



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE N.O. 1614 OF 2018

IN THE MATTER OF THE ESTATE OF BONIFACE NJERU NGEMI (DECEASED)

KENNEDY WAWERU2ND OBJECTOR

MOSES MARERI WAWERU.....3RD OBJECTOR

VERSUS

LUCY NJAMBI WAWER.....1ST PETITIONER

DAVID MIRANGA WAWERU.....2ND PETITIONER

JOSEPH MARERI WAWERU.....3RD PETITIONER

RULING

1. The deceased herein in respect of whose estate these proceedings relate died intestate on 20th October, 2009. According form P and A 5, the deceased left the following persons as his survivors;

(1) Michael Ngemi Waweru

(2) Lucy Njambi Waweru

(3) Joseph Mareri Waweru

(4) David Mirang'a Waweru

2. Among the assets listed as comprising the estate was; LR 2250/118, 143,145,117&165/Karen/Mukoma. On 23rd November, 2018 Lucy Njambi Waweru and David Mirang'a Waweru petitioned for a grant of representation. From the record, there is an application dated 8th May, 2019 seeking annulment and revocation of the grant of letters of administration intestate alleged to have been issued on 6th June,2018. However, there is nowhere it is indicated that a grant had been issued at any one time. Subsequently, the application for revocation of the grant was later withdrawn.

3. By a Chamber Summons dated 3rd December, 2019, one Oscar Sang Kiprono moved this court seeking orders as hereunder;

(1) Spent

(2) That Mr Oscar Kiprono Sang being a creditor of the estate of the deceased be enjoined in these proceedings.

(3)That Mr Ocar Kiprno Sang a creditor of the estate of the deceased be included as a beneficiary of the deceased's estate upon confirmation of the grant.

(4) That the costs of this application be provided for.

4. The application is premised upon grounds stated on the face of it and an affidavit in support sworn on 3rd December, 2019. The applicant's claim is pegged on the ground that he is entitled to the estate on account of having bought and paid Ksh 11,497,000 being part of the purchase price in respect of L.R No. 2250/118 which comprises part of the estate.

5. He averred that, on 19th December, 2015, he entered into a sale agreement with the deceased's wife for the purchase of the said property. In support of that assertion, he attached a sale agreement marked "OSK1" indicating one Loice Chepchirchir and Oscar Kiprono Sang as the buyers with Sophia N. Waweru as the holder of a power of Attorney of Boniface N. Njeru Njeru in respect of IR 10276 on LR No 2250/118/Karen Mukoma being the seller.

6. That subsequent to the said sale, several deposits were made and receipt thereof acknowledged (see annexure OSK-2 being bank statement). He further deposed that the sale agreement was drawn the year 2017 with the knowledge of all parties but it was not executed due to the demise of the vendor (See attachment no OSK-3 being a copy of the said agreement).

7. That he recently discovered that a petition for a grant of representation had been filed without indicating that the estate had liabilities yet he is a creditor to the said estate by virtue of the said sale transaction.

8. Despite being served, the petitioners did not file any response. However, the objectors to the petition one Kennedy Waweru and Moses Mareri Waweru being grandchildren to the deceased but also claiming a share in the estate opposed the application through replying affidavit sworn on 17th July 2020.

9. During the hearing, Mr. Bya Mukama holding brief for Mr. Esuchi for the interested party reiterated the averments contained in the affidavit in support of the application. Mr. Ngugi for the petitioners did not oppose the application. Mr. Nyandieka appearing for the objectors being grandchildren to the deceased opposed the application stating that, this court has no jurisdiction to determine this claim

10. According to Mr Nyandieka, the right court to handle the matter is the Environment and Land court. Counsel contended that if there was any sale of the property in question the year 2015 six years after the deceased had died, then the sale was irregular and illegal thus amounting to intermeddling with the estate.

11. Counsel further submitted that the power of attorney alleged to have been used by the deceased lapsed immediately the deceased died.

Determination

12. I have considered the application herein which is not opposed by the petitioners. However, the objectors who are the grandchildren to the deceased did vehemently oppose the application. The key issue for determination is, whether the interested party has reasonable claim under the law of succession to be included as a creditor against the estate. The interested party claimed that he bought LR 2250/118 the year 2015. It is not in dispute that the deceased died the year 2009. In other words, no sale transaction could be executed without processing a grant in respect of the deceased who was the registered owner of the property in question by the time he died.

13. It is trite that the power of Attorney having not been acted upon during the lifetime of the deceased lost its power or validity to be enforceable after the donor died. The authority to execute transactions using power of attorney was only relevant during the lifetime of the donor. In my view, the power of Attorney of a person who has already died could not confer authority upon someone to sell the deceased donor's property. It is only a holder of a grant of letters of administration who has authority to dispose of property of a deceased person with authority from the court.

14. Secondly, the interested party/applicant is not a beneficiary nor dependant of the estate. Having held that the alleged sale of the property of the deceased was not properly done, the route of being a creditor to access part of the estate is not tenable as doing so will amount to legitimizing an illegality. The only available remedy is to seek redress from the legal representative of the estate through the ELC. It is purely a civil claim recoverable by filing a suit seeking either specific performance of the contract or recovery of his purchase price if proved before Environment and Land Court.

16. In the case of the estate of **John Gakungo Njoroge (deceased) (2015) e KLR**, the court held that an interested party who had bought land from the deceased person before obtaining a letter of consent from the Land Control Board was entitled to recovery of his principle purchase price unless parties agreed by consent to have the creditors given the land they were claiming.

16. Although Section 66 of the law of succession recognizes creditors as interested parties in succession proceedings, such claim must have crystallized during the life time of the deceased. In the instant case, the property was not sold by the deceased nor the administrator or his legal representative. The claim against the estate is not capable of litigation before the probate court for enforcement. In situations where a creditor is claiming beneficial interest from the estate of a deceased person he must prove a legitimate claim which is enforceable before a probate court.

17. Faced with a similar situation, the court in the case of **In re estate of Solomon Mwangi Waweru (deceased) (2018) e KLR** had this to say.

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

18. The court went further to state thus;

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

19. Similar position was also held in the case of In the matter of the estate of Peter Igamba Njoroge Nakuru succession cause No. 432/2009 and succession cause No. 864/1996 (2015) e KLR where the court held that;

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.

20. In view of the wisdom derived from the above quoted authorities and having found that the claim against the estate had not fully crystalized, I do hereby hold that this probate court is not properly sized of the matter regarding the alleged creditor’s interest on the land in question.

21. Since the grant of letters of administration has not been issued and confirmed, distribution of the estate will take time. It therefore follows that, the interested party has time to file a suit to realize his claim through the Environment and Land court and should he obtain interlocutory conservatory orders in respect of the land, he will be at liberty to come before the probate court which shall in my opinion halt the distribution of the land in question pending the determination of the Environment and Land court.

22. In the event the Environment and Land court determines the claim before the probate case, the interested party shall table a decree from that court for consideration and possibly enforcement if appropriate

23. For those reasons, it is my holding that the interested party’s application dated 3rd December 2019 is not sustainable and the same is dismissed with no order as to costs.

Dated, signed and delivered virtually this 23rd day of December 2020

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HON. JUSTICE J. N. ONYIEGO

JUDGE