



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO. 1783 OF 2012

IN THE MATTER OF THE ESTATE OF GEORGE MURORI NDEGWA

DAVID KURIA NDEGWA.....PETITIONER/ APPLICANT

VERSUS

MOSES MUAGUA MUUTI.....RESPONDENT

RULING

1. On the 9th of November 2010 parties in this cause consented that Succession Cause No. 216 of 2008 in the Senior Principal Magistrate's Court at Kiambu be transferred to this Court for hearing and determination.
2. The said file was transferred to the High Court. From the said file this is what I gather. The deceased died on the 14th of July 2002. On the 16th of September 2008 Moses Magua Muuti a purchaser filed a petition in the Chief Magistrate's Court seeking to be granted the letters of administration intestate. In his affidavit in support of the petition he deposed that the deceased left the following survivors David Kuria Ndegwa and Robinson Peter Ndegwa and himself as a purchaser.
3. The petitioner thereafter filed citations against the deceased's brothers. On the 12th of November 2008 David and Robinson filed an affidavit in answer to citation and cross-petition for grant of letters of administration. In their joint affidavit they depose that they are the brothers of the deceased. That the petitioner has presented the petition in his capacity as a purchaser of an alleged piece of land namely Karai/ Gikambura/430 allegedly belonging to the deceased. They seek to have the applicant's petition dismissed for the following reasons; that the deceased was not married and had no children and the only persons left surviving him are his brothers. That the applicant did not inform them that he was filing the petition and only became aware when they were served with the citation. That they did not consent to the letters being issued to him nor did they attend the offices of Leonard Kirori advocate for purposes of authenticating their signatures as appears on the consent. That the land allegedly purchased by the applicant is still jointly owned by Grace Ndegwa (deceased), Martha Wambui Ndegwa (deceased), Robinson Peter Ndegwa, David Kuria Ndegwa and George Muroki (deceased) who are siblings of the deceased. That the land was divided into portions with each person getting a piece but it remained registered in the joint names of the persons and no transactions would take place on the land without the consent of the other registered members. That to the best of their knowledge the deceased never sold his portion of the land to the applicant and that such a sale would have required their consent which was never acquired. That they are aware that the deceased used to rent out his portion of the land to the applicant for cultivation purposes and the applicant would pay rent and that after the deceased's death the applicant continued to cultivate the land but stopped paying rent. That the said land falls within a controlled area under the ambit of a Land Control Board and under the said Act, if there was any sale the

relevant Land Control Board would have issued its consent within 6 months of the sale. That no such consent has been requested for, issued or exists in relation to the said piece of land, thus there can be no valid sale under the circumstances. That at a meeting where David Kuria Ndegwa was summoned by a Minister of PECA Njumbi Parish over the said land David was informed by the minister and the applicant that the applicant had purchased the portion of land belonging to the deceased which is about 1.2 acres from the deceased at Kshs. 40,000/-. That the applicant has no capacity to apply for the letters of administration of the estate of the deceased and that the said letters should be issued to them.

4. On the 22nd of April 2015 Moses Muuti filed affidavit in support of his petition. He reiterates what he deposed in his earlier affidavit in the CM's Court adding the following; that he filed the petition after the survivors failed to file the petition after the deceased's death on the 14th of July 2002. That he purchased the deceased's share in Land parcel no. Karai/Gikambura/430. He bought it piecemeal through three agreements which were reduced in writing by Ms M. W. Muhuhu advocate who also witnessed the said agreements. That the 1st agreement was entered on the 24th of September 1997 for purchase of 0.5 acre at a cost of Kshs. 100,000/-. That at the said time the deceased had informally subdivided and pointed out the boundary of the said half acre portion from his 1.22 acres in the said parcel of land. That the deceased also disclosed to him that the land was jointly owned by himself and his siblings and that the later had clearly demarcated their specific portions and were in occupations of their respective portions. They agreed that the deceased would instruct a surveyor to formally subdivide the land and to formally transfer the land to him. Subsequently the deceased sold a further 0.3 for Kshs. 50,000/- on the 29th April 1998, 0.4 for Kshs. 60000/- on the 7th September 1998. That between September 1998 and 2nd of August 200 he assisted the deceased and his brothers in the process of formally subdividing the said parcel of land to enable separate titles with him getting his title too. Later he instructed a surveyor John Mahinda and they met at the surveyors, the deceased and his siblings except Martha Ndegwa and they proceeded to Kikuyu to survey and subdivide the land and all parties signed the Mutation forms. Unfortunately the deceased died before the process of subdivision the land was formalised. That the Citees had no objection to him purchasing the said land and he continued to purchase the land until the court order. That he believes that it is only David Kuria who is opposed to his claim as all his other siblings support the position on the ground. That he has no objection to his petition and the cross-petition of David Kuria being jointly published in the Kenya Gazette and the two of them being appointed as administrators. He pointed out the deceased was buried in the portion of land of David Kuria after he objected to his burial in the portion he purchased. That he did not forge the signatures of David and Robinson in the consents as alleged that he filed the said unsigned document hence the subsequent citation.

5. David Kuria Ndegwa filed a cross petitioner's affidavit in support of the petition for letters of administration filed on 21st January 2010. He too reiterated the contents of his earlier affidavit adding the following; that prior to his death the deceased sought to effectively lease his portion of the property and so proposed that they undertake a formal subdivision of the property and that's is why they signed the mutation form. That the deceased never sold the land to the Citor as the property is jointly owned and their consent would have been sought. That after the demise of the deceased the property vests to the surviving joint owners. That the alleged mutation was not registered hence it lacks authenticity and is not conclusive evidence of sale. That he has always understood the Citor to be a tenant of the deceased's portion of the property and he has breached the tenancy upon refusal to continue paying rent after the death of the deceased.

6. After the court gave directions on the hearing parties adduced viva voce evidence. The Citor Moses Muuti adopted his affidavits filed in support of his case. He reiterated that he came to court as a purchaser and only after the deceased and some of his others passed and no action was being taken on the deceased's estate. In cross-examination he maintained his evidence in chief. He admitted that he had no consent from the siblings of the deceased and that the title had not come out as they were waiting to go to the board to get the consent.

7. David Kuria Ndegwa the Citee too adopted his affidavit adding that they buried their brother in the family burial place, which is in his parcel of land and that the purpose of the mutation was to know the portion Moses was to rent and it is Moses who took the mutation form to his home.

8. Parties filed written submissions which I have read and considered. The issue for determination is who should be the administrators of the deceased's estate. The petitioner admits that he is a purchaser of land parcel no. Karai/Gikambura/430. The Citees are the brother of the deceased. Section 66 of The Law of Succession Act Cap 160 provides the order of preference to be given to certain persons to administer where the deceased dies intestate. The section states 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 interest 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 interest as provided by part V:*
- c. The Public Trustee; and*
- d. Creditors*

Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will.

Section 39 of part V provides as follows;

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

- a. Father; or if dead*
 - b. Mother; or if dead*
 - c. Brother and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none*
 - d. Half-brothers and half-sisters and any child or children of deceased Half-brothers and half-sisters, in equal shares; or if none.*
 - e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.*
- 2. failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the consolidated fund.*

9. The petitioner falls under the category of a creditor as provided under Section 66 and ranks lower than the Citees. His main reason for filing the petition is that he purchased 1.2 acres out of land parcel No. 430 and that the deceased died before he got his title and that he is entitled to the said 1.2 acres. The Citees have challenged the said purchase and seek to be made administrators. In the submissions both sides submitted at length on the Citor's rights and interest in the said parcel of land. The parties have quoted laws relating to registration of land on the said issue. The issues of who owns the land or what interest or right the Citor has can only be determined in the Environment and Land Court (ELC). The said court has the jurisdiction to determine whether there was a purchase and further investigate the Title held by the Citees and his siblings, whether as joint tenants or tenants in common. In my view the Citees being the brothers of the deceased his siblings, rank in priority and should be appointed the administrators of the deceased estate. The petitioner /applicant is at liberty to pursue his claim in Land Parcel No. 430 in the ELC Court. The grant of letters shall issue to the Citees **David Kuria Ndegwa** and **Robinson Peter**

Ndegwa who were the surviving brother of the deceased. At the confirmation of the grant the administrators shall not include the portion that is being claimed by the Citor. The grant can be amended once the Citor proves his claim. No orders as to costs.

Dated, signed and delivered this **28th** Day of September **2017**

R. E. OUGO

JUDGE

In the presence of:

Mr. Ogutu h/b Mr Gachimo For the Citor

Absent Citees

M/s Charity Court/ clerk