



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 26 OF 2009**

**IN THE MATTER OF THE ESTATE OF DANIEL NJIRANI KARU .....DECEASED**

**FRANCIS KAMAU NJIRAINI .....1ST PETITIONER**

**VERSUS**

**LOICY WANJA WARUIRU .....2ND PETITIONER**

**AND**

**ESTHER WAITHERA .....OBJECTOR**

**RULING**

There are 2 sets of applications which I propose to deal with them simultaneously as they are co-related. The first application dated 6/1/2016 is by Francis Kamau Njiraini the 1<sup>st</sup> Petitioner who doubles up as an administrator of the estate herein. He prays that the orders issued on 11<sup>th</sup> December 2015 confirming the grant be set aside. He has backed up the application vide his supporting affidavit dated 5<sup>th</sup> January 2016. Substantially he argues that he did not consent to the mode of distribution and that the signature which is allegedly his is a forgery. He further contends that he never instructed the law firm of Ndegwa Waweru Advocates to represent him or to consent in any way. He submits that at the time the orders were granted he was unwell and was admitted in hospital.

Loise Wanja Waruiru, the 2<sup>nd</sup> petitioner as well as a joint administrator with Francis has opposed the said application. She avers in her replying affidavit that they agreed as a family to the mode of distribution and that he did sign the said consent on mode of distribution. She went further to state that as a result of the understanding the applicant participated in the sale of land parcel No 2116/17/11. It was her argument that one Esther Waithera Karu in whose house the applicant is currently residing has totally controlled the applicant and she uses him to destabilise the estate.

Cyrus Ndegwa Waweru Advocate, the former counsel for the applicant has sworn the affidavit dated 21/1/2016 stating how the applicant signed the supporting affidavit in the presence of David Onyanchha Commissioner for oaths. That the said allegation that he never signed the affidavit was to say the least dishonest.

The applicant did file another affidavit dated 28/1/2016 in which he has denied ever participating in the sale of the commercial property and insisting that his signature was forged. That the only time he went to the firm of Waweru Ndegwa & Co. was to collect some money left by his late mother.

The second application is dated 9<sup>th</sup> September 2016 in which Esther Waithera the applicant prays that;-

- a) The grant issued on 11/12/2005 be revoked**
- b) Upon the revocation a fresh grant be issued to Esther Waithera and Loice Wanja Waruiru.**
- c) That Loice Wanja Waruiru, Florence Njeri Chege, Mary Njoki Githinji or any other person be restrained by way of a temporary injunction from withdrawing Kshs 5 million deposited in Co-operative Bank of Kenya Ltd A/c No 01109694299000 in the joint names of Loice/Florence/Mary.**

The application is supported by her affidavit sworn on 9<sup>th</sup> September 2016 together with the supporting annexures. She deponed that the deceased was her father in law and had 2 parcels of land at Cherengani measuring 32 acres and Waumini in Kitale and gave them to Danson Githinji the husband to Mary Njoki and 25 acres at Kiungani Kitale and gave it to James Chege the husband to Florence. That Plot No 2116/17/11 Kitale Municipality was left to her late husband Samwel Karu. She said that she was never a party to the consent to the mode of distribution and that infact the signature of the late mother in law Chesie Wambui Njiraini was a forgery. She said that she would not agree to the sale of the Kitale Municipality property as it belonged to her and her husband.

The 1<sup>st</sup> petitioner Francis Kamau Njiraini has supported the said application through his affidavit dated 1<sup>st</sup> August 2016 stating that he was never a party to the sale transaction. He attached the medical document showing that he has been unwell and could not have participated in the transaction.

Loice Wanja Waruiru vide her replying affidavit dated 24/9/2016 has opposed the said application stating that the applicant was properly consulted but has all along been adamant and uncorporate. That the court had earlier observed that she had been the trouble shooter and that there was nothing to show that her husband had been given the said property by the deceased. She further attached forensic report from the CID department showing that the allegations by Francis that his signatures were forged were false. In any case, she contents, the estate was fairly distributed equally.

One Corporal Daniel Njoroge in his affidavit dated 15/9/2016 states that the Forensic analysis of Francis Njiraini signatures shows that the same were authentic and no forgery exhibited. He went on to state that its Esther Waithera who has protected Francis from being arrested including helping him to cross the border to Uganda.

The parties then proceeded to file rival submissions which I have had the benefit of perusing through. The issues for determination can be summarised as hereunder:

- 1) Whether Francis Kamau Njiraini signature was forged.**
- 2) Whether Ndegwa Waweru represented the said Francis Njiraini.**
- 3) Whether Francis Njiraini signed the mode of distribution as well as the sale agreement.**
- 4) Whether the deceased settled other parties (sons) prior to his demise.**
- 5) Whether there was consent to the mode of distribution .**
- 6) Whether the distribution was equitable.**

The above issues are broad and were captured on record. First of all as regards representation, I have perused the proceedings of 10/12/2015 before my brother Justice Githinji and it clearly shows that all the beneficiaries were represented by their counsels, namely Nyamu, Ndegwa Waweru and Mr Karani. The

subject application before the judge was one dated 10/11/2015. The parties did express their sentiments and the Judge proceeded to allow their application now the subject of this application.

In terms of the issues framed above, and though they may not be necessarily sequential I believe the same shall general answer both applications. In any case both applications are in support of each other. The issue of the beneficiaries was well settled and the same has not been raised. The only son of the deceased remaining is Francis while the rest are daughter and sister in laws.

On the first issue Francis has argued that his signatures both on the mode of distribution and the sale agreement were forged. This was clearly discounted by the evidence presented by the document examiner whose report is already on record. The same was not counteracted by the applicant nor Esther Waithera the co-applicant. In the absence of any opposition I easily conclude that indeed the said Francis Njiraini signed both the mode of distribution as well as the sale agreement.

In any event if his signature was forged he ought to have reported the matter to the police so that appropriate legal action be taken as the same is a criminal offence.

I also note that non of the applicants has filed any objection to the affidavit of Ndegwa Waweru advocate. Infact if there was such forgery then both Mr Waweru and Mr Onyancha who witnessed the documents ought to have been questioned.

Further I also believe that Mr Waweru Advocate represented Mr Francis Njiraini and anything to the contrary is not true. One shatters it if is true that he did not have authority to do so. But from the evidence on record and the representation mode before the Judge I am satisfied that the applicant was well represented.

Esther Waithera has argued strongly that she did not sign the mode of distribution and that her objection proceedings were still pending. The learned Judge observed that since the same had not been prosecuted, it could not hold the estate from being distributed. Indeed from the record it appears that she filed an objection dated 27/2/2014 through Ms Wanyama C.S. & Co. Advocates. The said objections remained on record and no steps were ever taken to prosecute. The court in my respectful view was correct in holding so. No explanation was ever given by the applicant why she did not prosecute. The same tempts one to conclude that it was just a ploy to hold the estate in abeyance.

More fundamentally she has deponed that the deceased did purchase land at Kiungani, Wamuini and Cherengani and settled his now deceased sons Danson Githinji the husband to Mary Njoki and James Chege the husband to Florence Njoki and that he gave her husband Daniel Karu the prime property LR No 2116/17/11. None of the above allegations was backed by any tangible evidence. If truly the deceased did so then there would have been documentary evidence to that effect or at least some form of constructive evidence.

Further if the said beneficiaries sold the aforestated parcels as she claims then there ought to have been evidence in support.

I have perused the mode of distribution presented in court and the same contains some third parties whom the applicant especially Francis does not dispute that they should be granted their portions. Equally it is common knowledge that in succession proceedings when it comes to the distribution of the deceased estate one may not be really mathematically accurate in distribution as there are other mitigating circumstances. However in this estate I note that none of the parties has been disadvantaged . As observed earlier I have not been furnished with any tangible evidence, save allegations that other beneficiaries benefited from the estate. Prior to the demise of the deceased. If indeed the deceased purchased land and gave it to his now deceased sons who are represented by their wives, no such evidence have been submitted to this court. The end results is that all parties must share equally a fact which is clearly demonstrated in the confirmed grant.

The proceeds from the sale of the property was equally shared. Although the ratio is not the same Esther

Karu and Francis Njiraini have not been completely left out.

In disallowing both applications, I note with grave concern that this estate has unnecessarily taken a great deal of time. In fact Chesia Wambui Njiraini the deceased wife died before settling the same. I also note the negative remarks made by Justice Karanja in respect to the applicant Esther Karu herein.

With due respect to her I am equally disappointed by her action of dragging this estate through unnecessary litigation and mudslinging.

Surely there must be an end to litigation. She cannot get more than the rest of the beneficiaries. I note from record how she has constantly changed advocates in a bid to achieve her desired end of frustrating other beneficiaries. This I shall not allow. Litigation must be allowed to run its course. However it must also be allowed to end.

I am tempted to think that what the police found out that she is using the 1<sup>st</sup> petitioner to achieve her end result could be true. It is also foolhardy for the 1<sup>st</sup> petitioner to fall into the trap. How could he sign the sale agreement as well as the amended mode of distribution then turn around?

In the premises the two applications are hereby dismissed. Since this is a family feud, each party shall bear their respective costs.

The earlier temporary orders issued are hereby set aside.

Delivered this 31<sup>st</sup> day of October 2016.

**H.K. CHEMITEI**

**JUDGE**

**In the presence of ;**

**Nyamu for 2<sup>nd</sup> Petitioner/Respondent**

**Ngeywa for the 1<sup>st</sup> petitioner/Applicant**

**Teti for the applicant/Objector**

**Kirong – Court Assistant**