



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
SUCCESSION CAUSE NO. 441 OF 2002
(IN THE MATTER OF THE ESTATE OF GRACE NYOKABI WAMOKO)
REHAB NYAGUTHI MUNENE.....1ST PETITIONER
GEOFFREY HUNGU WAMOKO.....2ND PETITIONER
VERSUS
GEODFREY NGUNJIRI WANJOHI.....1ST APPLICANT
HUTCHSON GITHINJI WANJOHI.....2ND APPLICANT
AND
MIRIAM MUTHONI NGUMO.....1ST BENEFICIARY
JANE WANGECHI WAMOKO.....2ND BENEFICIARY

JUDGEMENT

The deceased Grace Nyokabi Wamoko, died on 6th May 2001; at the time of her demise, she was domiciled in Kenya and her last known place of residence was Nyeri.

Her children, Rahab Nyaguthii and Geoffrey Hungu, petitioned this Court for grant of letters of administration intestate; the petition was filed on 18th October 2002 and in the affidavit in support thereof six other children were named as having survived the deceased. The petitioners listed in the following assets as comprising the estate of the deceased for:

1. Nyeri/Island Farm/186
2. Euaso Nyiro/ Suguroi Block VI/329
3. Euaso Nyiro/Suguroi Block VI/155
4. Othaya/Kiahagu/529
5. Plot No. 35 Gatugi Market

This estate was estimated at Kshs1, 000,000/=; there were no liabilities and therefore this accounted for the deceased's net intestate estate.

The record shows that the grant of letters of administration intestate was made to the petitioners on 3rd July 2003 and it was subsequently confirmed on 12th October 2007. According to the schedule to the certificate of confirmation of grant, the entire estate was distributed amongst all the children of the deceased.

By a summons for revocation of grant dated 1st November 2013, the applicants sought to have the grant revoked or annulled on two grounds; first, they alleged that the grant was obtained fraudulently by making of a false statement by concealment from the court of something material to the cause; secondly, that the grant was obtained by means of untrue fact as the petitioners did not disclose all the beneficiaries who were entitled to a share of the deceased's estate.

In the same summons, the protesters sought orders for injunction to restrain the petitioners or beneficiaries either by themselves, their employees or their agents or any other person acting under their authority, from interfering or dealing with land parcels **LR. No. Othaya/Kihugiru/1865** and **LR. No. Othaya/ Kihugiru/1866**. They also sought titles issued in respect of these parcels of land, apparently in execution of the certificate of confirmation of grant, to **Jane Wangechi Wamoko** and **Grace Nyokabi Wamoko** respectively, cancelled and reverted to the original registered proprietor who in this case was the deceased. They asked this court for an order that the administrators or the petitioners be compelled to transfer these parcels of land to them.

The summons was filed under **section 76 (b) and (c)** of the "Probate and Administration Rules"; I guess they meant **section 76(b) and (c)** of the **Law of Succession Act, cap 160** which is the right provision that provides for applications for revocation or annulment of grant. The application was supported by the affidavit of Hutchison Githinji Wanjohi which was sworn on 1st November 2013 and filed in court on the same date.

Mr Githinji swore that he and his partners had purchased part of the estate from the deceased prior to her demise; he exhibited on his affidavit a sale agreement dated 8th September 2000 allegedly executed between them and the deceased. He also deposed that, they had developed the land which they bought and established a school which accommodates over 500 students and about 50 teaching and non-teaching staff.

It was Mr Githinji's position, though the petitioners were aware of this fact from the very beginning, they never brought the succession cause to the attention of the applicants and in particular the summons for confirmation of grant.

Rehab Nyaguthii Munene, an administratrix of the estate responded to the summons by way of a replying affidavit which she swore on her own behalf and on behalf of her joint administrator. The affidavit was sworn on 21st February 2014 and filed in court on the same date.

According to Rehab, the protesters were given opportunity to purchase a part of the estate prior to the confirmation of grant but they were unable to pay the balance of the purchase price and discharge their part of the contract which they executed with the deceased.

This honourable Court directed that the summons for confirmation of grant be disposed of by way of oral evidence and therefore parties testified in court according to the positions they had adopted in this summons.

According to the testimony of Mr Githinji, he entered into a contract with the deceased sometimes in the year 2000 for purchase of her land. He referred to a sale agreement dated 8th September 2000 which was executed by Godfrey Ngunjiri Wanjohi Gichuru on behalf of the purchasers on the one hand and the deceased as the vendor on the other hand. The subject of the transaction was land parcels **LR. No.**

Othaya/Kihugiru/1865 and **LR. No. Othaya /Kihugiru/1866**. The purchase price was Kshs 620,000/= out of which Kshs 120,000/= was paid. Of this sum, Kshs 100,000/= was the deposit of the purchase price while Kshs 20,000/= was the sum paid for the trees, apparently growing on the land.

Mr Githinji testified that according to the agreement, the purchasers were to take possession, and indeed they took possession of the land upon execution of the agreement. Since then they had been using the land as a playground for their pupils. According to him, each of the two parcels measured 0.1 ha. It was also his evidence that the balance of Kshs 500,000/= was to be paid upon the execution of the transfer documents. He confirmed that one parcel, **LR. No. Othaya /Kihugiru/1866** had already been transferred to them. The witness produced certificates of search of land showing that the rest of the parcels had been transferred to their respective beneficiaries.

During cross-examination, the witness was referred to the sale agreement which is said they executed with the deceased and he confirmed that he had not signed it; he however said, that the agreement was signed by the Geoffrey Ngunjiri on his behalf and on behalf of the rest of the purchasers. The other partner, Stephen Githinji Gichuru, was deceased. He testified that in 2008 he entered into a sale agreement with the Rehab Munene for purchase of **LR. No Othaya/Kihugiru/1870** which was also the subject of the sale agreement of September 2000. This parcel, according to his evidence, was registered in the name of River Road School Ltd though he was not aware of how the transfer was effected because, apparently, there was no consent of the land control board for the transfer.

The witness insisted that by the time the same agreement was made the deceased person was still alive. He also stated, that Rehab Nyaguthii Munene had demanded money from him apparently for the purchase of the land even after the deceased's demise.

On her part, **Rehab Nyaguthii Munene** testified that the deceased was her mother and **Geoffrey Hungu**, the joint administrator of her mother's estate was her brother. She admitted that she knew the applicants and that she was also aware that prior to her mother's demise, she had entered into some transaction with the protesters in respect of land parcels, **LR. No. Othaya /Kihugiru/1865, LR. No. Othaya/Kihugiru/1866** and **LR. No Othaya/Kihugiru/1870** but that she died before the transaction was completed.

The witness testified that the protesters were aware of her mother's death and that they even attended her funeral. She also testified that the deceased's family asked them to pay the balance of the purchase price so that they could be incorporated in the succession cause as purchasers; in this regard, she testified that the applicants were aware of the succession proceedings and it is not true, as they alleged, that they were not aware of these proceedings. Eventually, according to her, the estate was distributed and the beneficiaries got their respective shares in the estate. She received land parcel **LR. No Othaya/Kihugiru/1870** as part of her share of the estate and she sold it to the applicants at a price of **Kenya shillings 800,000/=**.

Counsel for the parties filed written submissions in support of the positions their respective clients had taken; I have duly considered submissions and in my view, they mirror the evidence of their respective clients. Counsel for the applicants reiterated that they had *locus standi* in this cause principally because they had executed a sale agreement between themselves and the deceased; if anything, so it was submitted on their behalf, under **section 93(2) of the Law of Succession Act**, their interest in the estate ranked prior to the interests of the rest of the beneficiaries.

Counsel also submitted that, despite the fact that the petitioners were aware of the sale agreement between the deceased and the appellants they never disclosed this in the petition for grant of letters of administration intestate. In fact, they never disclosed in the affidavit in support of the petition that there were any liabilities in the estate. To this extent the protesters urged this honourable Court to find the petitioners to have been guilty of material non-disclosure and concealment of material facts.

Counsel for the petitioners, on the other hand, conceded that indeed there was a sale agreement to sell certain parcels of land registered in the name of the deceased to the applicants. However, as at the time of

her death, the applicants had never taken any action to complete the sale.

Counsel submitted that the applicants had no *locus standi* to file the application for revocation or annulment of grant. According to him, **section 76** of the **Law of Succession Act** only allows interested parties to file the application for revocation or annulment of grant and in his view, the applicants did not fit into that category of persons contemplated under **section 76** of the Act. And even if it was to be assumed that the applicants had been catered for under this provision of the law, there was no proof that there was an untrue allegation of facts as alleged. It was submitted on behalf of the joint administrators that the applicants were all along aware of the succession proceedings.

Finally, it was submitted on behalf of the protesters that, if there was any valid claim against the estate appropriate civil proceedings ought to have been taken. I understood counsel to say that the remedy for the appellant's grievances, if any, could appropriately be captured in an ordinary civil suit and not in this succession cause.

My evaluation of the applicant's application, the evidence for and against it and, the submissions by the learned counsel both for the applicants and the respondents leads me to the conclusion that the sale agreement of 8th September, 2000 is the linchpin of the applicant's application. Due to its centrality to the application herein, it is necessary that I reproduce it here.

“SALE AGREEMENT

1. VENDOR: GRACE NYOKABI WAMOKO

1D/0746191/64 of

P.O. Box 133 Othaya

2. PURCHASERS: STEPHEN GITHINJI GICHIRU

GODFREY NGUNJIRI WANJOHI

HUTCHISON GITHINJI WANJOHI

All of P.O. Box 59 Othaya.

3. PROPERTY: Land Parcels

1. OTHAYA/KIHUGIRU/1865 measuring 0.10 ha

2. OTHAYA/KIHUGIRU/1866 measuring 0.10 ha

3. OTHAYA/KIHUGIRU/1870 measuring 0.10 ha

All registered in the vendor's name

4. PURCHASE PRICE:

-Shillings six hundred and twenty thousand Kshs (620,000/=)

-Shillings two hundred thousand (200,000/=) for each parcel

-shillings twenty thousand (Kshs, 20,000) for all the trees in the three parcels of land.

5. MODE OF PAYMENT:

a) Shillings one hundred and twenty thousand (Kshs. 120,000/=) to be paid on the execution of this agreement through cheque No. 001531 of KCB Othaya.

b) Shillings five hundred thousand (500,000/=) to be paid on the signing of the transfer of the three parcels of land.

6. POSSESSION:

The purchasers shall take possession of the property immediately after execution of this agreement.

7. OTHER TERMS:

Both parties agree Mindo & Co. Advocates to be their advocates for the purpose of this transaction.

-The purchasers shall pay fees incidental to this agreement.

Executed this 8th day of September, 2000

BY THE VENDOR Grace Nyokabi

BY THE PURCHASER

GODFREY NGUNJIRI WANJOHI ON BEHALF OF ALL THE PURCHASERS.

WITNESS

DUNCAN MINDO ADVOCATE”

It is common ground that the deceased executed this agreement prior to her death. It is also not in dispute that there was part performance of this contract to the extent that the applicant was paid part of the purchase price and in consideration of this part payment, the applicants appear to have taken possession of part of the parcels of land.

As far as I can see, the applicants are seeking to enforce this agreement through their application for revocation or annulment of grant. This is clear from the third to sixth substantive prayers in their summons. For instance, in the third and fourth prayers, they are seeking orders for an injunction restraining the petitioners, amongst other persons, from any sort of dealings with land parcels **LR. No. Othaya /Kihugiru/1865** and **LR. No. Othaya/Kihugiru/1866**. In the fifth prayer, the applicants are seeking the cancellation of the titles that have been registered in favour of some of the beneficiaries of the deceased following the distribution of the estate. In the sixth prayer, they are seeking orders against the administrators of the estate compelling them to transfer these particular parcels of land to them.

As noted, the administrators were of course alive to the agreement between the deceased and the applicants. One of the documents the applicants themselves produced in proof of this fact is the petitioner's letter dated 30th October, 2004 addressed to the applicants asking them to pay the balance of the purchase price and complete the contract between them and the petitioners' mother. By this time, the administrators had already filed a petition for grant of letters of administration and indeed they had obtained the grant only that they had not applied for it to be confirmed. The letter does not seem to have elicited any form of response from the applicants, and therefore the testimony by Rehab that they eventually filed a summons for confirmation of grant without any reference to the applicants because of their inaction appears to me to be plausible. I note that though the letter was written way back in in the year 2004 the summons for confirmation of grant was filed three years after, to be precise, on 3rd July 2007; the grant was finally confirmed on 12th October 2007 when this honourable Court distributed the

deceased's estate amongst her children including the parcels of land that were the subject of the sale agreement between the deceased and the applicants.

Questions that would normally arise in these circumstances would, in my humble view, include whether the applicants were ready and willing complete the contract, or whether the administrators were entitled to treat the contract as rescinded in view of the lack of any response from the applicants to their letter of 30th October 2004. It would also be logical to ask whether either of the parties had breached the contract and was entitled to the sort of remedies that the applicants are seeking in the summons for revocation of grant. For instance, would the applicants be entitled to such remedies as injunction and specific performance, which essentially are remedies for breach of contract but which they are seeking in an application for revocation or annulment of grant?

All these questions, including the validity or enforceability of the contract between the deceased and the applicants are valid questions; however, I'm not persuaded that the best means through which they can be brought to the fore is by an application under **section 76** of the **Law of Succession Act**. I am also not convinced that the best forum in which these questions can be answered is in a succession cause. In my humble view, if the applicants' case is that they are aggrieved by the action of the administrators to distribute the deceased's estate without incorporating them and without regard to their contract with the deceased, then they have as much a cause of action in contract against the administrators, as they would have had against the deceased had this contract been breached in her lifetime. **Section 2 (1)** of the **Law Reform Act** provides a window for such suits; it says:-

Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

It is in a substantive civil suit for breach of contract that the applicant's grievances can be properly ventilated; it is in such a suit that they can persuade the court that they are entitled to such remedies as enforcement of the contract and registration of specific titles of the parcels of land in question into their names; it is in such a suit that the court can either order for specific performance of the contract or an award of damages or even both.

The main purpose of **section 76** of the Law of Succession Act is not to enforce contracts that may have been executed between the deceased and other parties. Where a grant has, by and large, been properly made, it cannot be revoked or annulled under **section 76** of the Act for the sole purpose of enforcing a contract executed by a deceased person. The basis and the reasons upon which an application under section 76 of the Act can properly be made are clear in that section and it is incumbent upon the applicant seeking to invoke that provision of the law to demonstrate that all or any of the grounds stated therein exist. I am not satisfied that this has been shown in the application before me. To be precise am not convinced, as has been suggested by the applicants, that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation may have been made inadvertently.

The administrators not only disclosed in their petition the extent of the deceased estate but they also identified his survivors and the beneficiaries of his estate. The petition contained all the material particulars prescribed in **section 51 (1)** of the Law of Succession Act; that section provides:

51. (1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to

- (a) the full names of the deceased;**
- (b) the date and place of his death;**
- (c) his last known place of residence;**
- (d) the relationship (if any) of the applicant to the deceased;**
- (e) whether or not the deceased left a valid will;**
- (f) the present addresses of any executors appointed by any such valid will;**
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;**
- (h) a full inventory of all the assets and liabilities of the deceased; and**
- (i) such other matters as may be prescribed.**

(3) Where it is alleged in an application that the deceased left a valid will –

(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application; (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

(4) No omission of any information from an application shall affect the power of the court to entertain the application.

Counsel for the applicants appeared to suggest that the petitioners ought to have indicated in the petition that the deceased had liabilities arising from the contract she executed with the applicants. For my part, I do not see such liabilities since at the time of the deceased's demise, it was in fact the applicants who owed the deceased the balance of the purchase price. It is true that the deceased had received part of the purchase price but it could not be said to amount to a liability because none of the applicants had sought for a refund of this money. It was instead presumed that the parties intended to complete the contract and it is for this reason that I think, long after the demise of the deceased, the petitioners asked for the balance of the purchase price. I guess it is also for the same reason that the applicants are now seeking to enforce the contract and have the land transferred to them.

The omission to state in the petition that there was contract between the deceased and the applicants or that part of the purchase price had been received by the deceased does not appeal to me to be fraudulent by concealment of something material to the case; neither can it be said that by listing the assets comprising the estate without disclosing any liability was an untrue allegation of fact essential in point of law to justify the grant because, as noted, there was no such liability. The applicants cannot also be heard to say that they had acquired any proprietary interests in the estate because, as far as I can gather from the available evidence, they had not completed payment of the purchase price and therefore the estate was validly in the name of the deceased and was available for distribution amongst her heirs.

I am inclined to conclude that the applicant's application is, for reasons I have stated, misconceived. Their remedy, if at all they are aggrieved that the contract between them and the deceased has been breached lies elsewhere. Their application dated 1st November, 2013 is dismissed. Parties will bear their own respective costs.

Signed, dated and delivered this 13th October, 2016

Ngaah Jairus

JUDGE