



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSES NO. 77 OF 2002

(Consolidated with SUCC. CAUSE NO. 284 OF 2007)

In the matter of the Estate of JOHANA NYAGA (Deceased)

BEDAN NJAGI NGANO.....APPLICANT/PETITIONER

V E R S U S

PHYLLIS GRACE KARIMI.....1ST RESPONDENT/PROTESTER

GICUKU NYAGA.....2ND RESPONDENT/PROTESTER

J U D G M E N T

1. The deceased died intestate on 18/09/2000. His widow Alice Wangiri Nyaga petitioned for letters of administration intestate in HC Succession Cause No. 77 of 2002 naming herself and three children of the deceased namely Bedan Njagi Nyaga, Peter Njue Nyaga and Mary Gicuku Nyaga as the beneficiaries of the estate. The grant was issued and confirmed on 12/05/2015 and the assets distributed.
2. One of the children Gicuku Nyaga, Succession Cause No. 284 of 2007 following the death of the petitioner. She named herself and her two brothers Bedan Njagi and Peter Njue as the beneficiaries. She was issued with letters of administration intestate on 28/07/2011.
3. The two succession causes No. 77 of 2002 and 284 of 2007 were consolidated and the two grants issued in each of the causes revoked by consent of the administrator and other interested parties.
4. The 1st protester was a party in succession cause No. 77 of 2002 pursuing her interests as a purchaser claiming to have bought various portions of land from the administrator and the deceased.
5. The 2nd protester was given a share in the grant confirmed on 12/05/2005 in succession cause No. 77 of 2002 namely parcels of land L.R. Gatari/Weru/3503, 350 4 and 3505. This grant was later revoked by consent of the parties.
6. The 1st protester in her protest dated 26/02/2018 filed on 27/02/2018 following the consolidation of the cases claims interest as a purchaser. She claims to have bought several parcels of land from the late administrator and widow of deceased and from the sons of the deceased.
7. The particulars were given as follows:-
 - (1) L.R. Gatari/Weru/3508 portion measuring $2\frac{3}{4}$ acres sold to her by the late Alice Wangiri Nyaga on 17/05/2004 at Ksh. 1,650,000/=.
 - (2) L.R. Gatari/Weru/3508 a portion of $\frac{1}{4}$ acre bought on 17/10/2007 from the late Alice Wangiri for Kshs.200,000/=.
 - (3) L.R. Gatari/Weru/3508 ? acre plot in exchange for payment of hospital bills for the deceased and his widow at purchase price of Kshs.200,000/= as per the agreement dated 16/09/2004.
 - (4) A plot of ? acre out of Gatari/Weru/3501 for Kshs.200,000/= and agreement dated 17/08/2004.

(5) A plot measuring ? acre bought from Alice for Kshs.200,000/= to be excised from L.R. Gaturi/Weru/3505.

(6) One ? acre plot for Kshs.200,000/= to Alice as shown in the agreement dated 15/03/2004 out of L.R. Gaturi/Weru/ 3498.

(7) One ? acre plot out of L.R. Gaturi/Weru/3499 for Kshs.200,000/=.

8. The 1st protester's evidence is that she bought all the said parcels of land from the late Alice Wangiri who was the administrator of the deceased's estate with the consent of her children Bedan Njagi Nyaga and Mary Gichuku Nyaga. She attached documents in respect of the six (6) parcels of land which indicate that the late Alice Wangiri sold to her and that the consideration was paid in accordance with the terms of the agreement.

9. The 2nd protester stated that he bought two parcels of land from the family of the deceased namely L.R. Gaturi/Weru/ 3503 and 3504 which were given to him in the grant confirmed on 12/05/2005 but later revoked. He further states that he participated in the succession proceedings and financed the beneficiaries in these causes leading to him being given another parcel of land L.R. Gaturi/Weru/ 3505. Although the 2nd protester did not annex any documentary evidence of purchase, he asked the court to rely on the revoked grant showing that he had been bequeathed L.R. Nos. 3503 and 3504. He further stated that the three parcels of land were sold to him with the agreement of all the beneficiaries.

10. This protest was argued by way of written submissions. Mr. Joe Kathungu for the petitioner did not file any submissions despite being granted time. Mr. Duncan Muyodi & Co. represented the 1st protester while Mr. Victor Andande of Victor L. Andande & Co. Advocates represented the 2nd protester. Both protesters filed written submissions which this court has perused and given due consideration in preparing this judgment.

11. The 1st protester's case is supported by a land purchase agreements between her and Alice Wangiri Nyaga for purchase of most of the parcels listed in her protest. For L.R. Gaturi/Weru/3508, the agreement dated 17/05/2005 is evident that Alice Wangiri received Kshs.1,650,000/= being the full purchase price. The agreement was witnessed by Momanyi Gichuki & Co. advocates.

12. The 2nd and 3rd agreements dated 17/10/2007 and 16/09/2004 for ¼ acre plots shows that the late Wangiri received the agreed purchase price for the plots to be excised from L.R. Gaturi/Weru/3508.

13. The other two agreements dated 17/08/2004 and 28/06/2006 show that the 1st protester paid full purchase price of Kshs.400,000/= for three ? acre plots at the rate of Kshs.200,000/=. There is also an agreement dated 17/10/2007 for purchase of ¼ acre plot for Kshs. 200,000/= sold to her by one beneficiary Bedan Njagi, one of the beneficiaries. He acknowledged receipt of the purchase price in full.

14. In the agreement dated 16/09/2004 between the 1st protester and Bedan Njagi, the parties agreed that Kshs.150,000/= was to be paid to Bedan Njagi by 1st protester to cater for hospital bills incurred by the deceased and his widow Alice Wangiri, to cater for legal fees and other expenses. The 1st protester paid part of the money leaving a balance of Kshs.50,250/= at the finalization of this succession cause.

15. The said Bedan later filed an application in this case dated 15/07/2009 seeking several orders against the 1st protester and accusing her of inter-meddling with the estate of the deceased. The learned judge W. Karanja, J. as she was then found that the deceased's family had already sold the plot in question to the 1st protester and allowed her to construct houses from which she was already receiving rent. In dismissing the application, the court held that the 1st protester had a beneficial interest in the estate and was not a stranger as alleged.

16. The application was dismissed.

17. The 1st protester relied on this evidence in her case which is borne by the record.

18. The 2nd protestor urged the court to rely on the revoked grant where he had been given the three parcels of land.

19. The grant was issued to Bedan Njagi Gichuku Nyaga and Peter Njue on 12/05/2005 and confirmed whereas the estate of the deceased was distributed to several beneficiaries including the 3 children of the deceased and the 2nd protestor Nicasio Njeru. He was given L.R. Gaturi/ Weru/3503, Gaturi/Weru/3504 and Gaturi/Weru/3505.

20. It is trite law that a revoked grant has no effect as far as distribution of the estate is concerned. However, I agree with the 2nd protestor that it may be used as evidence by a party who claims beneficial ownership in the estate and who had benefited from the grant before revocation. For the three administrators to have agreed and bequeathed the two parcels of the land to the 2nd protestor, he must have bought them from them and paid in full unless evidence to the contrary is availed. Such evidence has not been forthcoming from the family of the deceased.

21. The record of the court contains a land sale agreement dated 25/06/2003 between Alice Wangiri Nyaga and the 2nd protestor for sale of L.R. Gaturi/Weru/3503 and Gaturi/ Weru/3504 for Kshs.200,000/=. Alice acknowledged receipt of Kshs.175,000/= during execution of the agreement. The purchaser was to pay the balance of Kshs.25,000/= on or before 29/08/2003. The court believes the balance must have been cleared for the administrators to give the 2nd protestor the two land parcels in the said grant. The agreement was witnessed by Lugard Mugusu advocate and signed by the parties. Peter Njue Njeru signed as a witness. He is one of the beneficiaries in this case.

22. As for L.R. Gaturi/Weru/3505, the 2nd protestor states that he funded the succession cause and was given this parcel of land. No other

evidence was adduced to support this claim save the revoked grant showing that the 2nd protester was given this parcel of land as well during the distribution.

23. The respondent/petitioner was served with the protests and with all the hearing dates. Their advocate Mr. Kathungu participated in all the mentions of the case including the taking of directions. However, there was no reply filed by the respondent in answer to the protests.

24. In her application for confirmation of grant, the respondent proposed distribution as follows:-

(1) **Ngandori/Kirigi/333** to be shared as follows:-

Gicuku Nyaga - 0.65 ha.

Samson Kariuki Nyaga - 0.10 ha.

(2) **Gaturi/Weru/3498** to be given to:-

Fredrick Kivuti Chiriaw - wholly

(3) **Gaturi/Weru/3499** to be given to:-

Fredrick Kivuti Chiriaw - wholly

(4) **Gaturi/Weru/3508** to be shared as follows:-

Fredrick Kivuti Chiriaw - 1 acre

Bedan Njagi - 2 acres

Nyaga Njue - 2 acres

(to hold for his trust and his sisters)

(5) **Gaturi/Weru/3503** to be given to:-

Gicuku Nyaga - wholly

(6) **Gaturi/Weru/3504** to be given to:-

Gicuku Nyaga - wholly

(7) **Gaturi/Weru/3502** to be given to:-

Bedan Njagi - wholly

(8) **Gaturi/Weru/3499** to be given to:-

Bedan Njagi - wholly

(9) **Gaturi/Weru/3500** to be given to:-

Nyaga Njue - wholly

(to hold in trust for himself and his sisters)

(10) **Gaturi/Weru/3505** to be given to:-

Nyaga Njue - wholly

(to hold in trust for himself and his sisters)

25. In addition to the children of deceased, Gicuku Nyaga and Bedan Njagi Nyaga, there are two other beneficiaries namely Nyaga Njue and Fredrick Kivuti Chiraw who have been given shares in the estate. One of the children of the deceased Peter Njue Nyaga is not on the list and it may be assumed that is represented by Nyaga Njue, most probably his son. There was no evidence from the petitioner to explain this position.

26. The 1st protestor said that the other new entrant Fredrick Kivuti Chiraw is a stranger in these proceedings and has been bequeathed L.R. Gaturi/Weru/3498 and 3499 which were sold to her. The petitioner did not explain who this person was and only the statement of the 1st protestor referring to him as a stranger. The said person did not enter appearance in these proceedings.

27. The petitioner did not oppose the protests of the 1st and 2nd protesters. The 1st protestor's evidence of the sale agreements for each and every plot she bought from the family of deceased is overwhelming. All the agreements were witnessed by advocates and were conclusive evidence of sale. The 1st protestor also produced the agreement in which the parties agreed that she buys ¼ acre plot at Shs.150,000/= which was to meet hospital expenses for the deceased and his wife who was the original administrator.

28. The participation of the 1st protestor in these proceedings since 2005 during the lifetime of Alice Wangiri who sold to her some of the plots is evidence of her long walk to prosperity with this family of the deceased. The court has ruled in her favour in the past when she was branded an inter-meddler and called upon to render accounts of rent for houses she had constructed on a plot on the land she bought many years back.

29. After the death of Alice Wangiri, the chief Mbeti North location wrote a letter dated 22/03/2005 and named the 1st protestor as a beneficiary in addition to the three children of the deceased. This recognition by the chief of the area and by the three children of the deceased as an interested party in the succession cause adds weight to the 1st protestor's case.

30. It is on record that Bedan Njagi Nyaga one of the vendors of two parcels of land recognized the 1st protestor as a beneficiary in the affidavit sworn on 27/10/2014 in support of his summons in this cause. The 1st protestor is well known and has interacted with the family of the deceased for a period of over 15 years since she bought the first parcel of land from them.

31. I am satisfied that the 1st protestor has established her case against the petitioner in this confirmation of grant.

32. The 2nd protestor produced an agreement for sale of two parcels of land L.R. Gaturi/Weru/3503 and 3504. There was no sale agreement tendered in respect of L.R. Gaturi/Weru/3505. However, this court is satisfied that the revoked grant which bequeathed the 2nd protestor three parcels of land namely L.R. Gaturi/Weru/3503, 3504 and 3505.

33. The 2nd protestor relied on the relevant law which provides for the interest of a purchaser. Section 93 of the Law of Succession Act which provides :-

(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.

34. The interest of a purchaser is therefore recognized under the Act subject to proof by the person claiming in that capacity.

35. I hereby enter judgment for the two protesters against the petitioner to the effect that each of them shall be given the land bought from the family of the deceased in the terms this court will set out

36. Under Section 71 of the Act the court has as duty to identify the heirs of the estate before distribution. In this case it is not in dispute that the deceased was survived by three children namely Gicuku Nyaga, Bedan Njagi Nyaga and Peter Njue Njeru. These are the rightful heirs of the estate or their children may take the place in the event that any of them is deceased.

37. The 2nd limb of beneficial owners are the two protesters in their capacity as purchasers of various parcels of land from the family.

38. Due to the history of this case which has been explained in the foregoing paragraphs of this judgment, the grant issued to Gicuku Nyaga on 28/07/2011 is hereby confirmed on the following terms:-

(1) Phyllis Grace Karimi

L.R. Gaturi/Weru/3508 - 2¾ acres

L.R. Gaturi/Weru/3508 - ¼ acre 3 ¼ acres

L.R. Gaturi/Weru/3508 - ¼ acre

L.R. Gaturi/Weru/3501 - ? acre

L.R. Gaturi/Weru/3505 - ? acre

L.R. Gaturi/Weru/3498 - ? acre

L.R. Gaturi/Weru/3499 - ? acre

(2) Nicasio Njeru

L.R. Gaturi/Weru/3503

L.R. Gaturi/Weru/3504

L.R. Gaturi/Weru/3505 – Balance after ? acre of 1st protester has been excised.

- In the event that the 2nd protester has an unsatisfied claim in respect of L.R. Gaturi/Weru/3505 against the petitioner and Bedan Njagi Nyaga, he is at liberty to pursue it against them once the remaining assets are distributed.

39. I have reason to believe the orders of the court in respect of the protesters have substantially affected the proposed shares of the rest of the beneficiaries as set out in the application for confirmation dated 6/08/2013. It is not possible to distribute the remaining parcels to them until further consultation is done within the family.

40. The petitioner Gicuku Nyaga is hereby directed to file within 30 days an affidavit for distribution of the following parcels for the benefit of the other beneficiaries named in the grant as Bedan Njagi Nyaga, Nyaga Njue and Fredrick Kivuti Chiraw within 30 days.

41. A certificate of partial confirmation is hereby issued in respect of the orders herein.

42. The Deputy Registrar High Court is hereby authorized to execute the necessary documents for execution of the partial confirmation of grant.

43. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JUNE, 2018.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Kathungu for Administrator

Mr. Okwaro for 1st Protestor

Mr. Andande for 2nd Protestor

All parties present