



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 615 OF 2013

IN THE MATTER OF THE ESTATE OF HENRY MUNGAI KINUTHIA (DECEASED)

JOEL THEURI NJENGA.....APPLICANT/PROTESTOR

VERSUS

HELLEN WAITHIRA GIKONYO.....RESPONDENT

RULING

1. This ruling is in respect of the chamber summons application dated 10th August, 2016 in which Joel Theuri Njenga (hereinafter the applicant) seeks orders:

1. That this honourable court do issue an order to the respondent compelling her to excise three (3) acres from **NAKURU/RARE/KIRIRI 903** and transfer the same to the Applicant.

2. That the costs of this application be borne by the Respondent.

2. The application is predicted on five (5) grounds namely:

1. That the Applicant herein filed an affidavit of protest against confirmation of the grant made to the respondent on 15th January, 2014.

2. That the deceased has borrowed (sic) Kshs.348,964/= from Molyn Credit Limited and charged **NAKURU/RARE/KIRIRI 903** to secure the loan.

3. That the chargor, through Recovery Concepts Auctioneers demanded payment of the loan amount and interest thereon and threatened to auction the land. The Respondent approached the Applicant for help in repaying the monies to Molyn Credit Limited in an effort to avoid the sale by Auction.

4. That the Applicant paid monies to Molyn Credit Limited, being repayment of the loan that had been advanced to the deceased. It was agreed between the Applicant and Respondent that she would excise three (3) acres of land from **NAKURU/RARE/KIRIRI 903** and transfer it to the Applicant, Kshs.370,000/= being the consideration the Applicant had paid to Molyn Credit Limited for the loan advanced to the deceased.

5. That the Applicant is in the process of obtaining a confirmation of grant without including the Applicant's share of three (3) acres of the estate as a purchaser for value;

and further supported by the annexed affidavit of the applicant.

3. The substance of the grounds and the supporting affidavit is that prior to the death of Henry Mungai Kinuthia (deceased), he had borrowed Kshs.348,964/- from Molyn Credit Limited and charged his piece of land known as LR NO.NAKURU/RARE/KIRIRI 903.

4. The respondent approached the applicant for assistance to pay off the outstanding debt of Kshs.370,000 owing to Molyn Credit Limited. In return, the respondent was to sell three (3) acres of land to the applicant.

5. An agreement of sale was entered into. It was a term of the agreement that Kshs.370,000/- (the purchase price) was to be paid directly to

Molyn Credit Limited.

6. The respondent was to promptly file for letters of administration on behalf of the deceased's estate and include the applicant's share as part of the liabilities.
7. The applicant has however been excluded in the proposed distribution to the beneficiaries.
8. Despite evidence of proper service, there is no response to the chambers summons on record.
9. I have considered the material before me. It is clear from the record that the administration of the estate of Henry Mungai Kinuthia (deceased) is at the confirmation stage. There is an affidavit of protest from none other than the applicant herein claiming the said three (3) acres allegedly due to him.
10. The purported agreement of sale of the three (3) acres to the applicant is dated 22nd July, 2013. The deceased died on 27th February, 2012. Letters of administration were issued to the respondent on 29th January, 2014.
11. As at 22nd July, 2013, the respondent had no capacity in which to deal with the estate of the deceased. **Section 45(1)** of the **Law of Succession Act** provides:

“45 (1) 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.”

12. Indeed, there are grave consequences for flouting **Section 45(1)** above as **sub-sections (2)(a)** and **(b)** proceed to state:

“ (2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

13. In any event, even assuming that the respondent already had taken out letters of administration, she would not have obtained powers to sell any immovable property before confirmation of such a grant. **Section 82 (b)(ii)** provides:

“No immovable property shall be sold before confirmation of the grant.”

14. The correct legal position is that if the said Molyn Credit Limited were owed monies by the estate of the deceased (if at all) they ought to have lodged their claim to the administrator(s) of the estate and not to the respondent who had no capacity to represent the estate at the time the demand for payment of loan was made.

15. Any transaction between the Applicant and the respondent must based on the foregoing, be treated as a contract between the applicant and the respondent and I doubt that any breach of such a contract would find a ready redress through these proceedings.

16. Indeed, the applicant asks the court to order the respondent to excise three (3) acres of land from **LR. NO.NAKURU/RARE/KIRIRI 903** yet the grant is not confirmed. This is tantamount to asking the court to act against the express provisions of **Section 82 (b)(ii)** of the **Law of Succession Act**.

17. For the above stated reasons, I must find and hold that the application before court is completely without merit. The same is dismissed.

There will be no orders as to costs.

Dated, Signed and Delivered at Nakuru this 23rd day of March, 2017

A. K. NDUNG'U

JUDGE