



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 305 OF 2008

In the Matter of the Estate of Thuruaine Mwitari alias Thirwaine Mwitari (Deceased)

M'NABEA M'IMANYARA.....PETITIONER

LUDIA KAINDA.....PETITIONER

-versus-

STANLEY BUNDI

PAULINA NKURUGUCHU M'TWAMWARI.....APPLICANTS

AND

CHARITY J. M'NABEA.....LEGAL REPRESENTATIVE

AND

1. CHARLES MUGAMBI IKIARA

2. DANIEL KIRRINYA MUNENE

3. LEONARD NTEERE MUNENE

4. PETER KIRIINYA

5. RICHARD NDEREBA MUNENE

6. NICHOLAS KIINYA MUNENE

7. VIRGINIA KAIRUTHI MUNENE

8. NURU KITHINJI IGWETA

9. TIME U SACCO LIMITED.....INTERESTED PARTIES

JUDGMENT

Introduction

1. **THURUAINE MWITARI** alias **THIRWAINA** (the deceased) died in the year 1969. According to the letter by the chief of Chugu Location dated 8/5/2002 the deceased left Lydia Kainda (a daughter in law) and M'Nabea M'Imanyara (a purchaser) as his survivors. They petitioned for letters of administration which were issued on 24/8/2011 and confirmed on 17/7/2012. Distribution according to the confirmed grant was that M'Nabea M'Imanyara was allocated LR No. NYAKI/CHUGU/356 while LUDIA KAINDA LR. No. NYAKI/KITHOKA/4.

2. M'Nabea M'Imanyara however died on 22/9/2012 and vide a ruling by this court dated 3/11/2016, Charity J. M'Nabea was made party to this suit as the legal representative of the said late M'Nabea M'Imanyara.

3. On 19/1/2017 the applicant herein filed summons seeking for an injunction, inhibition and cancellation of subdivision and transfer of NYAKI/CHUGU/234 and the parcels excised from it, NYAKI/CHUGU/356 and NYAKI/KITHOKA/4. However, through a consent order dated 4/7/2018 this court directed that the confirmation orders be set aside, Ludia Kainda and Pauline Nkuruguchu M'Twamwari were appointed as joint administratrix, the inhibition orders on the said plots to remain in force and Ludia Kainda was ordered to apply for confirmation within 14 days. Thereafter, the 2nd administratrix and interested parties were to file their protest.

4. The said orders prompted the 2nd Petitioner to file her proposal on distribution of the estate dated 25/10/2018 where she stated that she has no interest in NYAKI/CHUGU/356 and NYAKI/KITHOKA/4 and therefore cannot distribute what she does not have.

5. The applicants thereafter filed summons for confirmation of grant dated 29/10/2018 and sought for the following specific orders, that;

a. The grant of the letters of administration intestate issued to Ludia Kainda and Pauline Nkuruguchu M'Itwamwari be confirmed.

b. L.R No. NYAKI/CHUGU/356 registered in the name of the deceased remain in the name of Thuruaine Mwitari as the registered owner

c. L.R No. NYAKI/CHUGU/234 registered in the name of M'Nabea M'Imanyara be deemed part of the estate of the deceased herein

d. The sub division of LR No. NYAKI/CHUGU/234 into LR Nos 1018-1024 and subsequent transfers be cancelled and reinstated to the original parcel No. 234.

e. LR. No NYAKI/CHUGU/234 be rectified by cancelling the name of Ludia Kainda with that of the deceased Thuruaine Mwitari being part of his net estate.

f. All the inhibitions, charges and all the encumbrances be lifted to facilitate the execution of the said orders

g. Production of the original title deeds be dispensed with for the purposes of the execution of the orders herein.

h. Costs of the application.

6. The application was based on the grounds contained in the supporting affidavit of Paulina Nkuruguchu M'Twamwari who stated that the deceased herein exchanged NYAKI/CHUGU/356 for NYAKI/CHUGU/234 with M'Nabea M'Imanyara and therefore the parcels that form the estate of the deceased herein are; NYAKI/CHUGU/234 and NYAKI/KITHOKA/4. She further stated that before filing the application herein Ludia Kainda had subdivided NYAKI/CHUGU/234 and transferred them to the interested parties. It was her proposal that the estate of the deceased should therefore be shared as follows;

NYAKI/CHUGU/234 to be shared equally between;

a) Stanley Bundi

b) Paulina Nkuruguchu M'Twamwari

c) Lydia Kaida

NYAKI/KITHOKA/4 to be shared equally between

a) Stanley Bundi

b) Paulina Nkuruguchu M'Twamwari

c) Ludia Kaida

7. The application was opposed by the replying affidavit dated 3/12/2018 sworn by Catherine K. Mwamba the Chief Executive Officer of Times U SACCO Ltd. She contended that the parcels that form part of the estate of the deceased are NYAKI/CHUGU/356 and NYAKI/KITHOKA/4. That NYAKI/CHUGU/234 was registered in the name of M'Nabea Manyara (deceased) at the time this cause was filed therefore it was not part of the estate. It was her further contention that if the family or beneficiaries of Thuruaine Mwitari had an interest in NYAKI/CHUGU/234 the administrator ought to have on behalf of the estate of Thuruaine Mwitari sought the transfer of the land from M'Nabea M'Imanyara in his lifetime and if he had died before transferring the same they ought to have sued his administrators in a civil case or in succession cause in respect of the estate of M'Nabea M'Imanyara.

8. NYAKI/CHUGU/234 was transferred to Ludia Kainda by M'Nabea M'Imanyara and NYAKI/CHUGU/1021 is a resultant parcel from the subdivision and one Nuru Kithinji a member of Time U SACCO is the registered owner and was advanced a loan using the said parcel of land as security and a charge was registered thereupon.

9. Charity J. M'Nabea filed a supplementary affidavit in opposition to the replying affidavit by Catherine K. Mwamba. She stated that since

early 1970's she has lived and worked on the parcel known as NYAKI/CHUGU/356 though it was then registered to the deceased herein. She was informed by her husband that NYAKI/CHUGU/234 was erroneously transferred to him by the family of the deceased but the deceased died before they could exchange the title numbers. However, each family has lived and developed on their parcels and it was because of this reason that her husband was involved in the cause herein.

10. In support of the above averments Paulina Nkuruguchiu M'Twamwari in her supplementary affidavit dated 10/12/2018 stated that by her own admission the 1st administratrix admitted to the fact that NYAKI/CHUGU/234 was erroneously transferred to the late M'Nabea Manyara. It was her further averment that when Stanley Bundi and herself filed the application for revocation of the original grant on 4/11/2014, they simultaneously filed an application for inhibition for the 3 parcels of land. However, the said orders for inhibition were not granted and thereafter NYAKI/CHUGU/234 was subdivided and transferred to the interested parties, most of whom are children of Ludia.

11. It was therefore her opinion that this court being of both law and equity, cannot be hindered in its exercise of powers under the doctrine of tracing merely by registration of a charge in favor of the 9th interested party. Neither the 1st petitioner nor herself has ever settled on LR NYAKI/CHUGU/356 and in addition there is no dispute between the family of the deceased herein and that of M'Nabea Manyara over the entitlement of their said parcels

Analysis and Determination

12. I have carefully perused through the application, affidavit, submissions and the record in its entirety and the issues to be determined are;

a. What are the assets of the deceased?

b. How should the estate of the deceased be distributed?

Estate property

13. The record shows that the properties that were registered in the name of the deceased at the time of his death were:

1, NYAKI/CHUGU/356 and

2. NYAKI/KITHOKA/4.

14. However, it was argued that M'Nabea M'Imanyara (now deceased) entered into an agreement with the deceased herein for the exchange of NYAKI/CHUGU/356 with NYAKI/CHUGU/234.

15. After considering all material filed in respect of the exchange herein, I note the averment by Charity J. M'Nabea in a supplementary affidavit in opposition to the replying affidavit by Catherine K. Mwamba that since early 1970's she has lived and worked on the parcel known as NYAKI/CHUGU/356 though it was then registered to the deceased herein. She was informed by her husband that NYAKI/CHUGU/234 was erroneously transferred to him by the family of the deceased but the deceased died before they could exchange the title numbers. However, each family has lived and developed on their parcels and it was because of this reason that her husband was involved in the cause herein.

16. It seems also that the exchange was effected when M'Nabea transferred to and Ludia Kainda was registered as the owner of NYAKI/CHUGU/234. Evidence available shows that these two families by mistake occupied land belonging to the other family. They intended to put right this mistake by exchanging the lands. Sadly, the deceased died before the exchange could be completed. They then embarked on completion of the exchange but adopted the wrong approach, hence, the confusion in these proceedings as well as subsequent transactions regarding the two pieces of land. I suppose the personal representative of the deceased ought to have noted the exchange transaction as outstanding in the estate of the deceased- such are matters which the personal representative must note in the proceedings- and then seek to ascertain the estate property before distribution. Of course, this procedure would have seen completion or otherwise of the exchange transaction between the deceased and M'Nabea. Had this happened, the muddle in these proceedings would have been avoided.

17. The foregoing notwithstanding, I am aware that ownership of land may be subject to overriding or other forms of interests in land say trust, possessory rights, adverse possession, matrimonial property rights, enforceable transactions such as sale or exchange of land, etc. Therefore, even if the land is registered, lawful claims of proprietary rights over the land on the basis of such recognized overriding or proprietary interests could be made. In determining the estate property, the court may take evidence on such claims. See the Court of Appeal in the case of Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge [2017] eKLR that:

“In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165 (3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap. 160. Moreover, the Constitution of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b);

20 (2); 21(1), 165 (3) (a) and 164 (3).”

18. In light thereof, I do not agree with the interested party that such claims must be determined by Environment and Land Court. My view is that this court has jurisdiction to ascertain the estate property in these proceedings. The request by parties herein is ascertainment of estate property and not really adversarial ownership dispute between the family of M’Nabea and the deceased. Such is a case that falls within the scary-edge cases or over-lap jurisdictions.

19. Both families agree that the deceased and M’Nabea (also deceased) occupied the land registered in the name of the other since the 1970’s. The estate of the deceased is not claiming L.R. NO. NYAKI/CHUGU/356 though it was registered to the deceased herein. This land was duly registered into the name of late M’Nabea by the personal representative of the registered owner. It is not estate property. Similarly, the family of M’Nabea is not claiming L.R. NO. NYAKI/CHUGU/234. Given the facts of the case, L.R. NO. NYAKI/CHUGU/234 is estate property. In sum, the estate property consists in L.R. NO. NYAKI/CHUGU/234 and NYAKI/KITHOKA/4. I so find and hold.

Beneficiaries

20. The second function of the court is to ascertain the identity of the rightful beneficiaries. It was the applicant’s case that Ludia filed these proceedings without their knowledge. According to a letter by the Chief Chugu location dated 17/10/2014 it was indicated that the deceased herein was the step father of the late M’Mchiri Nkuuru and had no children of his own. It was agreed by the elders and the clan members that the sibling of M’Mchiri Nkuuru are the beneficiaries of the land that was left behind by the deceased herein and therefore Mr. Stanely Bundi and Paulina Nkuruguchu were tasked to follow up on the issue. Ludia stated in the petition that she was a daughter-in-law of the deceased. The other two applicants also claim to be son and daughter in law of the deceased. It has been confirmed by all these parties that the deceased did not have children of his own. In the circumstances, I find that the applicants as well as Ludia are persons in equality in the order of preference in Part V of the Law of Succession Act to inherit the deceased. Ludia was aware of these facts but fraudulently applied for letters of administration solely to transfer parcel number 356 to M’Nabea in order for him to transfer parcel number 234 to her. She then subdivided the land and sold it to third parties. This was fraudulent and stealth. Accordingly, she dealt with estate property fraudulently. In these circumstances, what does the law say about third parties herein?

Interested party’s claim

21. The interested party has made a claim of a purchaser for value of one of the resultant subdivisions of NYAKI/CHUGU/234. And further that the said parcel of land is charged as security for loan. It seems the interested party claims that the said land was registered in the name of the late M’Nabea and not the deceased and so it should not be affected by these proceedings. This is a legitimate argument. And she is not without remedy. But where does her remedy lie?

22. She purchased it from Ludia Kainda after the suit land was transferred by M’Nabea to Ludia. I have, however, made a finding that this land is estate property and that Ludia dealt with it fraudulently.

23. The law of succession has in its core, preservation of estate property. And, Ludia as a personal representative of the deceased was under strict obligation to collect, bring in and preserve the estate property. This obligation entails tracing and following estate property. Needless to state that, a personal representative also acts as a trustee in relation to the estate and the beneficiaries thereto. She abused these statutory and fiduciary obligations in receiving, subdividing and selling the said parcel number 234 as her own property rather than as estate property. In such circumstances, the third parties should direct their claims to the particular recalcitrant personal representative for relief.

24. By parity of reasoning, read the case of **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Another (2014) eKLR** where it was stated: -

“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where one has not obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

25. Section 93 of the law of succession may not also offer protection to third party claims herein. However, I do not wish to administer a sudden shock to the third party. Given the peculiar circumstances of this case, the entitlement of the estate of Ludia will not be disposed of or transferred to the estate of Ludia until claims by the third parties are resolved by court. Accordingly, I direct the third party to institute appropriate legal proceedings against the estate of Ludia within 30 days and follow through on them without delay.

Distribution

26. Now the court can perform the ultimate function; distribution of the estate of the deceased. Being informed by the principle of equality in inheritance, I find the mode of distribution proposed by Paulina Nkuruguchu to be fair and consequently make the following orders;

I. The grant of the letters of administration intestate issued to Ludia Kainda and Pauline Nkuruguchu M’Itwamwari are hereby confirmed.

II. L.R No. NYAKI/CHUGU/356 that was initially registered in the name of the deceased belongs to the estate of M’Nabea M’Imanyara.

III. L.R No. NYAKI/CHUGU/234 that was registered in the name of M’Nabea M’Imanyara is deemed to be the property of

the deceased, hence, estate property of the deceased. All subsequent sub divisions and transfers are cancelled and the original parcel No. 234 be reinstated to be registered in the name of Thuruaine Mwitari, the deceased for purposes of these proceedings.

IV. All the inhibitions, charges and all encumbrances are hereby lifted to facilitate the execution of the orders herein. In the circumstances of this case, I direct the relevant land registrar to dispense with production of the original title deeds for the purposes of the execution of the orders herein.

V. Distribution of the estate of the deceased is as follows;

NYAKI/CHUGU/234 to be shared equally among: -

- a) Stanely Bundi
- b) Paulina Nkuruguchu M^oTwamwari
- c) The estate of Lydia Kaida

NYAKI/KITHOKA/4 to be shared equally among: -

- a) Stanley Bundi
- b) Paulina Nkuruguchu M^oTwamwari
- c) The estate of Ludia Kaida

VI. Each party to bear its own cost.

Dated and signed at NAROK this 14th day of December, 2020

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F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day December 2020

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T. W. CHERERE

JUDGE