



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.734 OF 2009

THE MATTER OF THE ESTATE OF NGUI KIKUYU NTHENGE (DECEASED)

BENEDICT NZOMO NGUI.....APPLICANT

-VERSUS-

RAPHAEL NDETI NGUI.....1ST RESPONDENT

GERALD NGUNGU NGUI.....2ND RESPONDENT

NGUI KIKUYU NTHENGE.....3RD RESPONDENT

RULING

1. This ruling relates to an application dated 28th May, 2019 by the Applicant against the 1st and 2nd Respondents who are administrators of the estate of the deceased and the 3rd Respondent. The application is vide notice of motion under Section 1A, 1B of the Civil Procedure Act, Section 47, 71, 76 of the Law of Succession Act and Rule 49, 63(1) and 73 of the Probate and Administration Rules.

2. The application seeks the following orders.

a) Spent.

b) Spent.

c) A prohibitory order be registered on Land Parcel No. Kithimani/Kithimani A/1810 and Land parcel No. Machakos/Matuu/100.

d) Pending the hearing and determination of the contested summons for confirmation pending before this Honorable court the Respondents, their agents, servants or workmen be restrained from interfering, transferring or dealing in any manner with the assets of the deceased or any part thereof.

e) Costs of the suit.

3. The facts constituting the application as indicated in the supporting affidavit of the applicant sworn on 28th May, 2019 are that the applicant is a co administrator and protestor as well as the eldest son of the deceased who is residing on Kithimani A/ 1810 that is part of the deceased's estate. The applicant avers that he has been in occupation of the land since 1980 when his father gifted him the land and in 2018 the Respondents started threatening the applicant and interfering in his quiet possession of the same. He averred that the respondents have sold off part of the deceased's estate and if they are not stopped, the estate will be no more.

4. The application was opposed vide a replying affidavit deposed by Gerald Ngungu Ngui on 24th June, 2019 wherein he confirmed that the applicant, he and the 1st Respondent together with Kikuyu Ngui are administrators of the estate of the deceased and that the 3rd Respondent is the deceased therefore the application is incompetent. It was averred that it is incorrect that the applicant resides in Kithimani/Kithimani A/1810 but instead he resides on Kithimani/Kithimani A/1169 that is 2 kilometers from the family land. A copy of a title deed indicating that the title to Kithimani/Kithimani A/1169 is registered in the name of the applicant was annexed. It was averred that Kithimani/Kithimani A/1810 is family land and the applicant has never been in occupation of 8.5 acres but the same has been occupied by 3 widows of the deceased and the applicant seeks to disinherit them thus the application ought to be dismissed as there was no gift *inter vivos* of the same to the applicant by the deceased. The deponent denied intermeddling with the deceased's estate.

5. The application was canvassed vide oral submissions. Njoroge for the applicant reiterated the contents of the affidavit and submitted that the actions of the Respondents warrant the grant of the orders sought pending the hearing of the succession cause.

6. Kingoo for the Respondents also reiterated the contents of the replying affidavit dated 24.6.2019 and added that the application lacks proof of interference, the same is frivolous and ought to be dismissed.

7. In rejoinder, counsel for the applicant submitted that the 3rd Respondent is a son of the deceased who took up the deceased's names and that the application was necessitated by the actions of the Respondents.

8. The duty of the succession Court has been reiterated in numerous cases and it is distribution of the estate of the deceased. **In Re Estate of G K K (Deceased) [2017] eKLR Musyoka J held that:**

“The primary function of a probate court is distribution of the estate of a dead person.”

9. The issues for determination are whether the suit land was given to the applicant as gift *inter vivos* by the deceased. The applicant's case is that he has been in occupation of the land since 1980 when his father gifted him the land and therefore he imputed that the suit land does not form part of the estate of the deceased and a prohibitory order ought to be issued. Counsel for the Respondents on the other hand submitted that the applicant never resided on the suit land and in fact has a title deed to Land Kithimani/Kithimani A/1169. The applicant averred that the Respondents are interfering with the estate of the deceased while the Respondents denied the same and added that the applicant sought to disinherit the widows of the deceased who reside on the suit land.

10. From the evidence on record, I note that from 2018 there seemed to be altercations with regard to the suit land and had the suit land been given to the applicant the Respondents would not have pleaded that it is family land and that the applicant would have been using the same alone and with no contentions.

11. A gift is a voluntary transfer of personal or real property without consideration. It involves the owner parting with property without pecuniary consideration. It is essentially a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money. It has been legally defined as “the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee” (***see Black's Law Dictionary, Revised Fourth Edition, (1968) St. Paul, Minn. West Publishing Co., at p. 187***). A gift *inter vivos* of land may be established by evidence of exclusive occupation and user thereof by the donee during the lifetime of the donor. A gift is perfected and becomes operative upon its acceptance by the donee and such exclusive occupation and user may suffice as evidence of the gift. In order to decide in favour of the applicant, the court has to be satisfied that applicant had furnished evidence whose level of probity was such that a reasonable man, having considered the evidence adduced by the respondent, might hold that the more probable conclusion is that for which the applicant contended, since the standard of proof is on the balance of probabilities / preponderance of evidence (***see Lancaster v Blackwell Colliery Co. Ltd (1918) WC Rep 345***). The burden of proof was on the applicant to prove on the balance of probabilities that he had a better claim to the land than the one made by the respondents.

12. The applicant averred that the suit land was being occupied by him, which I find not to be true because as per the affidavit of the Respondents the suit land is family land and the applicant resided near the same and there is even a title deed to Kithimani/Kithimani A/1169 in the names of the applicant. The record bears witness that the deceased died intestate and the applicant has not brought cogent evidence that he utilized the land. During confirmation of the grant, the court will have a chance to hear from the widows and other witnesses. Otherwise at this point it is premature to hold that the land was given to the applicant as a gift *inter vivos*. There is nothing to show that the Respondents distributed the deceased's property without obtaining Letters of Administration hence contravening the provisions of the succession Act. I therefore, find that the applicant failed to prove on a balance of probabilities that the suit land was given to him as a gift *inter vivos* and prayer (c) fails.

13. Evidence that the Respondents are dealing with the assets of the deceased in a manner inimical is not reflected on the court record and therefore prayer (d) fails.

14. The upshot is that this application lacks merit, fails on all grounds and is dismissed with no order as to costs. Even though I have declined the applicant's application, I note that the estate is yet to be distributed and I find it appropriate that those assets should be preserved. In that regard it is hereby ordered that all the assets of the deceased as disclosed vide petition form P&A5 and vide the rival affidavits on mode of distribution should not be sold or transferred pending the determination of the protest and confirmation of grant. It is further ordered that the status quo obtaining namely the occupation of the said assets by beneficiaries at the date of this ruling shall be maintained pending the confirmation of the grant.

It is so ordered.

Dated and delivered at Machakos this 25th day of September, 2019.

D. K. Kemei

Judge