



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 490 OF 2006

IN THE MATTER OF THE ESTATE OF JOHN MANJERU MWANGI - (DECEASED)

AGNES WAMBUI MANJERU.....1ST PETITIONER

SIMON MWANGI.....2ND PETITIONER

VERSUS

JANE WAIGWE MANJERU.....1ST OBJECTOR

ROBERT MAINA MANJERU.....2ND OBJECTOR

MILKAH WAMAITHA COMPANY LIMITED.....3RD OBJECTOR

JUDGMENT

1. John Manjeru Mwangi died on the 23rd February, 2000. A petition for letters of administration was lodged by Agnes Wambui Manjeru and Simon Mwangi on the 9th June, 2000.
2. That petition elicited an answer to petition and cross petition by Jane Waigwe Manjeru and Robert Maina Manjeru lodged in court on the 14th July, 2000.
3. As the two (2) antagonists squared it off through a myriad of applications and counter applications, Milkah Wamaitha Company Limited (hereinafter 3rd objector) lodged an objection to the making of the grant on the 21st February, 2014.
4. 3rd Objector's interest and claim in the deceased's estate is that of a purchaser of all that parcel of land known as the unsurveyed plot No.B11 Ruiru as per sale agreement dated 28th April, 1995 between the objector and John Manjeru Mwangi (now deceased).
5. It is the 3rd objector's case that the petitioners have omitted its interests and rights to plot B11 at Ruiru failing to included it as a beneficiary, creditor heir, legatee and or purchaser for value of plot B11 Ruiru.
6. The consent of the 3rd objector was never sought by the petitioners and the petition was surrounded with secrecy and concealment of material particulars.
7. In response to the objection, the 1st petitioner avers that the objection by the 3rd objector is bad in law as the subject matter plot B11 Ruiru is subject to a court case being Milimani Civil Suit No.11200 of 1995.

8. The 3rd objector is not a dependant of the deceased and can therefore not object to the making of a grant. The 3rd objector ought to have applied to be joined as an interested party.

9. On the day and time (18th July, 2016 at 9.00a.m.) set for hearing, and despite clear evidence of service, neither the petitioners nor the 1st and 2nd objectors appeared for hearing and the matter proceeded for hearing *ex parte*.

10. For the 3rd objector Simon Kaniu Kariuki testified that he is a director of Milka Wamaitha Company Limited.

11. He stated that the deceased sold plot B11 Ruiru to the company. The sale price was Kshs.312,500/=.

12. The company paid 10% of the sale price which was Kshs. 31,250/=. The balance being Kshs.281,250/= was to be paid upon transfer as per clause 2 of the agreement.

13. The buyer took possession and started developing the plot. A timber yard was established on a concrete foundation with an iron sheets roof.

14. The witness later learnt that the petitioners herein had included this property as part of the properties of the deceased. The company was not reflected as a beneficiary. That is why this objection was lodged. The wife of the deceased knew of the sale.

15. The witness produced the sale agreement and a Transfer of Funds slip to Ms Karanja Mbugua & Company Advocates being monies to complete the transaction.

16. I have had occasion to consider the 3rd objectors objection and the testimony offered in court. I have also considered the replying affidavit on record.

17. Of determination is whether the objection is merited and if in the affirmative what orders should the court grant.

18. In paragraph 12 of the 3rd objectors affidavit in support of the objection, it is stated:

“12. That the 3rd objector’s objection has merits because the petitioners are very untrustworthy individuals who have cleverly omitted the 3rd objector’s interests in this case. They cannot be expected to voluntarily transfer this plot to the 3rd objector unless the court orders them to do so.”

19. That paragraph summarises the mainstay of the 3rd objector’s objection.

20. **Section 66** of the **Law of Succession Act** provides as follows;

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled to intestacy, with priority according to their respective beneficial interests as provided by part V;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the Will.”

21. By virtue of Section 66 of the Act, the surviving spouse should have priority over everybody else. He or she has prior right to the administration of the estate of their departed spouse. The rights of others rank after that.

22. According to **Section 66** of the Act those others are;

a) The children of the deceased.

b) The father, mother, siblings and children of siblings, half siblings and children of half siblings and other relatives in the nearest degree of consanguinity upto and including the 6th degree according to Section 39(1) of the Act. The public trustee and creditors rank last in that order.

23. The 3rd objector is a creditor to the estate herein based on the material before court.

24. This court (Musyoka J) in **Re the estate of Dorcas Wanjiku** had this to say in respect of creditors to an estate;

“Creditors, as mentioned earlier, are neither heirs nor survivors nor beneficiaries nor dependants. They ought not to be listed in the petition as survivors, except in the column for liabilities. Ideally creditors should wait for the heirs, beneficiaries, survivors and dependants to apply for grant, failing which they, the creditors, would then become entitled to have citations issued. Where grant is not sought after they have issued citations, they should then ask the court to allow them to petition for a grant to be made to them. Where the heirs, dependants, survivors and beneficiaries obtain the grant, the creditors should, after the appointment of the administrators, prove their claim to the administrators, and if the administrators fail to honour their claims then move the court appropriately. Where the claim is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action filed in the civil court.”

25. In our instant suit, the heirs/beneficiaries of the estate herein have already petitioned for letters of administration.

26. On the material before me the 3rd objector has a solid *prima facie* claim against the estate.

27. Am afraid, however that the 3rd objector has chosen the wrong avenue to agitate its claim. The objection as it stands is bad in law.

28. I quote with approval the words of Musyoka J in Re the estate of Dorcas Wanjiku where he stated;

“The interests of creditors are taken care of at the confirmation of grant. The administrators ought in the confirmation application to include creditors where such creditors have proved their debts. In default of the administrators making such provision in the confirmation application, the creditors have the liberty to file affidavits of protest to the distribution of the estate proposed in the confirmation application or to move the civil court in a suit against the estate.”

29. The fears of the 3rd objector particularized in paragraph 12 of the affidavit in support (supra) are well taken care of by the law as even if the administrators fail to voluntarily transfer the plot to the 3rd objector legal remedies as in paragraph 28 above abound.

30. The rightful heirs/beneficiaries entitled to a grant of letters of administration in this matter exist and

are known and indeed they have applied for the same. The 3rd objector's claim is limited to securing its rights over plot B11 and not to oppose issuance of grant to the persons most entitled.

31. On the whole am satisfied that the 3rd objector's objection is without merit. The same is dismissed. As the objection was not defended at the hearing, each party to bear its own costs. The 3rd objector shall be served with all processes in this matter going forward through their advocates on record, if they so remain, or personally should the circumstances change.

Dated, Signed and Delivered at Nakuru this 30th day of March, 2017.

A. K. NDUNGU

JUDGE