



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO. 12 OF 2015

(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 159 OF 2011)

IN THE MATTER OF THE ESTATE OF THE LATE NKURU NKURI

VERONICA GACHERI.....PETITIONER

VERSUS

GILBERT KITHINJI PATRISIO.....1ST PROTESTOR

BEATRICE CIAKUTHI NGARI.....2ND PROTESTOR

MUNENE MATI.....3RD PROTESTOR

JOHN RUGENDO NYAGA (now deceased), but substituted by

FELACIA KAARI MBUANI.....4TH PROTESTOR

EVANS KABURU MATI.....5TH PROTESTOR

JUDGEMENT

1. This cause relates to the estate of the late **NKURU NKURI** (deceased) who died intestate at Chogoria Hospital on 9th February 2011 domiciled at Kithangari.

2. **VERONICA GACHERI**, the Petitioner/Applicant herein was appointed the administratrix on 27th June 2017 after the earlier grant was revoked. She had listed herself as the only surviving dependant and beneficiary to the estate left behind by the deceased. The following properties comprise the estate;

i. L.R. Karingani/Weru1233

ii. L.R. Karingani/Weru/1234

iii. L.R. Karingani/Weru/1296 &

iv. L.R. Karingani/Weru/1298

3. The Petitioner/Applicant vide Summons for Confirmation of Grant dated 10th July 2017 has now moved this court for confirmation of grant proposing to have the entire estate distributed to her.

4. In her oral evidence in support of her application for confirmation of grant, the Applicant acknowledged that Gilbert Kithinji the 1st Protestor herein was purchaser whose transaction of 0.75 acre had not been completed when the deceased died. She contended that because the Land Control Board (L.C.B) did not consent to the transaction, the only remedy for Gilbert Kithinji is monetary compensation.

5. She has further conceded that she sold 0.30 acres out of L.R. Karingani/Weru/1298 to Gilbert Kithinji Patrisio (1st Protestor) though she alleges that she did not have authority or capacity to do so. She contends that the 1st Protestor cannot benefit from an illegality. She further denied exchanging 0.80 acre of the deceased estate with him. She accuses the 1st Protestor for taking possession of the estate (L.R.

Karingani/Weru/1298) after she got married and left a vacuum.

6. She denied that Beatrice Ciakuthi (2nd Protestor) is a beneficiary claiming that she is a married sister to the deceased. She denied that the 2nd protestor cared for the deceased and argued that even if she did so it was her moral obligation. She denied the allegation that she has settled on Karingani/Weru/1298.

7. The Applicant has further denied that Munene Mati (3rd Protestor) is a beneficiary to the estate of the deceased herein claiming that he was a nephew to the deceased. She denied knowledge that the deceased bequeathed 0.14 acres to the 3rd Protestor. She contends that the letter from the Chief is not binding and is incapable of transferring any share to the 3rd Protestor.

8. She has also contested the claim by the late John Rugendo Nyaga (4th Protestor) on the estate. She contends that the 4th Protestor (deceased) was a son to one Nyaga Nkuri a brother to the deceased. She denied that the deceased gave him parcel No. Karingani/Weru/1233.

9. She has also denied that Evans Kaburu Mati (5th Protestor) should benefit from 0.14 acres despite having sworn an affidavit to that effect on 12th July 2016. She argues that the deceased could have transferred 0.14 acres to the 5th Protestor if he had given him the parcel.

10. In her written submissions through Ms I.C Mugo & Co. Advocates the Petitioner submits that she is the only child to the deceased. She avers that the claim by the 1st Protestor though backed by an agreement with the deceased is not enforceable because by dint of **Section 6 (1) Land Control Act** the agreement is null and void. She further submits that his other claim is also annulity because of the provisions of **Sections 55(1) and 82(b) (2) of the Law of Succession Act**.

11. She insists that the 2nd, 3rd and 4th Protestors did not turn up in court to prove their respective claims.

12. She avers that the claim of 0.43 acre by the 1st protestor is bad in law because the transaction is not backed a written agreement contrary to **Section 3(3) of the Law of Contract Act** and that the sale was done before the grant was confirmed rendering the transaction void.

13. The Petitioner's proposal mode of distribution elicited protests from five Protestors namely Gilbert Kithinji Patrisio (1st Protestor), Beatrice Ciakuthii Ngari (2nd Protestor), Munene Mati (3rd Protestor, John Rugendo Nyaga, (now deceased) (4th Protestor) and Evans Kaburu Mati (5th Protestor). They all filed affidavit of protests.

14. Gilbert Kithinji Patrisio in his affidavit of protest sworn on 24th July 2017 deposed that he is one of beneficiaries to the estate of the deceased as he had purchased 0.75 acres out of Karingani/Weru/1298 from the deceased in his lifetime on 2nd August 2010.

15. The 1st Protestor further avers that he bought 0.3 acres from the applicant and exchanged 0.80 acres which made his total claim in parcel No. Karingani/Weru/1298 to be 1.86 acres. He has annexed a copy of an affidavit sworn by the Petitioner/Applicant on 5th August 2014.

16. The 1st Protestor has averred that he has purchased another 0.43 acres from the Applicant to make a total of 2.29 acres. He contends that he has filed this protest because the Petitioner/Applicant in her petition has failed to take cognizance of his interests in parcel No. Karingani/Weru/1298.

17. In his written submissions made through Ms Njeru Ithiga & Co. Advocate the 1st Protestor has reiterated that he purchased 0.75 acres from the deceased on 2nd October 2010 and a further 0.30 acres from the Petitioner. He further submits that he further purchased 0.43 acres out of Karingani/Weru/1298 making a total claim of that parcel to 2.28 acres.

18. The 1st Protestors contends that the Petitioner has conceded his interests on the said parcel on oath and that because she directly benefitted from the transaction she should not be allowed to void the transaction to his detriment because of the extensive development he has carried out. He has urged me to invoke the provisions of **Article 159(2)** for the interest of justice. He has relied on the case of **Stephen Waweru Ng'ang'a -vs- Kimani Ng'ang'a (Nyeri High Court P & A Appeal No1 of 2011)** where the court *inter alia* held the Appellant should not be allowed to defraud innocent purchasers of their money and at the same time deprive of the land.

19. The 5th Protestor (Evans Kaburu Mati) on his part has protested to the proposed mode of distribution claiming that prior to the demise of the deceased, he had bequeathed him 0.14 acres out of Karingani/Weru/1298. He points out that the Petitioner in an affidavit sworn on 12th July 2016 recognized the interest and that even the Area Chief has further confirmed that he is entitled to 0.14 acres in Karingani/Weru/1298.

20. In his oral evidence in court the 5th Protestor told this court that he was a nephew to the deceased as he was a brother to his father and that he lives on the 0.14 acres given to him by the deceased.

In the cross-examination he conceded that he was charged in court for forgery in regard to the said parcel and that the Petitioner was the complainant and that he was convicted of the said offence.

21. In his written submissions vide Ms Waklaw Advocates, the 3rd Protestor has reiterated that his claim is based on the affidavit of the Petitioner/Applicant sworn and filed in court. He contends that the Petitioner has simply changed her mind and that the same change should be disregarded.

22. The other Protestors (2nd Protestor, 3rd Protestor and 4th Protestor represented/substituted by Felacia Kaari Mbuani) failed to turn up in court to tender evidence in support of their protest/claims on the estate. They only relied on affidavit of protests filed and the submissions. I will come back to the issue shortly.

23. This court has considered the Petitioner's proposed mode of distribution and the protest filed. There is no dispute that the Petitioner/Applicant is the sole child/dependant surviving the deceased.

24. The provisions of **Section 38 of Law of Succession Act** provides that where a deceased has left a surviving child with no spouse the net estate shall vest on that child. The law is therefore clear as a general rule on who should have get the entire estate in this cause. However there are exception to that rule and it relates to where the estate or part of the estate was held in trust for the benefit of another person or beneficiary.

25. I have considered the claims made by protestors in this cause. To begin with the respective claims by 2nd, 3rd and 4th protestors on the estate, is that this court finds that their claim has not been established or proved to the required standard in law. The above protestors only filed affidavit of protests but failed to come to court to adopt the same and be cross- examined to verify the veracity/authenticity of their claims. No good reason or at all was given for their absence by their counsel on 4th March 2020 when the matter was slated for hearing. Their absence in court for the trial lessened the probative value of the affidavit of protest filed. Their protest therefore fails for want of proof.

26. The 5th Protestor's claim that he was given 0.14 acres by the deceased is not supported by any evidence tendered before me. His reliance on an affidavit sworn by the Petitioner/Applicant on 12th July 2016 in my considered view is insufficient because the Petitioner was expressing her wish and not the wishes of the deceased upon which the 5th Protestor's claim is based. In any event the deceased died intestate so the question of wishes or the will of the deceased cannot arise. The Chief's letter dated 22nd September 2017 is addressed to no one in particular and is only indicative of the fact that the 5th Protestor was residing on the land. The said chief did not also come to court to verify the contents of his letter. The probative value of the said letter in my view is not sufficient to prove the 5th protestor's claim to the required standard of prove.

27. The 1st Protestor's claim of 0.75 acres and 0.30 acres in my view is well grounded. I have considered the evidence tendered and there is no dispute that prior to his demise the deceased had sold 0.75 acres to the 1st Protestor going by the sale agreement exhibited by the 1st protestor in his evidence. It is true that by the time the deceased died he had not taken the 1st Protestor to the Land Control Board for the requisite consent but he allowed the 1st Protestor to take possession of the parcel and develop it. This clearly shows that the deceased even if he had not obtained a consent as required by law was holding that parcel (0.75) in constructive trust for the 1st Protestor. When it came to constructive trust, in law the consent of Land Control Board is not a must to validate the transaction.

I have also considered the evidence of the Petitioner in court. She readily conceded that the 1st Protestor not only bought 0.75 acres from the deceased but a further 0.30 acres from her. She had earlier prior to the testimony in court sworn an affidavit on 5th August 2014 acknowledging those facts. She has now sought to avoid the 1st Protestor's purchasers interests using **Section 6 of Land Control Act (Cap 302)** and **Subsection 82(b) of Law of Succession Act** as a sword. The 1st Protestor has cited the provisions of **Article 159 (2) (d)** as a shield.

28. This court has carefully considered the Petitioner's legal position which I find correct. It is true that under **Section 82(b) of Law of Succession Act** the Petitioner had no capacity to dispose any part of the estate and under **Section 6 of Land Control Act** any transaction done without the consent of Land Control Board is void and anullity. I have on the other hand considered the 1st Protestor's position. He purchased 0.75 acres from the deceased in 2010 and paid the total consideration. The deceased used the money and allowed the 1st Protestor to take possession. Later the Petitioner sold 0.30 acres to him and was paid in full. She also used the money paid to her in consideration. There is no dispute that the Petitioner in trying to evade the Protestor's claim, she is trying to benefit from her own conceded wrong which is to keep both the money and the land. Even if I was to agree with her position order for a refund it would be an uphill task to start calculating the value of the money at the time of the impugned transactions and carrying out the valuations of the developments carried out by the 1st Protestor who rightfully had a legitimate expectation that the petitioner would transfer the purchased interests to him particularly given that she is a sole beneficiary. If there were other beneficiaries who were not party to the impugned transaction between the 1st Protestor and the Petitioner, this court would have no hesitation in invoking the provisions of **Section 82(b) of the Law of Succession Act**. Balancing the interests of justice between the Petitioner and the 1st Protestor going by **Article 159(2) (b) of Constitution of Kenya** the scales of justice tilts in leans in favour of 1st Protestors claim of 0.75 acres and 0.30 acres.

29. I have considered the 1st protestor's further claim of 0.80 acres and 0.43 acres and I find that the claims have not been proved to the required standard in law. The claim of 0.80 acres and 0.43 acres is therefore unsustainable.

30. The Petitioner/Applicant in her own testimony in court stated that she would give the 1st Protestor what she had conceded out of L.R Karingani/Weru/1298. This is what she stated in court during trial;

" I only know he (1st Protestor) bought 0.75 acres from my father and 0.30 acres I sold him, that is the only share he should get"
(Emphasis added).

This court finds in ironical and in bad faith for the Petitioner to contend in her submissions that the 1st Protestor's claim (particulars 0.75 and 0.30 acres) should be disregarded because it is bad in law. This court finds the contention a travesty of justice and is not persuaded as such.

In the end, this court hereby allows the Summons for Confirmation of Grant dated 10th July 2017 in terms of paragraph 6 of the Supporting Affidavit of the Petitioner save that L.R. Karingani/Weru/1298 will be distributed as follows:-

1. Gilbert Kithinji Patrisio - 1.05 acres

(to be curved out taking into consideration where the 1st Protestor has constructed the house he is living).

2. Veronica Gacheri - Balance.

I will not make any order as to costs so each party to bear own costs.

Dated, signed and delivered at Chuka this 24th day of June, 2020.

R.K. LIMO

JUDGE

24/6/2020

Judgement signed, dated and delivered in the open court in presence of Ndubi holding brief for Mugo for Petitioner, Kirimi for 4th Protestor and Mutua (Miss) holding brief for Ithiga for 1st, 2nd and 3rd Protestor and in presence of 1st, 2nd, 4th and 5th Protestors.

R.K. LIMO

JUDGE

24/6/2020