



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE No. 2204 OF 2011
IN THE MATTER OF THE ESTATE OF NYAMURA NJOGE
THUO ALIAS NYAMURA NJONGE THUO (DECEASED)
ROSEMARY NJERI NJAMURA.....APPLICANT
VERSUS
SAMUEL KIMANI NJAMURA.....1ST RESPONDENT
LEONARD THUO NJAMURA.....2ND RESPONDENT
AND
JAMES GITHUA KAMAU.....1ST INTERESTED PARTY
HANNAH NJAMBI NGANGA.....2ND INTERESTED PARTY
MUYA MUNYI.....3RD INTERESTED PARTY

RULING

The Deceased Njamura Njonge Thuo died intestate on 10th January 2017. Samuel Kimani Njamura and John Nganga Njamura; sons of the Deceased Petitioned for Grant of Letters of Administration Intestate vide Kiambu **Succession Cause No. 106 of 2010** with the Consent of the other beneficiaries.

The people who survived the Deceased are:

- I. Hannah Nyambura Njamura - wife
- II. Samuel Kimani Njamura - Son
- III. Leonard Thuo Njamura - Son
4. Rosemary Njeri Njamura - Daughter
- V. Jane Wanjiru Kiragu - Daughter

VI. John Nganga Njamura - Son

VII. Hanna Nyambura – Daughter to Elizabeth Wairimu (Deceased daughter)

VIII. Hanna Nyambura – Daughter to Lucy Wanyora (Deceased daughter)

The properties that were left by the Deceased are:

I. Dagoretti/Kinoo/2747

II. Plot No. 13 Kinoo Market

III. Plot No. 14 Uthiru Market

IV. Post Office A/C at Uthiru Post Office A/C No. 7916X

Grant of Letters of Administration Intestate were issued to the Petitioners on 15th December 2010 by the Resident Magistrate Court, Kiambu. The Grant was later confirmed and the certificate of confirmation of grant was issued by the Chief Magistrate's Court, Kiambu on 21st July 2011. According to the Certificate of confirmation of grant, the two Administrators were to hold Plot No. 13 Kinoo Market and Plot No. 14 Uthiru equally as trustees on behalf of the entire family. 80% of the money in Post Office Account was to be transferred to Samuel Kimani Njamura (the 1st Administrator) and 20% thereof was to be transferred to John Nganga Njamura (the 2nd Administrator).

Dagoretti/Kinoo/2747 was to be divided in the following way:

I. Samuel Kimani Njamura – 0.63 acres

II. Leonard Thuo Njamura – 0.63 acres

III. John Nganga Njamura – 0.51 acres

IV. Jane Wanjiku Kiragu – 0.12 acres

V. Hannah Nyambura Njamura – 0.12 acres

VI. Rosemary Njeri Njamura – 0.38 acres

VII. James Githua Kamau and Hannah Njambi Nganga (purchasers) – to share 0.25 acres jointly

VIII. Moses Munyua Nganga (purchaser) – 0.12 acres

IX. Samuel Kimani Njamura , John Nganga Njamura and Leonard Thuo Njamura – 0.05 acres for graveyard

X. Road access - 0.50 acres

Application for Summons for Revocation of Grant dated 5th October 2011 was then filed on 6th October 2011 by Hannah Nyambura Mjamura, Jane Wanjiru, Rosemary Njeri. They sought to revoke the confirmed grant on grounds inter-alia that the grant was obtained fraudulently, the Administrators of the Estate had personal interests in the Estate of the Deceased and that they had not consented to the mode of distribution of the Estate and as such, the grant was obtained without their consent. In the Affidavit in support of the Summons, they reiterated the grounds in the Application and further submitted that the signatures that appeared in the consent to the mode of distributed were not theirs and they had been forged. They also submitted that the certificate of confirmed grant bore names of persons who were not

beneficiaries of the Deceased and they came to learn that the said persons were purported purchasers of part of the Deceased property being Dagoretti/Kinoo/2747. The alleged Purchasers had started putting building material on the property. They further stated that the Administrators had wrongfully sub-divided Dagoretti/Kinoo/2747 and sold it to the aforementioned persons. They also stated that upon conducting a search, they learnt that the 2 plots Uthiru and Kinoo were now registered in the names of the Administrators as trustees of the entire family. Regarding the money in in Post Bank A/C, they submitted that the same had been divided between the 2 Administrators solely.

The Applicants then filed a Notice of Motion Application 4th May 2012 which was amended on 11th May 2012. They sought for orders inter-alia that pending the hearing and determination of the Summons for Revocation, the Court issues a temporary injunction restraining the Respondents/Administrators and the purported purchasers James Githua Kamau, Moses Munyua and Hannah Njambi Nganga from trespassing or erecting any structure on Dagoretti/Kinoo 5188, 5189 and 5190 which are subdivisions of Dagoretti/Kinoo 2747 pending the hearing and determination of the Summons for Revocation. Also, that the Court issues a Restriction order to the Registrar of Lands restraining him from registering the said parcels. **Accordingly, the interim orders were so granted by the Court on 6th October 2011.**

The Administrators replied to the Summons by way of Replying Affidavit dated 28th November 2011. They denied the allegations of forgery and in the alternative submitted that the other beneficiaries did consent to the mode of distribution and they all confirmed the same by signing consents to the confirmation of grant which was attested to by an Advocate and that they were present in Court during the confirmation of grant at Kiambu Law Court. They submitted that they sold a portion of the Deceased land in a bid to raise funds that would enable them finalize the Succession process and procurement of title deeds which explains why part of the parcel of land Dagoretti/Kinoo 2747 was sold to James Githua Kamau, Hannah Njambi Nganga and Moses Munyua Nganga.

With regard to the money in the Bank, they stated that the money was still intact and none had used it. They also submitted that the purchasers had paid money which was used to finalize the Succession process and so it would be unfair to grant the orders sought.

According to a Supporting Affidavit of Rosemary Njeri Nyamura, one of the Applicants in the Summons for Revocation, the Administrators/Respondents defied the Court order and went ahead to sub-divide and distributed Dagoretti/Kinoo 2747 and new titles were issued in the names of the Interested Parties. She also submitted that the two purchasers James Githua Kamau and Hannah Njambi Nganga had disregarded the Court order and continued to build structured on the land.

On 24th March 2015, Hannah Njambi Nganga, one of the purchasers put in a Replying Affidavit in response to the Applicants Application of 11th May 2012. In opposing that particular Application, she submitted that the Administrators of the Estate sold to them a plot out of Dagoretti/Kinoo 2747 measuring about 0.25 acres at Ksh. 5.3 Million. A copy of the sale agreement dated 26th May 2011 was produced before the Court. She submitted that after the sale, they took possession of the property and the same was duly transferred to them and they began to develop the property. She further stated that they were not aware that the other beneficiaries had objected to the sale and their possession of the property and when they were informed by the Administrators that there were issues raised by the other beneficiaries, they instructed their Advocates to peruse the Court file and upon perusal, they became aware of the Application dated 11th May 2012 which was scheduled for hearing on 30th September 2014 and they were allegedly represented by the firm of M/S Peter Gachuhi & Co. Advocates.

They further submitted from the perusal, they also became aware of an Application for Summons for Revocation of grant which was pending hearing and determination. In opposing the said Applications, they stated that they had acquired their ownership of the plot lawfully and the construction thereon which the Applicants were aware of were at an advanced stage and it would be unfair to stop them. They also brought it to the attention of the Court that they were never served with any Court order and they knew of the same upon perusal of the Court file and as such they cannot be deemed to have defied the said orders.

Rosemary Njer Njamura, daughter to the Deceased then filed an Application for Summons under certificate of urgency on 30th November 2015. In the Summons, she prayed for orders that, pending the hearing and determination of the Application and the Summons for Revocation earlier filed:

I. There be a temporary order restraining the Respondent and the 1st and 2nd Interested Parties from trespassing or erecting any structures on the parcels of land Dagoretti/Kinoo/5188, 5189 and 5190 being sub-divisions of Dagoretti/Kinoo/2747.

II. There be temporary order restraining the 3rd Interested Party from trespassing or erecting any structures on Plot No. 18 Kinoo Market registered in the name of the Deceased.

III. That the O.C.S Kabete Police Station do assist in execution of the orders.

The grounds in support of the Application were that:

I. The Respondents are the Administrators of the Estate of the Deceased.

II. The 1st Respondent purported to sell the parcels of Dagoretti/Kinoo 5188, 5189 and 5190 to the 1st and 2nd Interested Parties

III. The Respondents have purported to sell the Deceased land plot no. 18 Kinoo Market to the 3rd Interested Party without the consent of the beneficiaries.

IV. The 1st and 2nd Respondents have had been restrained from erecting structures by an order of the Court dated 6th October 2011.

V. The 1st and 2nd Respondents had ceased further construction until recently when they resumed construction work.

VI. The 3rd Respondent has purportedly bought Plot No. 18 Kinoo Market and has given notices to vacate to the tenants

VII. The Applicant and Widow who is sickly depend on the rent collected in Plot No. 18 Kinoo Market.

VIII. The Tenants have ceased to paying rent as they have been asked to leave to allow the 3rd interested Party to demolish the rental structures.

IX. The Beneficiaries of the Deceased will lose their inheritance if the interested parties are allowed to purchase the properties

X. The purported sale of the Deceased property amounted to meddling with the Estate of the Deceased.

The Affidavit in Support of the Application reiterated the grounds in the Summons and the averments in the Summons for Revocation of grant earlier filed. They further expressed their concerns that they did not know how the 2nd Respondent Hannah Njambi Nganga became an Administrator after the demise of John Nganga Njamura (deceased) as no Application for substitution was made and that the Respondents removed the caution lodged by them on L.R No. Dagoretti/Kinoo/2747 and disposed the land to the purported purchasers who were issued with new title deeds. Copies of the said title deeds were adduced as evidence.

ADMINISTRATORS/RESPONDENTS SUBMISSIONS

The Respondents/Administrators filed their submissions on 18th July 2016. They submitted that the other family members had consented to them being the Administrators of the Estate of the Deceased. Likewise, they also submitted that the beneficiaries were also consulted and they agreed to the mode of distribution of the Estate by signing consents to the confirmation of grant which was witnessed by an Advocate of the High Court. They further submitted that the beneficiaries attended Court and were present during the confirmation of grant.

They also submitted that the family did not have the necessary funds to follow up the succession and conveyancing process and thus, they agreed to sell a portion of the Estate to generate the required funds and this explains why a portion of the Estate was sold to the Interested Parties.

They denied the allegation that the widow had been disinherited by submitting that all the beneficiaries of the Deceased Estate had been taken care of by being given a share from the Deceased Estate as shown by a copy of the certificate of confirmation of grant.

Regarding the money in Post Bank, Uthuru Branch, they submitted that it was still intact and that it had not been divided between them as alleged. They further submitted that the purchasers had paid for the sale and the money had been used to facilitate the Succession and Conveyancing process and thus it would be unfair to revoke the grant.

In relying on the grounds for revocation and annulment of grant as listed under Section 76 of the Law of Succession Act, they submitted that the allegations of fraud and concealment had not been proved because the Beneficiaries had agreed to them being appointed Administrators and to them applying for confirmation of the grant. Accordingly, they prayed that the Application be dismissed with cost as it was only an afterthought having consented and agreed to what took place.

APPLICANT'S SUBMISSIONS

The Applicant filed her submissions on 11th November 2016 wherein she relied on the Affidavit in support of the Summons and the grounds on which the Summons was found as highlighted above. Further, they submitted that the Law of Succession Act and the Constitution advocated for equality of all Beneficiaries. Accordingly, she submitted that there were no reasons tendered why some children got a bigger share than others. She proposed that the properties of the Deceased revert back to his name and be redistributed as proposed in her submissions.

INTERESTED PARTIES' SUBMISSIONS

They filed their submissions on 14th November 2016. They stated that they bought parcels no. Dagoretti/Kinoo/5188, 5189 and 5190 in good faith and on the assumption that the Respondents had good title vide a sale agreement dated 26th May 2011 since they had proved to be indeed the Administrators of the Estate of the Deceased and had authority to sell. They further submitted that they were informed that the said sale was to generate funds to facilitate the conveyancing of the entire Estate. They admitted to having put up an ongoing construction because they had acquired that land in good faith.

They submitted that they had demonstrated that they had a beneficial and proprietary interest in the suit property as well as an overriding interest under **Section 28 of the Lands Act, 2012** and thus cancellation of the transfer to them will cause them irreparable damage and loss which the Applicants would not be able to compensate.

They relied on the following authorities:

I. Beth Kaari & Another v M'nyeri M'rimunya [2013]eKLR

II. Nabukenya v Mukula & 4 Others (Civil Suit No. 046 of 2011) [2013] UGHCLD 62 (19 June 2013)

DETERMINATION

From the foregoing summary, the issues for determination before this Court are:

- I. Whether the grant confirmed on 21st July 2011 should be revoked in light of the circumstances pleaded above and;
- II. Whether the purchasers' interest are protected.

REVOCAION OF THE GRANT

From the above, this case falls under intestate succession governed primarily by the provisions of **the Law of Succession Act** on intestate succession taking into account the fact that the Deceased died without a Will.

Section 71(1) of the Law of Succession Act as read with **Rule 40 of the Probate and Administration Rules** provides for the procedure to be followed when one applies for confirmation of grant

Section 71(1) provides;

“After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.....

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

Similarly, **Rule 40(4) of the Probate and Administration Rules** provides;

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined...”

Accordingly, pursuant to the above provisions, an Application for Summons for Confirmation of grant ought to list the beneficiaries of the Estate, the Assets available for distribution as well as the proposed mode of distribution which must be consented to by all the beneficiaries of the Estate. According to the facts, it is not disputed that the Samuel Kimani and John Nganga Njamura were indeed allowed by the other beneficiaries to apply Petition the Court for grant of letters of Administration Intestate.

However, the contention is that the Applicants and the other beneficiaries who filed Application for revocation of grant before the Court allege that they did not consent to the proposed mode of distribution and the Administrators proceeded to apply for confirmation of grant without their knowledge and consents. Moreover, it clear from the pleadings and evidence adduced that the Certificate of confirmation of grant included persons who were not beneficiaries of the Estate as defined under **Section 29 of the Law of Succession Act** and omitted some beneficiaries. Their claim to the deceased's estate was not disclosed to the Court and they are not beneficiaries or dependants of the deceased.

Pursuant to the confirmation of grant, Administrators who are deemed to be trustees under the **Trustees Act, Cap 164** are under a statutory duty under **Section 83 of the Law of Succession Act** to distribute the residual Estate in accordance with the Will in cases of testate succession or in accordance with the law on intestacy. This being an Intestacy Succession, the Administrators ought to have been guided by the provisions of **Section 35 and 38 of the Law of Succession Act** which grants the surviving spouse a life interest in the whole residue of the net intestate estate and provides that the Estate be equally divided

among the surviving children respectively.

From the pleadings, it cannot be said that the law was followed in facilitating the Administration of the Estate. The Administrators wrongfully added third parties who do not fit in the definition of 'dependants' to the certificate of confirmation of grant. Moreover, the mode of distribution was not equally as required by the law and some of the beneficiaries were in fact left out.

Section 76 of the Law of Succession Act provides,

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) ... or

(ii) to proceed diligently with the administration of the estate; or

(iii) ...

(e) ...

It has been pleaded and submitted that the signatures in the consents presented to Court in support of the Summons for Confirmation of Grant were forged and the Administrators have not explained how they obtained consents especially the widow of the deceased's signature as it is disclosed in pleadings that she is unwell and incapable of decision making.

On the other hand, the Administrators have denied this allegation and put the Applicant to strict prove thereof. Be as it may, it is clear before this court that the Administrators who have a duty to act in good faith and in a fiduciary capacity to all beneficiaries did not reveal to the Court and obtain consents from beneficiaries on the sale of part of the deceased's estate, that some of the people included in were not beneficiaries but purchasers. They failed to diligently administer the Estate among the beneficiaries as required of them under the **Law of Succession Act**. The mode of distribution was not founded on any law and no agreement was reached by all beneficiaries. The Administrators acted unlawfully and illegally contrary to their statutory mandate by giving themselves bigger portions of the Estate and disposing the rest of the property and retaining proceeds of sale without the consents of the other beneficiaries. Accordingly, the grant issued on 15th December 2010 and confirmed on 21st July 2011 is hereby revoked under **Section 76 (a) (b) & (c) of the Law of Succession Act**.

INTEREST OF THE PURCHASERS

The next issue is whether the interests of the purchasers herein 'the interested parties' are protected. The interested parties deposed that they have a proprietary interest in the aforementioned suit properties since they bought them in good faith and gave a consideration in exchange thereof. From the sale agreement dated 26th May 2011 between the Respondent and John Nganga Njamura (the previous Administrator; now deceased) on one part and the 1st and 2nd Interested Parties on the other, it appears that 0.25 acres out

of Dagoretti/Kinoo/2747 measuring approximately 1.38Ha was sold to the Interested Parties at a consideration of Ksh. 5.3 Million, a fact which has been admitted by the Administrators who claimed to have used the money to conclude the Succession and Conveyancing process of the rest of the Estate. The 3rd Interested Party however does not feature anyway in the sale agreement relied upon in their submissions. His claim of having purchased Plot No. 18 Kinoo Market and not been sufficiently established before this Court.

Section 93(1) of the Law of Succession Act provides:

“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

Section 24 of the Land Registration Act, 2012. No. 3 of 2012 provides:

“Subject to this Act—(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

Although **Section 93** as read with **Section 24** as aforehighlighted gives a blanket protection to purchasers. Courts have applied it only in cases where according to the circumstances at hand, the purchaser can be rightly deemed to be ‘**a bonafide purchaser for value without notice.**’

In **JACINTA WANJA KAMAU V ROSEMARY WANJIRU WANYOIKE AND ANOTHER (2013) E KLR** where the appellant therein unsuccessfully sought protection under **Section 93**, the Court of Appeal sitting in Nyeri stated:-

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser...”

In **JANE GACHORA GATHETHA VS PRISCILLA NYAMIRA GITUNGU AND ANOTHER (2006) EKLR** where a purchaser claimed that he was not aware of, and was not party for the fraudulent dealings with the title in issue and was therefore not only protected under **Section 93(1)** of the **Law of Succession Act** but also **Section 143** of the **Registered Land Act** (now repealed) the Court of Appeal in Nyeri elucidated:-

“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void abinitio and the property is traceable.”

In this instant case, the 1st and 2nd Interested parties have established that they indeed purchased part of the suit property. The Administrators who are sons of the Deceased did have a right to Petition for grant under **Section 66 of the Law of Succession Act** and the same was exercised with the consents of the other beneficiaries, that is, before they decided to advance their personal interests. So although, the administrators obtained consents to obtain the grant, this Court is not satisfied that obtained consents for confirmation of grant and authority to sell any part of the deceased's estate from all beneficiaries.

This Court finds that the 1st and 2nd Interested Parties are protected by the provisions of **Section 93 of Law of Succession Act** because they have proved from the presented Agreement for Sale they are bona fide purchasers for value without notice of defective title, in that they presumed the Administrators had the lawful authority and consents from all beneficiaries to sell the said properties were legally transferred

to them and titles issued. They paid 5.3m for the said purchase of land.

The 3rd Interested Party Moses Munyua Nganga is however not protected under the said Section 93 of Law of Succession Act because , he did not provide any evidence of the alleged purchase has been adduced and the Court cannot establish whether or not the said purchase took place.

It is also a matter of concern to this Court that;

- a) The administrators did not disclose to the Trial Court the medical capacity of the widow who ought under Section 66 of Law of Succession Act to have obtained grant and distributed the estate.
- b) The administrators did not disclose and inform the beneficiaries of proceeds of sale of part of the deceased's estate to James Githua, Hannah Njambi Nganga and Moses Munyua Nganga and how the funds were utilized towards Succession proceedings.
- c) The administrators sold part of the deceased's estate to obtain funds to process Succession proceedings, yet they admitted that there are funds to date in the deceased's account. Why was it not utilized first before unilateral sale of the deceased's estate?
- d) The Administrators failed to inform the Court that one of the administrators John Nganga Njamura died. Yet they went ahead without consulting beneficiaries and appointed the widow of the deceased administrator as administrator without order of Court from substitution proceedings.

DISPOSITION

From the foregoing, it is hereby ordered that:

- I. The grant issued on 15th December 2010 and confirmed on 21st July 2011 is hereby revoked.**
- II. The 1st and 2nd Interested Parties as Purchasers are hereby protected by Section 93 of the Law of Succession Act.**
- III. The Administrators/ Respondents are hereby removed from being Administrators of the Estate of the Deceased.**
- IV. They shall account to this Court and all beneficiaries on proceeds of sales that they undertook with regard to the deceased's estate and how the amounts were expended and what is available to the other beneficiaries within 90 days from today.**
- V. In default in the distribution of the deceased 's estate the Court shall take into account the portions of the deceased's land sold by the defunct administrators as part of their beneficial share of the deceased's estate.**
- VI. Any aggrieved party may apply or exercise right of appeal.**
- VII. Costs shall be in the Cause.**

DELIVERED DATED & SIGNED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF AUGUST 2017.

MARGARET W. MUIGAI

JUDGE

IN THE PRESENCE OF;

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