



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 654 OF 2009

IN THE MATTER OF THE ESTATE OF MBUGUA NJOGU (DECEASED)

RULING

1. The deceased herein died on 10th January 2006. He was survived by a widow and ten children. He left five assets, being Dagoretti/Kangemi/1163, 1164, 1165, 1169 and 1170. Representation to his estate was granted to his widow, Wambui Mbugua, on 2nd December 2011. She sought confirmation of her grant by an application dated 25th March 2013, and the grant was confirmed on 15th April 2013. The five assets devolved upon her absolutely.

2. The widow, Wambui Mbugua, died on 14th July 2015. It would appear that that prompted the filing of the summons for revocation of grant dated 14th July 2016, to substitute the dead administrator and to address other concerns raised in the application.

3. The matters raised in the application of 14th July 2016 were referred to mediation. The mediator filed a report dated 26th April 2017, which encompassed a partial settlement the terms of which were as follows –

‘I Peter Mwenda Njagi, have been designated as the mediator in this action and having conducted mediation between the parties report that the parties have reached a partial settlement agreement

(i) Helen Wambui Mbugua Kamau of ID No. 6890453 and Joseph Njogu Mbugua of ID No. 19130084 are the joint administrators for the purposes of signing transfer documents of the estate.

(ii) Safaricom shares – 500 and Kengen shares – 500 be sold by the said administrators and the proceeds thereof be distributed in equal value to each beneficiaries.

(iii) Kingangi Women Group shares, Githunguchu Farmers Group shares be forthwith administered by the administrators.

(iv) The parties agreed the mode of distribution as follows –

(a) Dagoretti/Kangemi/1163 – Registration to Kamau Mbugua, Estate of Charles Gitau and Estate of Christopher Kinuthia.

(b) Dagoretti/Kangemi/1164 – Registration to Helen Wambui Wambui Mbugua Kamau and Jane Wanjiru Thiong’o.

(c) Dagoretti/Kangemi/1165 – Registration to Anne Wangari Gitonga and Mercy Njeri Mbugua.

(d) Dagoretti/Kangemi/1169 – Registration to James Mbugua, Caroline Wambui Kinuthia and Sylvia Njeri Kinuthia.

(e) Dagoretti/Kangemi/1170 – (burial site). The High Court to determine mode of distribution as the respondents state in Kikuyu customs the sons are the custodian of a grave site, the sons live at home, hence all the three should be registered to the exclusion of the sisters who are married elsewhere, whereas the objectors i.e. the 4 daughters want to be solely registered as they have a lesser share in the estate. There are 7 remains of several family members buried there.

(v) That any other property that may come to the knowledge of the estate and is not mentioned here will be administered by the appointed administrators, namely Helen Wambui Mbugua Kamau of Id No. 6890453 and Joseph Njogu Mbugua of Id No. 1913084 for the benefit of all the beneficiaries.

(vi) Mention on 26th April 2017 at High Court, Nairobi.

19th April 2017

4. The partial settlement was executed by ten (10) individuals, representing all the survivors of the deceased. It was presented at open court on 26th April 2017, with nine (9) of the survivors in attendance, and the same was adopted as an order of the court. On item number (iv) (e) in the partial settlement on distribution of Dagoretti/Kangemi/1170, it was directed that there be a hearing thereon guided by affidavits to be filed by the parties. The parties complied by filing their respective affidavits thereon.

5. However, before the court could deal with that matter, some of the survivors began to raise the issue that there were houses on Dagoretti/Kangemi/1165 and the mediation process did not address itself to the issue of compensation being made to the owners of the said houses. That issue first came up on 29th May 2017 and I directed those raising it to file a formal application.

6. A Motion in that respect was filed herein on 3rd July 2017, dated 30th June 2017, the applicants being Martin Wangewa Njenga, Joseph Njogu Mbugua, Jane Wanjiru Thiongo, Beatrice Wai Gitau, James Rwenji Mbugua and Benson Kamau Mbugua, Hellen Wambui Kamau, Mercy Njeri Methu and Anne Wangari Gitonga; the persons allotted Dagoretti/Kangemi/1165, have been named as the respondents. They argue that the issue of compensation was raised during the mediation process but the same was not captured in the mediation report and the partial settlement. They would like the matter referred back to the mediator so that the issue can be addressed. It is this application that I should be determining.

7. The three respondents swore a joint affidavit on 23rd November 2017 in reply. They state that the mediation process does not allow for review or appeal, and that once the mediation agreement is signed by the parties it becomes final. They further aver that the late Charles Gitau Mbugua had built illegal structures on the land arbitrarily without the authority of the deceased. They submit that the persons who had put up the structures had benefited from the rent collected from them and that ought to be adequate compensation. They assert that the deceased had not allocated Dagoretti/Kangemi/1165 to anyone, and those who went ahead to put up structures on it did so at their own peril. They state that they have no interest in the said structures, and those who put them up can demolish them if they so wish. They point to the minutes of 26th July 2015 and state that the same do not reflect any discussion on the alleged compensation, saying that the issue never arose, and could not possibly arise as the structures were illegally on the ground.

8. It was directed on 27th November 2017 that the said application be disposed of by way of written submissions. The parties have complied and have filed detailed written submissions. I have read through the submissions and the authorities attached, and noted the arguments made therein.

9. I agree with the respondents that once a mediation settlement agreement is executed by the parties it becomes final. It is binding upon all who sign it. The court cannot interfere with it. I presume that the applicants had occasion to read through the mediation report and partial settlement at the time of the execution, and therefore knew that the property Dagoretti/Kangemi/1165 was being allocated to the respondents. Indeed, one may say that they were party to the process which allocated the said property to the three. Those with structures on the land knew that the said structures were there, and that the issue of compensation was not raised in the report, but they nevertheless signed the report. I do not think they should now turn around and claim that the report/settlement does not capture that issue.

10. Secondly, the property in question forms part of the estate of the deceased. The applicants have not averred that the deceased ever authorized them to put up those structures. The land did not belong to them and they should not have haphazardly developed it before the estate was distributed. The law on intermeddling is not meant to make life difficult for the survivors of a dead person, but to avoid scenarios such as the instant one.

11. Compensation can only come from the persons who would benefit from something. In this case it should be expected from the respondents. However, they are categorical that they are not interested in the structures. That would mean that those who put them up can go ahead and remove them. The persons allocated that parcel of land do not need them. It would also mean that after lapse of reasonable time, or upon due notice, the respondents as the persons entitled to the land will be at liberty to demolish the structures so that they can start to develop and enjoy their land.

12. I am not persuaded that a case has been made out for reference of the matter back to mediation.

13. On prayer 2 of the said Motion, about making the settlement from the mediation process an order of this court, I refer to paragraph 4 of this ruling, and reiterate that the said settlement was adopted as an order of the court on 26th April, 2017. The parties are, therefore, free to make such other applications, founded on that order, as they please.

14. The upshot is that the Motion dated 30th June 2017 lacks merit and should be dismissed. I hereby dismiss the same. Each party shall bear their own costs. The parties should go ahead to resolve the issue relating to item number (iv) (e) in the partial settlement in the manner directed by the court on 26th April 2017. There is liberty, though, for the applicants, should they be aggrieved by the orders herein, to move the Court of Appeal appropriately within twenty-eight (28) days of the date of this ruling.

DATED, SIGNED and DELIVERED at NAIROBI this 27TH DAY OF. JULY, 2018.

W. MUSYOKA

JUDGE