



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 766 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE GRACE WANGUI RUNGU alias WANGUI RUNGU-DECEASED

Njoki Gicheru NdiuniPetitioner/Applicant

Versus

Dadson Githenji Wahome.....1st Protestor/Respondent

Mary Muthoni Githenji.....2nd Protestor/ Respondent

Dadson Githinji Stephen.....3rd Protestor/Respondent

James Gatere Wahome.....4th Protestor/Respondent

RULING

By way of a summons dated 19th August 2015 expressed under the provisions of Rule 73, 49 and 59 (1) of the Probate and Administration Rules, **Njoki Gacheru Ndiuni** (hereinafter referred to as the applicant) moved this court seeking orders that the registration of the protestors herein as the proprietors of land parcel number **Githi/ Muthambi/41** be cancelled and that the same reverts back to the deceased's name **Wangui Rungu** and the first protestor herein **Dadson Githenji Wahome** and that the court orders the Land Registrar Nyeri to dispense with the original title held by the protectors while effecting the said cancellation. The applicant also prays for an order directing the removal of the restriction placed by the Criminal Investigation Department and also seeks costs of the application.

The grounds relied upon are that the transfer was effected fraudulently, that the land in question belonged to the deceased in this case and the first protestor herein **Dadson Githinji Wahome** in equal shares as per the search annexed to the affidavit in support of the said application, that the deceased died on 12.5.2010 and that this cause was filed on 7.9.10, that the same was gazetted as required and no one raised objections and the grant was issued to the petitioner/applicant on 15.6.11 and that while this cause was pending on 23.11.10 the protestors fraudulently transferred the said land to them, that upon learning of the said transfer the applicant lodged a complaint with the police who placed a restriction on the title, but unfortunately the police investigations have yielded nothing. That the protestors have not produced any document to show how they acquired the land.

The 1st protestor herein swore the affidavit dated 10.12.15 and averred *inter alia* that he was one of the registered proprietors herein together with the deceased, that the applicant has no claim to the land and that there were no fraudulent transactions in the registration in question. The other protestors did not deem it fit to reply to the said application.

At the hearing of the application, both advocates essentially adopted their respective clients affidavits.

Section 47 of the Law of Succession Act[1] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[2] and pronounce such decrees and make such orders therein as may be expedient.

Further under Rule 73 of the Probate and Administration Rules it is provides:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Rule 49 of the Probate and Administration Rules provides that:-

“A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”

Rule 59 (1) provides that *“save where otherwise provided in these rules every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate.”*

It is not disputed that the deceased and the first protestor owned the property in question in equal shares. Section 91 of the Land Registration Act[3] provides as follows:-

91. Meaning and incidents of co-tenancies

(1) In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

(2) Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content of the rights of the persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common.

(3)...

(4)...

(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

The land in question was held in common in undivided shares. Upon the death of the deceased, his share was to be treated as part of his estate. But in this case the co-proprietor proceeded to cause the land to be transferred to himself and the co-respondents in this application. The documents in support of the said transfer have not been produced hence it's not clear how the first respondent transferred the entire land which includes the deceased's share to himself and the others.

The issue that falls for determination is whether the purported transfer to the Respondents was done lawfully or fraudulently and whether the title now held by the respondents can be allowed to stand.

E. A. Francis in the book *“The Law and Practice relating to Torrens Title in Australasia”*[4]states that:-

i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.

ii. *Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.*

iii. *Fraud must involve an element of dishonesty or moral Turpitude.*

iv. *The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.*

v. *The fraud which the sections refer is that of the registered proprietor or his agent.*

In the case of *Assets Co Ltd vs Mere Roihi*^[5] **Lord Lindley** stated as follows:-

".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

The search exhibited to the applicants application marked **NGN5** shows that the entire land is registered in the names of the first, second and third Respondents. It's not clear why the fourth Respondent has been sued in these proceedings. Unfortunately, the Respondents have not explained how they acquired their interests to the said land. There is no explanation at all whether they purchased or what consideration if any they paid. No documents were availed to show how the transfer was effected. Addressing a similar issue **Lord Lindley** in the above cited case of *Assets Co Ltd vs Mere Roihi*^[6] had this to say:-

"Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a registered owner or from a person claiming under a title.....must be brought home to the person whose registered title is impeached or to his gents. Fraud by persons from whom he claims does not affect him unless knowledge of it is bought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries.....the case is very different and fraud may be properly ascribed to him....."

In the present case, the none of the Respondents has tendered evidence to explain how the title was transferred to them. Also, it is not disputed that the deceased owned the title together with the first Respondent. It follows that after the demise of the deceased, the share held by the deceased became part of his estate and could only be dealt with as provided for under the law of succession. Thus, the purported transfer of the deceased interest in the said land was not in accordance with the law and cannot be allowed to stand. The Respondents knew that the deceased had passed on and the mere fact that they were parties to the said transfer, raises the possibility of bad faith or an element of fraud because the deceased was not there to sign the transfer to them.

The question that arises is whether or not anyone could legally transfer or cause the property to be transferred to them. The answer to this question lies in Section 45 of the Law of Succession Act which provides that:-

45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person"

The section is clear that the *status quo* as at the time of the deceased's death ought to be maintained. The law requires that the deceased's persons' eatate ought to be preserved as at the time of death. In the matter of the estate of *M'mugambi M'guoko alia Mugambi Gwoko alia Mugambi Guoko- Deceased*^[7] **Makau J** held that the Petitioners acts in the said case of attempting to sell or selling the deceased's property to anyone was illegal, null and void for contravening section **45(1)** cited above.

Even if we were to assume that the second, third and fourth Respondents purchased the said land, Section **82 (b) (ii)** of the Law of Succession Act provides that:-

‘No immovable property shall be sold before confirmation of Grant’

The Respondents herein are armed with a title to the suit premises. Even if this court was to accept that a transfer was executed, that the transaction was entered into before the Grant was issued and confirmed. Thus, the transaction offends both Section **45(1)** and Section **82 (b) (ii)** cited above. These are points of law which go to the root of the validity or otherwise of the said transfer and the title held by the Respondents. Further, the above sections prohibit selling, disposing or otherwise intermeddling with a deceased estate.

Interpreting the section **45 (1)** cited above **Musyoka Jin the Estate of Veronica Njoki Wakagoto-Deceased**[8] had this to say:-

‘The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made. The fact of having petitioned for letters did not clothe him any authority. He and Felix Kunuthia intermeddled with the estate, and they no doubt committed an offence under section 45 (2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly mounted over them. This explains why property of dead persons is routinely intermeddled with’

Section **80** of the Land Registration Act[9] provides as follows:-

Rectification by an order of the Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

I find that the Applicant has demonstrated that Title number **Githi/Muthambi/41** was registered in the name of the deceased **Wangui Rungu** and **Dadson Githenji Wahome** as proprietors in equal shares and that upon her death the property became part of her estate and that the purported transfer to the Respondents was done fraudulently and or in total breach of the law and consequently the same is illegal, null and void and cannot be allowed to stand.

Accordingly I order as follows:-

*i. That the transfer of title number **Githi/Muthambi/41** effected on 23.11.2010 to **Dadson Githenji Wahome, Mary Muthoni Githinji** and **James Gathenji Wahome** and the subsequent issuance of a title deed to the said persons be and is hereby declared null and void for all purposes on grounds that the said transfer was effected fraudulently, irregularly and in total disregard of the law.*

ii. That the title deed for the said parcel of land number **Githi/Muthambi/41** issued to the said **Dadson Githenji Wahome, Mary Muthoni Githinji and James Gathenji Wahome** is hereby declared null and void for all practical purposes.

iii. That the Land Registrar, Nyeri is hereby ordered to cancel the said registration, transfer and Title Deed in respect of land parcel number **Githi/Muthambi/41** issued to **Dadson Githenji Wahome, Mary Muthoni Githinji and James Gathenji Wahome**.

iv. That the Land Registrar, Nyeri, is hereby ordered to remove the restriction registered on 23.10.2012 to facilitate the implementation of the orders made herein.

v. That the Land Registrar, Nyeri is hereby ordered to rectify the register in respect of land parcel number **Githi/Muthambi/41** and restore the names of **Dadson Githenji Wahome and Wangui Rungu** as joint proprietors in equal shares and issue a title deed in the said names.

vi. That the Respondents do pay the costs of this application to the Applicant in any event.

Right of appeal **30** days

Dated at Nyeri this 28th day of January 2016

John M. Mativo

Judge

[1] Cap 160 Laws of Kenya

[2] Ibid

[3] Act No. 3 OF 2012

[4] Volume 1, page 620

[5] {1905}A.C. 176 at Page 210

[6] Ibid

[7]{2011}eKLR

[8]High Court Succession Cause No. 1974 of 2008

[9] Supra