



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

SUCCESSION CAUSE NUMBER 449 OF 2009

In the Matter of the Estate of STEPHEN MUTUNGI M'MUTHURI (DECEASED)

PETER GAKUUBI M'MUTUNGI.....PETITIONER

VERSUS

GEORGE M'NTURIBI.....1ST APPLICANT

JULIUS KIRIMI.....2ND APPLICANT

SALOME KARUGA.....3RD APPLICANT

FLORENCE KANANA.....4TH APPLICANT

LUCY KATHURE.....5TH APPLICANT

GRACE MBUTHU M'MUTUNGI.....6TH APPLICANT

BENSON MWENDA MBWIRIA.....1ST INTERESTED PARTY

PATRICK GIKUNDI MURITHI.....2ND INTERESTED PARTY

KENNETH MUGAMBI.....3RD INTERESTED PARTY

SILAS BUNDI MBIJIWE.....4TH INTERESTED PARTY

RULING

The summons dated 20/11/2015 is brought Pursuant to Section 93 (1) of the Laws of Succession Act Cap. 160 Laws of Kenya, Paragraph 49 and 73 of the Probate and Administration Rules, Article 159 (2) (b) and (d) of the Constitution 2010. It is brought by the 4 interested parties, namely, Benson Mwenda Mbwiria, Patrick Gikundi Mwiti, Kenneth Mugambi and Silas Bundi Mbiijiwe hereinafter referred to as interested parties (IPs). The interested parties seek the following orders:

2. That the court do issue an order enjoining the three three interested parties;
3. That the court does declare the interested parties herein as purchasers for value and that

the title deeds are indefeasible as listed hereunder:

- (a) BENSON MWENDA MBWIRIA – L.R. NO. KIIRUA/NAARI/3748 measuring 0.20 Ha.**
- (b) PATRICK GIKUNDI MURITHI – L.R. NO. KIIRUA/NAARI/3643 measuring 0.304 Ha.**
- (c) KENNETH MUGAMBI KAMUNDI- L.R. NO. KIIRUA/NAARI/3603 measuring 0.304 Ha.**

4. That the court do issue an order that the above named parcels of land were purchased legally and thus the purchase should have a legal entitlement therein and that the caution placed thereon be removed.

5. Costs of the application.

The grounds from which these orders are sought are that the interested parties have purchased parcels of land and have been issued with titles and are also in the process of being issued with the title deeds; that the land was bought from Peter Gakuubi M’Mutunga from his share in Meru Succession Cause No. 449/2009; that the interested parties are bona fide purchasers for value without notice.

Each of the interested parties filed an affidavit in support of the application. Benson Mwenda deponed that he bought ½ acre of land for KShs.425,000/= on 3/8/2012, from Peter Gakuubi (the petitioner herein) who was then registered owner of L.R. KIRUA/NAARI/3644; that portion was excised therefrom; that he had conducted a search at the land registry and found Peter Gakuubi to be the registered proprietor and he obtained title L.R. KIIRUA/NAARI/3748 as per copy of title – BMM2; that he has since taken possession of the land; that he bought another ¼ acre from the petitioner on 21/5/2012 for which he is awaiting a title.

The 2nd interested party Patrick Gikundi Murithi claimed to have bought ¼ acre from the petitioner on 31/8/2011 as per agreement PGM1 and obtained a title deed KIIRUA/NAARI 3643 PGM2; that he has since taken possession and built on it and resides thereon.

The 3rd interested party Kenneth Mugambi, deponed that on 22/7/200-, he bought ½ acre from Peter Gakuubi and Harun Nteere and paid KShs.225,000 for L.R. KIIRU/NAARI/335 (RMK1) and another parcel for KShs.170,000/= and he obtained the title L.R. KIIRUA/NAARI/3603 (KMK2) which he took possession and built a semi permanent house and cultivates.

The 4th interested party Silas Bundi Mbijiwe also deponed that together with his wife Lucy Gacheri, they purchased ½ acre of land from Joses Tarcisio Mwebia for KShs.400,000/= as per sale agreement (SBM2), the said land had been bought from Peter Gakuubi and Harun Nteere on 18/3/2010 (SBM3), that he had already taken possession.

All the interested parties contend that their interests should be recognized and protected.

The protestors filed a replying affidavit opposing the application. It is sworn by Salome Karuga – 3rd protester, who urged that the application was filed with unreasonable delay since the interested parties were always aware that this case was ongoing; that the petitioner transferred the disputed land to himself fraudulently without the knowledge of the protestors who are beneficiaries to the deceased’s estate; that the 3rd interest party Kenneth Mugambi, had earlier deponed that he bought the land from the deceased, yet he colluded with the Petitioner and got the land at the confirmation of grant; that land L.R. KIIRUA/NAARI/3643 was sold to Patrick Gikundi and Dorcas Makena when there was an inhibition in existence; that Peter Gakuubi sold the shares of other beneficiaries and sold off more than his share and the court needs to determine the petitioner’s entitlement; that the court needs to determine the rights of all the beneficiaries to the deceased’s estate without interference from the interested parties; that the interested parties’ rights are only enforceable as against the sellers but not the protestors. They urged the

court to dismiss the application.

I have considered the application before me, the affidavits of the interested parties and the reply by the protestors. The application was filed right in the middle of taking viva voce evidence on distribution, the same having been commenced by J. Lesiit on 23/9/2013. This application was filed 2 years later.

The protestors had filed a notice of motion seeking revocation of grant issued to the petitioner, Peter Gakuubi, on 16/11/2010. On 31/7/2012, J. Lesiit granted the application whereby the grant was revoked, and the titles to land parcels KIIRUA/NAARI/9643, 2645, 3654,3596, 3597, 3599, 2600, 3601, 3602, 3748, 3749 and 3598 were cancelled and reverted to Stephen M'MMutungi, the deceased herein. This application seeks to have Titles KIIRUA/NAARI/3748, 3643, and 3603 which are part of the titles cancelled on 31/7/2012, declared as indefeasible and properties of the interested parties. The said titles having been cancelled on 31/7/2012 are no longer in existence. There has been no appeal against the order of J. Lesiit and granting this application would be tantamount to sitting on appeal on the Judge's order and this court lacks such jurisdiction.

In J. Lesiit's ruling, she ordered that a fresh mode of distribution of the estate of the deceased be made, to provide for the protestors amongst other beneficiaries. The protestors had been omitted from the list of beneficiaries of the deceased's estate. The matter is proceeding viva voce and in my view, the interested parties have no role to play in the distribution of the deceased's estate. A deceased person's succession cause is for purposes of determining and appointing the legal administrators of the deceased person and also for ascertaining of the deceased's heirs and their respective shares. In **Rubo Kipnetich Arap Cheruiyot v Peter Kiprop Rotich CA 128/2008, (2013) KLR**, the Court of Appeal observed:

“Claims by third parties to deceased person's properties, although sometimes lodged in the succession causes of such deceased person, are better litigated in separate suits ...”

In this case, the interested parties' titles have already been cancelled. The interested parties have no role to play in this cause. But the interested parties are not without recourse. If they have any claim, it is protected under Section 93 of the Laws of Succession Act against the seller. After the distribution is done in this cause, and the petitioner's share is determined, they can sue him in the Environment Land Court where they can urge their claims. The prayers they seek for declaration as bona fide purchasers cannot be granted in this cause.

I have considered the two decisions cited by Counsel. In **Mbulwa Maingi v Veronica Nthara Succession Cause 1127 of 2002**, the sale of the deceased's property by the Petitioner was upheld because the beneficiaries had been represented when the decision to sell was made and they shared the proceeds of sale. The facts are different from the instant case.

In **Meru Succession Cause 272B of 2009, the estate of Ngechu Mwirebua**, the sale of land by some beneficiaries was recognised by the court because the applicants' interest had not been interfered with and the transfer was made after confirmation of grant to which the applicant was party. The facts are different.

I do agree with the protestors that this application was brought late in the day. J. Lesiit cancelled the titles in July 2012, the case has been proceeding to hearing since 2013. I believe the interested parties must have known of the cancellation. Prayers there has been inordinate delay and in my view, this application is meant to derail and delay the conclusion of this matter. For reasons given earlier, I dismiss the application with costs to the Respondent/Protestors.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF JULY, 2016.

R.P.V. WENDOH

JUDGE

21/7/2016

PRESENT

Mr. Munene Kiumi Holding Brief for Mr. Mutegi for Applicants

Protestors – In Person