



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1397 OF 2012

IN THE MATTER OF THE ESTATE OF FRANCIS KIMANI MUCHIRI (DECEASED)

JUDGMENT

1. For determination is the application dated 4th June 2016. It is brought at the instance of Esther Nyamuiru Muchiri, one of the administrators of the estate. Grant was made to her jointly with James Robert Muchiri on 21st March 2013. The deceased died on 1st August 2010, and was survived by the applicant as widow, and four (4) children, being James Robert Muchiri, Anthony Muchiri, Mercy Nyaguthii and Rachel Wahito. The applicant has not itemized the assets that the administrators had ascertained as belonging to the estate and available for distribution, but she has a list of the assets that she proposes to have the court distribute, that is to say LR NOs 14270/14, 24 and 26, LR NOs 22718/ 5 and 6, and shares in Safaricom Ltd under CDS Account No. 7349055. She proposes that all these assets devolve upon her entirely.

2. The application is supported by consents to distribution duly executed by the four children, that is to say James Robert Muchiri, Anthony Muchiri, Mercy Nyaguthii and Rachel Wahito. The said consent is dated 4th June 2016. There are also affidavits by the same four children in support of the application, all sworn on 4th June 2016. Copies of documents indicating the registered ownership of the assets sought to be distributed have not been attached to the application.

3. There is a protest to the proposed distribution, through an affidavit sworn on 30th September 2016 by James Igamba Mbochi. He avers that the applicant had offered two of the assets of the estate for sale to him, that is to say LR NOs 22718/5 and 6 for a sum of Kshs. 14, 000, 000.00. He states that the applicant had presented herself as the sole administrator of the estate. He paid a sum of Kshs. 13, 000, 000.00 towards that purchase price. He pleads that the completion date was set at 22nd November 2012. He complains that since then the applicant has not yet caused the property to be transferred to his name to date. He states that he discovered later that the applicant transacted while she was yet to be appointed administrator for her appointment was on 13th March 2013 while the sale happened on 27th August 2012. He complains further that he discovered that the deceased had surrendered a portion of the land to state authorities and was compensated therefor. He says that he fears that he would suffer loss if the grant is confirmed and the estate distributed amongst the beneficiaries. He complains that he has not been cited as a creditor of the estate. He would like the administrators to explain how they would take care of his interests before the grant is confirmed. He has attached various documents to his affidavit to support the protest.

4. The applicant has responded to the protest through her affidavit sworn on 23rd May 2017. She concedes that there was a sale transaction between her and the protestor, sometime before the family initiated the process of obtaining representation to the estate. She avers that she brought it to his attention that the land was registered in the name of the deceased and the family would have to obtain representation to his estate. She also says that she pointed out to him that that process could take a long time. The parties entered into a sale agreement dated 27th August 2012, one of whose provisions stated that the property was in the name of the deceased and that the documents were with the family lawyer who was undertaking probate proceedings with respect to it. The initial payment was made on 17th August 2012 on basis of a handwritten agreement prior to the execution of the formal agreement of 27th August 2012. She concedes to having received the purchase price of Kshs. 13, 000, 000.00, with the last payment thereof coming on 23rd April 2013. She accuses the protestor of thereafter occasioning her prosecution for obtaining money from her by way of false pretenses and also of accusing her of intermeddling with the estate. She says that he also sued her in ELC No. 1352 of 2016 seeking to recover the purchase price and to have the sale agreement declared null and void. She pleads that the issues being raised here ought ideally to be raised in ELC No. 1352 of 2016. She states that she was always desirous of refunding the said money, which can only be achieved after the grant is confirmed. She has attached documents to her affidavit to support the contentions made therein.

5. The protestor swore a further affidavit on 5th June 2017 to respond to the issues averred to by the applicant in her replying affidavit. He reiterates that justice would only be done if the confirmation application is put on hold so that his concerns can be addressed through the suits that are pending elsewhere.

6. Directions were given on 6th June 2017 that the said application be disposed of by way of *viva voce* evidence. The oral hearing began on 19th July 2017. The protestor testified and was cross-examined. The applicant testified on 29th November 2017, and was cross-examined. Both sides did not call witnesses. Their respective testimonies breathed life to the averments made in their respective affidavits. I need not recite the said testimony as the same is on record. After the oral hearing directions were given for filing of written submissions, and the

parties filed and exchanged written submissions. I have perused through them, together with the authorities that they have cited, and noted the arguments made by them.

7. The contest in the protest proceedings herein is not between family members, but rather between an administrator and a person who claims to have had bought estate property from her before she was appointed administrator. There is no dispute as to who the rightful heirs of the deceased are, neither is there a contest as to what assets make up the estate of the deceased. The five survivors of the deceased appear to be in total agreement that the estate be devolved wholly upon the widow, the applicant herein. The protestor would like the court to halt the confirmation process so that his issues with the applicant can be resolved first. It would appear that the two have two suits over two of the assets of the estate, pending in other courts. Should the court postpone the confirmation of the grant as prayed for by the protestor?

8. Confirmation of grants of representation is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 71(2)(d) gives the court discretion to postpone confirmation for such duration as it pleases pending issuance of further citations to such persons as it may find necessary or for whatever other reason. The protestor is therefore well within his rights to seek postponement of the confirmation of the grant herein.

9. Several provisions of the Law of Succession Act are relevant to the outcome of the protest proceedings before me. I shall cite them verbatim. Section 45 of the Law of Succession Act, provides as follows –

‘(1). Except so far as expressly authorized 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.

(2). Any person who contravenes the provisions of this section shall –

(a) be guilty of an offence ... ‘

10. Then there is section 79, which states –

‘The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.’

11. Section 79 should be read together with section 80(2) which says that –

‘A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.’

12. Section 82(a) of the Act says –

‘Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers – to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that –

(i) ...

(ii) No immovable property shall be sold before confirmation of the grant ... ‘

13. In sum, the effect of these provisions is that the property of a dead person should not be handled in any manner, including by way of disposal by sale, by a person who has no legal authority to handle such property. The authority to deal with such property emanates from the law, that is the Law of Succession Act or any other relevant statute, or from a grant of representation. Handling such property contrary to the law, and in particular section 45 of the Law of Succession Act, amounts an offence punishable in accordance with the provisions of that section.

14. The sale the subject the dispute herein was entered into prior to the applicant obtaining representation to the estate of the deceased. She had no authority to deal with the property in the manner that she dealt with it. There is no provision in the Law of Succession Act or any other statute for that matter that would have enabled her to enter into agreements to dispose of such property. The fact that she was a widow of the deceased could not help her as surviving spouses have no automatic right to administration of an estate, especially in intestacy like in this case, without appointment by the court. She had no authority to enter into any sale agreements over the property. The property had not vested in her and therefore she could not enter into any binding contract with anyone over the same. Section 45 covers any person who handled the property of a dead person. It is not limited to members of the family of the deceased or person claiming an interest based on familial ties. It covers third parties, which include person who purports to buy such property. The protestor herein was such a person. He purported to buy property belonging to a dead person. He had no authority to handle the property. There was no authority for him to buy it emanating from any source whatsoever. The protestor’s hands are not clean so far as this is concerned. He should not be seen to be accusing the applicant of the offence of intermeddling yet, he was himself complicit in the same.

15. The property of a dead person vests in the persons that the court appoints as personal representatives, be they executors of a will or administrators. It is in such persons that the rights of proprietorship of estate assets inure. It is them that can sue or be sued over the property.

It is them who can enter into contracts of various shades over the property, of sale or disposal or lease, among others. In the case of intestacy, by virtue of section 80 of the Act, the grant of representation becomes effective only from the date the same is made. Meaning that the assets only vest in the administrator from the date of the grant. The administrator is therefore only able to bind a third party in his dealing with the assets only from the date of the grant. The principle of relation back is of relevance here. The grant of letters of administration in intestacy does not cover acts of the administrator prior to the making of the grant or prior to his appointment as administrator. The courts have been very clear on this in such cases as *Troutik Union International and another vs. Mrs. Jane Mbeyu and another* civil appeal number 145 of 1991, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* civil appeal number 8 of 1996 and *Otieno vs. Ougo and another* (1987) KLR 407, among others.

16. In the context of the instant case, at the time of the sale agreement the subject of the dispute the applicant had not been appointed administrator in intestacy to his estate. The property of the deceased therefore had yet been vested in her. She could not exercise proprietary rights over it. She could not enter into any legally binding arrangements over it. She could not sell or lease, and if she purported to she could not pass any good title to anyone. As the deceased died intestate, the principle of relation back did not apply to his estate. This would mean that the fact of the subsequent appointment of the applicant as administrator of the subject estate did not authenticate the otherwise unlawful transaction that she had entered into with the protestor. Her authority to handle the property was effect from 21st March 2013; anything she did prior to that date relating to the estate was not sanctioned by the law and was not legally binding.

17. Even though section 79 provides that the assets of the estate vest in the administrator upon appointment as such, and that he can begin to exercise legal authority over the assets from the date of his appointment, and that he can from that time on bind third parties, there are still restrictions to the authority imposed by the law. Section 82, for example, outlaws disposal of immovable property by way of sale prior to confirmation of grant. This means that although there is power exercisable by administrators of sale of estate assets, that power is not available with respect to immovable property until after the grant has been confirmed. If immovable property has to be sold for whatever purpose before the grant is confirmed, the said sale has to get the approval of the court. In the instant case, section 82 of the Act does not even have to arise. Representation to the estate had not been granted to anybody as at the date the subject date happened, and therefore the issue of confirmation of grant does not even arise. The point being made, however, is that the law is so strict on disposal of immovable assets of the estate that it does not even allow grant holders to dispose of it unless their grants have been confirmed or otherwise the court grants leave for such disposals.

18. The short of it is that the transaction between the applicant and the protestor over LR NOs 22718/ 5 and 6 was dead in water as at the date it was entered into. It was a sterile arrangement between two intermeddlers, persons who had absolutely no authority to deal with the said assets. They acted in contravention of the law. Their transaction was a nullity. It was of no binding effect to either of them, and it could not possibly be enforced by or against either of them.

19. The protestor invites me to postpone confirmation of the grant herein to allow him to finalise his suits against the applicant or to even have the applicant state how his interests would be secured before the grant is confirmed and the assets distributed. The transaction that he is relying on to urge me to make the postponement was dead in water at the time it was entered into. I cannot possibly exercise any discretion on account of it. It has no effect whatsoever to these succession proceedings. Perhaps allowing confirmation of the grant herein may in the long run help the protestor get his refund as proposed by the applicant, for it is after the grant is confirmed that the applicant will have, by virtue of section 82 of the Act, the authority to dispose of the immovable assets by way of sale to raise the funds that she, no doubt, requires to settle the protestor.

20. In the end the orders that I shall make in the circumstances are -

- (a) That the protest herein, comprised in the affidavit of James Igamba Mbochi, sworn on 30th September 2016, is hereby dismissed;
- (b) That the grant of letters of administration intestate made to Esther Nyamuiru Muchiri and James Robert Muchiri on 21st March 2013 is hereby confirmed;
- (c) That the estate of the deceased shall be disposed of in accordance with the proposals in paragraph 5 of the affidavit of Esther Nyamuiru Muchiri sworn on 4th June 2016;
- (d) That a certificate of confirmation of grant shall issue in those terms;
- (e) That the estate shall have the costs of the protest proceedings; and
- (f) That any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days of date hereof.

DATED AND SIGNED at KAKAMEGA this 13th DAY OF JULY 2018

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED at NAIROBI THIS 27TH DAY OF JULY, 2018.

M MUIGAI

JUDGE