



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 151 OF 2017

IN THE MATTER OF THE ESTATE OF FRACIAH WANJIKU KARIUKI (DECEASED)

RULING

1. Before me is the application filed on 14th March 2019 and brought under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. The Applicant, GRACE NJERI KIRIMA is seeking orders to the effect that; -

- a) Land Parcel No. MUGUGA/KANYARIRI/T.440 does not form part of the estate of FRACIAH WANJIRU KARIUKI (deceased) and cannot therefore be the subject matter of these proceedings.
- b) if any party herein has a claim regarding the said land parcel No. MUGUGA/KANYARIRI/T.440 the same should be presented and canvassed in either the Environment and Land Court (ELC) court or other appropriate forum.

2. The application is based on the grounds that Land Parcel No. MUGUGA/KANYARIRI/T.440 is registered in the Applicant's name and does not form part of the deceased's estate and that its wrongful inclusion herein has rendered it impossible to evict one MICHAEL KARIUKI KAMANU, a trespasser.

3. The application is supported by the affidavit of GRACE NJERI KIRIMA. She deposed that she purchased Land Parcel No. MUGUGA/KANYARIRI/T.440 (hereafter the suit property) from **Stephen Kariuki Mwaura** and **Salome Wambui Kariuki** who held proper title thereto but failed to acquire vacant possession as one **Michael Kariuki Kamanu** refused to yield vacant possession of the land parcel. She contended that due to an order in Kikuyu SPM's Court Civil Case No. 167 of 2019 to maintain the status quo, she is at a limbo as she cannot evict the said Michael Kariuki Kamanu and/or access her property.

4. MICHAEL KARIUKI KAMANU filed his replying affidavit on 25th June, 2019. He deposed that he is the grandson of Fraciah Wanjiku Kariuki, the deceased herein, and that the suit property was distributed *inter vivos* by the deceased to the alleged vendors Stephen Kariuki Mwaura and Salome Wambui Kariuki and himself. He contended that he was excluded by the said parties during the subsequent registration of the property's transfer in 1997; that he only learnt in 2012 that the Applicant's husband had paid Kshs. 200,000/= to purchase the suit property; and that after his death that the Applicant came forward to claim the land. He contended that he has lived on and continues to occupy the suit property with his family and asserted that the transfer of the suit property to the Applicant is fraudulent. He urged the court to cancel the title deed issued to the Applicant and to strike out the instant application.

5. The application was canvassed by way of oral arguments. Mr. Njuguna for the Applicant stated that the Applicant desires the exclusion of the subject property which is registered in her name from among assets of the deceased. It was argued that this court is not the correct forum to adjudicate on disputes concerning the ownership of the land. He emphasized that the vendors were registered owners of the suit property since 1997.

6. Mrs. Muhoho for **Peter Chege** a beneficiary and administrator asserted that the deceased herein died in 2005 which is prior to the transfer of the asset to the Applicant, and hence the subsequent transfer to the Applicant is fraudulent. She contended that the subject property should be part of the succession proceedings. The court was urged to dismiss the application.

7. The court has considered the material canvassed in respect of the summons filed on 14th March 2019. As well, the court has gone through the record of proceedings in the lower court where the cause was initially filed as **Limuru SRM's Succession Cause No. 34 of 2007**, and subsequently before the High Court after transfer in June 2013. At the time of the transfer to the High Court, proceedings had been taken in respect of a protest filed by one administrator, namely **Geoffrey Karanja Kariuki** against the confirmation of the grant sought *via* the summons filed by his Co-administrator **Peter Chege Kariuki** on 22nd June 2012. The protestor was unhappy with the alleged exclusion from the grant and the proposed distribution of three assets of the estate, namely **LR Nos. Muguga/Kanyariri/195; Nachu/Ndacha/1237; and Muguga/Kanyariri/T.440**, the latter which is the subject of the instant summons.

8. Although an order was made by **Musyoka J.** on 23/2/15 to take over the matter from the subordinate Court and to deliver a ruling on the pending summons to confirm the grant, on 23rd October 2015 **Musyoka J** deferred the ruling in order to make preliminary directions to the effect *inter alia* that the High Court had taken over **Limuru SRM's Succession Cause No. 34 of 2007** and would dispose of it; that the

grant earlier made to **Geoffrey Karanja E. Kariuki** and **Peter Chege Kariuki** in **Limuru SRM Succession Cause No. 1546 of 2007** was revoked and a fresh grant issued in the High Court Cause to the same administrators. Ruling on the summons for confirmation of grant as sought in summons dated 20th June 2012, and on the Protest was then reserved.

9. That ruling was delivered on 26th October 2016. In the ruling the court noting that two beneficiaries namely, **Mary Njeri Kamanu** and **Rachael Gathoni Njoroge** had neither consented to the confirmation, been allotted shares nor renounced their entitlement, observed that:

“The Applicant is clearly in violation of Section 51(2)(a) of the Law of Succession Act and Rule 7(1) (e) (i) of the Probate and Administration Rules which require that the Applicant lists all the surviving children of the deceased in summons for confirmation of the grant. The Applicant did know that Mary Njeri Kamanu and Rachael Gathoni Njoroge survived the deceased but chose not to disclose them. As there is violation of the law as indicated above, I shall not determine the application at this stage. The applicant shall cause Mary Njeri Kamanu and Rachael Gathoni Njoroge to file affidavits stating whether or not they are interested in taking a share in the estate of their dead mother. The Applicant shall also serve a copy of this ruling and on the application dated 21st July (the correct month is June – application for confirmation of grant) 2012, on the (2) women.”

10. With that the court also transferred the cause to the High Court at Kiambu. Thus, by the said date the summons to confirm grant dated 21st June 2012 and protest were still outstanding. Secondly, the 1st administrator and protestor **Geoffrey Karanja Kariuki** had died one month before the directions were given. On 29th November 2018 his widow **Mary Wambui Karanja** was substituted in his place. The court also directed that a fresh application to confirm grant be filed. In retrospect that direction was unnecessary in view of the two set of directions given by **Musyoka J.** Nevertheless, no new application has since been filed. Instead, on 14th March 2019 the present motion was filed. The summons is expressed to be brought under Section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules.

11. The court having considered all the issues raised during the canvassing of the summons, within the context of the entire record, is of the view that if it were to proceed to determine the motion, the court would have effectively determined key aspects of the outstanding summons for confirmation of the grant and protest filed on 24/7/12. Yet the instant summons, so far as I can see, was only served on counsel for the administrator, **Peter Chege** and counsel for the beneficiary, **Michael Kariuki Kamanu**. None of the other beneficiaries listed in the Protest filed on 24/7/12, including the alleged vendors who purportedly sold to the present Applicant, the suit property, namely, **Stephen Kariuki Mwaura** and **Salome Wambui Kariuki**, were served with the instant summons.

12. In the circumstances, the court is of the view that determining the instant summons on the basis of response filed by only one beneficiary Michael Kariuki Kamanu would work injustice against other beneficiaries. Equally, it would defeat the protest by the deceased administrator Geoffrey Karanja Kariuki which was heard in the lower court but has never been determined and in view of the directions of **Musyoka J.**, a ruling on the summons to confirm grant and protest is yet to be delivered.

13. This is a very unfortunate state of affairs, and the most prudent and just way to expedite and move this matter forward will be to invoke the provisions of Rule 73 and 40(6) of the Probate and Administration Rules and to deem the instant summons filed on 14th March 2019 as a protest to the summons filed on 22nd June 2012 to confirm the grant, and secondly to deem the affidavit filed on 25th June 2019 by Michael Kariuki Kamanu as a response to the deemed protest. In the interest of justice, the proceedings in respect of the summons filed on 22nd June 2012 and protest by Geoffrey Karanja Kariuki will be reopened for the sole purpose of hearing and determining the deemed Protest by **Grace Njeri Kirima**.

14. The court directs that the said deemed Protest is to be served personally **on all the beneficiaries/administrators listed in the affidavit of Protest filed on 24th July 2012, except Michael Kariuki Kamanu**, or their representatives if such beneficiaries are deceased. Upon being served, the said beneficiaries/administrators with the exception of Michael Kariuki Kamanu will have 21 days within which to file their responses to the deemed Protest of Grace Njeri Kirima. The Applicant/deemed Protestor Grace Njeri Kirima will extract the directions made in this ruling and serve them alongside the deemed Protest, upon all the administrators/beneficiaries herein (except Michael Kariuki Kamanu) or if deceased, their representatives, within 30 days of this ruling. Thereafter, affidavits of service will be filed to confirm compliance. In view of the corona virus pandemic, the matter will be mentioned before me on 29th September 2020 for directions regarding the hearing of the deemed Protest.

15. In addition, the current administrators are directed to comply with the direction made by **Musyoka J.** on 26th October 2016 concerning the beneficiaries **Mary Njeri Kamanu** and **Rachael Gathoni Njoroge**, or if deceased, their representatives. Costs will abide the outcome of the summons to confirm grant filed on 22nd June 2012, the Protest by **Geoffrey Karanja Kariuki** and deemed Protest of **Grace Njeri Kirima**.

SIGNED AND DELIVERED ELECTRONICALLY TO THE PARTIES ON THIS 25TH DAY OF JUNE 2020.

C. MEOLI

JUDGE