

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1665 of 2008

IN THE MATTER OF THE ESTATE OF MOFFAT MARIGA NG'ETHE (DECEASED)

GIDEON KARIMIA MARIGA.....APPLICANT

VERSUS

NELLIE WANJIKU MOFFAT.....RESPONDENT

RULING

Moffat Mariga Ng'ethe, the deceased to whose estate these proceedings relate died on 11th January 1987. On 17th July 2008, Nellie Wanjiku Moffat, the Respondent herein petitioned this court to be granted letters of administration intestate in respect of the estate of the deceased. In the petition, she described herself as the widow of the deceased. She listed the children of the deceased as follows: Amos Ng'ethe Mariga, Tabitha Hiro (married daughter), Gideon Karimia Mariga, Jane Njambi Njoroge (married daughter), Harrison Kamau Mariga, Caroline Waithera Mariga and Anthony Njau Mariga. All the children gave consent to the Respondent to petition the court to administer the estate of the deceased. She was issued with a grant of letters of administration on 31st October 2008. On 9th March 2010, the grant of letters of administration intestate issued to the Respondent was confirmed. The only asset that comprised the estate of the deceased, being a parcel of land registered as LR No.Kiambaa/Kihara/811 (*hereinafter referred to as the suit property*), was to be registered in the name of the Respondent.

From the applicant's application, it was apparent that the children of the deceased consented to the Applicant to be issued with the said grant of letters of administration intestate on the understanding that the Respondent would have a life interest in the said parcel of land after which the same would be distributed among the children of the deceased. According to the Applicant, contrary to this understanding, the Respondent had proceeded to have the said parcel of land subdivided and a portion thereof sold to a third party. The Respondent admits to this fact. She deponed in her affidavit sworn on 23rd April 2012 that she had sold part of the land so that she is able to maintain herself in her old age. She accused her children of neglecting her. In essence, it is the Respondent's case that she was justified to sell a portion of the suit parcel of land because of her situation.

During the hearing of the application, this court heard oral submissions made by Mr. G. Kamonde for the Applicant and Miss Karanja for the Respondent. This court had the benefit of reading the written submissions filed by the parties to this application. The issue for determination by this court is whether the Respondent held title in respect of the suit parcel of land as a life interest or an absolute proprietor. It is common ground that all the children of the deceased consented to the Respondent to petition the court to be issued with a grant of letters of administration intestate. That is as it should be. This is because **Section 66(a)** of the **Law of Succession Act** gives first priority to a widow or a widower to petition the court to administer the estate of his or her deceased spouse. However, it appears that the Respondent misapprehended her registration on transmission in regard to the ownership of suit parcel of land. **Section 35(1)(b)** of the **Law of Succession Act** is clear. A surviving spouse of a deceased person is entitled to a life interest in the whole of the residue of the net intestate estate of a deceased. Such spouse is entitled as of right to the absolute ownership of the personal and household effects of the deceased. In the present application, it was clear that the Respondent was only entitled to a life interest in the suit parcel of land. She lacked legal capacity to transfer the suit parcel of land either in whole or in part to third parties without the say so of the children of the deceased. On the other hand, **Section 38** of the **Law of**

Succession Act allows a property which is transferred to the children of a deceased person to be owned by the said children absolutely.

In the premises therefore, this court holds that the Respondent lacked legal capacity to transfer any portion of the suit parcel of land to a third party without the consent of the children of the deceased. This is because the Respondent's interest in the suit parcel of land is a life interest. She had no capacity to sell the property which the law allows her to enjoy during her life time. She is in effect a trustee for the children of the deceased. It was clear that the Respondent wrongly exercised her power as the administrator of the estate of the deceased. The transfers made by the Respondent pursuant to the grant of letters of administration intestate issued by this court are hereby reversed. The subdivision done at the behest of the Respondent is cancelled. The title in respect of the suit parcel of land shall revert to the name of the Respondent with the caveat that she holds the said title as a trustee of the children of the deceased. Since it appears that the Respondent cannot be trusted to faithfully administer the estate of the deceased, this court revokes the grants of letters of administration intestate issued to her on 31st October 2008 and confirmed on 9th March 2010. A new grant shall be issued to the Respondent Nellie Wanjiku Moffat, Amos Ng'ethe Mariga and Gideon Karimia Mariga. The same is confirmed on the terms specified hereinabove i.e. that the suit parcel of land shall be registered in the name of the Respondent in trust for all the children of the deceased. There shall be no orders as to costs because this is a family dispute.

DATED AT NAIROBI THIS 18th DAY OF APRIL, 2013

L. KIMARU

JUDGE