



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 522 OF 2009

In the matter of the Estate of HESBON MWANIKI GERALD (Deceased)

EVANS MUCANGI MWANIKI.....APPLICANT/PETITIONER

VERSUS

SPIRANDA NJOKI.....RESPONDENT

RULING

This is a ruling on the application dated 19/3/2015 seeking for orders that :-

1. *The applicant Evans Mucangi Mwaniki be substituted in place of the administrator herein Wilson Mbogo Esbon Mwaniki.*
2. *The grant of letters of administration intestate issued on 23/3/88 and confirmed on 28/10/10 be rectified in the following respect as provided for by Rule 43 (1) of the probate and administration rules.*

(a) *The parcel land Ngandori/Kirigi/10195 measuring 0.30 ha (whole parcel) be inherited by Michael Karungano*

3. *That the court be pleased to lift the caution placed against parcel number Ngandori/Kirigi/10195 by Sipiranda Njoki Ngovi.*

The application is grounded on the affidavits of Evans Mucangi Mwaniki and Peter Kariuki Mwaniki both of which were sworn on 19/3/2015.

The applicant stated that the deceased Hebson Mwaniki Gerald was his father. His brother Wilson Mbogo was issued with letter of administration intestate on 23/3/2010 and passed away on 30/6/2012 before the grant was fully executed.

The applicant obtained the limited grant ad litem in respect of the estate on 9/02/2015. The estate of the deceased comprised of Ngandori/Kirigi/1556 which was subdivided upon confirmation of grant to enable each of the seven beneficiaries acquire their respective shares. The administrator passed away before effecting the transfer of parcel number Ngandori/Kirigi/10195 to one of the beneficiaries Peter Kariuki Mwaniki.

According to the applicant, the confirmed grant should be rectified and the portion measuring 0.3 ha. out of Ngandori/Kirigi/10195 be inherited by Michael Karugano Murage who is a purchaser through the beneficiary Peter Kariuki Mwaniki.

The respondent Sipiranda Njoki filed a replying affidavit and stated that she is the wife of the purchaser of parcel number 10195 one Harisson Munyi Njagi now deceased. The sale agreement dated 13/10/2010 involves the Peter Kariuki Mwaniki as the vendor, the deceased Harrison Munyi as the purchaser and herself as a witness. She contributed funds towards the purchase of the land together with her late husband and they paid KShs.400,000/= leaving a balance of KShs.350,000/=. The agreement was to the effect that the balance was to be paid after the consent of the Land Control Board was obtained.

On diverse dates, her deceased husband informed her that he paid KShs.217,000/= to Peter Kariuki leaving a balance of KShs.33,000/=. When the vendor came for the balance, it was agreed that he gives them time to clear. The respondent and her son paid a further KShs.10,500/= leaving a balance of KShs.22,500/=. She has been living on the said portion with her children.

Later on the respondent's husband (purchaser) agreed to sell the said portion of land to another person one Michael Karugano Murage without her consent but she cautioned the land before the transaction was done.

In the year 2014, the respondent learnt that the vendor had entered into a sale agreement with the said Michael without her consent. The signature appearing in the sale agreement dated 13/10/2010 between her husband and the vendor is forged as she never witnessed the agreement. She therefore objects to prayer 2(a) and 3 of the application being allowed. She argues that if the application is allowed, her children will suffer.

Parties agreed to dispose of their applications through their affidavits.

It is not in dispute that the applicant is a son of the deceased Hebson Mwaniki Gerald. This fact is proved by form P & A.5 where the applicant has been listed as a beneficiary. There is also no objection of having the applicant replaced as the administrator.

The issues for determination are whether he can be substituted to replace the dead administrator and whether the grant should be rectified.

In the case of **FLORENCE OKUTU NANDWA AND ANOTHER VS JOHN ATEMBA KOJWA, Court of Appeal Civil Appeal in Civil Appeal No. 306 of 1998 at Kisumu** cited in the case of **JOHN KARUMWA MAINA V SUSAN WANJIRU MWANGI [2015]** where it was held that a court should not issue a grant to a person who has not sought for it. The judge stated as follows:-

“A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another.

The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules). I agree with the respondent that there cannot be a substitution of the dead administrator by his wife in the manner proposed by the applicant.”

In the present case the applicant has obtained letters of administration ad litem after the death of the administrator for purposes of pursuing this succession cause. The applicant annexed the death certificate for the administrator and the said letters of administration ad litem authorizing him to pursue this succession cause. There being no objection to prayer 1 and the requirements having been satisfied, I am of the considered opinion that it should be allowed.

Section 43(1) of the Probate and Administration Rules provides that:-

Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act

rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued.

The applicant prays that the grant be rectified so that parcel number 10195 can be inherited by Michael Karugano Murage who is a purchaser. He annexed to the application two sale agreements. The first one is between Peter Mwaniki and Harrison Munyi Nyaga and the second one is between Harrison Munyi Nyaga and the new purchaser Michael Karugano Murage. Harrison Munyi purportedly sold the portion he was buying from Peter Kariuki to Michael Karungano.

The question which arises is whether Peter Kariuki possessed the capacity to sell the land to Harrison Munyi bearing in mind that he was not the administrator of the estate. The portion he was to inherit which is now LR. 10195 was still in the name of the deceased when he entered into the sale agreement with Munyi.

The second question is whether Harrison Munyi who had not acquired ownership rights could sell the land to a third party. The applicant has attached a fresh agreement between the deceased Harrison Munyi and the second purchaser Michael Karugano in the status of lack of capacity.

The respondent states that her husband Harrison Munyi had paid over half of the purchase price to Peter Kariuki leaving a negligible balance of only Kshs.22,500/=. Peter Kariuki has not mentioned in his affidavit whether he refunded the purchase price to the respondent's family before he embarked on a second sale agreement.

The respondent has now placed a caution on the land to protect the interest of her family. The applicant and Peter Kariuki have failed to demonstrate that the respondent has no good cause to caution the land. This court is satisfied that she is protecting her interest for she lives on the land and the purchase price has not been refunded.

If the grant was to be rectified so as to give the portion of 0.30 ha out of LR. 10195, and the balance of 0.53 to Peter Kariuki, this would cause injustice to the respondent whose purchase price has not been refunded and whose family is still residing on the land.

It is in the interests of justice that the parties first resolve the matters in issue amicably with the guidance of the administrator before prayers 2 and 3 can be considered.

I therefore grant prayer 1 as prayed. I decline to grant pray 2 and 3 for lack of merit. It is hereby ordered that a fresh grant do issue to the applicant Evans Mucangi Mwaniki.

The caution on the land LR. 1556 and designated for LR.10195 to remain in force pending the resolution of the dispute.

The grant will remain in the same status as was confirmed on 28/10/2010 until further orders of the court in regard to the share of Peter Kariuki Mwaniki.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Njagi E.K. for R. Njeru for Applicants

Respondent present