



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.28 OF 2015

THE MATTER OF THE ESTATE OF KIOGORA MARETE KAMAKIA (DECEASED)

PAUL GITUMA KIOGORA.....PETITIONER

-VS-

DORIS MUKIRI MAGIRI1ST PROTESTOR

FAITH GACHERI ISAAC 2nd PROTESTOR

JUDGMENT

Protest by purchaser

[1] These proceedings relate to the estate of Kiogora Marete Kamakia (Deceased) who died on 22nd January 2006. He was survived by:

1. Jane Mpandi Kiogora - Widow
2. Paul Gituma Kiogora - Son
3. Lilian Gatwiri Kiogora - Daughter
4. James Kimathi Kiogora - Son
5. Doreen Karimi Kiogora - Son

[2] The estate of the Deceased includes the following parcels of land:

- a. Abothuguchi/Katheri/2664 measuring 0.405 Ha and
- b. Ontulili/Ontulili Block 1 (Katheri)/ 150

[2] On 14th July 2015 Grant of Letters of administration intestate were issued to the Petitioner. The Petitioner then applied for confirmation of grant vide Summons dated 24th February 2016. Subsequently, on 14th December 2016, the court directed that that the said application and protest shall be canvassed by way of written submission. Parties were given specific timelines to file further affidavits as well as their respective submissions. The objector filed submissions but on 21st March 2017, MrsKaume informed the court that she will not be filing any submissions and she requested for a ruling date. I will

consider all the affidavits and submissions filed.

Protestors' claim

[3] The Protestors in their Affidavit of Protest dated 17th May 2016 are claiming purchasers' interest. The specific facts as contained in the affidavit in protest are that through a sale land agreement dated 15th July 2013 Jane MpandiKiogora (the Deceased's Wife/Vendor) sold them the entire parcel No. ABOTHUGUCHI/KATHERI/2664 measuring 0.405 Ha at a consideration of Kshs. 1,050,000/-. That amongst the people who witnessed the said agreement is the Petitioner who even acknowledged that once the succession cause was complete they would transfer the said land to them. Other witnesses included Zachariah KoomeRintari and Charles NteereM'mugambi. They thereafter, pursuant to the said agreement occupied the land immediately, fenced it off and carried out enormous developments like planting coffee trees and Napier grass. Before the drafting of the agreement, they had gone to the chief (his letter dated 14.07.2013) capturing that Jane Mpandi was selling the land and would transfer to them upon the completion of the succession cause. The Protestors want the property to be transferred to them but they are of the opinion that the Petitioner and his mother want them to completely lose out. The agreement in question is annexed to the protest. The Protestors filed brief submissions in support of their stand point herein.

Petitioner denied sale

[4] The Petitioner deposed in his Supplementary Affidavit that his mother never told him of her intention to sell the suit land but that the land was being leased by different people pending distribution to the dependants. He states that he came to know about the sale of the land when he was preparing to appear for confirmation. When the Protestors' affidavit was read to him, he remembered that sometime back he met with Charles NteereM'mugambi at a pub where he bought him several beers. The latter told him about some ladies wanting to lease their land and that he should sign some documents for them. He questioned why he should sign and other family members were not there but Charles convinced him that he would speak to the other family members so that they may sign. He agrees that he was given a document which he signed though he did not read the contents as he cannot read nor did he read it for him. At that time he was quite drunk and not in his right senses. He further states that Charles did not disclose anything to him about a sale and his mother too has never mentioned it to him.

[5] Jane MpandiKiogora (wife of the Deceased) in her Supplementary Affidavit states that the affidavit of the Protestors is false an attempt to illegally disinherit them. That she did not sell the suit land willingly and the family did not sit and agree to sell. She had been shown some documents purportedly being the sale agreement of which she does not know of its contents though she remembers being requested to sign a document for lease of that parcel of land. M'TwaruchiuM'Mugambi sent her the fare for transport informing her that the matter was urgent for some ladies wished to lease the Deceased's land. When she got to Meru town M'TwaruchiuM'Mugambi took her to an office where she met some individuals who she had not met before, who said that they wished to lease her husband's land. They persuaded her to sign the document they called a lease agreement and they deposited money into her account. She claims that the document was not read to her and she does not know how to read and write. That none of her family members were present and M'Twaruchui and Nteere are neighbors to the suit land since she had been leasing and she did not think they could lie to him.

[6] She claims that she has not met the Protestors at any one time and neither did she show them her husband's land nor put them in occupation. She came to learn that M'Twaruchui showed them the land and she signed the document believing it was a lease agreement. She affirms that she was tricked into the wrong transaction as she never intended to sell any land as she had not filed any succession case to get any letters of administration enabling her to sell. She further states that she has only received Kshs. 320,000 for the lease. That she never sold the land to protestors and grant should be confirmed as it is then they can follow the refund.

[7] James Kimathi, son of the Deceased, in his Supplementary Affidavit, he states that his father had been leasing out the suit land for some time and after his demise his mother and siblings were entitled to

inherit the property. That there is no time that the family sat down and agreed to sell that piece of land. He further states that the Protestors allege that their mother sold the land to them despite the fact that the land does not belong to her but to all the beneficiaries. He wishes that they proceed with confirmation and if the Protestors gave their money to any persons they may seek redress through refunds and civil claims. Since, the beneficiaries had never signed any sale agreements and their mother had no letters of administration to enable her to sell the land. She did not have any authority from family members to sell off the said land and it is at the confirmation stage that he heard of a transaction to sell the land secretly and fraudulently. Their family stands to suffer irreparable loss if protestors are given their land.

DETERMINATION

[8] Under rule 41 of the Probate and Administration Rules, at the hearing of the application for confirmation the court shall consider all the affidavits and written protests. I shall begin with the protest herein. The protestors claim purchasers' interest in the estate having purchased the entire parcel of No. ABOTHUGUCHI/KATHERI/2664 measuring 0.405 Ha at a consideration of Kshs. 1,050,000/- from Jane MpandiKiogora, widow of the deceased (Vendor) through a sale land agreement dated 15th July 2013. They claimed that pursuant to that agreement, they occupied the said land immediately, fenced it off and carried out enormous developments like planting coffee trees and Napier grass. It was also a term of the said agreement that the Vendor was to file a succession cause in respect of the estate of the Deceased to facilitate transfer of the land to the Protestors. The question becomes; what is the status of such purchaser in a succession cause?

[9] To begin with, the primary duty of this court in the exercise of its jurisdiction as a probate court. I can do no better than what William Musyoka J, stated in re Estate of G K K (Deceased) [2017] eKLR that:

“The primary function of a probate court is distribution of the estate of a dead person.”

I see the claim by the Protestors is that of a purchaser and is based on a sale of land agreement with the widow of the deceased. Doubtless, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be tried in a succession cause. I am glad the protestors recognized this reality of law and made the following submission:-

“The law verily clear the protestors cannot inherit the estate of the deceased since they are not dependants; however we urge the Honourable court to invoke the Provisions of Rule 73 of the Probate and Administration rules, which gives the court the inherent power to make orders that many [sic] make ends of justice to be met”.

As the protestors are not beneficially interested in the estate, their claim cannot be litigated in this succession cause or even be set aside by this court under rule 41(3) of the Probate and Administration Rules. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot draw from its inherent jurisdiction to assist an unlawful transaction. I do not, however, wish to say much about the legality or otherwise of such transaction or the validity and enforcement of the agreement in question in order to avoid any prejudice to any future litigation on it. There are, however, ample judicial decisions on the matter and I do not wish to rehash them. Except, however, for purposes of determining the protest, it suffices to cite Musyoka J in re Estate of Stone KathuliMuinde (Deceased) [2016] eKLR that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

[10] Applying the above legal test, the protest fails and is dismissed. The protestors are not left without remedy or recourse as they are at liberty to pursue their claim in the appropriate court. I note the protestors' action may have been a legitimate quest for justice albeit filed in the wrong court. I also take into account the conduct of the Petitioner and the widow in entering into the kind of agreement I have seen without proper authority of the law. On that basis I will not condemn the protestors to costs. The order I make is that each party shall bear own costs of the protest.

Confirmation of grant

[11] The protest has been determined. The court should now consider confirmation of the grant. Towards that end, I direct that all beneficiaries to appear before me on a date I will appoint for purposes of confirmation of grant. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Kibiti advocate for Mr. Muriuki advocate for protestor

Mr.Kaume advocate for Petitioner - absent

F. GIKONYO

JUDGE