



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1091 OF 2009

IN THE MATTER OF THE ESTATE OF WILFRED CHEGE MUTHEMBA (DECEASED)

LUCY KASSIM MALAMBU.....PETITIONER

-versus-

HANNAH WANJIRU MALAMBU.....OBJECTOR

R U L I N G

Introduction:

1. The deceased to whose Estate these proceedings relate is Wilfred Chege Muthemba who died on 18th September, 2008. On 26th August, 2009, one Hannah Wanjiru Chege (hereinafter the Objector) filed an Objection to making of Grant on grounds that she was the mother of the deceased and Lucy Kassim Malambu (hereinafter the Petitioner), did not serve her with the relevant citation as required by law.

Objector's case:

2. The Objector states that she has an interest in the parcels of land mentioned in the petition filed by the Petitioner namely **Karai/Gikambura/1675** and **Karai/Gikambura/1674** which are subdivisions of Karai/Gikambura/826. The land was owned by the Objector's husband Fredrick Chege Muthemba (deceased) and her deceased son wrongly and fraudulently subdivided and transferred the two parcels to himself.

3. The Objector swore an affidavit in support of her application in which she deposes that during her husband's lifetime, he intended to subdivide his property, **Karai/Gikambura/826**, into three portions. 3.7 acres were to be set aside for his 7 daughters, 2 acres were to be set aside as matrimonial home and 2 acres to be given to their only son the deceased herein. Before her husband's demise, she was able to subdivide the property with the help of one of her daughters, and apply for consent to transfer **Karai/Gikambura/1675** to herself. Her husband however died on the same day she was issued with the consent and therefore no further dealings on the land would be possible. She did not obtain Letters of Administration to his estate.

Petitioner's Case:

4. The Petitioner in her replying affidavit deposes that she was the wife of Wilfred Chege Muthemba who died on 18th September, 2009. She applied for Letters of Administration to the estate on 12th May 2009,

and the Objector raised an objection thereto. The petitioner avers that her father in law Fredrick Chege Muthemba donated a Power of Attorney to her husband the Deceased, on 18th February 1993 and registered it the same day. The deceased used that Power of Attorney on 10th May 1993 to subdivide the property that is **Karai/Gikambura/826** into three portions as instructed by her father-in-law. 2 acres were to be sold to pay all the hospital bills of her father-in-law, another two acres were to be transferred to the Objector jointly with the deceased and 3.7 acres were to be transferred to the Deceased alone.

5. She asserts that there were previous proceedings in the Tribunal sitting in Kiambu West and later on in the Principal Magistrate's court at Kikuyu all aimed at disinheriting her and her children by the Objector. That the principal Magistrate adopted the proceedings of the Tribunal on 19th February, 2010 which stated that the Deceased transferred two parcels of land to himself instead of one.

6. The Petitioner states that in **Succession cause No. 325 of 2009; Estate of Fredrick Chege Muthemba**, the Objector procured Letters of Administration to the property Karai/Gikambura/1676 which was not sold as was required in the Power of Attorney, yet she denied knowledge thereof in her affidavit dated 10th October 2014.

7. The Petitioner avers that the tribunal was partisan and had a vested interest in the proceedings. That its main agenda together with the Objector and her daughters was to fetter and alter the direct terms of the Power of Attorney dated 18th February 1993 which in their illegal proceedings they managed to do. She wants the court to note that **Karai/Gikambura/1675** has since been sold to 3rd parties who are still awaiting transfer into their names and that these proceedings are aimed at divesting the said parties of their property as bonafide purchasers for value without notice contrary to the law.

8. The Petitioner asserts that the objection proceedings were filed in bad faith, aimed at disinheriting her and her children and hold absolutely no water and are full of malice and ill will. That in 1987 her father-in-law had the desire to transfer the entire **Karai/Gikambura/826** to the deceased and signed a document dated 22nd March 1987 to that effect and it was witnessed by two people. Her father-in-law later changed his mind and instead executed the Power of Attorney dated 18th February 1993.

9. M/s. Badia learned counsel appeared for the Petitioner while Mr. Wasilwa represented the Objector. M/s. Badia who raised many points of argument, begins by stating that the Objector herein had not complied with **Section 67, 68 and 69 Law of Succession Act**, there being no answer to petition or cross-petition filed, although she was properly represented in these proceedings. Counsel pointed out that the Objector had not raised the issue of the demolition of her house by the Deceased in her pleadings. She was therefore bound by her pleadings and could not raise it in evidence.

10. Counsel also argued that the Objector had not proved fraud against the Deceased in the manner in which the Power of Attorney was obtained and the terms of the Power of Attorney could not be altered by the Objector's oral evidence. She stated that the deceased's father had expressed a desire to transfer all of his land to him in 1987 and the Power of Attorney should therefore be construed within the law as a gift inter vivos. Counsel urged that the Objector having admitted the presence of buyers in parcel **No. 1675**, she was estopped from denying their existence. She asked the court to consider the buyers as innocent purchasers for value without notice.

11. Counsel asserted that there was no proof that the Objector was a dependant in the estate of the Deceased and she cannot therefore be provided for under the estate. The proceedings in the Land District Tribunal and the subsequent adoption by the Principal Magistrate court at Kikuyu were null and void and of no legal effect and the Objector's ignorance of the law was not a defence. She charged that the Objector has been indolent in this matter and further that there were inconsistencies between the Objector's pleadings and her evidence.

12. Counsel maintained that the property known as **Karai/Gikambura/826** belonged to the Deceased's father and the Objector could not therefore bequeath property which did not belong to her and the restrictions placed on **Karai/Gikambura/1674 and 1675** were therefore illegal and unjustifiable. Lastly

that the Petitioner is entitled to costs herein since costs follow events.

13. Mr. Wasilwa learned Counsel urged on behalf of the Objector that the Power of Attorney registered on 18th February 1993 terminated on 10th June 1993 when the granter thereof died. Any transaction carried out on the basis of the said Power of Attorney after the death of the granter should therefore be deemed to be null and void. Counsel argued that the parcel of land intended to be sold for purposes of settling the granter's medical bills was not sold for the intended purpose. The sale of the said parcel of land was therefore an affront to the very document the Petitioner was relying on.

14. Counsel submitted that the Deceased herein had no authority to transfer the two land parcels **Karai-Gikambura 1674** and **1675** to himself after his father's death, since no grant of representation had been issued with respect to the estate of his father. Further that under **Section 66** of the **Law of Succession Act** the surviving spouse had priority in the making of grant of Letters of Administration.

15. Counsel contended that the persons referred to as bona fide purchasers did not conduct any due diligence, or they would have established that the land they were buying belonged to Fredrick Chege Muthemba and not the Vendor. He stated that the Vendor was dealing with the land as if it belonged to him and not his father although no grant of Letters of Administration had been issued with respect to his father's estate. The purchasers cannot therefore be considered to be bona fide purchasers for value without notice.

16. The Objector was no longer living on the land and did not therefore know that the Deceased had sold portions of it. At the time of her testimony the Objector had become aware of two purchasers yet five purchasers testified. Counsel urged that the said sale of land was also null and void for failing to comply with certain statutory provisions with regard to the Stamp Duty Act.

17. Counsel questioned the propriety of the Petitioner depositing title to parcel **No.1676** which bore Fredrick Chege Muthemba's name as security at Karen hospital, where her husband was admitted and swearing an affidavit that she was the wife of the said Fredrick. She could have deposited any of the other titles which were already in her husband's name. Counsel urged that a grant of representation not having been issued in the estate of Fredrick Chege Muthemba, this court ought to return parcels **No.1674** and **1675** to the said estate where they belong.

18. I have perused the pleadings together with the evidence tendered in court and the rival arguments presented in the submissions and I note several undisputed points in the cause. First, the three plots adverted to by all the witnesses herein being parcels No. **Karai/Gikambura/1674, 1675 and 1676** were birthed from one piece of land being parcel No. **Karai/Gikambura/826**, which was the property of and was registered in the name of Fredrick Chege Muthemba. Fredrick Chege Muthemba deceased, was husband to the Objector and father to the Deceased herein.

19. It is also not in dispute that the parcel of land was subdivided into three plots one measuring 3.7 acres, and the other two measuring 2 acres each during his life time according to his wishes. Upon subdivision the three resultant parcels of land were registered in the name of Fredrick Chege Muthemba. The three plots from the subdivision were to be distributed with the parcel measuring 3.7 acres going to the Deceased herein and the 2 acres on which the matrimonial home stands going to the Objector. This was in the Objector's oral evidence.

20. The Objector is in possession of the title to **Karai/Gikambura/1676**, measuring 2 acres while title to **Karai/Gikambura 1674** which measures 3.7 acres and was transferred into the name of Wilfred Chege Muthemba is in the custody of the Petitioner. There is no dispute concerning these two parcels of land. The parties also agree that the wishes of Fredrick Chege Muthemba over the contested parcel of land measuring 2 acres that is Karai/Gikambura/1675 was that it should be sold for purposes of catering for his medical bills.

21. The issues that arise for determination are first, what the mandate in the Power of Attorney said to have been donated to the Deceased by his father Fredrick Chege Muthemba was and secondly, how the

disputed plot devolved to the deceased herein from his father's estate.

22. Fredrick Chege Muthemba had one wife, the Objector and together they were blessed with seven daughters and one son, the Deceased whose estate is the subject of these proceedings and who was the husband of the Petitioner herein. Letters of Administration have not been taken out with regard to the parcels of land No. 1674 and 1675. The beneficiary with first priority in obtaining grant of Letters of Administration in the estate of Fredrick Chege Muthemba, was obviously his widow the Objector.

Section 66(a) Law of Succession Act provides that:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- (c) the Public Trustee; and**
- (d) creditors:**

23. At the heart of this contestation is a Power of Attorney that the Petitioner says was donated to the deceased by his father, an assertion which the Objector disputes. According to **Black's Law Dictionary 9th Edition at page 1290**, by Bryan Garner, a Power of Attorney is an instrument granting someone authority to act as agent, or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal.

24. Fredrick Chege Muthemba died on 10th June, 1993. From then on all activity under the Power of Attorney ought to have come to an end. It is therefore important to establish how parcels **No.1674** and **1675** which belonged to him devolved to the Deceased without Letters of Administration having been obtained therefor. It must be remembered that a Donee of Power of Attorney uses it for the benefit of the Donor and not for his own benefit.

25. From the Respondent's testimony the Deceased transferred and obtained in his name, title to parcel No. **1674** on 30th September, 1996 and title to parcel No. **1675** on 10th October 2006, both long after Fredrick's demise in 1993. The deceased subdivided and sold parcel No. 1675 in 2005 while it was still in Fredrick's name. **Section 82 (b)(ii) Law of Succession Act** provides that:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(ii) no immovable property shall be sold before confirmation of the grant.”

The said transaction of sale was entered into after the deceased had died and before a grant was made or confirmed, therefor.

26. The Deceased did not have a confirmed grant of letters of Administration and was not the legal representative of the Estate of the deceased. He did not therefore have capacity to sell the assets of the Estate or any part thereof. Therefore, whereas the court recognises that the purchasers have a claim,

against the Deceased, that claim does not lie against the Estate of the Fredrick Chege Muthemba.

27. The purchasers having not bought the parcels of land from Fredrick Chege Muthemba or a legal representative of his estate, can only pursue their claim in the Environment and Land Court against the estate of the deceased. In the alternative they can enter into fresh negotiations with the Petitioner. The deceased had no colour of right to pass the property in the said plots to the purchasers as he did.

28. The persons referred to as bona fide purchasers should have conducted due diligence, and established that the land they were buying belonged to Fredrick Chege Muthemba and not the deceased herein. The deceased was dealing with the land which was still in the name of Fredrick Chege Muthemba as if it belonged to him although no grant of Letters of Administration had been issued with respect to his father's estate. The purchasers cannot therefore be considered to be bona fide purchasers for value without notice.

29. Even if the Petitioner's argument is that the wishes of Fredrick Chege Muthemba were for parcel **No. 1675** to be transferred and held in the joint names of her deceased husband and the Objector, that parcel would now belong to the Objector by the principle of "*jus accrescendi*", or the right of survivorship, the Objector having survived the deceased. In any case both parties testified that whereas Fredrick Chege Muthemba's wish was for parcel **No. 1675** to be subdivided into plots that would be sold to defray his medical bills, the plots were indeed sold, but the money was not employed towards defraying the said medical bills. The Objector and her daughters did bear that burden alone, while the Petitioner and the deceased herein consumed the proceeds from the sale of the plots alone.

30. It appears that the Petitioner and her deceased husband had all the intention of disinheriting their mother the Objector and that is why the Petitioner was keeping all three title deeds to the three plots, yet she admits that Fredrick Chege Muthemba instructed that one parcel of land on which the homestead stood should go to the Objector, a second parcel of land to go to the Deceased and yet another to be sold to cater for his hospital bills. The Petitioner testified that at one time she was in possession of all three titles. That Titles **No. 1674** and **1675** came into her possession when her husband died because they were always in her house, while title to 1676 was released to be used as security for a hospital bill when the Deceased himself fell ill and was admitted at Karen hospital.

31. The foregoing would also explain why the Petitioner used the Objector's title as security for her husband at Karen Hospital and not any of those that were in her husband's name. The court found it difficult to believe that the affidavit in which she described herself as the wife of Fredrick Chege Muthemba was sworn in genuine error, in view of the title deed in Fredrick Chege Muthemba's name which was supported by the said affidavit and which she gave to be used as security at the Karen Hospital.

32. The transfer of the properties known as **Karai/Gikambura/1674** and **1675** into the name of Wilfred Chege Muthemba was flawed *ipso facto* and is illegal on many levels. **Karai/Gikambura/1674** may be in the property in the possession of the Petitioner but it is the method that the deceased used to acquire it that was flawed. The property was supposed to be passed to him through transmission and not transfer and the records of the lands registry should reflect this fact.

33. In light of the foregoing the two properties **Karai/Gikambura/1674** and **1675** do not belong to the estate of the deceased herein and are not available for distribution. Although not prayed for it is the duty of this court to do justice to the parties before me. For that reason it is ordered as follows:

- i) Both properties be and are hereby returned to the estate of Fredrick Chege Muthemba to be distributed according to his wishes or as his intestate estate by his widow.
- ii) The transfer of the two properties **Karai/Gikambura/1674** and **1675** into the name of Wilfred Chege Muthemba is hereby revoked and cancelled.
- iii) The two properties **Karai/Gikambura/1674** and **1675** are hereby deleted from the list of assets

in the estate of Wilfred Chege Muthemba in Succession Cause No. 1091 of 2009.

SIGNED DATED and **DELIVERED** in open court this **24th day** of **August 2017**

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L. A. ACHODE

JUDGE

In the presence ofadvocate for the Applicant

In the presence ofadvocate for the Respondents