



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**SUCCESSION CAUSE NO. 85 OF 2015**

**(CHIEF MAGISTRATE'S SUCCESSION CAUSE NO. 25 OF 2012)**

**IN THE MATTER OF THE ESTATE OF KAHORO MUCHIRI KAHORO (DECEASED)**

**AND**

**MARGARET WANGUI KAHORO.....(PETITIONER)**

**RULING**

1. Before the grant issued to the Petitioner on 14/03/12 could be confirmed, as prayed in summons filed on 18<sup>th</sup> September, 2012, an Affidavit of Protest was filed by one **Francis Mathathi Gachoya** (Protestor) in his alleged capacity as a beneficiary by virtue of the fact that he had allegedly bought a portion measuring one acre out of the parcel of land parcel **No. Nyandarua/Kahuru/29** and now registered as **LR No. Nyandarua/Kahuru/711**. The purchase was allegedly transacted between the Protestor and the deceased vide an agreement dated 5<sup>th</sup> March, 2008. The Protestor states that he paid the purchase price in full and took possession of the said parcel.

2. He complains that while his name was listed in the introduction letter by the local chief and by the petitioner, he was excluded from the distribution of the estate as proposed in the Summons for Confirmation. He fears that the omission is mischievous as the Petitioner has assigned his parcel to herself.

3. The Petitioner responded to the Protest affidavit by her affidavit filed in 24/1/14. Wherein she states that the issues raised by the Objector could only be addressed after the grant was confirmed. She claims to have discovered that in the year 1993 that the title for the land parcel **No. Nyandarua/Kahuru/711** ceased to exist after it was sub-divided into parcels **Nyandarua/Kahuru/1612, 1615** and **2608** and that the land had not been further sub-divided even though a surveyor had come on the ground to confirm "old boundaries". That the court could only order transfer upon the succession cause being completed. She has annexed copies of the search certificate and green cards in this regard.

4. It would seem from the copies of relevant green cards that parcels were further sub-divided: Parcel No. **1332** was further sub-divided to create parcel No. **1613**, and parcel **1432** was sub-divided to create parcel No. **1615** while parcel No. **1333** was sub-divided to create parcel no. **2608** *inter alia*. The mother title of all these parcels remains No. **711**.

5. From the Protestor's submissions it appears that the objector's counsel took into account a replying affidavit filed on 20<sup>th</sup> March 2014. This affidavit was sworn not in response to the protest by the

protestor but to an application filed on 13/1/14 in which the Protestor sought an order of the court to transfer 1 acre out of land parcel 711 to himself. The application was not heard however and the Protestor filed a similar application on 24/2/14, which he later withdrew on 27/5/14.

6. Petitioner “**would be able to decide on the issues raised by the objector**” only after confirmation. The above notwithstanding, I note from her response to the above said Application was *inter alia* an allegation that the sale alleged by the Protestor is suspect and that there was no evidence that full payment had been made. The protestor also takes issue with these matters in his submissions which basically reiterate the matters stated in the affidavit of the Protestor. For her part, the Petitioner has reiterated that the present protest has been raised prematurely and that the of the grant.

7. The submissions further touch upon questions whether the Protestor paid in full for the land parcel he claims and the fact that no consent was obtained from the Land Control Board and concludes that all the purchaser can claim now is a return of the purchase price which the Petitioner is ready to pay.

In the circumstances it is contended that the Protestor is not a *bona fide* beneficiary/purchaser and the Petitioner did not conceal any material facts.

8. I have considered all the matters canvassed by way of affidavits, annexures thereto and the submissions. Firstly, it needs to be clarified that the subject of the instant ruling is the Protest filed against confirmation on 4/1/2013 and not the Protestor’s application filed subsequently on 13/1/2014. I am therefore unable to understand the assertions by the Petitioner that the protest is premature as the petitioner had by 13/1/2014 evinced an intention to confirm the grant as evidenced by her Summons for Confirmation of grant filed on 18/9/12.

9. Rule 40 (b) of the Probate and Administration Rules states that:

**“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the Principal Registry an affidavit of protest in Form No. 10 against such confirmation stating the grounds of his objection”**

Thus the Protestor is within his rights.

At the request of the parties, the lower court, then seized of the matter, referred the cause to this court on 24/3/15 by which date, the affidavit of the Petitioner in Reply to the Protest, had been filed. The High Court directed that parties file submissions in regard to the Protest.

10. In her Replying affidavit in response to the Protest and filed on 24/1/14, the Petitioner did not deny the key averments contained in paragraphs 2, 3,, 4, 5, 8- 11 of the Affidavit of Protest. Therein the Protestor asserts his claim to one acre out of the land parcel No. 711 which is part of the estate of the deceased. He asserted to have purchased the land from the deceased. He attached a copy of the sale agreement and the letter of introduction from the area chief as evidence of the said purchase.

11. The Petitioner merely stated in her affidavit that the protestor’s “issues” could only be handled after the confirmation proceedings were completed. It is not clear what that meant but, clearly, there is no denial in that affidavit of the purchase and possession of the one care piece of land by the Protestor.

12. The Petitioner also clarified that the original title No. 711 had been closed following sub-division in 1994.

And in a sign of good faith she intimated at Paragraph 8 that no further subdivisions were on going, rather that the Surveyor, had been “settling old” boundaries to the parcels (sub divisions). I am therefore quite surprised that in his submissions counsel for the Petitioner has raised matters that form the substance of the affidavit of the Petitioner filed on 28/3/14 with regard to the Protestor’s application of 13/1/14. Depositions in paragraph 8-12 are in direct contrast to the Petitioner’s earlier affidavit. The later affidavit disputes the sale of land to the Protestor, the payment of the purchase price, etc.

13. However, like the earlier affidavit, the latter affidavit does not deny the Protestor's assertion that he has been in possession of the land and is carrying out cultivation thereon (Paragraph 4 of the Affidavit of Protest). As I said, the Protestor's Advocate fell into the same error of regarding Petitioner's second affidavit as it filed in connection with the Protest.

14. In my own view, even if the said second Petitioner's affidavit were to be considered, it would be necessary for the Petitioner to give an explanation for the first affidavit which, on the face of it does not in any way challenge the Protestor's claim to the one acre piece of land.

Indeed, in the absence of an explanation, the second affidavit by the petitioner raising matters that are in contradiction to the contents of the first affidavit must be taken as an after thought.

15. Secondly, an explanation has not been given, even in the second affidavit of the fact that the Protestor is in occupation and using the land in question. The Petitioner's advocate has raised various arguments as to why the alleged sale agreement is invalid, the key one being that the relevant consent was not obtained from the Land Control Board. Evidently, the Protestor was not registered as the proprietor of the disputed parcel and seemingly, beyond the sale agreement and various payments no further step was taken between the vendor and the purchaser in completing the transaction.

16. It is undisputed that the vendor died only months after the date of execution of the agreement and therefore the failure to complete the transaction cannot be imputed upon the alleged failure by the Protestor to pay in full. Besides, equity counts as done, that which ought to be done. The Protestor is in occupation of the one acre piece of land on the strength of the written agreement between him and the deceased vendor. From the documentation tendered, the Protestor had paid no less than Ksh.115,000/= towards the purchase of the land.

No title document had been processed in his favour by the time the deceased died and it would not be reasonable to expect him to have paid in full.

17. In my view, justice and equity would not be done if this court were to ignore the payments done in pursuit of the sale agreement and the long occupation by the Protestor of the suit land, merely because the vendor died before completion of the transaction.

18. In the case of **Chase International Investment Corporation & Another -vs- Laxman Keshra & Others (1978) KLR, 143** the court considered when an equity can be raised in favour of a plaintiff, stating *inter alia* that:

**“If the circumstances are such as to raise equity in favor of the plaintiff and the extent of the equity is known, and what way it should be satisfied, the plaintiff is entitled to succeed....”**

I do not therefore accept the proposal by the Petitioner to refund the purchase price in respect of sale agreement that she has impugned, as an after thought.

19. I would agree with the Protestor's submission in the circumstances of this case that the Petitioner mischievously wants the Protestor excluded from getting his rightful share of the one acre parcel of land.

By her repeated complaint that the protest is premature, the Petitioner seems to suggest that once confirmation is done, the Protestor would proceed against her by way of a suit or that he would have to pay the current value of the suit land, to her benefit or to accept the refund of the purchase price, to his detriment.

20. Upon a careful consideration of the matter before me, I am persuaded that the Protestor paid, pursuant to the agreement with the deceased the sum of Ksh.115,000/= towards the purchase price and took possession of the one acre piece of land which he occupies and which was originally part of the now

closed title number 711. Thus, the one acre of land was held in the vendor's name in the form of a trust for the benefit of Protestor pending the completion.

21. In **Mwangi & Another -vs- Mwangi (1986) KLR 328** the Court of Appeal held that the rights of a person in possession or occupation of land are equitable rights binding on the land and the land becomes subject to those rights. (See also **Mutsonga -vs- Nyati (1984) KLR 425** and **Kanyi -vs- Muthiora (1984) KLR 712**. In an earlier case whose decision was applied in **Mwangi -vs- Mwangi (Supra)** namely **Gatimu Kinguru -vs- Muya Gathangi (1976) KLR, 253** the court stated:

**“ The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for purposes of Section 6 (1) of the Land Control Act and, therefore, does not require the consent of the Local Land Control Board.”**

The Protestor is therefore entitled to the said 1 acre piece of land out of the estate of the deceased and the proposed mode of distribution should have included him. The sum of Ksh.85,000/= in respect of which no proof of payment is shown will have to be paid at the point of transfer

22. By purporting to have the entire share of the land parcel No. 711 registered in her name, the Petitioner was attempting to steal a march on the Protestor. Further, the Petition filed clearly indicates that there are other beneficiaries and dependants of the deceased who on all accounts are adults. While the said parties, possibly in collusion with their mother, did not oppose the confirmation of the grant or claim their shares, it appears to me that this omission was only intended to deny the Protestor his due share.

23. Little wonder that the Petitioner severally states that the estate is not being distributed or the land divided.

As pointed out by the counsel for the Protestor this court has the duty to confirm the share due to every beneficiary while confirming the grant by virtue of the Provisions of Section 71 (2) which has the following proviso:

**“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identifies and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”**

24. I therefore direct that before the grant can be confirmed as sought in the Summons for Confirmation, the Petitioner does within 14 days file a further affidavit proposing the mode of distribution of the estate of the deceased, among all the beneficiaries in the Petition. Such proposal will include the Protestor as a beneficiary of the share of one acre that he is currently occupying. In the meantime the Protestor should make arrangements to pay the outstanding sum of Ksh.85,000/= to the Petitioner once the grant is confirmed in order to facilitate the transfer to himself of the parcel claimed. The parties will bear own costs.

**Delivered and Signed at Naivasha this 21<sup>st</sup> day of April, 2016.**

In the presence of

For the Protestor Mr. Obino

For the Respondent/Petitioner Mr. Gichuki

**C. MEOLI**

**JUDGE**

