



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.113 OF 2008

THE MATTER OF THE ESTATE OF STANLEY MUGAMBI M'ITHILI(DECEASED)

FLORENCE MAKENA PETITIONER

-VS-

JOHN MARURI M'IBERE.....1st APPLICANT

JOEL KILAA M'KIAMBI 2nd APPLICANT

JOHN MEME BONFACE 3rd APPLICANT

M'MUNORU M'MUGUONGO4th APPLICANT

RULING

Joinder of parties

[1] This decision relates to application dated 21st October 2016 in which the Applicants are seeking to be joined as parties in these proceedings. The Applicants claimed that they are bonafide purchasers of land from the deceased's father, Joseph M'ithiriKaira; and that they have extensively developed the parcels they bought. According to the affidavits of the Applicants, the following key facts are deposed to:

- a) 1st Applicant bought– 0.10 Acres on 12th October 1994;
- b) 2nd Applicant bought – 22 by 100 on 28th August 1995;
- c) 3rd Applicant bought– 22 by 100 on 7th October 1994;
- d) 4th Applicant bought– 25 by 100 on 17th June 1996;
- e) These parcels of land were to be excised from L. R. NO. NYAMBENE/ANTUBETWE/NJOUNE/648 registered in the name of the deceased's father, Joseph M'ithiriKaira.
- f) They all have each developed their respective arcsels of land.
- g) According to the Applicants the vendor allowed them to develop the land as they await the transfer of land to them but that did not happen.

f) The 2nd Applicant paid a consideration of Kshs. 40,000/-, the 3rd Applicant Kshs. 30,000/- and the 4th Applicant Kshs. 60,000/-.

[2] The 4th Applicant in his affidavit states that upon purchase, the seller subdivided the land and his parcel of land got a new number ANTUBWE/NJOUNE/2681. The vendor even got consent for him from the Land Control Board. In addition, the vendor wrote a letter to the Lands office asking that the land be transferred to him and other purchasers.

[3] According to the submissions filed by ARIN NKATHA STANLEY (the Deceased's widow), the estate to which these proceedings relate is the estate of Stanley Mugambi M'ithili and not Joseph M'ithiri Kaira. Therefore, as the Applicants purchased land from Joseph M'ithiri Kaira they should direct their claims to him or to his estate if he is dead. She submitted further that existence of a civil suit MERU CMCC NO. 717 OF 2012 between the Deceased and the Applicants means that their rights have not crystallized. She was of the view that they should continue with their claim under CMCC NO. 71 OF 2012 and seek remedy there and if they are successful, they can lodge a claim against this estate.

DETERMINATION

[4] I am in agreement with the Deceased's widow that the agreement was between the Deceased's father, Stanley Mugambi M'ithili, and the Applicants. However, the widow is being dishonest because, when Joseph M'ithiri Kaira died, his property namely NO NYAMBENE/ ANTUBETWE/NJOUNE/648 was vested in his personal representative, who is the Deceased. A personal representative also acts as a trustee for all persons with interest in the property and the remedy of tracing and following the trust property will apply. In fact this is the reason why case number CMCC NO.71 of 2012 was between the Deceased and the Applicants in relation to the ownership of the plot L.R. NO NYAMBENE/ ANTUBETWE/NJOUNE/648. And now that the Deceased has died the personal representative of his estate is the one to be joined in the case notwithstanding that this cause is still yet to be determined. [4] Having said that, is it proper to join the Applicants as parties in these proceedings? Courts have stated that joinder of parties in a succession cause is a matter of inherent jurisdiction of the court for purposes of ensuring the ends of justice are met and is ordinarily done under section 47 and rule 73 of the Law of Succession Act and Probate and Administration Rules respectively. See the case of re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR where Musyoka J elaborately states:

“Joinder of parties to a suit is concept in the ordinary civil process, where suits in the proper sense of the word are between two rival or contending sides. Other persons or entities not named as parties in the dispute may be joined, on application, to the suit if they meet certain conditions. ... Usually a person or entity will be joined where they have complementary claims with the parties arising from the same facts. The probate process can be said to be a civil process only to the extent of it not being a criminal process. It is, in most respects, a process completely distinct from that governed by the Civil Procedure Act, Cap 160, Laws of Kenya, and the Civil Procedure Rules. It is regulated instead by the Law of Succession Act and the Probate and Administration Rules, which prescribes processes that are clearly removed from those intended for the ordinary civil process. In other words, the probate process is a special jurisdiction with its own processes and procedures. Such special jurisdiction and procedures are saved by section 3 of the Civil Procedure Act.

The legislation that regulates the probate process has, however, imported into its practice certain provisions of the Civil Procedure Rules. That it has done through Rule 63 of the Probate and Administration Rules. However, the provisions of the civil process relating to joinder of parties are not among the provisions so imported under Rule 63.

The rationale for the omission to import the said rules has something to do with the design of the probate process. Succession causes are not ordinary suits in the sense where there are two rival claimants, asserting certain rights. Rather, it is a cause designed for the sole purpose of facilitating succession to the estate of a dead person. The ultimate goal being distribution of the estate amongst the persons, if they are more than. ... With regard to the assets, one of the

questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

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.

It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.

Joinder of parties is not envisioned in the probate process and should be avoided at all costs. It is not provided for under the relevant legislation, and it can only be allowed by the court in exercise of its inherent discretion. It is however my view that making an order to join an interested party in probate causes, even though I have on occasion done so, amounts to exercise of inherent discretion outside of its bounds.

This begs the hypothetical question that were this court to be of the persuasion that it had discretion to join third or interested parties to a probate cause, does the applicant qualify for exercise of that discretion in its favour? In the civil process, the persons who are joined to a suit as parties (whether as substantive parties or third or interested parties) must have an interest in or claim to whether directly or indirectly, to the subject matter of the suit.”

[5] I am aware that the Constitution enlarged capacity to sue. But, the court must not forget that the primary duty of court in a succession cause is distribution of the estate of the deceased. The Applicants seeks to be joined as interested parties in this cause so that they can protect the parcels of land which they claim they bought from the father of the deceased. I have stated before that the property in issue was vested in the deceased as personal representative of the estate of his father and could be traced as such. On prima facie basis, the applicants have an identifiable stake or legal interest although they are not parties in these proceedings. But, they need not be directly involved in these proceedings as parties; the law has devised ways of protecting their interests. Under rule 41 of the Probate and Administration Rules, the court may where such claims are made as in this case, appropriate or set aside the particular share in question or dispute to abide by the determination of the question in proceedings commenced under order 36 of the Civil Procedure Rules or in any other appropriate proceedings. In this case, there are already pending proceedings on the property in question. Accordingly, I hereby order that the parcels in question contained in L.R. NO NYAMBENE/ ANTUBETWE/NJOUNE/648 shall be set aside to abide by the determination of the court in MERUCMCC NO. 71 of 2012. I, therefore decline to join the applicants in this cause.

Dated, signed and delivered in open court at Meru this 26th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Gichuki advocate for B.G.Kariuki advocate for petitioner

Ojiambo advocate for Kimathi advocate for applicant

Anampiu advocate for interested party

F. GIKONYO

JUDGE