



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2381 OF 2008
IN THE MATTER OF THE ESTATE OF NANCY WANGECHI WAIHAKA (DECEASED)

MICHAEL NJOGU WACHIURI.....APPLICANT

VERSUS

LILIAN WAMBUI NJOGU.....RESPONDENT

RULING

1. The deceased Nancy Wangechi Waithaka died intestate on 14th March 2008. She had not been married, and had no children. She was survived by the following:-

- a. Lilian Wambui Njogu (sister/petitioner/respondent);
- b. Gachie Abinja Waithaka (brother);
- c. Edward Mugo Waithaka (brother); and
- d. Agnes W. Waithaka (sister).

The estate that she left had the following property:-

- a. shares in Kenya Police Savings & Credit Society (Police Sacco);
- b. Laikipia/Daiga/Umande Block 111/197 (Muramati);
- c. Ngong/Ngong/28733; and
- d. Ngong/Ngong/28734.

The respondent petitioned the court for the grant of letters of administration intestate. The grant was issued on 23rd February 2009, and confirmed on 31st May 2010.

2. The deceased's shares in the Police Sacco yielded 6 plots. When the estate was distributed Gachie Abinja Waithaka got 2 plots, Edward Mugo Waithaka got 2 plots, the respondent got one plot, and Agnes W. Waithaka got one plot. Agnes W. Waithaka was given Ngong/Ngong/28733 and 28734. Gachie A. Waithaka and Edward Mugo Waithaka were to equally share Laikipia/Daiga/Umande Block 111/197 (Muramati).

3. There is no dispute that following the distribution of the estate, but before there was formal transfer of the parcels of the land to the respective beneficiaries, Gachie Abinja Waithaka sold the two Police Sacco plots (plots Nos. 197 and 198) to the applicant Michael Njogu Wachiuri for Kshs.1.2 million out of which he received Kshs.800,000/=. They went to the Police Sacco to get the applicant become the

owner of the shares representing the plots. The two parties were introduced by Peter Njogu Maina who is the former husband of the respondent.

4. When the respondent learnt of the transaction she filed an application on 16th December 2015 seeking to restrain the Police Sacco and Peter Njogu Maina from interfering with the deceased's 6 plots, and an order to cancel and/or revoke the illegal and unlawful transfer of plots Nos. 197 and 198 to the applicant. It was also sought that the money paid in the transaction be refunded. The applicant's response to the application was that he had bought the two plots (each for Kshs.600,000/=) from Gachie Abinja Waithaka whom he knew to have inherited the same from the deceased. He stated that at the time of the purchase, the grant in respect of the deceased had been confirmed and the plots apportioned to Gachie Abinja Waithaka. He had in 2011 taken possession of the plots. The application was orally heard by Justice Muigai who delivered a Judgment on 10th February 2018 allowing it. The court found that, although Gachie Abinja Waithaka was allocated 2 plots in the certificate of confirmation, the same were not specified; that Gachie Abinja Waithaka had no capacity to sell the two plots to the applicant; that the only person who had capacity to sell them was the respondent who was the administrator of the deceased's estate; and, therefore, that the sale and transfer were irregular and illegal.

5. The applicant was aggrieved by this decision and on 14th December 2018 filed a notice of appeal to challenge the same. In a motion dated 22nd January 2019 he filed this motion seeking that the execution of the judgment be stayed pending the hearing and determination of his appeal to the Court of Appeal. The application was supported by his affidavit dated 22nd January 2019. It was his case that the decision to rescind the sale agreement and to have the land registrar at Kajjado to revoke and cancel any transfer to him, and for the parcels of land he has occupied since September 2011, would have substantial effect on him, if the application is not allowed.

6. The application was opposed through the replying affidavit by the respondent. Her case was that the circumstances leading to the sale and transfer of the suit land to the applicant were fraudulent since her, as the administrator, had not finalized the distribution of the estate to individual beneficiaries. She stated that the estate would refund what the applicant had paid for the two plots.

7. Counsel for the parties filed written submissions. I have considered the affidavits and the submissions.

8. Under **Order 42 rule 6 of the Civil Procedure Rules**, before the Court can order stay of execution pending the hearing and determination of appeal, it has to be satisfied that substantial loss may result to the applicant unless the order is granted, the application has been brought without unreasonable delay and the applicant has provided such security for the due performance of the decree or order as may ultimately be binding on him (**Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR**).

9. There was no delay in bringing the application. As for security, the applicant stated that he was willing to abide by whatever terms or conditions that the court may impose.

10. The applicant bought the two plots from Gachie Abinja Waithaka in September 2011, and took possession. He, however, acknowledged that there is part of the consideration that is outstanding. The Kenya Police Sacco records now reflect him to be the owner of the plots. The respondent stated that the estate was willing to refund the amount that the applicant paid for the land parcels.

11. The respondent has a judgment whose fruits the estate is entitled to enjoy. On the other hand, the applicant has filed an appeal against that judgment. He is entitled to appeal against any decision he is not happy with. The court has to guard against the appeal being rendered nugatory. (**Machira t/a Machira & Co. Advocates -v- East Africa Standard No. 2 [2002]KLR 63**).

12. Where the applicant alleges that he will suffer substantial loss if stay is not granted, he is bound to place before the court such material and information that would lead the court to conclude that in fact he stands a risk of suffering such tangible and considerable loss, moneywise or other, and that he should be granted stay (**Andrew Kuria Njuguna -v- Rose Wambui Kuria [2001]eKLR**).

13. The applicant stated that he has had the possession and use of the properties since September 2011 when he acquired them from Gachie Abinja Waithaka. He stated that he does not know the financial position of Gachie Abinja Waithaka, and that if the sale and transfer of the suit properties is revoked as ordered and the vendor is unable to refund the purchase price, he will lose both the money and the land. Lastly, if the application is not granted the respondent will give away the properties to whoever is entitled to them. In other words, the subject matter will admittedly be beyond the court. It is for these reasons that I find that if the application is not allowed the applicant will suffer substantial loss.

14. Consequently, I allow the application for stay, but this will be for 90 days to allow the applicant to revisit the issue at the Court of Appeal. That is the court that will consider, among other things, whether the applicant has an arguable appeal.

15. The applicant has been indulged. He will be the costs of the application.

DATED and DELIVERED at Nairobi this 29th day of APRIL 2019

A.O. MUCHELULE

JUDGE