



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 745 OF 1997**

**IN THE MATTER OF THE ESTATE OF GITHAIGA THUKU alias THUKU GITHAIGA alias LIVINGSTONE THUKU (DECEASED)**

**RULING**

1. The deceased herein died on 5<sup>th</sup> June 1994. Representation to his estate was sought herein through a petition lodged herein on 11<sup>th</sup> April 1997 by Charles Ikenye Wamanji and Peter Njau Wamanji, in their capacities as sons of the deceased. The deceased was said to have been survived by four (4) sons, being the two petitioners and Simon Gicura Wamanji and Willie Njoroge Wamanji. He was said to have died possessed of Ol-Joro Orok Scheme Plot No. 2717 – Nyandarua and Lari/Magina/909.
2. A grant of letters of administration intestate was made in the matter on 16<sup>th</sup> December 1997 to the petitioners. The grant was confirmed on 14<sup>th</sup> February 2001, on an undated summons for confirmation of grant lodged in the cause on 13<sup>th</sup> February 2001. The estate was distributed equally between all four (4) sons of the deceased. A certificate of confirmation of grant in those terms was issued dated 14<sup>th</sup> February 2001.
3. Along the way, one administrator, Peter Njau Wamanji, died, necessitating rectification of the grant to have him substituted with Elick Kimani Chege, and a review of the distribution to correct the description of one of the assets and to redistribute the other asset. This was done through an application dated 30<sup>th</sup> March 2011. The certificate of confirmation of grant was rectified on 18<sup>th</sup> January 2012, and a certificate to that effect was issued.
4. The application that I am called upon to determine is dated 9<sup>th</sup> December 2015. It seeks two orders against Simon Maina Kimondo and Jane Njeri, that the two be restrained from developing on Ol-Joro Orok Scheme Plot No. 2252 or on any of its subdivisions, and that they be ordered to vacate. The application is at the instance of the administrators, Charles Ikenye Wamanji and Elick Kimani Chege. They aver in their affidavit dated 9<sup>th</sup> December 2015 that Simon Maina Kimondo and Jane Njeri are in occupation of portions of Ol-Joro Orok Scheme Plot No. 2252 and have refused to move out to facilitate distribution as between the survivors of the deceased.
5. The reply to the application is by Simon Maina Kimondo. He swore a replying affidavit on 14<sup>th</sup> June 2016. He asserts that Nyandarua/Olgoro-orok/2252 ceased to exist since 23<sup>rd</sup> January 2013 after it was subdivided into nine (9) plots. He says that he has bought one of the plots, being Plot No, 26/Nyandarua/Olgoro-orok Salient/2252 from Daniel Muturi Wanjohi, who had in turn bought a larger piece of the land from the children of the deceased, that is to say Charles Ikenye Wamanji, Peter Njau Wamanji, Simon Gicura Wamanji and Willie Njoroge Wamanji. The land is said to have been previously known as Nyandarua/Olgoro-orok Salient/2717 registered in the name of the deceased herein, Elizabeth Muthoni Wamanji. He claims that there was an agreement with the administrators which led to

rectification of the certificate of grant on 4<sup>th</sup> April 2011 to include him as a beneficiary of one acre of the property together with Charles Ikenye Wamanji. The orders are said to have been made on 18<sup>th</sup> January 2012. He asserts that he is not a trespasser.

6. He has attached copies of several documents to his affidavit in support of his case. There is copy of a mutation form dated 30<sup>th</sup> January 2013 for the subdivision of Nyandarua/Oljoro-orok Salient/2252. It is filled at the instance of Charles Ikenye Wamanji and Elick Kimani Chege, the administrators. There is also a copy of a sale agreement dated 15<sup>th</sup> January 2001, executed by Daniel Muturi Wanjohi and Simon Maina Kimondo, regarding the disposal of Plot No, 26/Nyandarua/Oljoro-orok Salient/2252. There is also another agreement dated 16<sup>th</sup> April 1997 between Daniel Muturi Wanjohi and Charles Ikenye Wamanji, Peter Njau Wamanji, Simon Gicura Wamanji and Willie Njoroge Wamanji disposing of 4.7 acres out of Nyandarua/Oljoro-orok Salient/2717, which was registered in the name of the deceased, who was by then dead. There are also copies of handwritten acknowledgements of receipt of money, both signed in 1997, by Charles Ikenye Wamanji and Daniel Muturi Wanjohi. There is also a copy of a handwritten agreement, dated 16<sup>th</sup> June 2004, between Charles Ikenye Wamanji and several individuals, including Simon Maina Kimondo, who were in occupation of the subject land. They had all allegedly bought a portion of that land that Charles Ikenye Wamanji, Peter Njau Wamanji, Simon Gicura Wamanji and Willie Njoroge Wamanji had sold to Daniel Muturi Wanjohi, who thereafter left the country before transferring the land to them. The agreement of 16<sup>th</sup> June 2004 was in respect of settling dues owed to the Settlement Fund Trustees (SFT), the original owners of the property who had sold it to the deceased.

7. The averments in the affidavit of Simon Maina Kimondo have not been controverted for there is no response to them by way of affidavit.

8. I do not have in the record before me a response to the application by Jane Njeri.

9. The deceased herein died on 5<sup>th</sup> June 1994. Representation intestate was granted on 16<sup>th</sup> December 1997. The survivors of the deceased - Charles Ikenye Wamanji, Peter Njau Wamanji, Simon Gicura Wamanji and Willie Njoroge Wamanji - entered into an agreement to dispose of the property to Daniel Muturi Wanjohi on 16<sup>th</sup> April 1997. The respondents to the instant application then bought portions of the subject land from the said Daniel Muturi Wanjohi. The grant was confirmed on 14<sup>th</sup> February 2001. The sale to Daniel Muturi Wanjohi by the children of the deceased occurred before representation to the estate was obtained.

10. Section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, provides as follows –

*‘The executor or administrator to whom administration has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all property of the deceased shall vest in him as personal representative.’*

11. The vesting of the property of the dead in a personal representative places the administrator in the same footing with the owner of the property. Section 79 should be read together with sections 82 and 83 of the Act. Section 82 sets out the powers of the personal representative, which include the power to deal with estate property, which in any event vests in the administrator. The powers include the power of sale or conversion. Section 83 sets out the duties of the administrator, which include the duty to get in the assets of the estate, all of which vest in the administrator. By virtue of section 79, the property of a dead person vests only in the personal representative, who would be either the executor of a will made by the deceased or an administrator appointed by the court in intestacy. Only a personal representative can exercise the powers set out in section 82 and bear the burden of the duties set out in section 83.

12. Sections 79, 82 and 83 of the Act, ought to be read together with section 45 of the Act, which provides as follows -

*‘(1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or*

*otherwise intermeddle with, any free property of a deceased person.*

*(2). Any person who contravenes the provisions of this section shall –*

*(i) be guilty of an offence and liable to a fine ... or to a term of imprisonment ... or to both such fine and imprisonment ...'*

13. Section 45 states that handling of estate property by an unauthorized person is prohibited. The provision even criminalizes such conduct. The authority to handle estate property emanates from a grant of representation, and only persons holding such grants could dispose of estate property. There is also section 82(b) of the Act, which states as follows –

*'Personal representatives shall ... have the following powers –*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best;*

*Provided that –*

*(i) ...*

*(ii) No immovable property shall be sold before confirmation of the grant.'*

14. The purport of section 82(b) of the Act is that immovable estate property should not be sold before confirmation of grant. Although section 79 vests estate property in administrators and section 82(b) gives administrators power to dispose of such property by sale, the proviso in section 82(b)(ii) limits that power with respect to immovable property, so that such property cannot be sold until after the grant has been confirmed.

15. The respondents herein bought the subject property from a person who had purported to have bought it from the children of the deceased before representation had been granted to the estate. That meant that at the time of sale the estate had not yet been vested into the purported sellers. They therefore did not have the power to sell it to anyone. As it had not yet vested in them they could not pass a good title to anyone. Their conduct fell afoul of section 45 of the Act; the act of purporting to sell the property of a dead person without authority amounted to intermeddling with it.

16. The sum total of the above is that the transaction between Daniel Muturi Wanjohi and Charles Ikenye Wamanji, Peter Njau Wamanji, Simon Gicura Wamanji and Willie Njoroge Wamanji over Nyandarua/Oljoro-orok Salient/2717 on 16<sup>th</sup> April 1997 did not confer any rights at all over the subject property. Therefore Daniel Muturi Wanjohi did not acquire any rights that he could transfer to anybody else, including the respondents herein. The respondents, therefore, have no right to occupy the property in question.

17. Consequently, I shall allow the application dated 9<sup>th</sup> December 2015, in the terms proposed in the said application, that is to say that the respondents, Simon Maina Kimondo and Jane Njeri, are hereby restrained from putting up any structures on Nyandarua/Oljoro-orok/2252 or on any subdivisions thereof, and the two (2) shall hand over vacant possession of the subject property within thirty (30) days of date hereof. The applicants have not asked for costs, so none shall be granted. It is so ordered.

18. The deceased died possessed of two assets, one situated at Kiambu County and the other within Nyandarua County. It would appear that the family of the deceased is largely resident in Kiambu County. Consequently, I do hereby direct that the cause herein be transferred to the High Court at Kiambu for disposal.

**DATED and SIGNED at NAIROBI this 16<sup>TH</sup> DAY OF DECEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**

**DELIVERED and SIGNED this 20<sup>TH</sup> DAY OF DECEMBER, 2016.**

**R. OUGO**

**JUDGE**