and 2457**, respectively as the assets forming his estate. He also left the following surviving him:-

- a) Priscilla Kanyamu (deceased) - Widow
- b) Henry Mugambi (deceased) - Son
- c) Julius Gikunda (deceased) - Son
- d) Rael Kooru - Daughter
- e) Jane Karimi - Daughter
- f) Beatrice Kiende - Daughter
- g) Stella Kagwiria - Daughter
- h) Margaret Kangai (deceased) - Daughter

2. **Rael Kooru** was on 4th October, 2018 appointed the administrator of the deceased's estate. She therefore applied for confirmation of that grant on 28/11/2018 and proposed on how the estate should be distributed.

3. On 12/2/2019, **Joseck Muthuri Mwarania ("the Protestor")** filed a Protest through his affidavits sworn on 12/2/2019 and 23/4/2019, respectively. He alleged that before the deceased died, he had sold him one acre of land to be exercised from **Nkuene/Taita/527** for Kshs. 370,000/=. That he had already paid Kshs. 320,500/= towards the settlement thereof which was equivalent to 86% of the purchase price. That although this translated to 0.86 acres, he was only interested in 0.30 acres from the estate.

4. The petitioner opposed the protest vide her affidavit sworn on 1/4/2019. She denied that the deceased had sold any land to the protestor as alleged. She termed the agreement relied on by the protestor as a forgery and averred that there was no evidence that the protestor had paid the deceased the alleged Kshs. 320,000/=. She denied that her late brother, **Henry Mugambi** had any capacity to enter into any agreement binding on the estate.

5. The parties testified and reiterated what they had stated in their affidavits on which they were cross-examined. The protestor called one witness **Charles Mokuu, advocate**, who testified that he drafted and witnessed the sale agreement between **Henry Mugambi and Joseck Muthuri** dated 1/2/2010. That in the said agreement, the said **Henry Mugambi** had acknowledged that the deceased had received Kshs.

267,645/= from the protestor.

6. On her part, the petitioner testified that the deceased died more than 10 years ago and had only left one property **Nkuene/Taita/2457** for the girls having distributed the other two to his sons. She denied knowledge of any sale agreement between the deceased and the protestor.

7. Having considered the evidence on record, the only issue for determination is **how the deceased's estate should be distributed.**

8. It is the protestor's claim that he bought one acre from the deceased to be exercised from **Nkuene/Taita/527** for Kshs. 370,000/=. That he had paid a sum of Kshs. 320,500/-. He presented a sale agreement in support of his case. However, in opposition, the petitioner argued that the sale agreement was a forgery and that nothing was presented to prove that the alleged payments had been made.

9. I have considered the sale agreement dated 23/9/1998. It is alleged to be between the deceased and the protestor. It was for sale of 1 acre from **Nkuene/Taita/527**. The purchase price was shown to be Kshs. 370,000/=.

10. Several issues arise from the said agreement of 23/9/1998. These are as follows:-

- a) firstly, a claim on the said agreement should have been lodged before the Land and Environment Court and not the family court;
- b) there was no evidence that **Nkuene/Taita/2457** was a sub-division of/or from the alleged **Nkuene/Taita/527**. Instead, a copy of the green card produced in evidence showed that **Nkuene/Taita/2457** was a subdivision of **Nkuene/Taita/2391** and not **Nkuene/Taita/527**.
- c) there was nothing to show that the deceased ever owned **Nkuene/Taita/527** or that **Nkuene/Taita/2391** resulted from the said **Nkuene/Taita/527**;
- d) there was no evidence that the terms of the sale agreement dated 23/9/1998 were ever complied with by the protestor. Had he complied by paying the amount alleged, the deceased would have given him vacant possession of the alleged 1 acre way before he died on 20/12/2009. That was over 10 years since the alleged sale agreement was executed;
- e) the advocate who drew the sale agreement dated 23/9/1998 was never called to authenticate the same;
- f) there was no evidence that the purchase price was paid and if paid, when? If the agreement had not been fully executed within 6 years of its execution, can it be enforced thereafter?
- g) the evidence of acknowledgement by the late **Henry Mugambi** was insufficient for 3 reasons:-
 - i) there was no evidence that when he was executing the Land Sale Memorandum dated 1/2/2010, he was aware of the existence of the sale agreement dated 23/9/1998 or that the two had any connection whatsoever;
 - ii) as at the time he executed the Land Sale Memorandum, he was not yet the administrator of the estate of the deceased and he could therefore not bind the estate;
 - iii) the amount admitted to have been allegedly received of Kshs. 267,645/= is at complete variance with the sum of Kshs.320,500/= alleged by the protestor to have been so far paid in respect of the alleged sale.

11. For the foregoing reasons, the claim by the protestor has no basis. The same is for dismissal as it is hereby dismissed with costs. In the premises, the grant is hereby confirmed in terms of paragraph 4 of the supporting affidavit of **Rael Kooru Ndege** sworn on 27/11/2018.

It is so decreed.

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. ONG'INJO

JUDGE