



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 863 OF 2008**

**IN THE MATTER OF THE ESTATE OF MUCHENDU BONGWE (DECEASED)**

**JAMES MWANGANU MWANGI**

**JUDITH WANJIRU MWANGANU.....APPLICANT**

**VERSUS**

**PETER KAMUNYU MUCHENDU.....RESPONDENT**

**RULING**

The deceased Muchendu Bongwe died on 11<sup>th</sup> December 1988 as shown by the Death Certificate Number 203055. His wife Rahab Wanja Muchendu and mother to the beneficiaries died on 14<sup>th</sup> March, 2002 as shown by Death Certificate No. 97744.

The beneficiaries of the deceased's estate are;

- i. Samuel Nyutu Muchendu
- ii. John Njoroge Muchendu
- iii. Teresiah Wanjiru Ngethe
- iv. Peter Kamonyo Muchendu
- v. Paul Kimani Muchendu
- vi. Jecinta Wairimu Ndungu
- vii. Kamunge Muchendu

They filed for grant of letters of administration of the deceased's estate which was granted on 16<sup>th</sup> September, 2008 in the name of Peter Kamonyo Muchendu. On 9<sup>th</sup> September, 2010 the administrator filed for confirmation of grant which was granted on 21<sup>st</sup> February, 2011. On 7<sup>th</sup> February, 2012, the Applicant James Mwangi and Judith Wanjiru Mwangi filed an application for revocation and annulment of grant; because as purchasers of the land allocated to Samuel Nyutu Muchendu one of the beneficiaries of the estate; their interest was concealed and they have not obtained their share of the land as sold to them by Samuel Nyutu Muchendu.

The administrator, Peter Kamonyo Muchendu filed a Replying Affidavit on 1<sup>st</sup> March, 2012 and stated that he did not enter into any sale Agreement with the interested parties. Samuel Nyutu Muchendu had no capacity to sell land since no title has been transferred to his name and the estate had not been distributed. His brother Samuel Nyutu Muchendu disappeared in 2008 and his whereabouts are not known to date. He stated that as the administrator of the estate it would be illegal to transfer any part of the deceased's estate to any other person other than the beneficiaries of the estate.

On 31<sup>st</sup> August, 2012, the Applicant filed another application seeking the Court to orders to enforce the Applicants rights as purchasers of the suit property. The Objectors/Applicant deponed that they bought one (1) acre of land of Muguga/Jet Scheme/152 a share belonging to Samuel Muchendu is the subject matter of this suit. The said portion is subject of the sale that occurred since 12<sup>th</sup> March, 2012. The parties entered a consent that an injunction would remain in force until the hearing of the application interpartes.

The matter was scheduled for interpartes hearing through viva voce evidence on 4<sup>th</sup> February, 2015. PW1 Judith Wanjiru Mwanganu told this Court in 2008, she and her husband bought land from Samuel Nyutu Muchendu who was with Peter Kamunyu the administrator and Martin Kamunye, a relative. Samuel Nyutu Muchendu stated he had a shamba to sell but the said portion had not been sub- divided as the letters of administration of their late father's estate had not been obtained.

They discussed and agreed the purchase price at Ksh.575, 000/= one (1) acre. He said that the brother Peter Kamunyu had the Title. They needed money to begin the process of obtaining the grant of letters of administration. They went to the Purchaser's advocate Kamangu & Co. Advocate. They had a Sale Agreement of the purchase of land drawn and produced in Court as **Exhibit 1**.

At that time they agreed and paid; to the said Samuel Muchendu as follows;

- a. Ksh. 80,000/= - was paid to obtain letters of administration
- b. Ksh. 10,000/= - Paid to Peter Kamunyu
- c. Ksh. 80,000/= - Paid for the Surveyor's fees
- d. Ksh. 80,000/= - Paid to Njoroge Muchiri

The Sale Agreement was witnessed by

- i. Peter Kamunyu - brother to the Purchaser/administrator of the deceased's estate
- ii. Mwaura - the Broker
- iii. Njuguna - Applicant's brother

They agreed that the balance of the purchase price would be paid when they got the Title documents. In the meantime, the Applicants were allowed to cultivate the shamba. The Surveyor subdivided the portion and put the beacons.

She went back to Muranga; she was called on telephone by the seller and told that John Njoroge a brother to the seller was to be paid Ksh 15,000/= as he was not at the meeting of the sale of land. On 1<sup>st</sup> August, 2008 the Applicant came and paid Ksh. 15,000/= to John Njoroge in the presence of Peter Kamunyu, Anthony Mwangi, Patrick Wanjohi and Patrick Kamunye.

In May 2008, the Applicant moved from Muranga to Ndeiya and begun to cultivate land. Samuel Nyutu asked for more money yet the Title was not availed as agreed. They went to the advocate Kamangu & Co. Advocates and she paid Samuel Nyutu Kshs. 20,000/= and Peter Kamangu demanded 30,000/= in total she paid Ksh. 45,000/=. The purchase price was reduced from Ksh 575,000/= to Ksh 431, 250/== as the land was  $\frac{3}{4}$  of an acre and not one (1) acre. The balance of the purchase price to be paid was Ksh 306,250/= upon production of the Title documents. All that transactions are detailed in Agreement produced as **Exhibit 2 and 3** respectively.

Samuel Nyutu lived in Peter Kamunyu's place, thereafter he disappeared and they could not trace him. She continued to cultivate the land. Later, she was approached by people who came to inspect the land for sale. They told her that Peter Kamunyu and John Njoroge wanted to sell the shamba. She conducted a search at Kiambu Land Registry and found Peter Kamunyu and John Njoroge obtained a letter to apply for consent from the District Officer (D.O) Kikuyu to the Land Control Board.

At the Survey of Kenya Offices she found the land was in the names of Peter Kamunyu and John Njoroge. She filed an application in Court to safeguard her purchaser's interest over the "suit property".

She has never seen Samuel Nyutu to date, instead the administrator has sought to evict her from the land which she had been cultivating as shown by the photographs attached to the application of 31<sup>st</sup> August, 2012 marked “JMN2”

The Respondent and administrator of the deceased estate Peter Kamunyu Muchendu told the Court that he has been sued as administrator because of land that was sold by Samuel Nyutu. He did not know of the sale of land as he was asked by his brother Samuel Nyutu to accompany him to witness documents with his ID card as he did not have his ID card.

He told the Court that Samuel Nyutu was renting land and all he knew is that they had given him ½ acre of land to cultivate. He told the Court his brother Samuel Nyutu suffers from mental illness and leaves home for several years and then comes back. He lives with his sister and not at his house. The administrator stated that he was appointed administrator of their late father; deceased's estate. There are seven (7) beneficiaries and when he obtained the grant he kept the portion of Samuel Nyutu so that when he comes back he will give him his land.

The Applicant/Objectors were allowed to cultivate the land only not to buy and build on it. During the transaction he knew that his brother rented out his portion and not selling it. He told the Court; he did not understand what was going on and since he does not know how to read and write and he did not know what was agreed upon.

He stated that Samuel Nyutu did not sell any land, he had no land to sell and the family did not agree to the sale of land. He said he is ready to pay back the money as the land is currently valued at Ksh 1 million. He does not know if Samuel Nyutu is alive or not and as administrator he is entitled to hold the property and release it to the beneficiaries and not to any other person.

## ISSUES

1. Did Samuel Nyutu sell to the Applicants James Mwanganu and Judith Wanjiru Mwanganu his beneficial interest in land Muguga/Jet Scheme/152?
2. Are the Objectors/Applicant entitled to proprietary/possessory rights over the suit property?
3. What is the position with regard to the whereabouts and mental state of the vendor/seller?
4. How does his absence impact on the sale of Muguga/Jet Scheme /152?

## LAW

The Law that prescribes the duties of the administrators is provided by;

### **Section 83 of the Law of Succession Act Cap 160**

Duties of personal representatives are;

- a. ***‘to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;***
- b. ***To get in all free property of the deceased, including debits owing to him and moneys payable to his personal representatives by reason of his death;***
- c. ***To pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);***
- d. ***To ascertain and pay, out of the estate of the deceased, all his debts;***
- e. ***Within six months from the date of the grant, to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***
- f. ***Subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;***

- g. **Within six months from the date of confirmation of the grant, or such longer period as the Court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the Court a full and accurate account of the completed administration.**”

Stipulates the statutory mandate of the personal representatives of the deceased’s estate; administrators. If the deceased died intestate there will be administrator and in the case of a Will an executor. The administrator Peter Kamunyu was involved in the process of applying for letters of administration of the deceased’s estate on behalf of all beneficiaries including Samuel Nyutu, the vendor/seller of the suit property.

Pursuant to **Section 83 (e) and (g) Law of Succession Act** he ought to have given the Court a full and accurate inventory and account of all dealings therewith from the date of confirmation of grant.. He is also to complete the administration of the estate in all matters other than the continuing trusts and if required by the Court either on its own motion **or on the application of any interested party in the estate** to produce in Court a full and accurate account of the completed administration.

In the instant case, this Court finds that the evidence on record is that on diverse dates in 2008 the Objector/Applicant bought for value as bonafide purchasers 1 acre of Samuel Nyutu, the vendor’s beneficial interest in Muguga/Jetscheme/152. The Applicant proved the sale by the oral evidence she adduced in Court that she transacted directly with the seller, Samuel Nyutu who was introduced by a broker in the presence of the administrator Peter Kamunyu among other persons present.

Further there was a production of the Sale Agreement - **(Exhibit 1)** of 3<sup>rd</sup> April, 2008 drawn by Kamangu & Co. Advocates between the seller/vendor and buyer/Applicant of the land 1 acre for Ksh 575,000/= and a detailed process of payment of the purchase price in instalments upon certain deliverables. The Sale Agreement was witnessed by among others Peter Kamunyu ID No. 0340885.

**The Agreement paragraph 3, (a) (b) 4, 5 and 6 provides;**

**”3(a) Kenya Shillings Three Hundred and Twenty shall be paid when the succession cause in respect of MUCHENDU BONGWE (deceased) has been completed and certificate of confirmation of grant has been obtained.**

**(b) The balance of Kenya Shillings One Hundred & Seventy Five Thousand or less depending on the size of the land shall be paid one year after the confirmation of grant.**

**4. The vendor shall facilitate transfer of the property in favour of the purchase.**

**5. The contractual completion date shall be upon transfer in favour of the purchaser.**

**6. The property is sold with a vacant possession.”**

There is also a letter – **(Exhibit 2)** of 1<sup>st</sup> May, 2008 which shows when the Applicants paid Ksh 15,000/= to the seller in the presence of witnesses and one of them is Peter Kamunyu the administrator of the deceased’s estate Another agreement **(Exhibit 3)** is headlined **(Acknowledgment of Receipt of Money)**. The Agreement dated 14<sup>th</sup> June, 2008 it shows;

**” I Samuel Nyutu Muchendu have today on 14<sup>th</sup> June, 2008 received Ksh 45,000/= in cash from James Mwanganu and Judith Wanjiru being part of payment of sale of parcel Number Muguga/Jet Scheme/152”**

**” The balance Ksh. 306, 250/=”**

Signed by Samuel Nyutu Muchendu and witnessed by among others Peter Kamonyo Muchendu the

administrator herein.

All the above documents were of the sale of the beneficial interest of Samuel Nyutu Muchendu in Muguga/Jet Scheme/152.

Thereafter in May, 2008, the Applicants were allowed entry and possession of the said portion of land after the Surveyor came and demarcated the portion and put beacons. The Applicants cultivated the land from 2010 up to 2012 when they were stopped from building their house, and were threatened with eviction by the administrator (DWI). New buyers were brought in and the process halted with the Court issuing an injunction against the Applicants with regard to the suit property until the hearing and determination of the suit.

This Court is satisfied on a balance of probabilities that the evidence adduced by the Applicant, cross examination by the Respondent's Counsel, and the documentary exhibits strongly suggests and supports a legal sale of the suit property. The Respondent claimed in his examination in chief that he was with Samuel Nyutu but he did not sell any land it is Samuel Nyutu who told him that he was renting land to the Applicants. He asked him to witness the documents as he did not have an ID card. He did not know what was going on as he is not able to read and write.

Secondly, DWI stated that Samuel Nyutu is not mentally stable, he disappeared from home and before he had disappeared for long period of 20years and then came back. He disappeared thereafter and he has not been found since then.

Thirdly, DWI stated that Samuel Nyutu had no land to sell to the Applicants they just rented; the money paid was for renting the land and cultivating it. This is family land and they as the family did not consent sale of any land. They did not have a grant so they could not sell.

Finally, as administrator, he is holding the share of Samuel Nyutu with John Njoroge so that when Samuel Nyutu comes back he will be given his portion of his inheritance back. As administrator his duty is to distribute the assets of the deceased to the beneficiaries only.

## **ISSUES**

The first issue of concern to the Court is that Samuel Nyutu **"sold"** land in the presence and knowledge of the administrator and other witnesses who knew that he had mental challenges and therefore did not have capacity to enter into a contract of sale of land. The Applicants/Objectors did not know of the seller's condition but the administrator knew. If so, why did he allow him to enter into any negotiations, receive money and sign documents?

Secondly, upon realising what had happened the administrator ought to have refunded the money and rescinded the contract in 2008 if it is true his brother had/has mental challenges;

Thirdly, at the time and even today at no time has the Court been furnished with any evidence of the sellers/vendor's medical documents of his state of mind/capacity to inhibit him transacting the sale of the land so as to rescind/revoke the sale of land at the earliest opportunity. Despite letters from the Applicants advocate of 20<sup>th</sup> November, 2008 and 11<sup>th</sup> June 2008 they did not disclose the fact of mental incapacity then or now by any production of documentary evidence or treatment sheets of the Sellers's medical condition and/or mental capacity.

Fourthly, since the land sale in 2008, it was alleged that Samuel Nyutu disappeared and could not be traced to date. DWI stated to Court that due to his mental state, the seller disappears from home for even 20 years and then resurfaces back home. It is strange to this Court that a person with mental incapacity can be left to run free without care and support especially medical care if that is the case. Further, that the person has not been reported missing by his family members at any Police Station and any investigation conducted or any formal application made in Court makes it difficult for the Court to confirm the whereabouts and status of the Seller/vendor and the credibility of the information given to the Court.

Fifthly, if the transfer that took place between the vendor Samuel Nyutu and the Purchasers/the Applicants/Objectors and during all the dealings the administrator was present and he witnessed all the three (3) Agreements (**Exhibit 1 – 3**). It is curious he did not alert the Objectors of the seller's condition and the fact that he had no land to sell as they did not have a grant of the deceased's estate. If it was renting the land as he alleged; he did not state the terms for how long and how much was the land to be cultivated and rented? If he did not know what was happening why did he accept some of the money and what was it for as he also had no land to sell. He does not point out why and when monies were paid and why he received some money directly as evidenced by the documents and testimony of the Applicant/Purchaser.

Therefore the issue of not selling the land but renting for cultivation is not borne out by the evidence on record. If it was to rent the land, surely discussions ensued and then should have been agreement as to how much rent was payable for what period of time. Further, if the monies paid were for renting the land and not selling, the Applicants have been cultivating the land since 2008 to date, why would the administrator tell the Court in cross examination that he is ready and willing to refund the money paid? If it was to rent the land; the monies are expended in the period of renting that had been agreed if at all.

Sixthly; the administrator is supposed to disclose all dealings and interests in the deceased estate. He participated in the sale as a witness to the sale of land by Samuel Nyutu and received the money but failed to disclose to the Court the fact of renting or sale of the land and concealed material facts.

Seventhly; the fact of holding the interest of Samuel Nyutu; in his name and that of the brother John Njoroge until he reappears is suspect due to the following reasons;

- a. In the confirmed grant his name is included as one of the beneficiaries but specifically in the mode of distribution both administrators are listed as beneficiaries of his portion of land. The seller is not listed as beneficiary in the mode of distribution..
- b. In the confirmed grant his name is included but in the mode of distribution his portion is held by the administrator and the brother John Njoroge with no indication that it is held in trust for him.
- c. Thereafter, the administrator threatened to evict the Applicants and from the Court record it shows that the administrator and John Njoroge sought the land be sold to new buyers until the Court issued an injunction.
- d. When the Applicants went to the Kiambu Land Registry, they found that the administrators had their names in the Register as owners of the land that belonged to Samuel Nyutu and obtained letters from the District Officer's office to obtain consent Land Board at the District Officer's office from the Land Consent Board.
- e. At Kenya Survey, the land was registered in the name of the administrator (DWI) and John Njoroge.

The totality of the above evidence is that the administrator/beneficiary (DWI) Peter Kamunyu Muchendu and John Njoroge intended to obtain the share of Samuel Nyutu to their benefit and sell it to profit themselves. That is why the documents in the Succession Cause with regard to the confirmed grant do not indicate they hold the land in trust for Samuel Nyutu.

The Court is appalled at the administrators and beneficiaries' conduct of not seeking to find out where and how their brother is instead they have focused on selling his land without the consent of all other beneficiaries and threaten to evict the Applicant/objector.

The Court finds that there is a valid lawful and regular sale of the Land of the beneficial interest of Samuel Nyutu to the Applicant/Objector. The monies paid were not for renting land but buying land. This Court is however keen to find out if the said Samuel Nyutu is alive and well and his whereabouts. Further if he had capacity to enter into a contract due to alleged mental incapacity. At this stage it is difficult to

know and determine these crucial facts in the absence of Samuel Nyutu.

## **FINAL ORDERS**

The Court will order as follows;

- a. In the absence of Samuel Nyutu; the court cannot make appropriate orders as to his mental capacity. Medical documents have not been produced as evidence and his whereabouts are unknown; the Court finds a valid, lawful sale of Muguga/Jet Scheme/152 by the seller to the Applicants as evidenced by Agreements **Exhibits 1 – 3** in 2008.
- b. Therefore until; the whereabouts of Samuel Nyutu and his status is determined or his presence made available in Court, the Applicant/Objectors shall remain on the said land Muguga/Jet Scheme/152 and cultivate the land pending further Court orders.
- c. The administrator Peter Kamunyu and John Njoroge shall hold 0.75 acres of Samuel Nyutu in trust for Samuel Nyutu and the same shall not be subjected to any sale or alienation until the matter is conclusively determined with the presence of Samuel Nyutu or confirmation of his whereabouts and or condition.
- d. The Applicant/Objectors and Administrator/Beneficiary advocates and Deputy Registrar Family Court shall open an interest earning Account to deposit the balance of the Purchase Price in trust for Samuel Nyutu within 90 days from today, and the same shall remain in the account until further/final orders of the Court and/or presence of Samuel Nyutu.
- e. No order as to costs each party to bear its own costs
- f. Any of the party is at liberty to apply.
- g. The Respondents/Administrators shall confirm the whereabouts of the seller/vendor Samuel Nyutu. A formal report shall be made to the nearest Police Station by the administrator and investigations to commence. A report be filed in Court within 90 days.

**READ AND SIGNED IN OPEN COURT ON THIS 30<sup>TH</sup> DAY OF APRIL, 2015**

**M. W. MUIGAI**

**JUDGE**

***In the presence of;***