



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 47 OF 2004

IN THE MATTER OF THE ESTATE OF JUSTUS WAINAINA NJOROGE..... (DECEASED)

SUSAN MUTHONI MWANGIPETITIONER

=VERSUS=

RAHAB WANJIRU GATHWE..... OBJECTOR

JUDGMENT

BACKGROUND

1. Justus Wainaina Njoroge (deceased) died on 10th October 2003. A grant of letters of Administration intestate was issued to Susan Muthoni Mwangi and Rahab Wanjiru Wainaina on the 4th June, 2004.
2. Rahab Wanjiru Gathwe filed an objection to the said grant vide her affidavit sworn on the 18th August 2004. The gist of the objection is that Title No. Nakuru/Subukia Block 4/1423, listed by the petitioners as part of the assets of the deceased is not owned by the deceased but was family property (home) where she lived with her children and husband. The deceased herein was her son.
3. On 14/10/2015, directions were taken that the matter be disposed off by way of *viva voce* evidence with the petitioner being the plaintiff and the objector the defendant.

EVIDENCE

4. Susan Muthoni Wainaina (1st Plaintiff) testified that the deceased was her husband. The defendant is her mother-in-law (mother to the deceased).
5. Parcel No. Nakuru/Subukia/Subukia Block 4/1423 (Mihang'o) is registered in the name of the deceased. A title issued on 1/9/2003 in the names of the deceased is exhibited.
6. It is the 1st Plaintiff's evidence that the deceased gave money to the objector to buy the land. The farm was previously owned by Nyakinyua Women Group. No man could buy shares and therefore the deceased gave money to the objector and the purchased parcels were registered in the names of defendant, one Lilian Wambui and Ruth Ngina (the later being sisters to the deceased). The deceased held 3 shares through the 3 persons above.
7. Later, the deceased demanded the land to be registered in his name. The 3 shares were put together and it became one parcel of land and a title issued. Various receipts issued by Subukia Nyakinyua Mihang'o

Company Limited in the names of the Defendant, Lilian Wambui, Monica Wathiuru Gathwe, some with cancellations and with the name of Stanley Gathwe Macharia, inserted are exhibited.

8. The 1st Plaintiff further states that she is the one who paid Kshs. 11,353/= for the title.

9. When her husband died, he was buried on this land. The deceased had renovated a settler's house on the land for use by his parents (the objector and his (deceased's) father.

10. The deceased was a 3rd born in the family.

11. On cross-examination, the 1st plaintiff on being shown some receipts for Kshs. 12,000/= and 23,000/= states that it is possible the objector bought the house. She adds that the objector bought the house as their parent.

12. John Wachira Mathenge an assistant surveyor is the one who excised the deceased land from that of the father under directions of the deceased's father Stanley Gathwe. The deceased's father was present at the time.

THE OBJECTOR'S CASE

13. The objector's evidence is that she had intended to have Lilian Wambui and the deceased (Justus) hold the land in trust for other siblings. She had bought the land and the house. She produced a bundle of receipts.

14. She produced receipts in respect of purchase of a house. She denied ever transferring the land to her son. The title to the land was procured by the 1st plaintiff when deceased was very sick.

15. On cross-examination she denied the contents of paragraph 13 of her affidavit sworn on 18/8/2004 where she states she had registered her son to hold the land in trust.

16. DW2 stated that the land belongs to the objector his mother. He added that the deceased never lived on the subject land.

17. Elizabeth Wangui Stanley was summoned to testify as a necessary witness by the Court. She was a former secretary at the land buying company.

18. She said she was aware that parcel of land No. 62 was registered in the names of the objector. The land was then sub-divided into 3 portions. One portion belongs and is registered in the names of Justus (Deceased) i.e. plot No. 1423. There are 2 other parcels, 1424 and another registered in the names of objector and Stanley Gathwe.

19. She however did not know how and why they sub-divided the land.

20. On cross-examination by Ms Njoroge, she indicated that the deceased got land No. 1423. He became a member by getting land with the company. She acknowledged receipt by the company of Kshs. 11,353.80 from the deceased.

21. On cross examination by Ms Njoroge, she said that the objector was the original shareholder. She acknowledged receiving money from the objector for purchase of a house.

SUBMISSIONS

22. Directions were given that written submissions be filed. Both parties complied.

ANALYSIS AND DETERMINATION

23. I have had the occasion to consider this petition, the objection, the evidence from both divides and the learned submissions of counsel.

24. From the outset, it is quite clear that the objector is not interested in obtaining letters of administration and managing the estate of the deceased. Her claim is in respect of a specific asset being parcel of land No. Nakuru/Subukia/Subukia Block 4/1423 to which she lays claim as the owner.

25. Indeed the affidavit is brought pursuant to the correct rule being **rule 16(1)** of the **Probate and Administration Rules** which provides;

“Rule 16(1): Any person who wishes to bring to the notice of the Court any matter as to the making or contents of the will of the deceased (whether written or oral), the rights of dependants or persons who might be entitled to interests on the intestacy of the deceased, or any other matter which might require investigations before a grant is made or confirmed, may file in any registry in which an application for grant to the estate has been made or in the principal registry an affidavit giving full particulars of the matter in question.”

26. I hasten to add, though, that where the matter requiring investigation is a competing interest in land as against the estate, then the more expedient and effective route to resolve such a conflict would be in the filing of an independent suit against the administrator of the estate who like in this case is already determined.

27. According to the contents of paragraph 13 of the objector’s affidavit sworn on 18th day of August 2004, she avers that she had intended land parcel Plot No. 1423 to be held in trust by Lilian Wambui and Justus Njoroge (the Deceased) for the rest of the family as deceased was the 1st born son in the family while Wambui was among the last daughters and unmarried by then. During the hearing, the objector states that the title deed to the land was obtained by the deceased’s wife when the deceased was very sick.

28. From the foregoing, the questions emerging are whether the land in question was held in trust by the deceased for the family of the objector and/or whether the title was fraudulently acquired.

29. This Court has stated time without number that the probate court is not the appropriate forum to adjudicate on such a claim as herein. As held by *Musyoka J* in **re Estate of Mbui Wainaina (Deceased) [2015] eKLR** the mandate of the succession court under the Law of Succession Act is Limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues.

30. This is in line with **Rule 41(3)** of the **Probate and Administration Rules** which provides as follows;

“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 proviso to section 71 (2) of the Act, proceed to confirm the grant.

31. It is most certainly desirable that such claims should always be placed in the right Court and more so during this period after the advent of the Environment and Land Court.

32. I appreciate this matter was filed prior to the establishment of the Environment and Land Court but even then, the relevant jurisdiction still existed within the High Court sitting as a general civil Court.

33. Land Title Number Nakuru/Subukia Subukia Block 4/1423 is registered in the names of Justus Njoroge Wainaina under the Registered Land Act (Cap 300) now repealed.

34. The objector has been cagey as to how the land was registered in the names of the deceased. In her affidavit, she seems to suggest that the registration did exist but the land was to be held in trust by the deceased for the rest of the family.

35. This position changes when oral evidence is recorded and it now emerges that the land, according to the objector was registered in the names of the deceased and title procured by the 1st petitioner when the deceased was very sick. This suggests some level of fraud.

36. Has there been any prove of a trust, ownership in favour of the objector or fraud.

37. On the issue of trust, I place reliance on a passage from the decision of the **Court of Appeal in Civil Appeal No. 6 of 2013, Salesio Mittonga - vs - M'Arithi M'athara & 2 others [2015] eKLR** where quoting from a judgment by *Lessit J* stated;

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists (see Wambugu - vs - Kimani). In this case, the respondent had to adduce evidence to establish on a balance of probabilities that a trust exists in his favour over the suit property. I did consider the Respondent’s evidence at length. He did not explain on what basis he believes that a trust existed. All he said was that he did not know why the land was registered in the 1st Appellant’s name and not his father’s name....”

38. In our instant suit, the issue of existence of a trust alluded to in the affidavit by the objector, appears abandoned at the main hearing and thus there is no evidence of a trust available.

39. Has the objector proved ownership? The registration of the deceased as the owner of parcel No. Nakuru/Subukia Subukia Block 4/1423 is a 1st registration and is under Section 27 absolute. No evidence is called to explain how it was possible to have the deceased registered as owner of the land if he was not the owner.

40. The land buying company Subukia Nyakinyua Mihang’o Company Limited gave him the necessary documentation to effect the registration and in the absence of evidence to the contrary, this registration remains unchallenged.

41. The attempt to impute fraud on the part of the wife of the deceased, the 1st petitioner herein, remains just that, an attempt. No evidence is called to show fraud on her part.

42. The receipts produced are not conclusive evidence of ownership. There is evidence of receipts too from the deceased including the payment for Kshs. 11,353.80 at the time the title was being issued.

43. On the whole no proper challenge had been mounted against the ownership of Title No. Nakuru/Subukia Subukia Block 4/1423 by the deceased.

44. The objection lodged by Rahab Wanjiru Gathwe is thus unmerited and must be dismissed.

45. The objection is dismissed. I take into cognizance the relationship of the parties and order that each party bears its own costs.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG’U

JUDGE