



**REPUBLIC OF KENYA**

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

**SUCCESSION CASE NO. 123 OF 2014**

**FRANCIS THIONGO NDEGWA ..... 1<sup>ST</sup> PETITIONER**

**JOHN MWANGI NDEGWA ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**MARY WAITHERA .....OBJECTOR**

**RULING**

1. The objector *Mary Waithira* moved this court by way of a summons dated 31<sup>st</sup> May 2014 mainly seeking orders of inhibition barring the registration of any dealings in respect of several parcels of land which she claims belongs to the Estate of her mother the late *Grace Wairimu Kamau* but which the petitioners herein who are her siblings allegedly unlawfully transferred to themselves and to others during and after the life time of the deceased.

2. She listed the said properties in the summons as follows;-

- a) LR Numbers LR Uasin Gishu/Kimumu/4720-4743 Subdivided from land formerly known as Uasin Gishu/Kimumu/162;
- b) LR Numbers Uasin Gishu/Kimumu/5060-5082 Subdivided from land formerly known as Uasin Gishu/Kimumu/163;
- c) LR Number Eldoret Municipality/Block 12(Kingongo)3304
- d)LR Number Kapsaret/Kapsaret Block1( Nyamumbi)/289
- e) LR Number Eldoret Municipality/Block 12/36.

3. The other properties in respect of which the inhibition orders are sought are those that according to the objector (the applicant) currently constitute the Estate of the deceased.

These are parcels of land known as Soy/soy Block 10/Navillus/1047; Eldoret Municipality/Block 14/1396; Solai/Ndungiri/Block 3(Wanyororo "B"/1529; Muigai Inn Plot Nos. W29 and W30; Huruma plot No. 152; western Farmers 15/1654.

The inhibition orders were sought to preserve the Estate of the deceased pending the hearing and determination of the instant succession cause.

4. The summons are supported by an affidavit sworn by the applicant on 31<sup>st</sup> May, 2014. She deposed that the deceased died on 11<sup>th</sup> June, 2011; that no grant of representation has been issued to administer her Estate; that she petitioned for a grant of administration ad colligenda bona when she discovered that her siblings had alienated to themselves some of the properties that belonged to the Estate but her petition was dismissed.

5. She contended that some of those properties were transferred to the petitioners and her other siblings during the lifetime of the deceased but at a time when she was suffering from a mental condition known as Senile dementia and she was thus incapable of voluntarily effecting the said transfers. She annexed a bundle of copies of green cards relating to the aforesaid parcels of land marked as exhibits “MW4” to “MW11”. She also deposed that the deceased owned two parcels of land in Juja under Share Certificate Numbers W29 and W30 which have been sold and the circumstances regarding their sale is a matter pending investigations by the police.

6. It is the applicant’s case that the order sought should be issued against all the properties that formed part of the deceased’s Estate and those that were transferred in her lifetime pending the determination of the succession cause to enable the court determine the legality of the said transfers after hearing evidence.

7. The application is opposed through a replying affidavit sworn by the 1<sup>st</sup> Petitioner *Francis thiongo Ndegwa*. It is the petitioner’s case that the application is incompetent and amounts to an abuse of the court process as it seeks to deal with properties which do not form part of the deceased’s Estate and are therefore outside the ambit of the succession cause; that the deceased in her lifetime willingly and legally transferred some of her properties to her children including the petitioners; that the petitioners subsequently sub divided the parcels of land transferred to them and sold them to other people; that if the order sought was issued, it would adversely affect the purchasers who are not parties to the cause as they will not be able to obtain title to their land.

8. Parties agreed that the application be prosecuted by way of written submissions: Those of the applicant were filed on 12th January, 2016 while those of the respondents were filed on 14<sup>th</sup> December, 2015. The submissions were briefly highlighted before me by learned counsel Mr. Otieno for the applicant and Mr. Mwaniki for the respondents on 4<sup>th</sup> April, 2016.

9. I have carefully considered the application, the affidavits filed by the parties and both oral and written submissions made by counsel on record as well as the court record.

Having done so, I find that the objector and the petitioners are children of the deceased the late *Grace Wairimu Kamau* who died on 11<sup>th</sup> June, 2011. The deceased’s other children are *Anne Waruguru Ndegwa* and *Daniel Njehia Ndegwa*. The court record shows that the petitioners petitioned for full grant of representation to the deceased’s Estate on 11<sup>th</sup> April, 2014 but the grant has not been issued to date.

10. In the petition, the following properties were listed in the inventory of assets comprising the Estate;

(a) Parcel of land No. B/15/14/Huruma/152

(b) Muigai –Inn plot No. 1029

(c) Eldoret Municipality/Block 14/1395

(d) Eldoret Municipality/Block 14/1396

(e) Barclays Bank shares

(f) Kenya Commercial Bank shares

(g) William Tea Kenya Limited shares

(h) Soy/Soy Block 10/Navillus/1045

11. It is thus evident that most of the properties against which the applicant seeks orders of inhibition are not included in the list of assets comprising the Estate.

12. It is common ground and this is confirmed from the copy of green cards availed by the applicant that land LR No's Eldoret Municipality/Block 12(Kingongo) 3394; Kapsabet/Kapsabet Block 1 (Yamumbi/289; Eldoret Municipality Block 12/36; Uasin Gishu/Kimumu 162 and 163 were transferred by the deceased in her life time to her children including the petitioners; the petitioners then subdivided land parcel No. Uasin Gishu/Kimumu 162 and 163 into several plots resulting in title Numbers Uasin Gishu/Kimumu/4720- 4743 and 5060 to 5082 respectively.

13. The applicant has challenged the legality of the said transfers claiming that at the time they were made, the deceased did not have capacity to give consent to the alienation of her property to anyone since she was suffering from a mental condition known as Senile Dementia – See annexure marked “MW3” to her supporting affidavit.

14. In view of the foregoing, I find that the only issue for my determination is whether the applicant has made out a case that would warrant the grant of preservative orders as sought in the instant application.

15. I wish to start by stating that it is not disputed that the properties I have enumerated in paragraph 11 were not in the names of the deceased at the time of her death. They had already been transferred to the applicants and two of their siblings. The question that then arises is whether they can be said to be part of the deceased's Estate which can be administered under the Law of *Succession Act chapter 160* of the Laws of Kenya 160).

16. The purpose of the Law of Succession Act is captured in its preamble which states that it is an “*Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of Estates of deceased persons; and for purposes connected therewith and incidental thereto*”. This means that a succession court only has jurisdiction to deal with matters pertaining to the administration of Estates of deceased persons.

17. What then constitutes the Estate of a deceased person?

An Estate is defined in *Section 3 of Cap 160* as the free property of a deceased person. And free property of a deceased person is defined as the property which a deceased person was legally competent freely to dispose during his lifetime and that which his interest was not terminated by his death.

18. In this case, there is clear evidence that the aforesaid properties ( those described in paragraph 11) were not part of the deceased's free property at the time of her death since her proprietary interest in the same had been extinguished the moment the same were transferred whether lawfully or otherwise to other people including the petitioners during her life time.

19. Whether the transfers were done legally or illegally is a different question altogether. It is however a question that cannot be resolved by a succession court because as stated earlier, its jurisdiction is limited to the administration and distribution of deceased person's Estates. It does not have jurisdiction to question or entertain a dispute regarding the legality or otherwise of transfers done by a deceased person during his or her lifetime since this goes to the question of validity of title to land. Such a dispute can only be determined by the Environment and Land Court.

20. It therefore follows that this court can only issue preservative orders in respect of properties that are proved to form part of the deceased's Estate but not against properties whose title is vested in persons other than the deceased.

it is therefore my finding that this court has no jurisdiction to issue the orders sought by the applicant in respect of the properties described in prayer 3 (a); (b); (c); (d) and (e) in the instant application. I

therefore decline to issue the orders sought as against those properties.

21. As stated earlier, this court can only issue preservative orders in respect of property proved to comprise a deceased person's Estate. There is evidence that land known as Soy/Soy Block 10/Navillus/1074; Eldoret Municipality/Block 14/1395, and 1396 and Huruma plot No. 152 belonged to the deceased at the time of her death. There is also evidence that the deceased at some point owned plots No 29 & 30 at Muigai Inn but the applicant now claims that the plots have been sold to 3<sup>rd</sup> parties. According to exhibit marked "MW14", the circumstances under which the plots were sold are under investigations. Consequently, it is not possible to tell whether the said plots were sold before or after the deceased's death. As regards land described in prayer 3 (f) as Solai/Ndungiri/Block 3/Wanyororo "B"/1529 and Western Farmers 15/1654, the two properties are not included in the inventory of assets belonging to the Estate in form P&A 5 and the applicant has not availed to the court any documents to prove that the said properties belong to the deceased's Estate.

22. In view of the foregoing and considering that no grant of representation has been made in this cause, I find that it will be in the interest of justice to issue the orders sought in respect of the properties I have stated above which undisputably belong to the Estate of the deceased in order to preserve them for the benefit of all the deceased's dependants pending the determination of this cause.

I therefore issue preservative orders prohibiting any dealing with land parcels known as LR No. Soy/Soy Block 10/Navillus/1047; Eldoret Municipality/Block 14/1395 and 1396 and Huruma Plot No. 152.

23. Before concluding this ruling, I wish to state that it is disconcerting that the petition for grant of letters of administration to the deceased's Estate has remained pending for over two years. It is alleged by the respondents that the applicant has been the stumbling block to the issuance of the grant. Whether this is true or not is not for me to determine but it cannot be gainsaid that further undue delay in the issuance of the grant of representation in this cause will adversely affect all the beneficiaries of the Estate including the objector. For this reason, the beneficiaries are encouraged to agree on who among them should be appointed as administrators of the Estate in order to facilitate a speedy conclusion of this cause.

24. In the end, the application partially succeeds. Costs of the application shall be costs in the cause.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 28<sup>th</sup> DAY of July, 2016.**

In the presence of:-

Mr. Odhiambo for Mr. C.F Otieno for the objector/Applicant

No appearance for the Petitioner/Respondents

Naomi Chonde – Court clerk