



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 2718 of 2013
IN THE MATTER OF THE ESTATE OF DANIEL NGACHA MUTA (DECEASED)

R U L I N G

1. The Court has before it an Application by Summons for the Rectification of the Grant of the Certificate of Confirmation. It was filed on 12th October 2016 it seeks orders that:

(i) *“That the Certificate of Confirmation of Grant of Letters of Administration issued on 17th November 2014 to the said KESIA WAMBUI NGACHA be rectified.*

(ii) *That cost of this application be in the course.”*

2. The Application is said to be “grounded on the Affidavit of **KESIA WAMBUI NGACHA** filed herewith, the nature of the case and the reasons to be offered. The Application seeks rectification of various aspects of the Grant and Confirmation. Neither the Application nor the Affidavit sets out clearly the reasons for rectification nor the precise areas that require rectification. It is said that it is desirable to have the errors rectified by this Court. However, the Affidavit in support does include a Schedule. That Schedule Lists the Beneficiaries as:

- (1) Kesia Wambui Ngacha - Widow
- (2) Obadiah Mutta Ngacha - Son
- (3) Andrew Kanari Ngacha - Son
- (4) Peter Guandaru Ngacha - Son
- (5) Nancy Wangeci Ngacha - Son
- (6) Winnie Wairimu Ngacha - Son
- (7) Wambui Waithira - Granddaughter
- (8) Daniel Ngacha Wanjiku - Grandson
- (9) Joseph Gitonga Njeri - Grandson
- (10) Boniface Njogu Njagi - Buyer

(11) James Mutua Kamunya - Buyer

(12) Julius Nyingi Ngugi - Buyer

(13) Rachel Njoki Kahara – Buyer

The Estate is intended to be distributed to them. In fact the last four on that list are not, in fact, members of the family nor dependants of the Deceased within the meaning of **Section 29 of the Law of Succession Act Cap 160** but persons who are alleged to have purchased the Estate after the confirmation of the Grant. In the existing Certificate of Confirmation, all the Land was to vest in the Administratrix. Neither the Application nor the Affidavit sets out how and why the “mistakes” or “errors” arose. Therefore the Application simply seeks to add four additional persons to the Estate.

3. There is an additional Affidavit sworn by Obadiah Mutta Ngacha. He says that he is the first born in his family. He says that before his death the deceased had subdivided plot numbers Nyandarua/Turasha/1663 and Nyandarua/Turasha/1878. He also says that before his death the deceased sold 1 ½ acres to James Muta Kamunya and 1 ½ acres to Julius Nyingi. The Deceased is also said to that “instructed” Kesia Wambui Ngacha to sell a further 8 acres to educated the children and grandchildren. 8 acres were sold to Rachel Njoki Kahara and there is an agreement for sale of 2 ½ acres to Boniface Njogu Njagi. None of those parcels are described in relation to any particular piece of land however the purported buyers are laying claim to portions of Nyandarua/Turasha/1663 (Boniface Njogu Njagi) Three of the Beneficiaries have signed a document entitled “SALE OF LAND AGREEMENT” The Agreement is dated 7th February 2015. On that date the Certificate of Confirmation of Grant had been issued distributing all those properties to the Administrator. In the circumstances, on that day the purported Sellers had no locus to sell the said pieces of land.

4. Also Exhibited to the Affidavit is a copy of Minutes of Family meetings. The original seems to have been written in the Kikuyu Language. There is no explanation as to how both versions came into being and the weight to be attached to them. Peter Guandaru Ngacha tells the Court that he is the Custodian of the Minutes and they are a true reflection of the resolution of the family meetings. Further, there is no evidence before the Court that the Deceased did sub-divide the pieces of land referred to. Official and formal sub-division is a process that involves the Lands Registry and results in various parcels of land being given new numbers. The Title Deeds produced to Court relate only to the complete parcel of land. There is no Surveyors Report or plan to say when and how the sub-division occurred. Further the sales took place after the Death of the Deceased and therefore cannot really be said to be the position at the time of death.

5. One of the purported buyers Racheal Njoki Kahara has filed an Affidavit. She claims to have purchased 8 acres together with buildings of the piece of land registered and known as NYANDURAU/TURASHA/1878. It is said that “the portion of land (Subdivided Parcel) is to be out of the Property. A surveyor shall be appointed to hive out the 8 acres as indicated. In fact there is no evidence that a Surveyor has done that. That agreement was dated 1 July 2014, in other words before the grant had been confirmed. The Agreement confirms that most of the purchase price has been paid. There is the sum of Kshs 1,350,000/= (Kenya Shillings one million three hundred and fifty thousand.) said to be outstanding. There is no confirmation of receipt either as part of the sale agreement or otherwise acknowledging receipt of the monies said to be paid.

6. In addition the Court has not seen any independent valuation of the properties with which to satisfy itself that the price paid and alleged to have been paid is a fair market value and therefore the interests of the beneficiaries are taken into account.

7. Further, there is the issue of Stamp Duty payable under the **Stamp Duty Act Cap 480 Laws of Kenya**. Although the Act does provide for some instances where one can be exempted from duty payable on the transfer on property. They include

(a) transfer by way of transmission- e.g. pursuant to a will or intestacy; and

(b) transfer between husband and a wife; and

(c) transfer by way of a gift to a charitable organization as provided for under”

(e) transfer of a family property to a company whose shares are wholly owned by the family members pursuant to **Section 106** of the Act and **Legal Notice Number 92 of 2007**.

8. In order to qualify for exemption, the applicant should make an application to the collector of stamp duty supported by a statutory declaration or affidavit wherein the applicant will state the section of the Act relied upon in seeking the exemption and attached the requisite supporting documents. In this case none of the documents produced have been stamped to denote that duty has been paid. That brings **Section 19** of the Act into play. **Section 19** provides:

19. Non-admissibility of unstamped instruments in evidence; and penalty

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under [section 20](#) or of obtaining a certificate under [section 21](#);

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in [subsection \(5\)](#), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.”

9. It was confirmed to the Court that the prospective buyers were neither members of the Deceased’s family nor his dependents, therefore transfer to them cannot be said to be transfer pursuant to a will or intestacy. The sale has taken place after the Letters of Administration were issued, but sale is not distribution. It is a new event.

10. For the reasons set out above, the Application for Rectification is both defective and unsubstantiated. The correct disposition would be to the respective members of the family in whom the shares are to vest.

The addition of the said purchasers changes the complexion of the Application. Should the heirs of the Deceased wish to do so, they can then sell their own land. Based on the evidence before the Court the properties were sold without good title and the sale agreements are therefore null and void. Even if that had not been the case, the failure to pay stamp duty means that they are unenforceable and are not good evidence. In the circumstances, the Application is dismissed.

Order accordingly

FARAH S. M. AMIN

JUDGE

SIGNED AND DATED at NAIROBI this 23rd Day of May 2017

In the Presence of

Court Assistant: Patrick

Kesia Wambui Ngach – Administratrix

Peter Guandaru Ngach – Beneficiary