



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 5 OF 2018 (OS)**

**ALICE WANGARI RUKWARO.....PLAINTIFF**

**VERSUS**

**PATRICK KANGETHE NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**PATRICK KANGETHE & SONS.....2<sup>ND</sup> DEFENDANT**

**COOPERATIVE BANK OF KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RM NGURU t/a NGURU AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The instant suit commenced on 23<sup>rd</sup> January 2018, by way of Originating Summons dated 23<sup>rd</sup> January 2018, seeking determination of two questions, namely –

(a) Whether in obtaining letters of administration *ad colligenda bona* of all the estate of Gladys Njeri Kaguthi (deceased) in Nairobi P&A Cause No. 2319 of 1995, the 1<sup>st</sup> defendant herein, Patrick Kang'ethe Njuguna, was capable of vesting unto himself as a beneficiary or to any other person and subsequently offer as collateral for a loan all that property known as LR No. 209/2489/31 Desai Road Nairobi; and

(b) Whether, if the answer in (a) above is in the negative, the 3<sup>rd</sup> defendant herein is holding a good title as collateral capable of realization under any financial arrangement between a chargor and a chargee as envisaged by the defendants herein.

2. The factual background is that the plaintiff and the 1<sup>st</sup> defendant are biological children of the deceased, Gladys Njeri Kaguthi, who died on 8<sup>th</sup> August 1995. Following her death, the 1<sup>st</sup> defendant, without consent of the plaintiff and other survivors of the deceased, obtained a grant of letters of administration, limited to collection and preservation of the estate of the deceased. Full representation was never sought and therefore it was never obtained. The property of the estate the subject of these proceedings was subsequently transferred to the name of the 1<sup>st</sup> defendant, who caused it to be charged with the 3<sup>rd</sup> defendant to secure a loan advanced to the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant has since advertised the said property for sale hence these proceedings.

3. The plaintiff filed a Motion, dated 23<sup>rd</sup> January 2018, contemporaneously with the originating summons, seeking orders to restrain sale of the subject property by auction founded on the grounds that the limited grant had been obtained without her consent and that of her siblings. She avers in the affidavit, sworn on 23<sup>rd</sup> January 2018, in support of the application, that she and her siblings had vehemently opposed the application for limited grant, saying that there were protracted legal battles in court in a family feud that spanned several years. She avers that the family was taken by surprise when it came by the notice advertising the property for sale yet the estate had not been distributed to facilitate its transmission to the 1<sup>st</sup> defendant to enable him secure a loan facility with its title. She has attached to her affidavit several documents from the papers filed in or obtained from the succession cause in Nairobi P&A Cause No. 2319 of 1995 and a copy of the notification from the 4<sup>th</sup> defendant.

4. The Motion elicited responses from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

5. The 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant is the business that the 1<sup>st</sup> defendant runs under that name, concedes to be a brother of the plaintiff, and to have had obtained limited representation to the estate of the deceased, which provoked protracted litigation with his siblings. He concedes to having obtained loan facilities using the title of estate property with the assistance of his advocate in Nairobi P&A Cause No. 2319 of 1995. He states that he fell into bad times and experienced difficulties in servicing the loan, which exposed the property to foreclosure by the 3<sup>rd</sup> defendant. He asserts to have had obtained transfer of the property by proper means.

6. The 3<sup>rd</sup> defendant's response is vide an affidavit sworn on 26<sup>th</sup> January 2018 by its legal officer, Florence Muthoni. She raises a number of technical issues –the Motion is *res judicata*, the suit is barred by the Limitation of Actions Act, Cap 22 Laws of Kenya, the dispute relates to land and therefore falls under the exclusive jurisdiction of the Environment and Land Court by virtue of Article 163(5)(b) of the Constitution, the suit challenges distribution of the estate hence the same ought to have been filed in Nairobi P&A Cause No. 2319 of 1995, and the plaintiff has no *locus standi* to challenge the exercise of the statutory power of sale as she has no title to the subject property. She avers that there are several other suits in other courts over the subject property all geared to restrain the 3<sup>rd</sup> defendant from exercising its power of sale, the suits being the suits Mombasa HCCC Nos. 50 and 54 of 2016, Nairobi HCCC No. 293 of 2017 and Nairobi ELCC No. 3 of 2018. She complains that the instant suit is designed to frustrate the 3<sup>rd</sup> defendant in its efforts to realize its security. She has attached to her affidavit a bundle of documents to support the 3<sup>rd</sup> defendant's position. The 3<sup>rd</sup> defendant also filed a list of authorities to support its case.

7. The Motion was urged orally before me on 9<sup>th</sup> February 2018, by Mr. Nyaga for the plaintiff, Mr. Ngira for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and Mr. Kongere for the 3<sup>rd</sup> defendant. Counsel based their oral submissions on the points of law advanced in the papers lodged in court on behalf of their respective clients.

8. There is no dispute that the property in question, LR No. 209/2489/31 Desai Road Nairobi, was originally a property in the estate of the deceased. A succession cause in respect of the estate of the said deceased was initiated in Nairobi P&A Cause No. 2319 of 1995 and a grant limited to the collection and preservation of the estate was made. The plaintiff and the 1<sup>st</sup> defendant are in agreement that they litigated on the matter of the said grant in Nairobi P&A Cause No. 2319 of 1995. What appears to be in dispute is how the said property ended up in the name of the 1<sup>st</sup> defendant before he obtained credit using its title. I believe that Nairobi P&A Cause No. 2319 of 1995 is still alive. The grant made in that cause, limited as aforesaid, was temporary, awaiting the making of a full grant. It would appear that full grant was never made and therefore the estate of the deceased was not distributed. The fact that full grant was never made means, therefore, that there could not have been any basis for transfer of any of the assets to the names of the survivors of the deceased, and that ought to raise questions as to the propriety of the transfer of LR No. 209/2489/31 Desai Road Nairobi to the name of the 1<sup>st</sup> defendant. That is a moot point that will have to be determined by a court of law. The question is at which forum ought it to be determined. .

9. The question as to whether the said transfer was properly done is a matter being raised by one of the survivors of the deceased as against another survivor; the latter having obtained limited representation to the estate. The matter is a dispute within the estate of the deceased. It raises issues touching on distribution of the assets of the estate of the deceased, for survivors of the deceased could only get property transferred to their own names upon distribution following confirmation of a full grant. The suit calls upon the administrator appointed in Nairobi P&A Cause No. 2319 of 1995 to account for his handling of estate property for by his appointment, by virtue of section 79 of the Law of Succession Act, Cap 160 Laws of Kenya, the estate assets vested in him as administrator, to be held by him in trust for all the beneficiaries, including the survivors.

10. In my very humble view, the issues being raised by the plaintiff as against the 1<sup>st</sup> defendant ought to properly be raised in Nairobi P&A Cause No. 2319 of 1995. A grant *ad colligenda bona* does not last forever. It is limited in time, the person holding that grant is obligated to obtain a full grant to deal with the property that he has collected and preserved under the limited grant to facilitate distribution of the said property. Accounts touching on handling of estate property ought to be sought in the same cause. To a large extent the suit herein raises issues that ought to properly reside in Nairobi P&A Cause No. 2319 of 1995, and the plaintiff ought to have moved the court properly in Nairobi P&A Cause No. 2319 of 1995 for the orders that she seeks in the instant suit. There was absolutely no reason for her commencing another suit instead of litigating in Nairobi P&A Cause No. 2319 of 1995. In any event, she concedes that she and the 1<sup>st</sup> defendant had litigated for long in that suit before they reached an armistice.

11. Regarding the suit against the 3<sup>rd</sup> and 4<sup>th</sup> defendants, I do note that there are several other cases over the same subject matter pending before other courts. However, these suits do not appear to involve the plaintiff as she does not appear to be a party to any of them. I do not therefore think it should be said that the 1<sup>st</sup> defendant is using her to obtain restraining orders through the back door. It has not been demonstrated that she was in any way privy to those suits, and that she has connived or colluded with the 1<sup>st</sup> defendant in bringing the instant suit. In the instant suit the plaintiff raises questions, relating to the 3<sup>rd</sup> defendant, as to the propriety of the charge that it created over the suit property. The family court has no jurisdiction to deal with such matters. The same ought to be placed before either the Commercial Division of the High Court or with the Environment and Land Court in a suit properly brought by way of plaint.

12. In view of what I have stated above, it is clear that I entertain serious doubts as to whether the matter of LR No. 209/2489/31 Desai Road Nairobi is properly before me in this suit. It would appear to be estate property that ought to be properly handled under Nairobi P&A Cause No. 2319 of 1995. Issues as to whether LR No. 209/2489/31 Desai Road Nairobi moved properly from the estate to the 1<sup>st</sup> defendant ought to be handled there. Issues as to whether a third party to the estate, such as the 3<sup>rd</sup> defendant, can dispose of it by way of auction, is a matter that I believe ought to be properly raised in Nairobi P&A Cause No. 2319 of 1995 for the court seized of the matter to give directions thereon.

13. I note that the plaintiff is not the administrator of the estate of the deceased. The suit property has therefore not been vested in her by virtue of section 79 of the Law of Succession Act. She cannot therefore exercise proprietary rights over the same as against a third party. She has no locus to assert any rights akin to those of an owner of such property and she cannot therefore prosecute any suit for injunctive relief as if she were owner of the property.

14. I am not persuaded that the plaintiff herein has made out a case for grant of the orders sought in the Motion dated 23<sup>rd</sup> January 2018, in view of the foregoing. I shall accordingly dismiss the said Motion. The suit herein was prompted by the conduct of the 1<sup>st</sup> defendant in failing to pursue Nairobi P&A Cause No. 2319 of 1995 to its logical conclusion, I shall accordingly not award any costs to him and to the 2<sup>nd</sup> defendant. I shall, however, order that the 3<sup>rd</sup> defendant is entitled to the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF APRIL, 2018.**

**W. MUSYOKA**

**JUDGE**