



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 570 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE ANNAH CHEPKURUI MUTUA (DECEASED)

ABDI CHEBOCHOK JUMA.....APPLICANT

VERSUS

AGNES CHEMUTAI NYAKWARARESPONDENT

RULING

1. The ruling is in respect of the amended summons for alteration of the grant dated 28/5/2018.

1. Spent

2. Spent

3. Spent

4. **THAT** the confirmed Grant of Letters of Administration issued to the respondent on 25th May 2015 and confirmed on 28th January 2016 be altered and the property known as Nakuru Municipality Block 13/298 (Bondeni House No. 32) be removed from the list of assets of the estate of Annah Chepkurui Mutua (deceased).

OR in the alternative, the respondent be ordered to transfer property title number NAKURU/MUNICIPALITY/BLOCK 12/298 (old Bondeni House No. 32) to the applicant.

5. **THAT** the County Government of Nakuru be restrained from deleting the applicant's name from the records of rates or substituting his (applicant's) name with that of any other person or persons.

6. **THAT** the court do grant any other orders/directions in the interest of justice and fairness.

2. The application is premised on grounds that;

a) The Respondent unlawfully included property title number Nakuru Municipality/Block 13/298 (Bondeni House No. 32) in the list of assets in the estate of the deceased without material disclosure that the said property had been sold to the applicant by the deceased before her death.

b) The beneficiary of the said property has initiated steps to have the applicant's name deleted from the rates register.

c) The applicant stands to suffer irreparable loss and damages unless the respondent is restrained.

3. It is supported by the affidavit of Abdi Chebochok Juma.

4. The applicant's case is that he purchased property title number Nakuru/Municipality/Block 13/298 (originally known as Bondeni House Number 32) from Annah Chepkurui Mutua (the deceased). He annexes a sale agreement showing Kshs. 270,000/= as the purchase price.

5. He avers that he took possession of the property and has been in occupation from the date of purchase in 1999.

6. He has since improved the 14 residential units that were at the property and he has built 11 permanent residential units and 4 semi-permanent units.
7. The applicant urges that a transfer was effected and the names of the deceased deleted from the rates records of the property and substituted with the applicant's. A rates demand notice is exhibited.
8. It is urged that the inclusion of the property as one of the assets of the deceased was in bad faith and driven by malice and fraudulent intention.
9. The application is opposed and the respondent has raised a preliminary objection on a point of law to wit;
 1. **THAT** the applicant is not a beneficiary of the estate of ANNAH CHEPKURUI MUTUA (deceased) and therefore his claim can only be addressed in a civil suit and not in this matter.
 2. **THAT** the applicant's application should be dismissed with costs.
10. In a replying affidavit, the respondent avers that the grant herein is regular as she followed due process required of her by law.
11. It is urged, that at the time of the purported sale the vendor had not obtained letters of administration and thus lacked capacity to sell the property. Secondly at the material time, the alleged vendor was admitted at Valley Hospital where she died on 9/10/1999.
12. It is urged that once the beneficiaries discovered the fraudulent sale, they returned the cheque which was to satisfy part of the purchase price.
13. Further, the applicant was to recover Kshs. 120,000/= he had purportedly paid from collection of rent from the rental houses on the suit properly which he did.
14. The matter reached the ears of the local chief who advised that the matter be resolved amicably and the chief wrote letter dated 29/3/2003.
15. Matter was canvassed by way of written submissions.
16. Of determination is whether the court has jurisdiction to hear this matter, whether the grant herein should be altered to remove property known as Nakuru/Municipality/Block 13/298 (Bondeni House Number 32) from the list of assets of the estate of Annah Chepkurui Mutua (deceased) or in the alternative, whether the respondent should be ordered to transfer the said title to the applicant. The court, too, has to determine whether the County Government of Nakuru should be restrained from deleting the applicant's name from the records of rates or substituting the applicant's name with that of any other person or persons.
17. I will naturally tackle the issue of jurisdiction first as my finding thereon, if in the negative, determines the application as, without jurisdiction, I must down my tools.
18. The people of Kenya through their loud pronouncement under **Article 162(2) (b)** of the **Constitution** took away the jurisdiction of the High Court to determine matters on ownership of land. The Constitution creates a court of equal status with the High Court to determine such matters. **Article 162(2) (b)** of the **Constitution** provides;

“162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title to, land.”

Article 165(5) (b) of the **Constitution** provides;

“165 (5) The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

19. The jurisdiction of the High Court and that of the court of equal status is thus spelt out in clear and unambiguous language in the Constitution.
20. To buttress the effect of lack of jurisdiction I will place reliance on the celebrated decision in the **MV LILIAN S (1989) KLR** in which **Nyarangi JA** famously had this to say on jurisdiction;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

He goes on to say:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

21. The above constitutional provisions did not, however, oust the jurisdiction of the High court to deal with succession matters where immovable property is part of the assets. The High court’s sphere of inquiry as provided for in the Law of Succession Act extends to ascertaining assets available to an estate, liabilities owed by the estate, the identities of the beneficiaries and ultimately the mode of distribution of the estate to ascertained beneficiaries.

22. The applicant in this case claims a beneficial interest in the estate. This question was addressed by the **Court of Appeal** in **MUSA NYARIBARI GEKONE & 2 OTHERS vs. PETER MIYIENDA & ANOTHER [2015] eKLR** where while upholding the decision of ***E.M. Muriithi J***, the court stated;

“On the question whether the 1st respondent was beneficially interested in the estate of the deceased and whether he had the legal standing to apply for revocation of the grant of the letters of administration, the learned judge held that under Section 76 of the Law of Succession Act the court is empowered to revoke or annul a grant “on the application of any interested party or of its own motion” and that the expression “any interested party” is wide enough to cover a person who claims to have purchased an asset of the estate.”

The court further says;

“The relevant part of *Section 76* of the *Law of Succession Act* provides:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion

a)

b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d)

e)”

The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of **Section 66** and **39** of the **Law of Succession Act**. **Section 66** provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased had died intestate. **Section 39** provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an “interested party” for purposes of an application for revocation or annulment of grant of letters of administration under **Section 76** of the **Law of Succession Act**. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to **Section 76** of the **Law of Succession Act** when he held that the 1st respondent has the locus standi to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent’s interest as a purchaser of the property of the deceased qualified him as an ‘interested party’ with standing to challenge the grant.”

23. The Court has jurisdiction to entertain the current application.

24. As to whether the property Nakuru Municipality/Block 13/298 (Bondeni House No. 32) should be removed from the list of assets of the estate, there is evidence from a sale agreement and change of records of ownership at the County Government in favour of the applicant. There is evidence of the knowledge of the respondent about the sale of the said property.

25. In her affidavit in support of the petition, she lists this property as part of the assets of the deceased failing to mention the interest of the applicant at all. This was “concealment from the court of something material to the case” within the meaning of **Section 76(b)** of the **Law of**

Succession Act.

26. Had this information been volunteered to the Court, the grant would not certainly have been confirmed in the terms now existing.
27. The court was misled into including in the list of the assets of the estate a property that was for all intents and purposes not a free property of the deceased at death. The respondent was aware of the applicant's interest which she never disclosed. As the administrator of the estate of the deceased, it was her duty, if she harboured any misgivings in regard to the purchase by the applicant, and if she held that the estate had a cause of action against the applicant, to enforce the said cause of action within the meaning of **Section 82(a)** of the **Law of Succession Act**.
28. In light of the affidavit evidence on record, the respondent ought to have disclosed when applying for the grant of letters of administration the interest of the applicant. The **Court of Appeal** put it succinctly in the **MUSA NYARIBARI GEKONE** case above. The Court stated;
- “Based on that evidence, we think the learned judge was right to hold as he did that the 1st appellant should have disclosed, when applying for the grant of letters of administration or when seeking its confirmation, that the 1st respondent had an interest in the property. At the very least, the 1st respondent should have been considered a creditor of the estate, having paid part of the purchase price with respect to the property to the deceased and the balance of the purchase price to the deceased's mother subsequent upon the death of the deceased.”**
29. I am satisfied that there was material non disclosure of the applicant's interest as a purchaser for value of the subject property and therefore the untruthful allegation that all persons beneficially entitled to the estate had been ascertained and determined as those listed in the petition.
30. From the record, it is clear that the applicant has no grouse with the grant held by the respondent. His grouse as I understand it, is the inclusion of property Nakuru Municipality/Block 13/298 (Bondeni House No. 32) as part of the assets of the deceased.
31. The duty of the administrator was to transmit the net estate of the deceased to the rightful heirs. This certainly would be confined to the free property of the deceased as at the time of her death.
32. When the complaint of a party is not that they have priority in being issued with the grant or when the complaint by a party is that an administrator has included a property that ought not to have been listed as a property of the deceased, the certificate of confirmation of grant can be dealt with without having to cancel the grant. This (see **Re ESTATE OF NGUGI (Deceased) 2002 2 KLR 404**).
33. The applicant has thus made the right approach by anchoring his application on **Rule 73** of the **Probate and Administration Rules** and praying for the alteration of the grant.
34. From the foregoing, I make a finding that the said property ought not to have been included as an asset in the estate of the deceased. The property known as Nakuru Municipality/Block 13/298 (Bondeni House No. 32) should be removed from the list of assets. Should the administrator maintain that the estate has a cause of action against the applicant she is at liberty to enforce the cause of action appropriately and in separate proceedings as mandated by **Section 82 (a)** of the **Law of Succession Act**. That Section provides;

“Sec. 82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

35. Having so found, I need not delve into the question whether the respondent should be ordered to transfer the property to the applicant which was an alternative to issue number 2.
36. As to whether the County Government of Nakuru should be restrained from deleting the applicant's name from the record of rates or substituting the applicant's name with that of any other person, I am of the finding that the order naturally flows from the earlier finding removing the property from the assets of the deceased.
37. With the result that the summons dated 25/5/2018 is successful. I allow the same and make the following orders;
1. **THAT the confirmed Grant of Letters of Administration issued to the respondent on 25th May 2015 and confirmed on 28th January 2016 be and is hereby altered and the property known as Nakuru Municipality Block 13/298 (Bondeni House No. 32) be removed from the list of assets of the estate of Annah Chepkurui Mutua (deceased).**
 2. **THAT the County Government of Nakuru be and is hereby restrained from deleting the applicant's name from the records of rates or substituting his (applicant's) name with that of any other person or persons unless on the basis of other orders of a competent court.**
 3. **THAT the certificate of confirmation of grant dated 28/1/2016 is hereby recalled for rectification.**
 4. **THAT each party to bear its own costs.**

Dated and Signed at Nakuru this 27th day of February, 2019.

A. K. NDUNG'U

JUDGE