



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 360 OF 2012

IN THE MATTER OF THE ESTATE OF DAVID KARIUKI WAIGANJO (DECEASED)

JOHN MUITIRI MITHANGA.....1ST APPLICANT

HARRISON KAHIGA WAITINDI.....2ND APPLICANT

STEPHEN KARIUKI NGUGI..... 3RD APPLICANT

SUSAN WANGECI THEURI.....4TH APPLICANT

ELIZABETH NJERI KUNGU..... 5TH APPLICANT

JAMES IRUNGU NDIRANGU.....6TH APPLICANT

VERSUS

JANE NJAMBI KARIUKI.....RESPONDENT

RULING

1. This a ruling on the plaintiff's application dated **21st January 2014** seeking the following prayers

i. An order to enjoin the applicants herein as creditors in the estate of the deceased.

ii. That the respondent be ordered to recognize and honour sale agreements made between the deceased and the applicant with regard to parcels of land LR NAKURU MUNICIPALITY BLOCK 17/89 AND NAKURU MUNICIPALITY BLOCK 17/645

iii. That the Administrator /Respondent be ordered to undertake survey work on the said parcels for purposes of processing title documents in the names of the applicants as per their respective agreements failure which the applicants to undertake the survey work and all documents necessary for processing title documents be executed by the deputy registrar and signatures and production of original certificate of lease and identification documents by the respondents be dispensed with.

iv. That costs be borne by the Administrator/Respondent

2. Grounds on the face of the application is that prior to his death, the 1st,2nd,3rd,and 4th Applicants entered into separate sale agreements with the deceased over portions of parcel of land **No. LR NAKURU MUNICIPALITY BLOCK 17/89** whereas 5th and 6th applicants entered sale agreement with the deceased over land **No. LR NAKURU MUNICIPALITY BLOCK 17/645**.

3. That apart from the sale agreements, the deceased also signed transfer forms over each and every portion of land purchased by the applicants but he unfortunately passed on before process of transfer of the said parcels of land were completed.

4. That the applicants approached the respondents informing her of the existence of the agreements herein but she went ahead and listed the parcels of land as part of the estate of the deceased and failed to disclose their claims to court. They attached the said agreements to the application.

5. In response the respondent filed replying affidavit dated 27th May 2014. She averred that **Mirugi Kariuki & Co. Advocates** acted for her

late husband and should not be allowed to act for the applicants. She further averred that she knows that some of the applicants have settled in land **No. LR NAKURU MUNICIPALITY BLOCK 17/89**.

6. She averred that as administrator of the estate she is willing to transfer to the applicants shares save for 2nd Applicant **Harrison Kahiga Waitindi** who is not entitled to any share. She added that she is not aware that the 2nd applicant purchased land from the deceased. She said that the 2nd applicant was her husband's Advocate who treated him unfairly leading to him serving a jail term before his death. She said she learnt of 2nd applicant's claim when he entered the land by force prompting her Advocate to write to him to cease trespassing on the property; and in the process the applicant sent the agreement to her lawyer and they were later sued by a person who claimed to have purchased a plot from the 2nd applicant.

7. The respondent stated that she is not ready to transfer any portion of the deceased's land to the 2nd applicant but she is willing to refund any money paid by him to the deceased if he will prove.

8. She further stated that if any of the applicants is owed money by the estate of the deceased separate suits should be filed for recovery of the said amount.

9. The 2nd applicant filed supplementary affidavit in response to respondent's replying affidavit. He averred that they represented the deceased after he had entered into sale agreement with him as the agreement was entered into on 18th November 2008 and he made full payment of purchase price; that at the time of deceased instructing **Mirugi Kariuki & Co Advocates**, the matter of the sale agreement had been finalized and what was remaining was completion of the same by the deceased.

10. 2nd applicant averred that the deceased instructed them to obtain an order for police assistance and for removal of people in occupation of his land in **CM 'S Court Land Dispute No.2 of 2005**. He averred that while the order was being executed, it was brought to their attention that there existed another **High Court Case No.11 of 2006** which orders had been made against the deceased; that they were not on record in that case and had no knowledge of such orders.

11. That they only filed notice to act together with **Mbiyu & Co Advocates** on 12th May 2010. That the people affected by eviction moved to court to have the deceased punished for contempt and they did everything possible to resist the application. He urged the court to call for files in Chief Magistrate Court, **Land Dispute No.2 of 2005, David Waiganjo Vs Rosebella Jerono Mudavadi and Nakuru HCC No.11 of 2006 Rosebella Jerono Mudavadi Vs David Kariuki Waiganjo** to appreciate their involvement in the matter and efforts made to save the deceased from serving jail term; unfortunately the court found that he was guilty of contempt and jailed him; that the 2nd applicant had no role to play as it was the ruling of the court.

12. He averred that the deceased was present when he took possession of the land and even supervised his workers who were putting up perimeter wall around the plot which existed until the year 2013 when the respondent and her sons with the advice of her Advocate demolished it; that the letter dated 13th December 2013 by **Musembi Ndolo & Co. Advocates** confirm that at the time it was written, he had taken possession of the plot. He stated that what had happened then is that he had sold the plot to **Stephen Kiandi Nduati** and he was depositing building materials to put up a house.

13. Applicant averred that the agreement between him and Stephen **Kiandi Nduati** is clear and that the respondent had offered to refund purchase price to him, which he declined and her Advocate was not keen in following up the matter as facts are clear but her current Advocate was ready to help the respondent deny the applicant what is rightfully his.

ANALYSIS AND DETERMINATION

14. I have considered averments herein. The respondent is not opposed in completing transfer portions of land sold by the deceased prior to his death save for 2nd applicant. The reason she has declined to recognize the 2nd applicant as a purchaser is that she was not aware that the deceased sold land to him. She further stated that he is the cause of the deceased being jailed before his death. On the other hand, the 2nd applicant averred that he purchased the land before the deceased instructed the firm of **Mirugi Kariuki & Co. Advocates** to act for him in a land dispute seeking eviction. He averred that at the time of filing the application for police assistance in eviction, existence if High Court matter was not brought to his attention, he stated that the deceased was jailed for contempt following court ruling.

15. I will start with the first issue raised; whether the firm of **Mirugi Kariuki & Co. Advocates** should not be allowed to act for the applicants. 2nd respondent admitted that the firm of **Mirugi Kariuki & Co. Advocates** was instructed to seek order for police assistance in eviction in **Land Dispute No.2 of 2005**. The respondent however failed to demonstrate how the estate of the deceased will suffer any prejudice if the **Mirugi Kariuki & Co. Advocates** is allowed to represent the applicants. There is no mention of information acquired during that relationship which is likely to be used against the respondent. From the foregoing, I find that no sufficient grounds have been demonstrated to bar the firm of **Mirugi Kariuki & Co. Advocates** to represent the applicants herein.

16. In respect to 2nd applicants claim, I note that the firm of **Mirugi Kariuki & Co. Advocates** was appointed by the deceased in **Nakuru HCC No.11 of 2006** on 12th May 2010. From the pleadings attached I note that the dispute was in respect of **LR MITI MINGI/MBARUK BLOCK 3/788** and **LR MITI MINGI/MBARUK BLOCK 3/793** registered in the deceased's name; the two parcels shared a common boundary which the plaintiff in the suit **Rosebella Jerono Mudavadi** obtained judgment against the deceased on 14th July 2006 and decree on 6th May 2009 and deceased served on 8th July 2009; from the pleadings the deceased went to the lower court and obtained eviction order to remove the decree holder in **LR MITI MINGI/MBARUK BLOCK 3/793** which she stated she had never occupied. She alleged the deceased ignored the decree of the High Court and caused massive destruction in her land **LR MITI MINGI/MBARUK BLOCK 3/788**. This led to the deceased being jailed for contempt.

17. I note from the 2nd applicant's agreement attached that its dated 18th November 2009. It is signed by both vendor and purchaser. Portion purchased is part of **LR NAKURU MUNICIPALITY BLOCK 17/89 PLOT C**. Plot C is in the survey plan attached and transfer form signed is attached. Sale agreement showing sale by 2nd applicant to **Stephen Kiandi Nduati** is attached dated 20th November 2013.

18. Record show that the deceased passed on 1st February 2012. The 2nd applicant's agreement was done in the year 2009. The 2nd applicant has averred that he took possession of the plot and fenced when the deceased was alive. The respondent has not questioned authenticity of the agreement. She only said she did not know 2nd applicant's sale agreement with the deceased and accused the 2nd applicant for the jailing of the deceased.

19. Record has however clearly shown that the deceased was jailed for contempt pursuant to court ruling. This cast doubt on credibility of the respondent. She has not come out as an honest person in her averments viz –a- viz the court record. Respondent averred that he declined refund from the respondent and her averment that she is willing to refund money paid by 2nd applicant confirm existence of sale agreement between 2nd applicant and deceased.

20. The respondent has failed to demonstrate to the court that the deceased never entered into a land sale agreement with the 2nd applicant. From the foregoing, I find her refusal to recognize the 2nd applicant as a purchaser baseless.

21. **FINAL ORDERS**

1. That the Respondent do recognize the applicants as creditors of the deceased's estate and honor sale agreements between the applicants and the deceased herein

2. That the respondent do complete proceed of transfer of the portions of LR NAKURU MUNICIPALITY 17/89 sold to the 1st, 2nd ,3rd and 4th applicants and portions of LR NAKURU MUNICIPALITY BLOCK 17/645 to 5th and 6th applicants.

Ruling dated, signed and delivered via email at Nakuru This 30th day of April 2020.

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RACHEL NGETICH

JUDGE

TO:

Mirugi Kariuki Advocates – Counsel for Applicant

Waiganjo & Co. – Counsel for Respondent