



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT PETITION NO. 33 OF 2013

**IN THE MATTER OF ARTICLES 19 (3), 20(2), 21 (2), 22 (1) AND 23 AND 159 OF THE
CONSTITUTION 2010**

AND

IN THE MATTER OF THE VIOLATION OF PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/139

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL**

FREEDOM) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

CHARLES RATEMO NYAMBATI.....RESPONDENT/PETITIONER

VERSUS

JACTON OCHARO.....1ST RESPONDENT

CHARLES LATEMA NYAMWEYA.....2ND RESPONDENT

ALICE KERUBO NYAMBATI.....3RD RESPONDENT

KEFA NAMI NYANGITO.....4TH RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII/GUCHA.....5TH RESPONDENT

RULING

1. The petitioner, Charles Ratemo Nyambati instituted the instant petition stating he was the duly constituted legal administrator of the estate of Samson Nyambati Nyamweya (deceased) on the basis of the grant of letters of administration Ad litem issued in **HC Succession Cause No. 2013 (Kisii)** on 12th November, 2013. The 1st and 2nd respondents were co-owners with the deceased of land parcel number **Kisii Municipality/Block III/139** with each holding 1/3 share of the property. The petitioner avers that after the deceased death, the 1st and 2nd respondents fraudulently and in collusion with the 3rd, 4th and 5th respondents caused the suit land to be transferred to the 4th respondent thereby denying the petitioner his share of inheritance in the suit property as a beneficiary of the deceased. Interalia by the petition the petitioner prays for the following reliefs:-

i. Declaration that the 1st, 2nd and 3rd respondents had no rights, mandate and/or authority to transact over, transfer and/or convey the interests over and in respect of the estate of Samson Nyambati Nyamweya, deceased constituting the 1/3 share of the suit land that is LR No. Kisii Municipality/Block III/139 to the 4th respondent.

ii. An order for cancellation of the transfer and registration of LR No. Kisii Municipality/Block 111/139, in the name of the 4th respondent, together with the certificate of lease issued on the 15th October 2013 and rectification of the register to reflect the position ante.

2. Simultaneously with the petition the petitioner filed a Notice of Motion application seeking a conservatory order pending the hearing of the application and the petition. The court on 17th December 2013 issued ex parte an inhibition order restraining any dealings and transactions relating to the suit property pending the hearing of the notice of motion inter partes. The 1st, 3rd and 4th respondents filed replying affidavits opposing the petition and the Notice of motion.

3. On 12th March 2014 the parties agreed to proceed with the hearing of the substantive petition consequently and the interlocutory applications by the petitioner and the 4th respondent dated 11th December 2013 and 24th January 2014 respectively were marked as withdrawn and directions were given in regard to the disposal of the petition. Owing to intervening factors and circumstances including the demise of the 3rd respondent's counsel the petition did not proceed to be heard when it was scheduled and the court on 26th November 2014 adjourned the hearing of the petition to a date to be taken at the registry on a priority basis. In the meantime the 3rd respondent was given liberty to engage another advocate.

4. On 17th July 2015 the 4th respondent filed the Notice of Motion dated 16th July 2015 the subject of this ruling which was certified by the Judge as urgent on 21st July 2015 and direction given that a hearing date for the application be given by the court registry on a priority basis. The application was fixed for hearing on 17th September 2015 when the parties appeared before me. Having regard to the nature of the application I directed that the 4th respondent's application dated 16th July 2015 be disposed of first before the petition is heard. The hearing date of 23rd November 2015 scheduled for the hearing of the petition was accordingly vacated.

5. By the application dated 16th July 2015 the 4th respondent seeks the following orders:

1. That this application be certified urgent and an interpartes hearing date given on a priority basis.

2. That the orders issued by this honourable court on 17th December 2013 be discharged and or vacated.

3. That the petitioner's petition dated 11th December 2013 be struck out with costs to the 4th respondent/applicant.

4. That there be any other or further order as the court may deem just and expedient.

5. That costs of this application be provided for.

6. The application is supported on the grounds that are set out on the face of the application and the affidavit sworn in support by one **Kefa Nami Nyangito** dated 16th July 2015. The 4th respondent/applicant avers that the petitioner fraudulently obtained letters of administration **Ad Litem** to the estate of the late Samson Nyambati Nyamweya (deceased) and purported to file this petition as such administrator. The applicant states that the letters of administration **Ad Litem** have since been revoked and thus the petitioner lacks the locus standi to prosecute the instant petition on behalf of the estate of the deceased. The applicant states he is the registered proprietor of **LR No. Kisii Municipality/Block III/139** having lawfully and legally purchased the same from Jackton Ocharo, Samson Nyambati (deceased) and Charles Latema Nyamweya who owned the property in common in equal shares. The applicant further states he purchased the suit property pursuant to an agreement dated 12th August 2013 executed by all the vendors for the sum of kshs. 60million and on the basis of the agreement M/s Co-operative Bank of Kenya Ltd advanced him kshs. 65 Million to finance the purchase. The applicant avers the shares due to the vendors was transmitted to their respective bank accounts by the Co-operative Bank Limited following execution of the transfer of the property to the 4th respondent by the vendors. The applicant avers that Samson Nyambati Nyamweya (deceased) had executed the transfer and that is why the sale proceeds were released to his account.

7. The petitioner filed a statement of grounds of opposition to the 4th respondent's application dated 16th September 2015 together with a list of authorities. The petitioner in his grounds of opposition averred that the 4th respondent's application is bad in law, misconceived and legally untenable. The petitioner asserted that the application offends the provisions of articles 20 (1), 22(1), 24(1) and 258 of the Constitution. The applicant further averred that the application is not made in good faith and was intended to obscure the fraud that was perpetrated in the execution of the alleged sale agreement and the transfer instrument which the petitioner claims was done after the death of the registered proprietor. The petitioner further claims the application is devoid of any merit and is otherwise an abuse of the due process of the court.

8. No other party filed any grounds of opposition and/or replying affidavit. Further to the court's directions the applicant filed his submissions dated 30th September 2015 on 2nd October 2015, the 1st and 3rd respondents filed their submissions in support of the 4th defendant's application on 16th October 2015 and the petitioner filed his submissions in response thereof on 21st October 2015. The parties counsel appeared before me on 5th November 2015 and made oral submissions highlighting their filed written submissions.

9. Having reviewed and considered the 4th respondent's application, the response thereto and the submissions made by the parties the issues for determination in this application are:-

i. Whether following the revocation of the letters of administration Ad Litem issued to the petitioner, the petitioner lost the locus standi to prosecute the petition.

ii. Whether the petition should be struck out.

10. There is no dispute that the petitioner applied for and was granted letters of administration Ad Litem of all the estate of Samson Nyambati Nyamweya (deceased) which were limited to the purposes only of filing suit until further representation was granted by the court. This was the grant issued by the court on 12th November 2013. Under section 54 of the **Law of Succession Act, Cap 160 Laws of Kenya** a court may according to the circumstances of each case, limit any grant of representation which it has

jurisdiction to make. In the case of the application made by the petitioner for a limited grant, the court limited the grant for only the purpose of filing suit and no other purpose.

11. The applicant submits that the petitioner having obtained a limited grant **Ad Litem** for the purposes of filing the present petition and that grant having been revoked the petitioner lacks any capacity to continue to prosecute the petition and argues the petition must of necessity fall by the way side as it was instituted by a person who had no capacity to represent the estate of the deceased. The applicant submitted further that the petitioner was claiming a right as a son of the deceased who is entitled to inheritance as a beneficiary. This, the applicant submits is a matter that ought to be governed by the provisions of the **Law of Succession Act**. The petitioner recognizing that sought and obtained a limited grant **Ad Litem** to give him locus to litigate on behalf of the deceased estate. Once the instrument that gave the petitioner locus was revoked, then the petition which was predicated on the basis that the petitioner was a duly constituted personal legal representative of the deceased must of necessity collapse, so the applicant submits.

12. The petitioner submitted that the petitioner lodged the petition on the basis that he was a son of the deceased and hence one of the beneficiaries entitled to benefit from and/or inherit part of the deceased estate. In this regard the petitioner argued, to the extent that he had some legitimate interest in the suit property which the respondents were dealing with contrary to the provisions of the constitution he had a right to lodge a constitutional petition and did not in fact require grant of letters of administration to do so. He opined that under articles 19 (3) and 22(1) of the Constitution where the rights of a person are infringed such person has unrestricted right to access the court for the protection of his rights. For a right or interest to deserved protection under the constitution such right or interest must have crystallized. The right to a beneficial interest in a deceased estate crystallizes through the acts of the personal legal representative of the deceased estate.

13. The property the subject matter of this suit was owned by the 1st, 2nd respondents and the deceased in equal shares. The petitioner's claim relates to the 1/3 share that was held by his deceased father. The petition was instituted after the deceased death and after the property had changed hands to the 4th respondent. What the petitioner is challenging is the transaction process that resulted in the suit property being registered in the name of the 4th respondent. In my view such a claim belongs to the realm of civil law and not constitutional petition. I say so because in the present instance third parties have acquired rights over the suit property through a process they claim to have been lawful and legitimate and in my view the validity or otherwise of such process can only be properly tested through a civil suit where parties file their respective pleadings and tender evidence which is subjected to cross-examination. In the case of a deceased party any legal action on behalf of the deceased estate can only be through a duly appointed legal representative.

14. As the interest claimed by the petitioner herein relates to a deceased person, such person's estate can only be represented by a person who holds letters of administration which authorize him to represent the deceased estate. It is the personal representative who is under section 82 of the Law of Succession Act authorized to file suits on behalf of the estate. The court in the case of **Trouistik Union International & Another –vs- Mbeyu & Another [1993] eKLR** took the position that the estate of the deceased person is vested in the legal representative. Hon. Lady Justice Ongundi in the case of **Republic –vs- Attorney General & Another ex parte John Mugo [2013] eKLR** while considering the role of a legal representative observed as follows:-

“And a legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the Law of Succession Act. Its true that under the Adjudication Act any one can appear to represent a dead person. But the court which deals with estates of deceased persons operates under the Law of Succession Act which gives specific direction on how such matters should be handled. The applicant cannot fail to follow this procedure and hide under article 22 (1) and 2 of the Constitution. The applicant herein has a specific claim which is the estate of his deceased brother.

It cannot therefore be anyone having a claim on this estate who can file a claim. The law of

Succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.”

15. In the case of **Omari Kaburu –vs- Industrial & Commercial Development Corporation [2007] eKLR** Lady Justice Karanja (as she then was) commenting on the issue of locus standi in regard to estates of deceased persons stated thus:-

“...The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”.

In the case of **Kennedy Odoyo Okello –vs- District Registrar Migori & 2 Others (Kisii ELC Petition No. 37 of 2012)** Hon. Justice Okong’o in a judgment delivered on 14th March 2014 at page 59 observed thus:-

“Under the Law of Succession Act, Cap 160 Laws of Kenya, the property of a deceased person belongs to his estate and the only person who has a right over the same is the legal representative of such estate.”

16. In the petition before the court no doubt the petitioner recognized that he needed to obtain a grant of letters of administration in order to have the locus standi to bring the petition. The grant issued to the petitioner on 12th November 2013 was to serve this purpose. This grant as is admitted by all the parties was revoked and annulled by the High Court on 5th June 2015. The revocation and the annulment of the grant rendered all that was done in reliance on the same a nullity. The petition was anchored on the grant as providing the petitioner with the authority and mandate to bring the petition as the legal administrator of the estate of Samson Nyambati Nyamweya (deceased). Without the grant there is no foundation for the petition and the same must give way. The petitioner must find another way to pursue his interest either through proper succession proceedings and/or civil proceedings and in doing so he must take cognizance that the dead only speak through duly constituted legal representatives.

17. The upshot is that I find the 4th respondent/applicant’s application dated 16th July 2015 meritorious. I order the petitioner’s petition dated 11th December 2013 to be struck out and the ex parte orders issued by the court on 17th December 2013 discharged and vacated.

18. I have taken into account the circumstances giving rise to the petition and the relationship amongst the disputants and in exercise of my discretion order that each party will bear their own costs of the application and the petition. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 26th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the petitioner

..... for the 1st respondent

..... for the 2nd respondent
..... for the 3rd respondent
..... for the 4th respondent

J. M. MUTUNGI

JUDGE