



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.1854 OF 2005**

**IN THE MATTER OF THE ESTATE OF PETER KINUTHIA WAITHAKA (DECEASED)**

**STEPHEN KARIUKI NDUATI.....1<sup>ST</sup> APPLICANT**

**FLORENCE NJOKI NDUATI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOHN ROKI WAITHAKA.....1<sup>ST</sup> RESPONDENT**

**CAROLINE NYAMBURA WAITHAKA.....2<sup>ND</sup> RESPONDENT**

**AND**

**STEPHEN KIHONGE NDUNGU.....INTERESTED PARTY**

**RULING**

On 6<sup>th</sup> July 2005, John Roki Waithaka and Caroline Nyambura Waithaka (the Respondents) petitioned this court to be issued with a grant of probate in respect of the estate of Peter Kinuthia Waithaka (the deceased). Annexed to the petition was a handwritten Will of the deceased. The Will was witnessed by two advocates. In the Will, the deceased appointed the Respondents to be the Executors of the Will. The deceased also made various bequests to persons named in the Will. Most of the bequests were made to his dependants. However, in respect of one property which was previously registered as LR. No. Dagoretti/Riruta/888 (the property had been subdivided into nineteen (19) plots by the deceased prior to his death), the deceased made the following bequest that is the subject of this Ruling:

***“1(f) John Nduati Kariuki - 3913***

***- 3914***

***Which I have sold to him and have been paid part of the purchase price leaving a balance of Kshs.300,000/-.”***

A grant of probate was issued to the Respondent on 1<sup>st</sup> December 2005. The said grant was confirmed on 30<sup>th</sup> September 2008. In the application for confirmation of grant, the Respondents requested the court to confirm the grant in terms of the deceased’s written Will.

On 28<sup>th</sup> July 2011, the Applicants filed an application pursuant to the provisions of **Rules 49** and **59** of

the **Probate and Administration Rules** seeking various orders from the court. The Applicants stated that they were the administrators of the estate of the John Nduati Kariuki (deceased). The Applicants were issued with a grant of letters of administration intestate in respect of the said deceased on 29<sup>th</sup> January 2007. The said deceased died on 17<sup>th</sup> June 2006. The Applicants requested the court to compel the executors of the Will of the deceased herein to transfer plots No.3913 and 3914 (hereinafter referred to as the suit properties) to them in accordance with the certificate of confirmation of grant that was issued by the court. The Applicants further prayed that the Respondents be compelled to execute the necessary transfer documents in respect of the suit properties to the Applicants. The Applicants further prayed that if the Respondents fail to execute the said transfers, the Deputy Registrar of the court do execute all the necessary documents on their behalf so as to transfer the said properties to the Applicants. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Applicants. The 1<sup>st</sup> Applicant swore a further affidavit in support of the application.

The application is opposed. The 1<sup>st</sup> Respondent, John Roki Waitthaka swore a replying affidavit in opposition to the application. While conceding that indeed the deceased had made a bequest in favour of John Nduati Kariuki (deceased), he deponed that the deceased sold the two properties to Stephen Kihonge Ndungu (the Interested Party) on 19<sup>th</sup> August 2004. This was a couple of months prior to his death. The 1<sup>st</sup> Respondent explained that the deceased was compelled to sell the suit properties to the Interested Party because at the time he needed urgently to raise funds to enable him pay for specialized medical treatment in India. The 1<sup>st</sup> Respondent deponed that the deceased took this action after he had tried in vain to obtain payment of the balance of the purchase consideration from John Nduati Kariuki (deceased). He swore that even though the deceased made the bequest in the Will in favour of John Nduati Kariuki (deceased), it was clear that by the time of his death, the suit properties were no longer in his possession. The deceased could not therefore make the said bequest because the suit properties were no longer available to be given by way of gift in a Will.

On his part, the Interested Party swore a replying affidavit in opposition to the application. He deponed that he met with the deceased sometime in August 2004 whereby he agreed to purchase the two plots each for a purchase consideration of Kshs.3 million. On the date of execution of the agreement *i.e.* 19<sup>th</sup> August 2004, he paid to the deceased the sum of Kshs.4.5 million. The balance of Kshs.1.5 million was to be paid on or before 1<sup>st</sup> December 2004 subject to the vendor obtaining the relevant Land Control Board consent and rendering vacant possession. He deponed that unfortunately the deceased died before the completion date. He explained that he had not taken possession of the suit properties because he was informed by the Respondents that the court had yet to make a determination in regard to the distribution of the estate of the deceased. The Interested Party annexed in the affidavit in opposition to this application a copy of the said sale agreement. It was his case that he had validly purchased the suit properties from the deceased prior to his death and therefore he had priority over the same as compared to the Applicants whose claim was based on the Will of the deceased.

Prior to the hearing of the application, counsel for the parties to the application filed written submission in support of their respective clients' opposing positions. Mrs. Thongori for the Applicants, Mr. Wachira for the Respondents and Miss Kange'the for the Interested Party highlighted their respective submission. This court has carefully considered the said submission, both written and oral. It has also read the pleadings filed by the respective parties herein in support of their respective cases. The issue for determination by this court is whether the suit properties were available to be bequeathed to John Nduati Kariuki (deceased) at the time of the deceased's death. It is the Applicants' case that the fact that the deceased went to the pains of acknowledging John Nduati Kariuki's ownership of the suit properties in his Will, clearly indicated that the deceased felt that he was under legal obligation to complete the sale of the suit properties and transfer the same to the said John Nduati Kariuki. On their part, it is the Respondents' case that at the time of death of the deceased, the suit properties were no longer in existence because the deceased had already sold them to the Interested Party. In essence, it is the Respondents' case that there was failure of the testamentary disposal of the suit properties to John Nduati Kariuki by way of ademption. The Respondents relied on provisions of **Section 23** of the **Law of Succession Act** and in particular the **Second Schedule** thereof. The Interested Party supports the position taken by the

Respondents.

Having carefully evaluated the facts of this application, it was clear to this court that indeed the Applicants had established a case to compel the Respondents to transfer the suit properties to them as the Administrators of the estate of John Nduati Kariuki (deceased). It is the Respondents who petitioned this court for a grant of probate in respect of the last Will of the deceased. The grant of probate was issued. The Respondents made an application for the said grant of probate to be confirmed in terms of the written Will. The said grant was confirmed. This court has seen the affidavit in support of the application seeking to have the grant of probate confirmed. The Respondents did not state that some aspects of the Will had failed because the deceased had sold the suit properties prior to his death. Nothing would have been easier than for the Respondents to say so. The Applicants were therefore within their rights to move this court to compel the Respondents to abide by the certificate of confirmation of grant which the Respondents themselves had applied and were granted by the court. This court is of the considered view that it was not within the mandate of the Respondents to disown the certificate of confirmation of grant which they themselves applied to this court to confirm.

For completeness of record, this court will address the issue whether the bequest to John Nduati Kariuki (deceased) failed as alleged by the Respondents. **Section 23** of the **Law of Succession Act** provides thus:

***“Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to***

***the extent provided by the second schedule”.***

**Rule 8** of the **Second Schedule** which is titled **“Failure of Testamentary Dispositions”** provides as follows:

***“(1). If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect by reason of the subject thereof having been withdrawn from the operation of the will; and where a gift fails on this account it said to be “adeemed.”***

***(2). There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.”***

**Black’s Law Dictionary, 8<sup>th</sup> Edition** defines **“ademption”** thus:

***“The destruction or extinction of a testamentary gift by reason of a bequeathed asset’s ceasing to be part of the estate at the time of the testator’s death; a beneficiary’s forfeiture of a legacy or bequest that is no longer operative.”***

In the present application, it was clear that at the time of the deceased’s death, the suit properties were not the deceased’s properties because he had already sold them to John Nduati Kariuki (deceased). The only issue that was still outstanding was the payment of the balance of the purchase consideration of Kshs.300,000/-. That balance was not paid because the deceased sold the suit parcels of land before he had formally subdivided them. At the time of his death, he had surveyed and excised the two plots from the bigger parcel of land which was registered as LR. No. Dagoretti/Riruta/888. He had also obtained numbers for the specific parcels of land. The numbers were Plot Nos.3913 and 3914. The deceased sold the suit parcels of land to John Nduati Kariuki for the purchase consideration of Kshs.1,750,000/-. The deceased was paid Kshs.1,350,000/- leaving a balance of Kshs.300,000/-. Therefore, the deceased did not have legal capacity, if indeed he did, to sell the suit properties to the Interested Party.

This court’s finding in regard to why the deceased acknowledged the sale of the suit properties to John Nduati Kariuki in the Will is that the deceased wanted to bind the executors to complete the sale transaction which he did not manage to do during his lifetime. This court was further persuaded by the affidavit sworn by the Applicants which was to the effect that the deceased and the said John Nduati

Kariuki were close acquaintances who had many business dealings. Their relationship was good. It was unlikely that the deceased would have turned against his friend after he had acknowledged him in the Will. Even if the deceased was minded to do so, he would have indicated how the said John Nduati Kariuki was to be refunded the purchase consideration that he had paid. The fact that he did not do so, clearly leads this court to the finding that he did not sell the suit properties to the Interested Party as claimed by both the Interested Party and the Respondents.

In the circumstance of this case, there was no ademption. The suit properties were in existence at the time of the deceased's death. The suit properties are still in existence to date. The Interested Party has not taken possession. The said properties have not been transferred to the Interested Party. The Respondents themselves acknowledged the ownership of the suit properties by the estate of John Nduati Kariuki (deceased) when they went through the entire succession process and had the Will proved and confirmed without any reservations. This court finds it suspicious that the Respondents never renounced that part of the Will that acknowledged the sale of the suit properties to John Nduati Kariuki until when the Applicants filed the present application. The grant of probate was issued on 1<sup>st</sup> December 2005. It was confirmed on 30<sup>th</sup> September 2008. Until 2011, anyone going through the court file would be in no doubt that the Respondents had every intention of transferring the suit properties to the estate of John Nduati Kariuki (deceased) as provided in the Will. This court is of the view that the dragging in of the Interested Party into these proceedings was a ploy by the Respondents to deny the Applicants their rightful entitlement.

In the premises therefore, this court allows the Applicants' application in terms of Prayers 3, 4 and 5 of the application dated 27<sup>th</sup> July 2011. The Respondents are ordered to sign all the relevant documentations so as to transfer the suit properties known as Plots No.3913 and 3914 (formerly part of LR. No. Dagoretti/Riruta/888) to the Applicants as the administrators of the estate of John Nduati Kariuki (deceased) in terms of the certificate of confirmation of grant of probate that was issued to them by this court on 30<sup>th</sup> September 2008. The Applicants are ordered to pay to the Respondents the said sum of Kshs.300,000/- plus interest at 12% per annum (compounded) from the date of death of the deceased until payment in full. That payment shall be made before the Respondents are compelled to execute the transfer documents. The Respondents shall do so within thirty (30) days of the date of the last payment of the above decreed amount in default thereof the Deputy Registrar of this court shall execute the said documents on behalf of the Respondents. In normal circumstances, this court does not award costs in succession matters. In the present case however, the Applicants shall be awarded costs of their application. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2014**

**L. KIMARU**

**JUDGE**