



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 792 OF 2009**

**IN THE MATTER OF THE ESTATE OF JOHNSON THEURI GITAHU (DECEASED)**

**RULING**

1. Johnson Theuri Gitahi, the deceased to whose estate these proceedings relate died intestate on 10<sup>th</sup> October 2007. He was survived by one widow Teresia Wanjiku Wainaina and nine children. Catherine Wanjiru Gitahi, Gitahi Theuri and Anne Mutiso. He is survived by 4 daughters and 1 son. There is also a purchaser one Stephen Macharia Karoki who claims as against the deceased's estate. Catherine Wanjiru, Gitahi Theuri and Anne Mumbi Mutiso petitioned for and were granted grant of letters of administration of the deceased's estate on 12<sup>th</sup> January 2010 and was subsequently confirmed on 6<sup>th</sup> June 2011. All properties and assets of the deceased were to be distributed equally amongst his children save for land parcel no. Aguthi/Gititu/132 which was to wholly devolve to Stephen Wachira Karoki. Subsequently vide application dated 28<sup>th</sup> April 2014, the administrators seek to rectify the grant confirmed on 28<sup>th</sup> April 2014 by deleting from the schedule of the deceased's asset L.R. 5842/2/17 Karen for reasons that the same had been wrongly indicated as belonging to the deceased.
2. The application dated 4<sup>th</sup> July 2014 is brought under Rules 49 and 73 of the probate and administration rules. The applicant seeks to be enjoined as an interested party and particularly in relation to summons for rectification of the grant confirmed on 6<sup>th</sup> day of June 2011. The application is based on grounds that; on 17<sup>th</sup> October 2008 Anne Mumbi Mutiso a beneficiary to the estate to the deceased entered into a contract for the purchase and sale of 1 acre to be exercised from L.R. No. 5842/2/17 Karen. Anne subsequently assigned the proprietary interests of the same to the applicant. The said proprietary interests crystallized when this Court issued the confirmation of grant on the 6<sup>th</sup> June 2011 confirming Anne Mumbi Mutiso as a trustee of her share in the suit property.
3. James Oudia an appointed attorney of Hellen Odido who holds a power of attorney P/A 58133 states in his affidavit dated the 4<sup>th</sup> of July 2014 that on the 17<sup>th</sup> of September 2008 the applicant entered into a sale agreement with Anne Mumbi Mutiso a beneficiary in the estate of the deceased for the purchase of a share of an acre to be excised from property known as L.R 5842/2/17, she paid Kshs. 660,000/- being the deposit for the purchase price; that therefore the applicant has an equitable title or interest in the suit property with a right to have the legal title formally transferred to her at completion of the said transaction; that the said property is subject of arbitral proceedings before the Arbitral Tribunal hence the reason the applicant claims to have locus to be enjoined in these proceedings as an interested party to participate in the Summons for Rectification dated the 28<sup>th</sup> of April 2014.
4. In response to this application the respondents filed grounds of opposition dated 28<sup>th</sup> November 2014 indicating that the applicant had not proved locus to merit inclusion as a party to the cause; that the interested party issue is subject to arbitral proceedings in other judicial proceedings and the issue raised was not germane to other parties in these proceedings.
5. The application came for hearing on 10/2/2015. The applicant reiterated what is deponed in the applicants and argued further that the respondent's counsel is the husband of Anne Mutiso the vendor and that the property that the administrators seek to delete is not the same as the same as the property in the agreement and that if they succeed in their application they will have stolen a match against them.
6. Mr. Mutiso for the respondent in opposing the said application argued that the application was incompetent as the evidence tendered is by one James Oude who purports to depone the affidavit on the

same on basis of a power of attorney by Hellen Odido who claims to have contracted to purchase L.R. 5342/2/17 from Anne Mutiso's husband who failed to complete the same and the matter went before the tribunal. He argued that there was a difference in power to execute and power to give evidence. He relied on the case of **Jack J. Khanjira and another vs. Safaricom Limited** [2012] e KLR where the court held that the power of attorney was specific. Mr. Mutiso pointed out that one cannot donate power to give evidence as evidence is personal, that power donated to James in this case was general. It further argued that the issues raised by the applicant are matters before the tribunal and are best determined at the said forum, while in essence the succession cause merely determines the estate of the deceased's person. He pointed out that the applicant is not a beneficiary in the estate and neither is there any allegation that there was any dealing between the applicant and the deceased. That the dispute is between the applicant and the beneficiary which dispute is being determined in another forum. For this argument Mr. Mutiso relied on the case of **Rubo Kipngetich Arap Cheruiyot vs. Peter Kiprop Rotich** Civil Appeal No. 128 of 2008 where the Court appeal held there is no legal provision that a purchaser ( the appellant) should lodge his claim in the suit land in the deceased's succession cause , that it had no merit. It was argued that the applicant will not suffer any prejudice and that the application to vary the grant was made way before the arbitration proceedings.

7. Mr. Odera in reply submitted that the issue of the power of attorney is a matter before the arbitration, that the power to present this suit is donated; that the case of Rubo (supra) is not relevant and that if the respondent's application is granted she will wave it before the tribunal and that joining the applicant will not prejudice the respondent.

8. On the question as to whether the applicant should be enjoined as an interested party to the suit. In my view what the court should look at is whether the intended party is a necessary party. Joinder of parties is provided for under Order 1 Rule 10 of the Civil Procedure Rules. In the case of **Central Kenya Limited –vs- Trust Bank Ltd and Others Civil Appeal No.222 of 1998**, wherein the Court of Appeal stated that;

*“the paramount consideration in an application under Order I Rule 10(2) of the Civil Procedure Rules, is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit”.*

The applicant claims that she bought one acre from the respondent, there is a dispute between the parties and the ruling is yet to be delivered. Succession causes deal with the estate of a deceased person. In the case of **Rubo Kipngetich** (supra) the Court of Appeal held that, “ **deceased persons' succession causes are for purposes of determining the appointing the legal representative of the deceased persons and also for ascertaining of the deceased's' heirs and their respective shares**” The applicant has not shown that she bought the land from the deceased as was in the case of Rubo. In my view enjoining the applicant as a party serves no purpose as her claim is not on the estate but from an individual who is to benefit from the deceased's estate. The court of Appeal in the Rubo (supra) case stated that “**claims by third parties to deceased persons' properties although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits**”, as is being done at the tribunal in this case. Further the property she claims is subject of a matter pending determination before the tribunal. As such she is not a necessary party in the determination of this matter. I decline to make a finding on the power of attorney as that is an issue to be determined by the tribunal. No orders as to costs. It is so ordered.

Dated, signed and delivered this 26<sup>th</sup> day of **March** 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Applicant**

.....**For the Respondent**

.....**Court Clerk**