



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 432 OF 2010

In The Matter Of The Estate Of Chabari M'rimunya (Deceased)

SIMON KAMUNDI.....PETITIONER

Versus

TABITHA GATIRIA MAINGI.....1ST OBJECTOR

PHILIS KARUGU MWORIA.....2ND OBJECTOR

TOM MUTUMA CHABARI.....3RD OBJECTOR

MICHAEL MURERWA.....4TH OBJECTOR

JUDGMENT

[1] **CHABARI M'RIMUNYA** (“the deceased) to whom this Succession Cause relates died on 1st July 1998. The Chief’s letter of introduction stated that the deceased was survived by Simon Kamundi and James Mutegi Murungi and his assets comprised in land Parcel No. **NKUENE/MITUNGUU-KITHINO/3** measuring 24 acres. The petitioner petitioned for grant letters of administration which were issued to him on 16th February 2011 and confirmed on 28th February 2012.

[2] The objectors filed summons for revocation or annulment of the grant dated 2nd October 2012 under **Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules**. The grounds upon which the application is grounded as set out in the application and the supporting affidavit of Tabitha Gatiria Maingi sworn on 2nd October 2012 are:-.

a) That the grant was obtained fraudulently by making of a false statement, untrue allegations of facts and concealment of material information.

b) The 1st objector is the only surviving spouse of the deceased and 2nd objector is his sister. The petitioner is the son to the 2nd objector, thus, not a dependant to the estate of the deceased. The sole surviving spouse ranks in priority to administer the estate of the deceased.

c) That the chief of Kirendene Location was informed and did issue any letter to the petitioner. The petitioner forged the letter.

d) That the true dependants of the deceased are:

1. Tabitha Gatiria Chabari - Widow
2. Tom Mutuma - Son
3. Philis Karugu - Sister
4. James Mutegi - Nephew
5. Michael Murerwa - Nephew

[3] The application was opposed through two replying affidavits of James Mutegi Murungi and Simon Kamundi both sworn on 16th October

2012. They denied the allegations made by the objector and deposed:-

- a) That Tabitha Gatiria is not a widow of the deceased as she was married to Muturi Wachokomba who is the father of Tom Mutuma.
- b) When the deceased fell sick he sent for James Mutegi who took him to hospital. He later called the sub-area *mkubwa* and relatives where he stated his desires about his estate; to be given to James Mutegi Murungi, his nephew.
- c) On 31st December 2008 James became financially endowed and with the concurrence of his cousins he allowed the petitioner to proceed with the cause and relinquished his entire bequest to the petitioner.
- d) That the chief's letter in this matter was obtained from Chief Kathia Magambii the chief Mitunguu location before Mitunguu Location was subdivided to find Kirendene location.

[4] Six Interested Parties, namely, Mworira C. Kirera, Dorcas Muthoni Kumenya, Peter Kirimi Muthiri, Lucy Kinya Mathew, Naomi Kanini Kirera and Caroline Gatwiri Mwirigi filed affidavits sworn on 28th January 2013. They stated that they bought land from the petitioner and are protected under **Section 93 of Law of Succession Act**.

[5] This matter was heard by *viva voce* evidence. **PW1 Tabitha Gatiria Maingi's** evidence was:-

- a. That she is the wife of the deceased and not Muturi Wachokomba. They had a son Tom Mutuma who was born on 6th October 1994 and that the deceased had no other wife or child. She got married to the deceased in 1993 when she was 20 years old but does not know how the deceased was as he was an elderly man.
- b. That the deceased has two sisters Philis Karugu and Florence Samuel and two brothers who are deceased.
- c. That she knows James Mutegi for he is the son of her brother in law and they were in the same school.
- d. She denied that the land was left to Mutegi who purportedly sold the same to the petitioner. That the land has been sold and none of the purchasers are in occupation of it as she lives on the land with her son, Philis and her children.

[6] **OW2 Philis Karuga Mworira** told the court that the deceased is her younger brother hence the allegation made by the petitioner that he is the son of the deceased is not true as he is her son. She affirmed that the deceased married Tabitha in accordance with Meru Customary Law and had one son. She stated that during the deceased's lifetime her brother said that the land be left to her to share it. She was the one that she took care of the deceased while in hospital because his wife had left him and when he died she buried him together with her son Gituma and also sought assistance from Mutegi.- It is not against the Meru custom for the deceased to have left his land to a woman because he left her with his children. She had his two children and she was the one who was caring for him when he fell sick till his death.

Submissions

[7] Parties also filed written submissions. The 2nd, 3rd and 4th objectors submitted that in the certificate of confirmation of grant the six interested parties are disguised as beneficiaries and even signed the consent to the mode of distribution. That the interested parties bought land before confirmation of the grant while the 1st interested party one Mworira L. Kirera bought his share even before this cause was filed. The sale of the land by the petitioner is a breach of the law under **Section 82 (ii) of the Law of Succession Act**. They relied on the case of **Monica Adhiambo v Maurice Odera Koko [2016] eKLR**.

[8] On the other hand, the interested parties submitted that the *locus standi* of the interested parties has already been decided by the court in its ruling dated 1st March 2016 hence making this issue *res judicata*. That the court confirmed that they are people entitled to the estate in the certificate of confirmation. Therefore, their rights given and established by an order of the court cannot just be wished away. If the grant is set aside under **Section 76 of the Law of Succession Act** then the court can make a decision on the fate of the petitioner and interested parties. If it is not set aside the confirmed grant will remain as ordered by the court

ANALYSIS AND DETERMINATION

[9] Issues in controversy which this court must determine are:-

- a. **Validity of sale of estate property to the interested parties and**
- b. **Whether or not to revoke the grant issued and confirmed to Simon Kamunde.**

Of sale of estate property

[10] Before I tackle the real issue on this subject, I must point out that I see a distorted interpretation by the interested parties of the ruling delivered by this court on 1st March 2016. It is quite mischievous of them to submit that this court confirmed that they are entitled to the estate in the certificate of confirmation. The ruling tackled the issue of whether the interested parties should be removed from these proceedings. The ruling did not tackle the issue of whether they are entitled to the estate; that is the issue for determination. It is wrong for the interested parties to deliberately distort the ruling of the court in the hope that it will augment their case. Such the court will not take

lightly and the interested parties are accordingly warned.

[11] Concerning propriety or otherwise of sale of estate property, I say the following. The Law of Succession Act expressly prohibits sale of immovable property of the deceased before confirmation of grant. The prohibition serves vital purposes. One, it protects and preserves the estate from being intermeddled with, dissipated or wasted away. And two, it guarantees the right of beneficiaries to inherit. A relevant hint; it is only after confirmation that the beneficiaries and their respective shares in the estate are identified by court. The named beneficiary then acquires a beneficial interest which can be sold or charged or exchanged or dealt with by such beneficiary as permitted in law of an owner. Therefore, before confirmation none of the beneficiaries have any or identifiable beneficial interest which they can sell or charge or dispose of. See the proviso to **Section 82** of the Law of Succession Act which states as follows:

Provided that—

(i)....

(ii) no immovable property shall be sold before confirmation of the grant;

...”

[12] Accordingly, sale of immovable property of the deceased before confirmation of grant is in violation of the law, and therefore unlawful acquisition. Needless to state that such unlawful acquisition is null and void and is not protected in law. See the claw-back provision of the Constitution in article 40(6) of the Constitution that:-

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

[13] Be that as it may, only bona fide purchases are protected under Section 93 which states:

“(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a 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.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

a. The protection is circumscribed in law and is not intended to validate invalid transactions or acquisitions. Thus, the protection is not a cure-all remedy or available in all transactions. The section does not supersede the Constitution and the law on unlawful acquisitions. Only bona fide purchasers and lawful acquisitions may benefit from the protection in section 93 of the Law of Succession Act.

[14] Being of that persuasion, any transaction that defrauds the beneficiaries of the deceased’s estate does not enjoy the protection. See Nagillah J in the case of **Monica Adhiambo v Maurice Odero Koko [2016] eKLR**

“The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.”

[15] Applying the test of the law, the sale agreements presented by the interested parties show that they were entered into on the following dates:

- a) Mworira C. Kirera on 25th January 2010 and 10th December 2010
- b) Dorcas Muthoni Kumenya on 2nd August 2011 and 4th April 2012
- c) Peter Kirimi Muthiri on 16th August 2010 and 6th April 2011
- d) Lucy Kinya Mathew on 6th April 2011 and 17th February 2012
- e) Naomi Kanini Kirera on 7th October 2011
- f) Caroline Gatwiri Mwirigi on 7th September 2012.

[16] The first five interested parties bought land before the confirmation of the grant, i.e. before 28th February 2012. Those transactions are outright unlawful, null and void. They violated **Section 82 (b) of CAP 160** which prohibits the sale of immovable property before the confirmation of the grant.

[17] As for the 6th interested party she bought after the grant was confirmed. But, what are the circumstances underlying the acquisition of the grant?

[18] Although the petitioner denied, evidence show that the Objector is the widow of the deceased. She therefore had preference in applying for grant as the deceased died intestate. See **Section 66 of the Law of Succession Act** that surviving spouses are given the first priority. When you read **Section 66** together with the table of consanguinity you will note that if for example the deceased died with no spouse or child neither the petitioner nor James Mutegi would be person with priority.

[19] I am aware that the petitioner and James Mutegi claimed stated that the deceased had called people and stipulated how his land is to be distributed, that is, to be given to James Mutegi. The allegation was not substantiated or supported by evidence.

[20] What's more, the agreement of sale which is said to have taken place between James Mutegi and petitioner on 12th January 2009 holds no water for James Mutegi had not been given any power or authority for this cause relating to the estate of the deceased, owner of the land, had not been initiated.

[21] The deceased's sisters at that point were alive and the petitioner did not seek their consent to take out the grant of letters of administration or notify them of these proceedings.

[22] In addition, when the petitioner initiated this petition he stated that the deceased was survived by two sons: Simon Kamundi and James Mutegi Murungi. The two are not sons of the deceased but nephews of the deceased. The objectors stated that the deceased was survived by a widow and a son; these nephews refuted. However, the sister to the deceased and mother of the petitioner **OW2** testified that the deceased was married to **OW1** and they had a son.

[23] From the foregoing, I am of the considered view that the grant of letters of administration issued on 16th February 2011 and confirmed on 28th February 2012 is a candidate for revocation and is hereby revoked. Given what has happened to the estate and in the best interest of all parties concerned, I make a fresh grant to:-Tabitha Gatiria Chabari and Philis Karugu as joint administrators of the estate.

[24] In light thereof, the grant was obtained fraudulently and by a person who had no authority. Furthermore, he is guilty of non-disclosure and misrepresentations. Consequently, the sale made to the 6th interested party premised on unlawful acts and fraudulent grant is blown away. By the revocation on those grounds the purchaser cannot shelter under the umbrella of **Section 93 of the Law of Succession Act**. The upshot is that the 6th Interested Party's purchase is not protected. I declare the sale of the estate land herein unlawful and therefore null and void.

Beneficiaries

[25] From the record, the rightful beneficiaries are:-

- 1. Tabitha Gatiria Chabari - Widow**
- 2. Tom Mutuma - Son**
- 3. Philis Karugu - Sister**
- 4. James Mutegi - Nephew**
- 5. Michael Murerwa - Nephew**

Distribution

[26] In light of the principle of equality enshrined in section 38 of the Law of Succession Act, the estate property being the Parcel No. NKUENE/MITUNGUU-KITHINO/3 measuring 24 acres shall be shared equally amongst the following beneficiaries of the estate:-

- 1. Tabitha Gatiria Chabari - Widow**
- 2. Tom Mutuma - Son**
- 3. Philis Karugu - Sister**
- 4. James Mutegi - Nephew**
- 5. Michael Murerwa - Nephew**

[27] The grant I have issued herein is confirmed in the foregoing terms. No order as to costs.

Dated signed and delivered in open court at Meru this 30th January, 2019

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F. GIKONYO

JUDGE

In presence of

Riungi for 2nd, 3rd and 4th objector

Muchui for Gikunda for 1st objector

Kithinji for Mwarania for petitioner

All parties present

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F. GIKONYO

JUDGE