



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 684 OF 2012

(IN THE MATTER OF THE ESTATE OF MITHAMO KARUNGARU (DECEASED))

IRENE WANJIRUMITHAMO.....PETITIONER

VERSUS

SIMON KUIYAKI KARUNGARU.....PROTESTOR

**EVANSON GITHINJI
KINYANJUI.....APPLICANT/INTERESTED PARTY**

RULING

The deceased herein, Charles Mithamo Karungaru died on 29th April, 2004. On 19th October, 2012, the deceased's widow lodged in this Court a petition for grant of letters of administration of the deceased's intestate estate. According to **Form P&A 5**, which is an affidavit sworn by the petitioner in support of the petition for grant of letters, the deceased was also survived by three children apart from the petitioner.

Amongst the assets that are listed to have comprised the deceased's estate is an immovable and apparently developed property referred to as **Karatina Municipality BI/104**; the deceased's liabilities are listed as including Kshs 200,000/= which he is said to have owed **Evanson Githinji Kinyanjui**, the applicant or interested party herein, at the time of his demise.

The record in this cause shows that the grant of letters of administration was made to the petitioner on 23rd August, 2012 and was subsequently confirmed on 1st November, 2012. According to the schedule of the distribution of the deceased's estate in the certificate of confirmation of grant issued on the same day the interested party was allocated a half share of the property, **Karatina Municipality BI/104**.

It would appear that after the grant was confirmed and before the estate was distributed amongst the beneficiaries as scheduled in the certificate of confirmation of grant, **Simon Kuiyaki Karungaru**, the protestor herein, sought to have the grant revoked or annulled vide a summons dated 5th February, 2013. This summons was, however, not heard because by a consent filed in court on 21st June, 2013, the petitioner and the protestor agreed that Evanson Githinji Kinyanjui, the applicant, gets a half share of the property, **Karatina Municipality BI/104** while **Simon Kuiyaki Karungaru** gets the other half of the same property; their respective shares were identified and specifically described in the consent. The consent was adopted as the order of the court on 11th December, 2012.

Evanson Githinji Kinyanjui, the applicant herein, claims he was aggrieved by the consent principally because though he is directly affected by that consent and as he says, adversely so, he was not party to it. For this reason, he has now filed in this court a summons dated 13th November, 2014 seeking to have the

consent reviewed and set aside and also to restrain the protestor from collecting monthly rent in excess of **Kshs. 61,000.00** apparently from the share he was allocated in **Karatina Municipality BI/104**; he has also sought an order for account for the protestor to account for what in his view is the extra sum of **Kshs 15,000/=** the protestor has been collecting on monthly basis over and above what is rightly due to him. It is this summons that is the subject of this determination.

The summons is said to have been brought to court under **Rule 59(5)**; it is not clear from the summons the rules that the applicant could have been referring to but I presume it is the **Probate and Administration Rules** made under **section 97** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**.

In the affidavit sworn by the applicant on 13th November, 2014 in support of the summons, the applicant says that he purchased from the petitioner a share of the deceased's estate, more particularly, the half share of **Karatina Municipality BI/104** on 23rd July, 2012 at a consideration of **Kshs 6,000,000.00**. It was the applicant's expectation, perhaps because of the representations made to him by the petitioner, that he would be earning a monthly rental income of **Kshs 61,000.00** from the premises that he had acquired.

Contrary to the applicant's expectations and in an alleged breach of the agreement executed between the applicant and the petitioner in respect of the suit property, the applicant deposes that the petitioner and the protestor sub-divided the property between themselves and without any reference to him; they eventually recorded the impugned consent order in court without even consulting the applicant. It is the applicant's case that at the time this consent was recorded, the petitioner had disposed of her interest in the property to him and thus his contribution to the consent was necessary.

The applicant has sworn that as a result of the consent, he is getting a monthly rental income of Kshs 46,000.00 from his share of the property while the protestor is receiving Kshs 76,000.00 from the other share of the property; the applicant deposes that he is prejudiced by this inequality which is inconsistent with the sale agreement executed between him and the petitioner. According to him, the protestor has been allocated the front part of the property comprising shops that yield more income than the backyard rooms that the applicant has been given.

In order to mitigate his grievances, the applicant has proposed that the entire property should be retained as an undivided single unit whose rental income should then be shared out equally between him and the protestor and if it has to be divided, then such division of the property should take into account the rental income from the shops or rooms that constitute this property.

The petitioner did not respond to the application but the protestor filed a replying affidavit opposing it. In his affidavit, the protestor deposed that he did not obtain his share of the suit property by transmission as the applicant seems to suggest but rather he was always a registered co-owner of the property together with his brother, the deceased herein.

The protestor has also sworn that the petitioner purported to sell the share of property belonging to the deceased without the protestor's knowledge or consent.

Since he was not party to the contract between the petitioner and the applicant, the protestor has stated that he is not bound by any terms or conditions in that contract which, in any event, is contrary to his rights as the proprietor of the half share of the suit property.

In the protestor's view, the applicant is a stranger to the estate and has no basis of interfering in any manner whatsoever with protestor's possession and enjoyment of his share of the property.

In short the protestor sought to have the application dismissed with costs.

The applicant's summons was heard on 1st December, 2014; apart from failing to respond to the application, neither the petitioner nor her counsel appeared in court though the latter was served with the summons which, according to the affidavit of service filed in court, was endorsed with the hearing date.

In their submissions, the respective counsel for the applicant and the protestor reiterated their respective clients' depositions in their affidavits. Counsel for the protestor, however, added that the contract between the petitioner and the applicant could not be enforced against him because first, he was not privy to it and second, it was illegal any way. Counsel's contention that the contract was illegal was based on the fact that the petitioner purportedly sold part of the deceased's estate before the grant of letters of administration was made; in essence, according to the protestor's counsel, the applicant and the petitioner had intermeddled with the deceased's estate.

Counsel for the protestor also submitted that even if the contract was to be accepted as legal, the consent was consistent with the terms of the contract to the extent that the applicant had been shown what he was to purchase prior to the execution of the agreement and he was purchasing the property in the same state and condition in which it was at the time of the contract. He urged that according to the contract itself, it was the property that was purchased and not the income from any part thereof.

I have considered the submissions by the learned counsel for the applicant and the respondent. They do not dispute that protestor and the deceased were owners in common of **Karatina Municipality BI/104** so that each of them was entitled to a divisible share of the property; it is also beyond dispute that the deceased died intestate on 29th April, 2004. The record shows that the grant of letters of administration of his estate was made to the petitioner on 23rd August, 2012 and was subsequently confirmed on 1st November, 2012.

According to the sale agreement exhibited to the applicant's affidavit, the applicant is stated to have purchased the deceased's half share of **Karatina Municipality BI/104 on 23rd July, 2012**; the petitioner received ten per cent of the purchase price at the execution of the contract while the balance was to be paid upon the conclusion of the succession cause. This information is contained in **clause (2)** of the agreement.

My understanding of the applicant's summons is that his application is based on this sale agreement; in other words, he would not have filed the summons herein but for the sale agreement which, for all intents and purposes encapsulates what, in his view, are his rights to a portion of the deceased's estate. Considering that the sale agreement was executed before the grant of letters of administration was made, the validity of this agreement was questioned by the protestor; in my humble view, the answer to this question may as well settle this summons and therefore it would be appropriate to consider the agreement's legitimacy at the outset.

A few provisions in the Law of Succession Act can help us understand when and how a deceased person's net intestate estate is to be disposed of and whether the agreement between the petitioner and the applicant was consistent with the law's prescription in this regard. I would start with **section 55. (1)** of the Act; it says:-

55. (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.

The essence of **section 55(1)** is that no action can be taken in distribution or in disposal in any manner whatsoever of a deceased's person's estate until the court's authority has been obtained; without such an authority, any act purporting to distribute a deceased's person's property of the nature described in **section 55** of the Act is null for the reason that it is simply contrary to this particular provision of the law.

Coming back to the summons at hand, it follows that the petitioner had no power, or to put it more aptly, she had no capacity to enter into any contract whose effect was to dispose of the deceased's estate or any part thereof without the grant having not just been made but confirmed as well.

And even if the grant had been confirmed, the petitioner's interest in in the net intestate estate of the deceased of which the suit property is part is limited to life interest only; at least this is what **section 35(1) (b)** of the Act says. Under the proviso to **section 37** of the Act, the petitioner could have disposed of such

property only for purposes of her maintenance and subject to the consent of the court.

To the extent that the petitioner and the applicant dealt with the deceased's estate in a manner that contravenes **sections 35(1)(b), 37 and 55(1)** of the Act there is a possibility that they could both have committed an offence under **section 45 (2)** of the Act; this provisions says:-

45. (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 -

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;

For purposes of determination of the summons before me, this court is only concerned with the legality or lack thereof of the contract executed by applicant and the petitioner and all I can say in that regard is that in view of the provisions I have made reference to, the contract is vitiated by an illegality; it is void and unenforceable against the protestor who was, at any rate, not privy to the contract. That being the case, it is apparent that the basis upon which the applicant's summons is founded is, legally speaking faulty, and for my part, I can do no better than dismiss it; it so dismissed with costs.

Signed and delivered in open court this 13th February, 2015

Ngaah Jairus

JUDGE