

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 209 OF 2013

IN THE MATTER OF THE ESTATE OF JULIUS GATHEMIA KIHARA - (DECEASED)

CHRISTINE NJOKI GATHEMIA.....ADMINISTRATOR

VERSUS

SAMUEL NJONGORO NJIHIA.....OBJECTOR

JUDGMENT

1. The deceased Julius Gathemia Kihara died intestate on 7th June 2012. He was survived by his wife Christine Njoki Gathemia (the administrator) and four children Moses Jesse Kihara, Agatha Nyaitara Banda Thomas, Joseph Ngugi Gathemia and Mary Anne Kabura Gathemia. On 5th February 2013 the administrator filed this petition for the grant of letters of administration intestate in respect of the estate of the deceased whose only estate was a parcel of land comprised in Dagoretti/Mutuini/640 measuring about 1.10Ha. The grant was issued on 22nd May 2013.

2. On 24th June 2013 Samuel Njongoro Njihia (the objector) filed a citation calling on the administrator to accept or refuse to apply for letters of administration in respect of the deceased. His case was that he was a creditor to the estate of the deceased in the sense that, before the deceased died, he had bought a portion of his land but that the transfer had not been done. He stated that the administrator was aware of this transaction but had refused to proceed to transfer the portion to him.

3. On 19th February 2014 the administrator filed application to have the grant issued to her confirmed. The family had agreed that she inherits the deceased's land. On 12th May 2014 the objector filed an affidavit to challenge the confirmation, making reference to the sale agreement he had signed with the deceased before his death. He wanted to be recognised as a purchaser and to be given the portion that he had bought. The administrator's response was that she was not aware of the sale transaction between the deceased and the objector, her consent had not been sought and that, in any event, the transaction was void for want of consent of the land control board. The administrator asked that her application for confirmation be allowed to proceed and the objector, if he had any claim, should sue the estate for the portion of land.

4. It is evident that on 30th September 2010 a sale agreement ('SNW 3") was entered into in which the deceased sold plot No. 9 measuring 0.25Ha being a subdivision of land parcel Dagoretti/Mutuini/640 to the objector for Kshs.3,000,000/=. Kshs.2,000,000/= was paid to the deceased in various instalments. As agreed, Kshs.1,000,000/= was deposited with their common advocates (Wangai Nyuthe & Co. Advocates) to be held on stake-holder basis pending the handover by vacant possession of the property to the purchaser. By the time the deceased died, a consent had been obtained to subdivide the land to allow for separate title to Plot No. 9. The subdivision was yet to be done. Consent for the transfer was going to be sought after the subdivision. In effect, there was no subdivision, transfer or handover of the portion. Counsel for the parties filed written submissions on the legal status of the transaction. Advocates for the objector acknowledged as follows:-

“During the course of the sale transaction, the deceased collected the original Land Control Board consent to subdivide the land to enable him procure the approval for subdivision from the City Council of Nairobi. The deceased was to embark on the process of subdivision and procure the resultant titles emanating from the subdivision and handover the title in respect of the protester’s plot to the firm of administrators to enable them transfer of the property to the protester.”

5. It is clear to me that without the consent, either from the City Council of Nairobi or the Land Control Board or both, the transaction became null and void. What the objector would be entitled to is the refund of the purchase price. Indeed, the administrator’s advocates indicated that their client proposed to refund the Kshs.2,000,000/= and for the advocates holding the Kshs.1,000,000/= to refund the same. Under the agreement, the refund was to be with interest at the rate of 5% per annum above the prevailing Barclays Bank Limited interest rate.

6. I find that the objector is a creditor to the estate of the deceased. The administrator of the estate is under the law entitled to refund the money the estate owes to the creditor. I direct that within 60 days Wangai Nyuthe & Co. Advocates refunds Kshs.1,000,000/= to the objector. In the meantime the grant shall be confirmed on the basis that land parcel Dagoretti/Mutuini/640 shall be registered in the name of the administrator who will within 60 days sell 0.25Ha of it and use part of the proceeds to settle the debt of Kshs.2,000,000/= refund to the objector. The amount shall carry interest at the rate of 5% per annum above the prevailing interest rate of Barclays Bank from 2011 to date. The objector shall execute without reference in case of any failure. Each side shall bear own costs.

DATED, DELIVERED and SIGNED at NAIROBI this 17TH day of MAY 2017.

A.O. MUCHELULE

JUDGE