

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1566 OF 2013

IN THE MATTER OF THE ESTATE OF FRANCIS PETER NJUGUNA RURIGI alias FRANCIS P. NJUGUNA RURIGI alias FRANCIS NJUGUNA alias F. P. NJUGUNA RURIGI alias FRANCIS PETER RURIGI (DECEASED)

RULING

1. The application I am called upon to determine is dated 26th November 2014, which seeks removal or exclusion of Plot No. 1 – 310 Mathare North from the schedule of the assets belonging to the deceased. The applicant asserts that the said asset did not belong to the deceased, but exclusively to her.

2. The respondent has opposed the application. She states that the deceased was the one who had purchased the property but inserted the name of the applicant, who was then his wife, as a co-owner. She asserts that the said asset forms part of the estate of the deceased.

3. I have noted from the record that Muchelule J. did grant orders on 1st February 2016 to preserve the said asset, and more particularly to stop the applicant from evicting tenants pending disposal of pending confirmation and protest proceedings.

4. Ideally, the issue being raised by the applicant in the instant application ought to be dealt with within the context of the confirmation and protest proceedings. That is provided for in Rule 42(2) (3) of the Probate and Administration Rules. I would though concede that it can also be handled prior to the hearing of the confirmation application.

5. Under Rule 42(2), it is provided as follows:-

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide determination of the question arising in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.’

6. My understanding of this is that where a claim is brought by anyone, whether a beneficiary or survivor of the deceased or even a third party, that he has an interest of one sort or other in estate property, such property shall be set aside or be removed from the schedule of assets to await determination of the question as to the interest of the claimant. Should it be established that the property or part thereof belongs to the claimant then the asset or part thereof remains removed from the schedule. However, should it be established that the claimant had no interest of any sort in it; the property is restored to the schedule and thereafter distributed under section 71 of the Act.

7. The nature of the proceedings for determining such interest is set out partly in Rule 41(3) and wholly in Rule 41(4). What is envisaged is an Originating Summons under the successor of Rule XXXVI Rule 1 of the Civil Procedure Rule. The summons ought to be at the instance of the administrator where the claimant is named as a respondent. That does not preclude a suit properly brought before the Environment and Land Court by the claimant against the estate under the Civil Procedure Act and Rules for determination of the question of ownership as between the deceased and the claimant. The effect of these provisions is that such questions ought not to be determined within the probate cause.

8. That should be the direction that ought to be taken in this matter. The applicant is claiming exclusive ownership of Plot No. 1 – 310 Mathare North. That is a matter that this court ought not to venture into determining. That is the exclusive province of the Environment and Land Court. The role of the probate court is to distribute those assets that are indisputably the deceased's.

9. Going by the provisions of Rule 42(2)(3) of the Probate and Administration Rules I do hereby order that Plot No. 1 – 310 Mathare North be removed or set aside from the schedule of the assets of the estate. Thereafter, the applicant or the administrators shall move the relevant court for a decree on the ownership of the said property. If it turns out that the said asset is estate property, the administrators shall move this court in this cause on the strength of the said decree for the restoration of the asset to the schedule of the assets of the estate and its subsequent distribution. The setting aside of Plot No.1 – 310 Mathare North shall not be a bar to this court disposing of the pending confirmation and protest proceedings as they relate to the rest of the estate.

10. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE