



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 309 OF 1994

JULIUS GENNINGS GICHOGA.....1ST PETITIONER

ERASTUS MUGIIRA M'MAGIRI.....2ND PETITIONER

VERSUS

MWINGOKA SELF HELP GROUP.....1ST OBJECTOR

JANET KAIMURI KINYUA MWAI.....2ND OBJECTOR

JULIUS MUGAMBI.....3RD OBJECTOR/APPLICANT

JOSEPH NKARICHIA.....4TH OBJECTOR/APPLICANT

RULING

1. The objectors/applicants through an application brought pursuant to section 68(I) and (2) of the Law of Succession Act; Rule 73 of Probate and Administration Rules and section 128 of the Registered Land Act (repealed) sought orders that the 3rd and 4th applicants be granted leave to file their objection proceedings out of time on the ground inter alia:- that the applicants are bonafide purchasers for value; that they have been in actual possession and have extensively developed their plots; that the respondents are not keen on executing and transferring the said portions to the applicants; that the applicants will suffer loss and damage as the respondents did not disclose material facts when they filed this cause. The applicants relied on their affidavits dated 5th June, 2012 and annexures thereto and which affidavits are based on ground on the face of their application.
2. The 2nd petitioner filed replying affidavit dated 14th December 2012 whereas the 1st petitioner filed his affidavit on 2nd July 2014. The 2nd petitioner contention is that the objectors/applicants have no good claim against him and that their application is misconceived.
3. The advocates on record agreed that the application be determined by way of written submissions. The 3rd and 4th objectors/applicants filed their submissions through the firm of M/s F. K. Gitonga & Co. Advocates whereas the 1st petitioner filed his submissions on 2nd July 2014 and the 2nd petitioners submissions were filed on 29th October, 2013. The court has carefully considered the application, the respective parties affidavits in support of their rival positions, the submissions and relevant sections of the Law of Succession Act. The issue for determination is whether the applicant's application meets the criteria for granting leave to file objection proceedings out of time.
4. In the instant cause the grant of representation was filed with the court on 30th September, 1994 and

notice issued to the Government Printer on 20/12/1994 and notice was published in the Kenya Gazette on 24th December, 1994. The grant of letters of administration intestate was thereafter issued on 18th March, 1996. The Law of Succession Act requires under section 67(I) that where a party is to file an objection to do so within the specified period of not less than 30 days.

5. Section 67(I) of the Law of Succession provides:-

67. (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

It is further provided under section 68(I) of the Law of Succession as follows:-

68 . (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow.

6. The applicants/objectors application was filed more than 18 years since publication of the application for grant of representation. Whereas **Section 67(I) of the Law of Succession Act** requires an objection to be filed within 30 days from the date of publication, the application is seeking for leave to file objection out of time is based on the ground that the applicants are bonafide purchasers for value from the 2nd petitioner and not the deceased and further on the ground that they have been in occupation of the suit property and have developed the same. They further claim that the petitioners have delayed transfer of the portions they purchased and that they failed to disclose material facts on objectors interest and if leave is denied they would suffer irreparable loss and damage. The objectors did not in their application claim that they are beneficiaries or creditors to the deceased estate but purchasers from the 2nd petitioner. The contracts relied upon were made on 19th May, 1994 in respect of the 3rd objector and the 2nd petitioner. The 4th objector avers he entered into oral agreement with the 2nd petitioner on undisclosed date.

7. Rule 17 (I) of the Probate and Administration Rules states requirement of filing an objection by a person who has not applied for a grant to the estate of the deceased and wishes to object to the making of the grant. Under the said rule the objector is supposed to be a person entitled to apply for the grant which has been applied for by another person who is entitled to do and has to state his relationship (if any) to the deceased and ground of his objection.

Rule 17(I) of the Probate Administration Rules Provides:-

17. (1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7 (4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.

The persons entitled to Grant of Letters of Administration are well spelled out under **Section 66 Law of Succession Act. The said section 66(a) (b) (c) and (d)** provides:-

66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; (c) the Public Trustee; and(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Further Rule 26(I) and (2) of the **Probate and Administration Rules** provides:-

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

8. In view of the above and the objectors being outside the persons envisaged under **Section 66 of the Law of Succession Act**, are therefore not entitled to apply for Grant of Letters of the administration of the deceased estate. They are not entitled to make any objection as they are not beneficiaries or creditors to the deceased estate. Furthermore they did not state their relationship to the deceased or set grounds that be classified to be falling under the Law of Succession Act. They did not give any reason for delay in filing their objection within 30 days from the date of publication of notice for the application for grant. I find that the objectors have no interest in the deceased estate as they are not creditors to the deceased estate and had no transaction with the deceased during his time. The agreements they rely on were made between themselves and one of the beneficiaries long after the death of the deceased, that is to say with the 2nd petitioner who had no capacity to make such an agreement even if he purported to have letters of administration. **Section 82 (b) (ii) of the Law of Succession Act** provides:-

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers.

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(ii) no immovable property shall be sold before confirmation of the grant;

9. In view of the foregoing I find that the objectors/applicants are strangers to the deceased estate and their claim if any lies against the 2nd petitioner as an individual in a civil suit and not in this cause nor as a representative of the deceased estate. I therefore decline to grant their application to file objection proceedings out of time. The application is therefore dismissed with costs to the petitioners.

DATED AT MERU THIS 30TH DAY OF OCTOBER, 2014

J. A. MAKAU

JUDGE

Miss Mutinda for F. K. Gitonga advocates for objectors/applicants

1st petitioner – person – present

Mr. G. Ringera for 2nd petitioner

Objectors - absent

J. A. MAKAU

JUDGE