



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO.228 OF 2006

IN THE MATTER OF THE ESTATE OF JOSEPH KIPNGETICH CHERAMGOI (DECEASED)

ERICK KIPLANGAT NGETICH.....PETITIONER/RESPONDENT

VERSUS

HENRY NGETICH.....1ST PROTESTOR/RESPONDENT

ESTHER CHERAMGOI.....2ND PROTESTOR/RESPONDENT

WESLEY KIPKEMOI RONO.....3RD PROTESTOR/RESPONDENT

RULING

1. This matter relates to the distribution of the estate of Joseph Kipngetch Cheramgoi (deceased), who died intestate on 11th February 1997. Letters of administration intestate were issued to the petitioner, Eric Kiplangat Ngetich, on 19th November 2012.

2. By an application filed on 13th April 2011, the petitioner sought confirmation of the grant. In the affidavit in support of the application, the petitioner set out the following as the beneficiaries of the estate who survived him:

i. Henry Kimoro Ngetich

ii. Joel Kipsang

iii. Lenah Chelangat

iv. Eunice Chebii

v. Lornah Sigei

vi. Kiplangat Michael

vii. Lily Chepkemioi

viii. Jane Chepkurui

ix. Eric Kiplangat Ngetich

x. Peter Kimutai Ngetich

xi. Carolyne Chelangat Cheramgoi

xii. Ernest K. Ngetich

3. His widow, Agnes Cheramgoi, two sons, Charles Kipkoech Ngetich and Willy Ngetich, as well as one daughter, Nancy Cherotich, were

also deceased.

4. The estate of the deceased comprised the following properties:

Plots

- i. Kericho Municipality 631/114 (Majengo)**
- ii. Kericho Municipality 631/219 (Belgut)**
- iii. Kericho Municipality 631/304 (Embassy)**
- iv. Kericho Municipality 631/287 (Mwalimu)**
- v. Kericho Municipality 631/437 (Site and Service)**

Land Parcels

- i. Kericho/Roret/1345 (Keregut)**
- ii. Kericho/Roret/2013 (Keregut)**
- iii. Kericho/Roret/1064 (Keregut)**
- iv. Kericho/Roret/1345 (Keregut)**
- v. Kipkelion/5492 (Kipkellion)**
- vi. Kericho/Roret/481**
- vii. Kericho/Roret/476 (Kaplelgot)**
- viii. Kericho/Roret/478**
- ix. Kericho/Roret/478/520 Tulwet Kapsiyet.**

5. The petitioner proposed that the estate of the deceased should be distributed as follows:

1ST HOUSE

- 1. Kericho/Roret/1345 (Keregut)**
- 2. Kericho/roret/1023 (Keregut)**
- 3. Kericho/Roret/1064 (Keregut)**
- 4. Kipkelion/5492 (Kipkelion)**

PLOTS

- 1. Kericho Municipality 631/287**
- 2. Kericho Municipality 631/437 Site and Service**

2ND HOUSE

- 1. Kericho/Roret/481**
- 2. Kericho/roret/476**
- 3. Kericho/Roret/478**

SHARED PROPERTIES

1. Kericho Municipality 631/114

2. Kericho Municipality 631/219

3. Kericho Municipality 631/304

6. Following the filing of the application by the petitioner, the 3rd protestor, Wesley Kipkemoi Rono, filed an affidavit of protest in which he alleged that he has an interest in land parcel number **Kericho/Municipality/631/304**. It is in respect of this protest that this ruling relates.

7. In his affidavit of protest sworn on 4th July 2016, Mr. Rono deposes that he instructed his advocate on record to peruse the court file and was advised that the petitioner had filed an application for confirmation of the grant issued to him on 19th November 2012. He further deposes that his interest in the estate should have been included as a liability of the estate. The basis of this claim is that in 1996, the deceased in this cause had given him the said parcel to develop in order to avoid it being repossessed by the Municipal Council. The deceased had further instructed him to pay rates due to the Council in lieu of paying rent, and he had paid Kshs.14,000 on 3rd November 1997. He annexes a receipt showing payment of rates to the Council.

8. According to the protestor, he thereafter undertook developments on the said property. These developments included a permanent building at a cost of Kshs.3,000,000/-. He further contends that he had entered into a verbal (oral) agreement with the deceased in this regard in the presence of the deceased's sons, Eric Ngetich and Henry Ngetich. He alleges that he continued with construction on the premises even after the death of the deceased, with support from the two first born sons of the deceased's two households.

9. According to the protestor, following the demise of the deceased, the deceased's son, Henry Ngetich, approached him and asked him to give him rates amounting to Kshs.472,000/-, which the protestor alleges he gave to the said Henry Ngetich pursuant to a memorandum which he annexes to his affidavit, on the basis of which he paid the said amount in instalments. Henry Ngetich, however, did not pay the rates, and the protestor was compelled to pay Kshs.439,692.50, an amount allegedly paid through a Mr. Elijah Biwot who owns the adjacent plot.

10. The protestor claims to have spent a total of Kshs.6,675,692.5/- in developing the plot whose current value stands at approximately Kshs. 14,000,000/-. It is his contention that given the extent of his investment, it would be inequitable for the administrators to leave him out of the distribution.

11. In response, Eric Kiplangat Ngetich filed an affidavit sworn on 28th November 2016. In the said affidavit, he deposes that the deceased had, during his lifetime, leased premises known as **Kericho/Municipality/631/304** to the protestor as a tenant only and not to construct and/or develop the said plot. He further deposes that at the time the premises were leased to the protestor, all the buildings and all fixtures were in place and the protestor was paying the required rent. It is his deposition further that the deceased had paid all the rates due in full, and he annexes receipts in respect of the rates payments.

12. Mr. Ngetich further deposes that if any massive developments were undertaken by the protestor, such developments were illegal as they were done without the knowledge or consent of the deceased or of the administrators of the estate of the deceased. It is his contention that the protestor had never sought the consent of any of the houses of the deceased to develop any rental premises. Further, that neither he nor the deceased had given the protestor authority to pay the rates of either Kshs.472,000/- or Kshs.439, 692.50/-. Further, that none of the beneficiaries had consented to the sale of the subject premises, Kericho Municipality/631/304, and any such sale is illegal, null and void *ab initio*. His contention is that the deceased is still the registered proprietor of the property and the property is therefore available for distribution to the beneficiaries of the estate of the deceased in this cause.

13. Henry Ngetich also filed an affidavit sworn on 9th December 2016. He avers that there was no contract of sale between the deceased and the protestor with respect to Kericho Municipality/631/304. It is his contention further that the deceased never instructed the protestor to pay rates, noting that the deceased died on 11th February 1997 while the protestor alleges that payment of rates was made on 3rd November 1997, as evidenced in the receipt annexed to the protestor's affidavit. In his view, unless such authority was given posthumously by the deceased, the protestor's claim is false.

14. It is Henry Ngetich's further averment that the protestor had filed a claim against the beneficiaries of the estate, being Kericho CMCC No. 163 of 2016, which claim had been dismissed for want of jurisdiction.

15. The parties filed written submissions in support of their respective cases. In his submissions dated 7th April 2017, the protestor argues that his claim is that of a liability on the estate by virtue of his investment on the subject property. He maintains that there was a verbal agreement between himself and the deceased that he would develop the said parcel of land to avoid repossession by the Municipal Council for want of development. He argues that pursuant to the said agreement he was to pay the rates as and when they fell due. He further reiterates the contention in his affidavit that he paid various amounts in respect of the developments on the said land parcel. He also repeats his contention that he entered into a sale agreement with Henry Ngetich for the sale of the said property. The said agreement was allegedly dated 6th July 2009 pursuant to which he paid a sum of Kshs.2,000,000/- to Henry Ngetich for the property.

16. It is his submission further that he had utilised a total of Kshs. 6,675,692.50 on the premises but had only gained a sum of Kshs. 960,000/- in rent collected from the leased premises. He urges the court to recognise his claim as a liability on the estate of the deceased, placing reliance on section 51(2) (h) and 83 of the Law of Succession Act. He argues that he ought to be compensated for his developments which he argues are worth Kshs.5,715,692.50.

17. The petitioner, Eric Kiplangat Ngetich filed submissions dated 24th January 2017. He submits that Kericho Municipality 631/304 is registered in the name of the deceased, Joseph Cheramgoi. It is his contention that the alleged sale by Henry Ngetich was done before confirmation of grant and the sale was therefore void *ab initio*.

18. It is his submission further that he and the deceased paid the rates for the property, and the protestor was a mere tenant of the deceased who has colluded with the petitioner's brother, Henry Ngetich, to dispose of the estate illegally to the detriment of the beneficiaries of the estate of the deceased. It is his case that the protestor was only occupying commercial premises which had already been erected by the deceased. He urges the court to dismiss the protest with costs.

19. Henry Ngetich filed submissions dated 12th April 2017. His position is that the protestor does not fall into the category of a creditor under section 66 of the Law of Succession Act which recognizes adverse interests to the estate of a deceased including those of creditors. He relies on the decision in **the Matter of the estate of Beth Mutheu Ngusya (deceased) Succession Cause No. 645 of 2011** where Nyamweya J. stated as follows:-

“A purchaser of land from a deceased...is deemed to be a creditor and to have a debt owed to him or her by the deceased, to the extent that the deceased was under a legal obligation while alive to transfer the land to the purchaser or refund the purchase price”

20. He submits that there was no agreement between the deceased and the protestor and he does not therefore fall in the class of creditors as provided under section 66 of the Law of Succession Act. The deceased had died without disposing of the subject property and no claim can be made against his estate in respect thereof.

21. It is also his submission, in reliance on section 55 and 82 (b) (ii) of the Act, that no immovable property of the deceased shall be sold before the confirmation of the grant. The protestor had not tendered any evidence of a valid sale agreement between himself and the deceased and neither has he produced a confirmed grant that would empower the beneficiaries to sell the land to him. Any sale done before the confirmation of the grant has no legal effect and the land therefore still forms part of the estate of the deceased. On this point he relied on the case of **James Masanya Ontiri vs Magero Marungo & Anor [2014] eKLR**.

Analysis and Determination

22. The issue for determination in this protest is fairly straight forward: was the protestor a bona fide purchaser of the property known as **Kericho Municipality 631/304** and therefore eligible for consideration as a liability of the estate?

23. From his averments and submissions, the protestor claims a right as a purchaser on two levels. First, he alleges that he had a verbal agreement with the deceased to develop the subject property in order to avoid its repossession by the Municipal Council. He alleges that he paid rates for the property, proof of which he produces a receipt dated 3rd November, 1997, nine months after the death of the deceased. He also alleges that he made considerable investments on the property. What is clear from his averments is that there was no sale of the property to the protestor by the deceased. A verbal agreement cannot in law form the basis of a binding contract for sale of land, which must be in writing. In any event, the verbal agreement in this case was not for sale of the property, but allegedly for development of the property and payment of rates to the Municipal Council.

24. The second ground on which the protestor alleges that he has a right as a purchaser of the deceased's property in dispute is that it was sold to him by one of the beneficiaries, Henry Ngetich. Henry Ngetich is a son and a beneficiary of the estate of the deceased. Were it to be assumed that the protestor did enter into a sale agreement with the said Henry Ngetich, the only circumstances under which the protestor can find protection of his interest, if any, in the deceased's property are set out in section 93 of the Law of Succession Act which provides as follows:

93. Validity of transfer not affected by revocation of representation

(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

25. However, a party can only seek protection under this section if he or she can show that indeed, he or she was a purchaser for value in circumstances that are permissible in law. Thus, in **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013) eKLR** in which the appellant sought protection under section 93, the Court of Appeal sitting in Nyeri stated:-

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82 (b) (11) of the Act it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.” (Emphasis added)

26. The protestor in this case has relied on an alleged verbal agreement with the deceased to develop the land, and a sale agreement with the son of the deceased. The first was not a contract for sale, even assuming that such an agreement was in contemplation. However, in light of the fact that the receipt produced as evidence of the agreement to pay rates is dated nine months after the death of the deceased, it is not possible for any credence to be placed on such claim.

27. As for the alleged sale by the beneficiary Henry Ngetich, the law is clear that no such transaction can take place prior to confirmation of grant. The attempt by Henry Ngetich to dispose of the property was in violation of the Law of Succession Act. Section 45 provides as follows:

“Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

28. In addition, section 55 of the Law of Succession Act expressly provides that:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”

29. In considering a case in which there had been a purported sale of the property of a deceased person prior to confirmation of the grant, Musyoka, J. stated as follows in **In the matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**:

“In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under section 45 (2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with. As the respondent had no authority to sell the property in question, Felix Kinuthia acquired no interest in it at all as the seller had no title to it whatsoever. A buyer, such as Felix Kinuthia, is not in the same footing with a creditor, for the interest he alleges to have acquired in the estate was not acquired from the deceased during his lifetime or from a person authorized to sell the property. It should be noted that even where a grant of representation has been obtained, the grant-holder has no power to sell any immovable asset before confirmation of the grant.”

30. What the protestor has been able to establish, in my view, is that he was in occupation of the deceased’s premises on **L. R. No. Kericho Municipality/631/304**. He has no claim as a purchaser of the property, and any developments that he made on the said premises were made in his capacity as a tenant.

31. As for the amounts allegedly paid to Henry Ngetich, the protestor has a claim against the said Henry Ngetich, who misrepresented that he had the right to dispose of the property of the deceased. The protestor has no claim against the estate of the deceased, and his protest therefore fails and is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Kericho this 29th day of June 2018.

MUMBI NGUGI

JUDGE