



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 122 OF 2010
IN THE MATTER OF THE ESTATE OF NYAMU MUGA-DECEASED
George Muriithi Wamai.....Petitioner
versus
Stephen Ngatia Muna.....Protestor

JUDGEMENT

Nyamu Muga (herein after referred to as the deceased) died intestate on 6th June 1964 at the prime age of 98 years. On 17th day of February 2010, **Stephen Muga Muna**, a creditor to the deceased's estate (herein after referred to as the protestor) took out citations and served **George Muriithi Wamai** and **Grace Wangu Wamai** (hereinafter referred as the petitioners) who filed an entry of appearance to citation on 15th April 2010.

On 2nd March 2011, the protestor petitioned for letters of administration intestate to the deceased's estate. He named the following persons as persons surviving the deceased:-

- i. *George Muriithi Wamai-----Grandson.*
- ii. *Grace Wangu Wamai-----Daughter*
- iii. *Stephen Ngatia Muna-----Purchaser.*

No consent was filed pursuant to Rule **26 (2)** of the Probate and Administration Rules. The only property listed in the affidavit in support of the petition is **Ruguru/Kiamariga/1148**.

The petition was gazetted on 20.4.2012 and on 27th June 2012 **George Muriithi Wamai** and **Grace Wangu Wamai (the petitioners)** filed an objection to the making of the grant claiming that they are grandchildren of the deceased and that the petitioner was not related to the deceased. They also filed petition by way of cross-petition.

On 23rd November 2012 by consent of the parties temporary letters of administration were issued in the joint names of **George Muriithi Wamai** and **Grace Wangu Wamai** and the petitioner **Stephen Muga Muna**.

On 23th May 2013 **George Muriithi Wamai** applied for confirmation of the said grant and proposed that the above property to registered in his name.

On 23rd June 2013 **Stephen Ngatia Muna** (the protestor) filed an affidavit of protest in which he averred

inter alia as follows:-

- i. That the deceased had a wife called **Wanjiku Nyamu** who is deceased, that the two never had children, that the said wife was an auntie a one **Gotho Iregi** whom she took as her child and who occupied 0.5 acres of the deceased's above mentioned land and which portion had been marked before the death of the deceased and his first wife.
- ii. That the two beneficiaries are children of the deceased and his second wife.
- iii. That in 2003 **Ngothe Iregi** sold to the protestor his beneficial interest in the said land measuring 0.5 acres as per the sale agreement annexed thereto and the applicant was party to the said sale and he took part of the purchase price.
- iv. That the land parcel **Ruguru/Kaimariga/1148** should be shared as follows; **George Muriithi Wamai-1.1 acres** and **Stephen Ngatia Muna-0.5 acres**.

Hearing commenced before me on 24th February 2016. The protestor's evidence was the deceased was not related to him, that he purchased the land from one **Ngothe Iregi**, an uncle to the deceased, that he has a sale agreement in support thereof and produced the same as an exhibit. He said he paid **Ksh. 108,000/=** for the said land and he purchased it in good faith. He also stated Muriithi did sign the said agreement. He testified that he took possession of the land but was chased, arrested and detained.

The petitioner, *George Murrithi Wamai* testified that the deceased was his grandfather, that the deceased had a son and six daughters, all are married. He stated that he had leased the land to **Ngothe Iregi** and does not know how the said **Ngothe Iregi** agreed with the protestor and denied knowledge of the alleged sale. On cross-examination he denied signing the said agreement and insisted that the protestor had leased the land but he chased him. He also admitted that he appeared with the protestor at the advocates office and they agreed to refund the money because the land did not belong to the seller.

From the death certificate, the deceased died in 1964, hence its necessary to re-state the law applicable in this case. The Law of Succession Act[1] came operation on 1st July 1981. Section 2 (1) of the Act provides that:-

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

The deceased person was a Kikuyu by tribe and therefore as per Section 2 (2) cited the applicable law in so far as it is not repugnant to justice or inconsistent with any written law is Kikuyu customary practices. The administration of the estate however must be in accordance with the Law of Succession Act.[2] This position of law has been evident in various decisions of this Court and the Court of Appeal. In the case of *Philis Michere Mucembi Vs. Wamai Muchembi*[3] the deceased had died before the commencement of the Law of Succession Act.[4] The court made the following observations:-

“Section 2(2) of the Law of succession Act clearly excludes the distribution of the estate of a person who died before 1st July, 1981. Such property must be distributed in accordance to the law of succession that was in place before the Law of Succession was enacted.....”

Rawal j (as she then was) in the matter of the Estate of Kiiru Muhia "A'-Deceased held that the provisions of the Law of Succession Act do not apply to a person who died before the Act came into force.

However, in the present case I must clarify that we are not strictly dealing with the issue of distribution, but a claim by the protestor that he bought the land in 2003, many years after the deceased died and from a one **Ngothe Iregi**, whom the protestor says a deceased wife took as his child. The protestor stated that:-

*"That the deceased had a wife called **Wanjiku Nyamu** who is deceased, that the two never had children, that the said wife was an auntie a one **Gotho Iregi** whom she took as her child and who occupied 0.5 acres of the deceased's above mentioned land and which portion had been marked before the death of the deceased and his first wife."*

This is the person the protestor claims to have purchased the land from. The position is complicated by the fact the land was registered in the name of the deceased in this case and it was never transferred to the said Wanjiku Nyamu so it's not clear how she could give out what belonged to the deceased without obtaining letters of administration. Thus, the land remained registered in the deceased's name and no evidence was adduced to show that the deceased bequeathed the said land to **Wanjiku Nyamu**.

Also, there is no clear evidence either oral or in writing to show that indeed **Wanjiku Nyamu** had adopted the **Gothe Iregi** or gave him the alleged portion of land either to use or to own.

Secondly, and even more important, the sale agreement states that the "the vendor is the legal representative of the estate of the late Nyamu s/o Muga the registered owner of the piece of land known as Plot number Ruguru/Kamariga/1148....." The said statement is misleading and a serious misrepresentation. The alleged vendor had no letters of administration to the deceased's estate and at that point in time no one had petitioned for the letters of administration until these proceedings were commenced. The implication is that strictly, the said **Ngothe Iregi** did not have the legal capacity to enter into the said agreement and on that basis the said agreement is **null and void** and the said vendor could not pass ownership pursuant to the alleged agreement.

Paragraph 7 of the said agreement states that "the vendor undertakes to institute succession proceedings to the estate of the late Nyamu s/o Munga." To me that statement amounted to putting the cart in front of the horse. The alleged vendor ought to have obtained the grant first before purporting to sell the land.

Similarly, even though **George Muriithi Wamae** denies receiving any money from the protestor, even if we were to admit the contents of the acknowledgement dated 12th January 2004, still the same challenge arises in that he too did not have letters of administration, hence he could not sell the land.

The question that arises is whether or not the alleged vendor could legally sell the property in question as per the said sale agreement before the grant is issued. 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 persons estate ought to be preserved as at the time of death. In the matter of the estate of *M'mugambiM'guoko alia MugambiGwoko alia MugambiGuoko- Deceased*[5] **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.

Section 82 (b) (ii) of the Law of Succession Act provides that:-

'No immovable property shall be sold before confirmation of Grant'

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 agreement. Further, the above sections prohibit selling, disposing or otherwise intermeddling with a deceased's estate.

Interpreting the section 45 (1) cited above **Musyoka Jin the Estate of Veronica NjokiWakagoto-Deceased**[6] 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.'

Given the above legal position, I find that the protest grounded on the strength of the said agreement cannot stand. Consequently, I find that the protest has no merits in law. I accordingly I dismiss the protest and order as follows:-

- a. ***That*** the a certificate of confirmation of Grant of letters of Administration to the deceased's estate be issued to **George Muriithi Wamai**.
- b. ***That*** **George Muriithi Wamai** is the lawful and absolute beneficiary of all that parcel of land number **Ruguru/Kiamariga/1148**.
- c. *No orders as to costs.*

Right of appeal 30 days

Dated at Nyeri this 17th day March of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Ibid

[3] {2010} eKLR

[4] Supra

[5]{2011}eKLR

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