



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.284 OF 2008

**IN THE MATTER OF THE ESTATE OF THE LATE JACKSON MUGO MATHAI  
(DECEASED)**

**MUIGAI COMMERCIAL AGENCIES  
LTD.....INTERESTED PARTY/APPLICANT**

**VERSUS**

**MARY WANJIKU MUGO.....LEGAL  
REPRESENTATIVE/RESPONDENT**

**RULING**

There are two events that preceded the filing of the summons dated 27<sup>th</sup> September, 2011, to which this ruling relates. The first event was the ruling delivered by Maraga, J (as he then was) on 13<sup>th</sup> May, 2010 in which he explained and held that;

**“In this case it is not in dispute that the applicant is not an heir and is not and has never been a dependant of the deceased. It has no proprietary interest in the deceased’s estate. It is also not an advocate or attorney of the purchasers. If there are any aggrieved purchasers, they should sue the respondent as the legal representative of the deceased.”**

This finding was on an application in this cause wherein an application by Muigai Commercial Agencies Limited, seeking, in the main, the renovation or annulment of the grant for the reason that the petitioner herein in filing the cause failed to disclose that parcel of land known as KAMPI YA MOTO BLOCK 3/24-228 had been sold by Muigai Commercial Agencies Limited, as an agent of the deceased, to several purchasers.

The second event relates to two orders. One issued on 16<sup>th</sup> February 2011 and another on 17<sup>th</sup> March 2011 in which the applicants in an application filed on 1<sup>st</sup> July 2010 were given 14 days to nominate a representative in place of Kipchumba Samuel Kipkato who had brought the summons dated 8<sup>th</sup> June 2010 but filed on 1<sup>st</sup> July 2010 on their behalf and who had purported to withdraw it. It was necessary to substitute Kipchumba Samuel Kipkato who was also the deponent of the affidavit in support of the application because some of the applicants maintained they had not instructed him to withdraw the application. The period to nominate a representative was extended for a further 14 days and it was ordered that should they fail to do so within that period, the application would stand struck out.

Earlier on 2<sup>nd</sup> February, 2011 one John Omonywa Mariera had filed an affidavit of protest claiming purchaser interest in a portion of the suit property.

The petitioner has bought the instant summons dated 27<sup>th</sup> September, 2011 seeking that the affidavit of protest dated 2<sup>nd</sup> February, 2011 be struck out on the grounds that-

- i) the protestor, John Omonywa Mariera, lacks *locus standi* to bring the protest as he was one of those whose application dated 8<sup>th</sup> June 2010 was struck out for failure to substitute Kipchumba Samuel Kipkato within 14 days;
- ii) the ruling by Maraga, J (as he then was) of 13<sup>th</sup> May, 2010 was clear that a purchaser could only sue the legal representative of the deceased in a separate suit;
- iii) although the suit property was agricultural land no consent from the Land Control Board was obtained, hence the sale agreement was void;
- iv) the agreement having been entered into on 10<sup>th</sup> September 2010, the transaction was statute barred.

In reply, the respondent (protestor) John Omonywa Mariera has deposed that being a purchaser of part of the suit property, he has the *locus standi* to bring the present protest; that if the protest is struck out, the protestor will suffer prejudice. These arguments have duly been considered. The application dated 8<sup>th</sup> June 2010 was to stand struck out within 14 days from 17<sup>th</sup> March 2011 if the applicants would not have nominated a representative.

On record is an authority filed on 25<sup>th</sup> March, 2011 by ten applicants nominating Samuel Muna as their representative. That authority was filed within eight (8) days from the date of the order and was therefore within time. It follows that the application of 8<sup>th</sup> June, 2010 was not struck out as suggested in this application, the parties concerned having complied. It would appear that out of the original 117 purchasers only 34 authorized the bringing of the application of 8<sup>th</sup> June 2010. That number has further dropped to ten (10), as those who still wish to proceed with the application.

It must also be noted that the protest by John Omonywa Mariera was brought earlier than the orders of 16<sup>th</sup> February, 2011 and 17<sup>th</sup> March, 2011. Both the protest and the application of 8<sup>th</sup> June, 2010 have the effect of stopping the petitioner from proceeding with the confirmation of the grant, yet **Section 55** of the **Law of Succession Act** is clear that until and unless a grant is confirmed, the administrator (trix) cannot distribute the estate or make any division of the property constituting the estate.

It must also be remembered that the **Law of Section Act** (in **Section 72**) recognizes only three instances where a grant cannot be confirmed, namely where application for provision of dependants under part III is pending, where Estate Duty Commissioner (it is doubtful if such person exists today) has not satisfied the court that all estate duty payable in respect of the estate (again doubtful if such payments are still applicable) has been paid and finally, the court itself is satisfied that estate duty is payable in respect of the estate and has not been paid. It follows that failure to settle a debt or to provide for debtors or purchasers cannot be a ground for refusing to confirm a grant.

The debtors and purchasers must wait until the estate is vested in the legal representative in terms of **Sections 79, 82 (d) and 83 (d)** of the **Act**. Both the application and protest, although appear meritorious, have been brought prematurely and their effect is self-defeating as the applicants' or protestors' claims are incapable of being satisfied before the grant is confirmed.

As a matter of fact, the administratrix has, through counsel, not disputed the claim. She has only sought the authentication of the claims and an opportunity to prosecute her application for confirmation of the grant.

Finally, this court, Mr. Justice Maraga, having held that the only recourse for the purchasers is filing a suit that decision stands in the absence of an order setting it aside. Muigai Commercial Agencies Limited filed a notice of appeal to challenge that decision. At the time of arguments of this application, there was no evidence that the appeal has been allowed and the ruling set aside.

With that in mind, I do not find any purpose in considering the other grounds raised in this application save reiterate my sentiments expressed on 15<sup>th</sup> February, 2011 that in view of the sheer numbers of the persons claiming purchaser interest in the estate, it is in the best interest of the administratrix, counsel involved and the purchasers that a solution be found to avoid further delay and, of course expense in the matter.

For the reasons stated, the application dated 27<sup>th</sup> September, 2011 is allowed. The affidavit of protest of 2<sup>nd</sup> February 2011 is struck out.

I make no orders as to costs.

**Dated, Signed and Delivered on Nakuru this 14<sup>th</sup> day of February, 2012.**

**W. OUKO  
JUDGE**