



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 525 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE M'MARETE M'NTII

RULING

1. The deceased to whose Estate the proceedings herein relate is M'Marete M'Ntii, who died on 21.10.14 at Pandya Hospital, Mombasa. A Grant of Letters of Administration in respect of the estate of the deceased was on 30.6.15 issued to Nahashon Murori Marete, Julius Mugiira Marete and Margaret Maringa Marete the sons and widow respectively, of the deceased. The Administrators filed a Summons for Confirmation of Grant on 3.8.15. However, just prior to the hearing of the same, an application was filed by a group of individuals claiming an interest in the estate of the deceased.

2. In their amended Chamber Summons, the Applicants seek in the main a declaration that the portions of the land known as Block II/MN/202 ("the Land") which they purchased from the deceased and occupied by them do not form part of the estate of the deceased. They further seek that the Administrators be ordered to sign transfer forms in respect of the said portions of land ("the Portions") and that the Portions be ascertained and delineated from the Land. The Applicants assert that the Administrators of the estate failed to disclose in their Petition for a grant of representation, the Applicants' interest in the Land as a liability of the estate.

3. In an Affidavit sworn by one Maria Kiriro Mwamvungo on their behalf, the Applicants claim that they entered into binding sale agreements with the deceased for the Portions. That the Portions which they purchased and occupy do not form part of the estate of the deceased and ought not to be distributed to the beneficiaries thereof. The deponent annexed a bundle of documents upon which the Applicants relied to support their claim.

4. The Application is opposed by the Administrators. In a Replying Affidavit sworn by Julius Mugiira Marete, the Administrators deny that the deceased ever entered into any sale agreement and that the annexed agreements are tenancy agreements. That the Portions form part of the estate of the deceased. That the Applicants are tenants of houses without land and continued to pay ground rent to the deceased until his demise on 21.10.14. They annexed copies of receipts for ground rent. That the deceased had no intention of transferring the Portions to the Applicants but only licenced them to construct houses on the Portions. That the documents relied on by the Applicants confirmed that they leased the Portions at a monthly ground rent of Kshs. 200/=. To the Administrators, the Applicants are busybodies only interested in preventing and/or delaying the lawful administration of the estate.

5. A dispute arose as to the property on which the Applicants are laying claim. According to the Applicants, there are two titles circulating. Title No. C. R. 1808 for Plot No. II/MN/202 and Title No. C. R. No. CR. 60271 for Plot No. II/MN/8411, copies of which were on the record. The Administrators' explanation for this is that Plot No. 8411 is a subdivision of Plot No. 202. The Administrators acknowledge in their Affidavit sworn on 22.4.16 that the Applicants are owners of houses without land on Title No. C.R. 60271. A perusal of the two titles confirms that there was a subdivision of Plot No. 202

and one of the resultant plots is Plot No. 8411 which is in the name of the deceased. Indeed Plot No. 8411 (C.R. 60271) was listed in the Affidavit in support of the Summons for Confirmation of Grant, for distribution to the beneficiaries of the estate.

6. The issues for determination are whether the Applicants are outright purchasers from the deceased of the Portions as per their claim or whether they are owners of houses without land as contended by the Administrators. The other issue is whether the Portions form part of the estate of the deceased. In order to make such a determination, it is imperative that each of the documents annexed to the Affidavit in support of the Amended Chamber Summons is subjected to scrutiny. In my assessment there are three categories of Applicants and each Applicant in each category will be considered individually:

7. Category A

The Applicants in Category A are those for whom copies of agreements or receipts for payment were produced in relation to portions on the suit property.

i) For Maria Kiriro Mwamvongo was annexed a copy of a sale agreement dated 17.3.08 between her as Purchaser and Jane N. Kivungo for a “Swahili house without land of twelve (12) rooms...in Mishomoroni, Plot number 202/II/MN” for Kshs. 900,000/= of which Kshs. 100,000/= was paid. There is annexed another agreement dated 9.4.08 between the same parties showing payment of the balance of the purchase price of kshs. 800,000/=.

ii) For Jessy Gambo, the document annexed is referenced “Lease of Land” between her and the deceased. In this document, the deceased acknowledges receipt of Kshs. 40,000/= from this Applicant in respect of a lease for a portion of land measuring 20 by 70. The units are however not clear. The lease further indicates that Jessy Gambo will commence payment of monthly ground rent of Kshs. 200/= on 31st May of a year that is not clear. The date of the Lease is 10.10.2004.

iii) For Job Onengo was annexed a copy of a receipt number 308 dated 23.4.04 for Kshs. 100,000/= being payment for a lease for 99 years. The receipt is signed by the deceased and also contained the words “monthly payment 200/=.” A copy of his national identity card was also annexed.

iv) For Fredrick A. Orido is a copy of a sale agreement between him and the deceased dated 23.8.11 for a plot measuring 70 by 21 ft. The consideration is Kshs. 28,000/= to be paid in 6 instalments. The Agreement provided that the Applicant would pay the sum of Kshs. 100/= “every month as land rate”. Also annexed for this Applicant is a copy of a receipt number 41 dated 3.12.14 for Kshs. 4,000/= being payment of ground rent for the period January 2008 – September 2009.

v) For Dickson Okello, a Sale Agreement dated 31.5.08 is annexed for a portion of land measuring 65ft by 40ft. Notably, the Agreement is between this Applicant as Purchaser and one Awadh Aisha Mahafudh. The purchase price is Kshs. 180,000/=. The Agreement provided that “After payment of the last instalment if there is any accumulated ground rent during the period of possession by the seller, the seller will pay the owner of the land all outstanding ground rent”. The Agreement further provided that “Transfer fees to the owner of the land will be paid by the buyer”. Also annexed is a copy of a Transfer of Land from the deceased to this Applicant. This Transfer states that the deceased acknowledges receipt of Kshs. 25,000/= from this Applicant and transfers his right title and interest to this Applicant. From the documentation, it is quite clear that the sale of the plot was from Awadh Aisha Mahafudh to the Applicant. What was paid to the deceased was the transfer fee referred to in the Sale Agreement. The Court does note that the documents have been drawn in a less than satisfactory manner.

vi) For Jimmy Mbocho Mukua, a copy of an Agreement dated 5.5.04 between him and was annexed. The portion agreed upon measured 30 by 40 for Kshs. 60,000/=. He paid Kshs. 30,000/= and the balance was to be paid in instalments of Kshs. 10,000/= from June to August. The Applicant was to commence construction upon completion of payment. The Administrators produced two receipts. One dated 5.5.04 for Kshs. 30,000/= which stated “monthly payment after

six month 200/=”. The other receipt dated 10.11.04 for Kshs. 15,000/= which indicated a balance of Kshs. 15,000/=.

vii) For Joseph Murage, a copy of Agreement dated 10.5.04 was annexed in respect of a plot measuring 35 by 65 ft. The agreement was for a lease of 99 years for Kshs. 90,000/=. Receipts for ground rent were annexed by the Administrators. One dated 16.11.13 for Kshs. 2,400/=. The period is unclear. The other receipt is dated 18.2.14 for Kshs. 2,400/= for the period June 2007 to May 2008.

viii) For Eliud Njau Kinya, an agreement dated 29.11.12 is annexed showing that he purchased half of a plot from Salome Wairimu “being shamba of Mr. Marete M’ntii.” The agreement also indicates that this Applicant paid a transfer fee to the deceased of Kshs. 15,000/= leaving a balance of Kshs. 5,000/=. Also annexed is a copy of a receipt from the deceased dated 3.6.13 for Kshs. 5,000/= being balance of transfer fees. Also annexed is a rates receipt dated 13.6.13 for Kshs. 4,900/= paid to the Municipal Council of Mombasa.

ix) For Grace Mayar is annexed a Transfer Agreement from one Anastacia Mayar to her. The Agreement states that the “plot is a lease plot payable monthly at rate of Kshs. 200 only”. A receipt for plot rent from the deceased dated 25.9.12 for January 2012 to December 2013 for Kshs. 4,800/= was annexed to the Affidavit of the Administrators.

x) For Salome Wairimu, is annexed a copy of an agreement dated 10.1.04 between her and the deceased for a plot measuring 35ft by 65 ft for a consideration of Kshs. 90,000/=. The Administrators annexed a copy of a receipt from the deceased for Kshs. 2,400/= being “rent fee”.

xi) For Hamisi Rajab, a copy of an Agreement for sale in Kiswahili dated 30.9.03 was annexed. The Agreement is between this Applicant, Rajab Mussa Rajab, Khusna Rajab Zulfaa Rajabu, and their mother on the one hand the deceased on the other. The wording in the agreement is “nimemkodisha” meaning he has leased the same. The agreement further provides that the monthly sum of Kshs. 200/= will be payable with effect from six months from the date thereof. Architectural drawings were also annexed.

xii) For Helen Moka, a Sale Agreement dated 15.1.05 between her and the deceased was annexed. It was for the sale of a plot the consideration of which was Kshs. 60,000/=. It was a term of the agreement that the purchaser being this Applicant would pay a ground rent of Kshs. 200/= per month after six months from the date of the agreement. A copy of architectural drawings was also annexed. Also annexed to the Replying Affidavit is a receipt from the deceased dated 29.10.12 for Kshs. 1,000/= being plot rent for August 2010 to December 2010.

xiii) For George Mwaura Njenga, a Sale Agreement was annexed. The Agreement is however is between this Applicant and one Duncan Wanyoike Gatuma for sale of half of the Applicant’s plot. The Agreement clearly states that “The above plot is under Samson Karauri/Marete M’Ntii Plot No. 202, Mishomoroni”. Also annexed is a receipt dated 25.7.06 for transfer fees of Kshs. 20,000/= issued to Duncan Wanyoike Gatuma by the deceased for “transfer of a half plot from George Mwaura 35 by 50”.

8. Category B

Category B Applicants are those for whom no Agreements were produced in Court but for whom receipts for plot rent payments were produced.

i) For Joshua Muthigi Mutahi, a receipt number 559 dated 16.2.07 from the deceased was annexed. The receipt is for the sum of Kshs. 20,000/= received from Joshua Muthigi Mutahi being payment of “house transfer from Fabiano W. Wanjala”. The words “Plot No. 201 Sec 2 MN” are written on the receipt.

- ii) For Festus Amolo, 2 receipts from the deceased for plot rent dated 7.9.05 and 15.12.05 for Kshs. 9,000/= and 14,000/= respectively, were annexed to the Affidavit of the Administrators.
- iii) For Lydia Njiru, a receipt from the deceased for plot rent dated 10.10.08 for Kshs. 4,000/= was annexed to the Affidavit of the Administrators.
- iv) For Peter Wainaina, a receipt from the deceased for plot rent dated 18.5.10 for Kshs. 8,000/= was annexed to the Affidavit of the Administrators.
- v) For William Okoth Otieno, a receipt from the deceased for plot rent dated 8.9.12 for Kshs. 600/= was annexed to the Affidavit of the Administrators.
- vi) For Susan Mwangombe, a receipt from the deceased for plot rent dated 22.10.11 for Kshs. 4,800/= was annexed to the Affidavit of the Administrators.
- vii) For Duncan Wanyoike, a receipt from the deceased for plot rent for one year dated 27.4.09 for Kshs. 2,400/= was annexed to the Affidavit of the Administrators.
- viii) For Abdurahman M. Bidiku, 2 receipts from the deceased for plot rent dated 10.12.12 and 11.2.13 for Kshs. 3,000/= and 6,000/= respectively were annexed to the Affidavit of the Administrators.
- ix) For Regina Njeri Mwaniki, two receipts from the deceased for plot rent dated 26.10.10 and 2.5.13 for Kshs. 6,000/= and 4,000/= respectively are annexed to the Affidavit of the Administrators. Clearly showing that this Applicant was a tenant of the deceased.
- x) For Abud Mcheni Mote who may be Abaid Michemi indicated in the Application, a copy of a receipt for plot rent for the year 2007 dated 9.12.10 for Kshs. 2,400/= was annexed to the Affidavit of the Administrators. Also annexed was a copy of another receipt dated 12.3.02 for Kshs. 60,000/= for a plot of 35 by 65. The words “200/= per month” are written on the receipt.
- xi) For Edward Mutwiri, a receipt from the deceased for ground rent dated 28.5.12 for Kshs. 5,000/= was annexed to the Affidavit of the Administrators.
- xii) For Maurice Wangale, copies of architectural drawings for a proposed temporary house on Plot No. 202 Section II Mainland North were produced. It is instructive to note that the drawings are for a proposed *temporary* house. A copy of a receipt from the deceased for plot rent dated 5.12.12 for Kshs. 1,200/= was annexed to the Affidavit of the Administrators.

From the documents set out above, it is evident that the Applicants in Categories A and B are not outright purchasers of the Portions but are owners of houses without land in respect of the same.

9. Category C

Category C Applicants are those Applicants for whom the annexed Agreements appear to have an intention of an outright sale.

- i) For Dickson Shadrack Okello, is another Agreement for Sale dated 14.6.14 for a portion of Plot Number 1808/17 measuring 0.0267 ha. This Agreement places this Applicant in a category of his own. The purchase price was Kshs. 250,000/= of which a deposit of Kshs. 100,000/= was paid on execution of the Agreement. The balance was to be paid in four instalments of Kshs. 37,500/= the last of which was to be paid on receipt of the deed plan. The Agreement further provided that the deceased would endeavour to have the property discharged and transferred to the Applicant “within the shortest time frame” and to deliver to the Applicant the deed plan on completion date. What is not clear however is whether the deed plan was ever availed nor indeed whether the balance of the purchase price was paid to the deceased. Then there is the receipt for plot rent dated 23.4.11 for

Kshs. 2,000/=, which raises doubt as to the intention of the parties.

ii) For Judith A. Obera was annexed a copy of agreement for sale between her and the deceased of a plot measuring 65 ft by 41 ft. It was a term of the agreement that the vendor “shall do all things as may be required to ensure smooth transfer of the said piece of land” and also that the vendor sells “absolutely to the purchaser”. The vendor acknowledged receipt of Kshs. 90,000/= being the purchase price. For this Applicant, it appears that the intention of the parties was an outright sale as stated in the Agreement. Further, no receipts for ground rent were produced by either party to show that the same was paid.

10. The Administrators have dismissed the Applicants as busybodies whose only interest is to prevent and/or delay the lawful administration of the estate. They contend that the filing of the Application herein just when the Summons for Confirmation of Grant was due to be heard confirms this. A careful look at the record shows that the claim by the Applicants deserves consideration. Rule 40(6) of the Probate and Administration Rules provides:

“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 10 against such confirmation stating the grounds of his objection”.

11. It is the view of this Court that the Applicants fall in the classification of “any person wishing to oppose the confirmation of grant” as they assert that they have a valid claim against the estate of the deceased. Although the Applicants ought to have filed an Affidavit of Protest, I have elected to entertain the Application on the basis of Article 159(2)(d) of the Constitution which enjoins me to administer justice “without undue regard to procedural technicalities”.

12. Category D

Category D Applicants are those for whom no documents were produced by either party. These include the following:

- i) Mercy Wanjiru
- ii) George M. Kinyanjui
- iii) Boniface D. Juma
- iv) Sammy Macharia
- v) Morrie Maina
- vi) Njoroge Mwaura
- vii) Sharon Ndiemo Khamisi
- viii) Sarah Kamire
- ix) Peter Ogallo
- x) Thomas Otieno Otita
- xi) Hendrica Aswota
- xii) Maria Mwamuonga
- xiii) Jessica Tengeke

xiv) Leonard Babiee

xv) Swaleh Abdalla

xvi) Philemon Mwambi Liwa

xvii) Beatrice Mnyazi Gande

xviii) Julius Njahi Mucheke

13. It is trite law that he who alleges must prove. Section 107 (1) of the Evidence Act provides:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I have perused the record herein. I find no documents relation to the Applicants in Category D. In the absence of any documentation by way of agreements or plot rent receipts, I am unable to make any finding in favour of the Applicants in Category D.

14. I have evaluated all the documents produced by the Applicants and the Administrators. The Court is satisfied that Category A, B and C Applicants have proved on a balance of probabilities that they entered into valid Agreements with the deceased for the sale to them of the Portions. The sales, save for Category C Applicants, were however not outright sales but the manifest intention was for the purchasers to be owners of houses without land. This is why the Applicants paid ground rent to the deceased, as evidenced by the receipts produced in Court by both the Applicants and the Administrators.

15. The concept of house without land is a unique phenomenon to the Kenyan coast. It is a concept that entails the purchase of a portion of land which does not grant ownership rights to the purchaser. The purchaser after payment of the agreed consideration, which is equivalent to stand premium payable in conventional long leases, acquires the right to construct a house on the portion of land but title does not pass. It is a lease for which a monthly ground rent is payable by the purchaser to the owner of the land. In Famau Mwenye & 19th Others v. Mariam Binti Said, Malindi HCCC No. 34 of 2005, Ouko, J (as he then was) had this to say of the concept:

“That land system is only referred to as ‘house without land’, that is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

Khaminwa, J in Christopher Baya and 2 Ors. V. Philip Kiluko and Anor., Mombasa HC Civil Appeal No. 64 of 2004, described the concept as ***“the right to build on another’s land under agreement which does not pass title to the land”***.

16. For the Applicants in Categories A, B and C, sale agreements were produced in support of their respective claims as shown above. Should the Administrators then be compelled to execute transfers in favour of the Applicants? I think not. Save for category C Applicants, these were not outright sales. Indeed Ground 1 of the Amended Chamber Summons reads thus:

“1. THAT the Applicants are owners of House without land on the plot known as block II/MN/202.”

If the Applicants themselves concede that they are owners of houses without land on the Property, they cannot then seek a declaration that the Land does not form part of the estate nor can they seek an order to compel the Administrators to transfer the Portions to them. Given that no title passed to the Applicants, the suit property remains part of the estate of the deceased. Consequently I find no basis for compelling the Administrators to execute transfers in favour of the Applicants for the respective portions that they

occupy. Having so found, then the prayer for delineation of the Portions from the Land must fail.

17. On the claim that the Administrators did not notify the Court of the Applicants' interest in the estate, I find that this is so. The Administrators ought to have included the claim of the Applicants in the Land as liabilities of the estate. This notwithstanding, I find that nothing hinders the Administrators from distributing the suit property to the rightful beneficiaries subject to the interest of the Applicants.

18. In view of the foregoing, I make the following declarations and orders:

- a) The suit property Plot No. II/MN/8411 CR. 60271 which is a subdivision of Title No. II/MN/202 CR 1808 forms part of the estate of the deceased.
- b) The Portions occupied by category A, B and C Applicants are a liability of the estate of the deceased.
- c) The Administrators may proceed to apply for confirmation of the grant in respect of the suit property with the caveat that whoever the property will devolve to shall take it subject to the ascertained rights of Category A, B and C Applicants.
- d) The claim by Category D Applicants is hereby dismissed for want of documentation.
- e) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 28th day of July, 2016

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**