



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 784 OF 1990

IN THE MATTER OF THE ESTATE OF MWAURA GITACHU (DECEASED)

TERRY WAIRIMU WAINAINA.....APPLICANT

VERSUS

TERESIAH WANGUMO MWAURA.....1ST RESPONDENT

DR. JOSHUA GITACHU MWAURA.....2ND RESPONDENT

RULING

1. The deceased Mwaura Gitachu died on 17th October 1989. He had three wives, namely Charity Wanjiku, Esther Thithi and Gladys Nyambura. He left a Will in which he appointed his three sons (the 2nd respondent, Hezekiah Njuguna Mwaura and Henry Gitachu Mwaura) as joint executors. Each one of them represented a house. A grant of probate was issued to the executors on 2nd December 1990 and confirmed on 19th October 1997.

2. The ruling and orders that the applicant Terry Wairimu Wainaina seeks to be vacated, set aside and/or to be reviewed relate to the application dated 23rd September 2015 by Teresiah Wangumo Mwaura (1st respondent) of the house of Charity Wanjiku. The executor in respect of that house was Dr. Joshua Githachu (2nd respondent). He was the respondent in the application. The complaint by the 1st respondent was that following the confirmation of the grant, the 2nd respondent had, instead of registering the property in his name as trustee for the beneficiaries in the house of Charity Wanjiku, registered himself as the absolute proprietor and gone on to sell some of the property to third parties. The application sought the revocation and/or cancellation of the titles to the sold properties so that they revert into his name for subsequent sharing to the beneficiaries. The application was allowed.

3. The applicant's case is that on 14th February 2013 the 2nd respondent sold her land parcel No. Thika Municipality Block 20/2555 for Ksh.2.4 million which she paid. She had done due diligence, including a search at the Lands Registry, to establish that the 2nd respondent was the owner of the parcel. The parcel was transferred to her.

4. There is no dispute that the 2nd respondent became the registered proprietor following the confirmation of the grant. This is the registration that the 1st respondent complained about that had led to the revocation and/or cancellation to the title of the disputed parcel.

5. The applicant's case is that, now that she had become the registered owner of the parcel by dint of the sale and registration, she was entitled to be served and heard in the application before adverse orders were made against her. She stated that she was an innocent buyer for value without notice. There is no dispute that she was not served with the 1st respondent's application, and she was therefore not heard before the orders were given. The orders affected her.

6. The application was opposed by the 1st respondent who stated that the sale and transfer was without her consent as beneficiary, and that the 2nd respondent was only a trustee who had no power to sell the property. She stated that the applicant was an intermeddler who had colluded with the 2nd respondent to defraud the estate of the parcel.

7. Written submissions were filed by counsel in the matter. I considered them.

8. Under **Article 50(1)** of the Constitution –

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

9. The right to a fair hearing is fundamental to the rule of law. It is an aspect of natural justice hinged upon the principle of “*audi alteram partem*” which provides that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against him. In the case of **Prime Salt Works –v- Kenya Industries Plastics Ltd [2001]EA 528**, the Court of Appeal observed that:

“.....implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be judge of his own cause and that no man shall be condemned unheard, that these two principles must be observed by the courts save where their application is expressly excluded.”

It is a cardinal principle of law that everyone deserves an opportunity to be heard before any order is made against him (**Wilson Tanui Barno & 2 Others –v- Jennipher Kositany [2015]eKLR**).

10. Whatever the merits of the complaint in the application dated 23rd September 2015, the applicant was entitled to be heard on it because she had become the registered proprietor of parcel No Thika Municipality Block 20/2555 and what was being sought was the revocation and/or cancellation of her title to it. She was not served with the application, and was not heard on it. Yet, adverse orders were issued against her.

11. It is for these reasons that I allow the applicant’s application dated 9th January 2017. I set aside and vacate the orders issued on 4th April 2016, and direct that the application dated 23rd September 2015 be served on the applicant who shall respond to the same within 15 days. Along with the response, the applicant’s counsel shall file written submissions to which the other parties shall respond within 15 days. The application shall be heard on 15th May 2018.

12. I make no orders as to costs.

DATED and DELIVERED at NAIROBI this 27TH FEBRUARY 2018

A.O. MUCHELULE

JUDGE