



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 88 OF 2001

IN THE MATTER OF THE ESTATE OF SIMON KIBAARA MUTEGI (DECEASED)

RULING

1. Douglas Simon Kibaara died on the 7.2.2001. This succession cause was instituted for purposes of appointment of administrator(s) and subsequent dealing with the estate. The record shows a history of acrimony between the various interested parties.
2. Among the interested parties aforementioned are Domisiano Kaburu Njeru and David Kigen Kelwon who have laid individual claims of purchase of parts of the deceased's land parcel known as plot number 33 OL Longai Settlement Scheme.
3. By a consent of the parties recorded in court on the 8th December 2016, it was ordered that the matter proceeds to hearing to determine the net estate and upon such determination the cause was to be heard further to determine beneficiaries and distribution.
4. In his testimony Domisiano Kaburu Njeru (hereinafter Njeru) told the court that he purchased 45 acres of land from the deceased in two (2) separate agreements. The said 45 acres were part of the land known as Plot No. 33 OL Longai.
5. It was Njeru's testimony that the initial sale for 30 acres of land was between the deceased and one Jedial Nyaga Dishon. Dishon entered into a sale agreement for 15 acres to Njeru out of his purchased 30 acres. Upon the death of Dishon, Dishon's wife (the administrator of the estate of Dishon) sold the other 15 acres to Njeru.
6. Njeru further testified that he bought a further 15 acres of land directly from the deceased through an agreement dated 10/12/1985. He took possession of the total 45 acres when the deceased was alive.
7. Njeru produced sale agreements and consents from Land Control Board as exhibits.
8. The 2nd claimant David Kigen Kelwon testified that he bought 6 acres of land from the deceased. Vide an agreement dated 13/8/1999 he bought 2 acres. He bought a further 4 acres vide an agreement dated 20/6/2000. He produced a ledger from his Co-operation Society showing how he paid for the land.
9. In answer to the evidence of the two claimants above, Corporal Thomas Kareithi from DCI headquarters, Peter Njuguna Kebaara and Martin Evans testified.
10. Corporal Thomas Kareithi's evidence is that Kelwon was charged over forgeries following a complaint by Peter Njuguna Kebaara. The documents related to purported sale of land to Kelwon by the deceased. These documents were additional land sale agreement dated 20/6/2001, witnesses to the additional sale agreement on 20/6/2000, 2 journal vouchers and sale agreement payment breakdown.
11. It was Kareithi's testimony that the forensic report concluded that the purported signatures of the deceased did not match known signatures of the deceased and hence were forgeries. Kareithi testified that there was also a complaint over a lease agreement against Njeru.
12. Peter Njuguna Kebaara (Peter) testified that the deceased never mentioned having sold a further 15 acres of land to Njeru. He asserted that the 30 acres sold to Nyaga and Njeru is distinct and fenced off. He added that the deceased would lease 70 acres of land to one Mr. Martin and as such it was mathematically impossible to sell a further 15 acres to Njeru.
13. Peter further testified that the lease agreement signed between Njeru and Mugo, the former administrator of the deceased for 55 acres would mean that Njeru was leasing part of his land when one factors in land that was to be sold to one Ruto (10 acres), 30 acres already bought by Njeru and 6 acres taken by Kelwon.
14. It is Peter's testimony that Kelwon only paid 120,000 out of the Sh 240,000 he was to pay for 2 acres.

15. Martin Evans testified that he used to lease land from the deceased. He exhibited lease agreements showing a lease for 70 acres, 60 acres and 35 acres in different times. He also produced a maize cropping agreement.
16. It was Martin's evidence that he knew Njeru.
17. Both parties filed written submissions.
18. I have had occasion to consider the evidence and submissions on record.
19. The issue for determination is one (1). What is the net estate of the deceased?
20. Two persons claiming purchaser interest have lodged their claim of purchase complete with sale agreements, land board consents and payments.
21. Their evidence has been countered with evidence of alleged forgeries, and no-existence of the alleged sales of extra 15 acres to Njeru and extra 4 acres to Kelwon.
22. The hearing of what is the net estate of the deceased herein has metamorphosed to a protracted land case.
23. The ready question that follows is that of jurisdiction.
24. In **re Estate of Mwangi Gikonyo (Deceased) 2017 eKLR**, Waweru J had this to state when faced with a similar circumstance;

“The important question here of course is whether a succession court is sufficiently equipped to adjudicate a claim based on a contract of sale of land, trusts and such” Put another way, can a succession court enforce a contract of sale of land or a claim of land based on trusts, etc.”

Succession proceedings are very limited in nature and scope. The court is mandated only to determine the persons beneficially entitled to a deceased person's estate and their respective shares therein. Where an interested person's interest in the estate is based on a contract of sale, or trusts, the succession court would not have the benefit of proper pleadings, etc. Further, to embark on determination of such claims, the succession court might have to ignore express laws, such as those relating to limitation, land control, etc. In my view, contested claims in a deceased person's estate that are based on contracts of sale, trusts etc belong in civil court, not in a succession court. A civil court will have the benefit of proper pleadings, discovery, etc which a succession court will not have.”

25. Addressing the same issue Musyoka J in **re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** had this to say at paragraph 29;

“Clearly disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

26. From the evidence adduced, it is clear that no dispute exists over 30 acres of land purchased by Njeru from the deceased and 2 acres purchased by Kelwon from the deceased. The dispute is over 15 extra acres claimed by Njeru and 4 extra acres claimed by Kelwon.
27. As indicated under paragraphs 24 and 25 above, the resolution of that land purchase dispute needs to be placed before the court with the relevant jurisdiction which is the Land and Environment Court.
28. Article 162(2) of the Constitution provides as follows;

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

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.

29. Under Article 165 (5) of the Constitution of Kenya 2010, the jurisdiction of the High Court is set out.

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

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

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

30. In re Estate of Alice Mumbua Mutua above, Musyoke J at paragraph 30 correctly in my view put the legal position post 2010 Constitution thus;

“Having said that, I do note that the consent that consolidated these suits was recorded on 11th May 2010, that was before the Constitution of Kenya 2010 was promulgated on 27th August 2010. As at 11th May 2010 the High Court had jurisdiction to hear land disputes relating to use and occupation thereof and title thereto, one could properly argue that a land suit relevant to a pending succession dispute could be heard simultaneously by the same court. The promulgation of the Constitution of Kenya 2010 changed the dynamics. Article 165(5) took away the jurisdiction of the High Court with respect to determination of land disputes concerning land use, occupation and title. Clearly, therefore the probate court has no jurisdiction over the suit in ELC No. 121 of 2009.”

31. For the ends of justice to be met, this court having been satisfied that the claimants Njeru and Kelwon have legitimate claims on part of the estate must afford the two (2) a reasonable opportunity to pursue and ventilate their claim in the Environment and Land Court.

32. I would accordingly set aside the 15 acres claimed by Njeru and the 4 acres claimed by Kelwon by virtue of **Rule 41(3)** of the **Probate and Administration Rules** to enable the claimants to prosecute their claims. That rule provides;

41(3) “Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the provision to section 71(2) of the Act, proceed to confirm the grant.”

33. The administrators of the estate herein shall be at liberty to proceed with other aspects of this cause.

34. With the result that the establishment of the net estate has not been possible through these proceedings, I make the following orders:

1. The claimants Domisiano Kaburu Njeru and David Kigen Kelwon to pursue their respective claims in the Environment and Land Court.

2. The administrators of the estate and other interested parties to proceed with other aspects of the cause.

3. Each party to bear its own costs.

Dated and Signed at Kisii this 25th day of November 2019.

A.K NDUNG’U

JUDGE

Delivered at Nakuru this 10th day of December 2019.

R. NG’ETICH

JUDGE