



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.499 OF 2010

In the Matter of the Estate of:

Mboroki Mworira Irethiu (Deceased)

MECKLINA KIRIGO M'MURITHIU.....PETITIONER

Versus

MARY GANTUKU SIMUKIRI.....1ST OBJECTOR

JENIFA TIRINDI MWAMBA.....2ND OBJECTOR

PATRICK KIREA DANIEL.....PROTESTOR

RULING

[1] The protestor herein is Patrick Kirea Daniel. He filed an Affidavit of Protest dated 26th February 2015 against Confirmation of Grant dated 28th July 2014. The Protestor's case was that he is a purchaser of part of the estate land. He stated that vide an agreement for sale dated 15th October 2010, the Petitioner with the consent of the other dependants of the Estate of Mboroki Mworira Irethiu (deceased) sold to him a parcel of land measuring ½ (half) of an Acre; which was to be excised from L.R Abothuguchi/Gitie/230 registered in the name of the Petitioner's husband one Mboroki Mworira Irethiu (Deceased). The agreed consideration was Kshs 150,000.

[2] The Protestor contended that that prior to and after the execution of the said sale of land agreement, the Protestor, the Petitioner and the other beneficiaries agreed that he was to make a down payment of Kshs 50,000 to facilitate the filing of this Succession Cause and the balance of Kshs 100,000 was to be paid upon finalization of this Succession Cause. He did as per their agreement and paid the deposit. However, it was the Protestor's case that without his knowledge, the Petitioner filed an application for distribution dated 28th October 2014 and excluded him thus provoking this Protest to protect his beneficial interest.

Petitioner: Protester stranger to the estate

[3] In Reply to the Affidavit of Protest, the Petitioner swore an Affidavit where she deposed *inter alia* that the Protestor was a stranger to the Estate of the deceased and that the annexed agreement was made in her private capacity and not in his capacity as one of the Administrators. She averred further that, in any case the Protestor was in breach of the agreement but that issue should be determined by an ordinary civil court between themselves in private capacities but not in this Succession proceeding.

[3] The other beneficiaries namely Jenifer Tirindi and Mary Gantuku similarly filled Affidavits in Reply to the Protest where they deposed that the Protestor was not related to them or their late father and that further individual commitments or contracts of their sister (the Petitioner) should not be a liability to their father's Estate or in anyway delay conclusion of this matter. Consequently they urged the court to dismiss the Protest.

[4] When the matter came up for hearing on 5th March 2015 the court directed that the matter be disposed of by way of written submissions. The Protestor in his submissions essentially reiterated the contents of his Affidavit of Protest. He only added that he has perused the Replying Affidavit and that the Petitioner had miserably failed to support the allegations contained in her Replying Affidavit. He further submitted that his claim was valid as the same was supported by the Objector. Consequently he urged the court to allow the same.

[5] The Petitioner on the other hand submitted that the Protestor alleged to have bought the land on 15th October 2010, a whole 34 years from the death of the deceased. It was therefore submitted that the Protestor cannot be said to be a creditor of the Estate of the deceased and he cannot impede the Succession Cause through a Protest. Further, it was submitted that he should wait for the Estate to be distributed among the legal beneficiaries of the deceased and thereafter he can pursue whomsoever he believes owes him land, money or other indebtedness. Consequently, the Petitioner argued that the Protest lacks merit and should be dismissed with costs.

DETERMINATION

[6] The issue that has arisen is:

(1) Whether a claim by the Protestor, a purchaser of part of the estate property from the Petitioner before filing of a succession cause should be litigated in this succession cause.

The law on this subject is not clear. Some courts have held that a purchaser's claim should be litigated separate from the succession cause, whilst others have said it should be within the succession cause. The decision of the Court of Appeal in the case of ***Rubo Kipngetch Arap Cheruiyot vs. Peter Kiprof Rotich Civil Appeal No. 128 of 2008*** also invites diverse interpretation; when it stated as follows:-

“Claims by third parties to deceased persons’ properties *although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits*”.
[underlining mine for emphasis]

[7] From the rival submissions and affidavits by the parties, one matter is clear; that the Protestor and the Petitioner entered into an agreement for sale of some land. Except, the Petitioner contends that; (1) the said agreement was between her (in her private capacity) and the Protestor; and (2) the Protestor is in breach of the said agreement. Doubtless, the circumstances of this case are peculiar: the agreement in question was between the Protestor and the Petitioner and not between the deceased or his legal representative and the Protestor. As such, the Protestor may not have a direct claim in the property of the estate of the deceased. However, it would certainly have been different altogether; (1) if he purchased the land from the deceased as his claim would have been against the legal representative of the estate of the deceased to complete the transaction on behalf of the deceased: or (2) if he purchased the land in circumstances and manner prescribed in the law of Succession Act, for instance section 37 thereof. As a general rule, no immovable property of the deceased shall be sold before confirmation. See section 82(b) (ii) of the Law of Succession Act. But, it has been argued that in some cases the court may authorize sale of immovable assets in those instances provided under the Law of Succession Act. The Court of Appeal recognized these possibilities in the case of ***Rubo Kipngetch Arap Cheruiyot vs. Peter Kiprof Rotich Civil Appeal No. 128 of 2008*** (supra). Therefore, on my part I take the following view of the matter; that there is no absolute prohibition of third party claims being litigated in a

succession cause depending on the circumstances of the case, although they are better litigated in separate causes. In the present case, the Protestor purchased land from the Petitioner after the death of the deceased and before even this succession cause had been filed let alone confirmation of grant. The Petitioner was not yet a personal representative of the deceased. She could only therefore have entered into the said agreement in her private capacity. Thus, the Protestor's claim should be directed to the Petitioner in person rather than to the estate. And if he succeeds, the Petitioner alone will meet the decree. But I must sound a warning here. To the Protestor; never buy property of deceased especially immovable property before confirmation of the grant except with the consent of all the beneficiaries and sanction of the court. To the Petitioner; it is quite mischievous and cunning for potential administrators of the estate to sell part of or the estate property especially immovable property before confirmation of the grant. It is obnoxious to note that the Petitioner sold part of the estate property in order to file this succession cause only to turn around, and seek the help of the law, not for the love of the law but for ulterior purpose of cleansing her fraudulent acts. Such behaviour is not only uncouth but fraudulent, stealth and dishonest. I should state also that this is an act of intermeddling with the free property of the deceased by the Petitioner. And when such conduct is brought to the attention of the court, it must consider it and where appropriate bar persons who have committed such acts of intermeddling with the estate from becoming administrators of the estate. I also refer the Petitioner to the provisions of section 45 of the Law of Succession Act which criminalizes and sets penalties for any act or acts of disposing of, or in any manner intermeddling with the free property of the deceased. The Petitioner should know that the court may act *suo moto* on acts of intermeddling and commit any person found guilty of intermeddling to a term of prison or fine or both. I dare say that the dishonest conduct of the Petitioner may haunt her and be a basis for future prohibitory orders on the share that will be given to the Petitioner at the behest of the Protester when he has filed appropriate suit for relief. Parties should respect the law and should not break it in the hope that the same law will straighten their paths. I say these things to emphasize the importance of protecting the free property of the deceased by all concerned persons, and also express the great deprecation of intermeddling by courts of law; it is sharply loathed by courts of law.

[7] Accordingly, despite the foregoing sentiments, I dismiss the Protest but I will not condemn the Protester to costs given the circumstances of this case. The Protestor may pursue his claim against the Petitioner through the right procedure and forum for relief. Those are the orders of the court.

Dated, signed and delivered in court at Meru this 19th day of January 2016

F. GIKONYO

JUDGE

In the presence of;

Thangicia for Mwarania for Petitioner

Kaberia for Objector

C/c – Mwenda/Mark