



REPUBLIC OF KENYA

High Court at Nakuru

Succession Cause 200 of 2010

**IN THE MATTER OF THE ESTATE OF THE LATE MWANGI KIBIRIGWE ALIAS MWANGI
KIBIRIGWI**

MUCHOKI MWANGI

KINGEE MWANGI.....PETITIONERS

VERSUS

CHARLES WAINAINA

F.MUNGAI.....OBJECTOR

RULING

The Petitioners applied for letters of administration on 22/04/2010 in respect of the estate of the deceased who died on 9/09/2005. The petition was advertised under Gazette No. 6616 dated 26th April 2010 and published on 11th June 2010. Following the publication of the petition as aforesaid, Charles Wainaina F. Mungai (the Objector) filed an objection to the making of the grant dated 2nd August, 2010 and the same was accompanied by an answer to the petition for a grant and petition by way of cross- application under Rules 17 (1) and (5) of the Probate & Administration Rules.

It is not in dispute that the deceased herein was the registered owner of the property known as LAND L.R NO. 8285/676 KARIOBANGI. The Objector gave *viva voce* evidence and further relies on his submissions dated 30th April 2012 and filed on the same day in support of his case. It is the Objector's case that by the agreement dated 5.05.1981 (exhibit 1), his late father Fredrick Mungai purchased the suit property from the deceased and paid the full purchase price of Kshs. 32,000/=. By the agreement dated 10/12/1989 (exhibit 2), the Objector purchased his late father's interest in the property for Kshs. 48,000/=.

It is the Objector's case that although the deceased herein gave his late father the original copy of his title which he produced as exhibit 3, he never effected transfer of the property in favour of his late father. He actually alleged that on 11/05/1994 his late father's Advocates M/s Munene & Company Advocates wrote to the deceased instructing him to come to the office in order to sign some documents but the deceased wrote back on 8/09/1994 informing him that he would not be able to meet him as he was unwell at the time. Copies of these letters were produced and marked as exhibits 7 and 8(a) respectively. He further stated that on 21/02/1995, he met the deceased and a fresh agreement for the purchase of the property was made between himself and the deceased (exhibit 9). The objector contended that he paid the deceased a further Kshs. 10,000/=. Upon purchasing the same, he took possession of the premises and rented it to third parties copies of the agreements were produced and marked as exhibits (10 and 11) and that he paid rates for the property until the 1st Petitioner took possession sometimes in December 2009.

The Objector therefore claims that the suit premises should not be included among the deceased's assets as the same had been sold to him.

The Petitioners on their part have denied the allegations of the Objector. They rely on the Grounds of Objection dated 15/01/2011 and filed on 8/02/2011 and on the written submissions dated 15/05/2012 and filed on 17/05/2011. The 1st Petitioner gave evidence the substance of which was that the suit property belonged to the deceased and that he had no knowledge of the same having been sold to the Objector or any other person. He produced a search certificate form dated 5/01/2010 showing that the records at the Ministry of Land show that the plot belonged to his father (exhibit 2).

It was the 1st Petitioner's evidence that he only met the Objector on 18/12/2009 at the Kariobangi Chief's camp where he had been summoned on allegations of trespassing over the suit premises. He says that he was very close to his father and that had he sold the property he would have told him. He further stated that his father did own another property but the same has not been included in the present succession proceedings as they do not have the original certificate of title. He did acknowledge that he had passed by the premises and noted that there was someone who was in occupation of the same but he never took the time to find out with whose authority they were there.

The 1st Petitioner stated that his father was illiterate and could not sign he used to thumb print documents. He therefore did not recognize the signatures produced by the Objector and was adamant that the same could not have been made by his father.

He states that he has been paying rates for the estate since the year 2009 and does not know who had been paying the same previously. The Petitioners have stated that the Objection and Petition are incompetent because the Objector, not being beneficiary or next of kin of the deceased, has no right to challenge or claim any part of the estate.

The Issues for determination are as follows:-

1. whether the Objector has a right to bring the objection and petition.
2. whether the suit premises is free property capable of distribution under the Law of Succession

(a) The Petitioners by their written submissions have alleged that the objection and petition by the Objector are incompetent as the Objector cannot purport to be a beneficiary or a next of kin so as to give a right of challenge or claim any part of the estate. They have further contended that it is only dependants who are entitled to inherit the property as per Section 26 of the Law of Succession Act (*Cap 160 of the Laws of Kenya*). They have relied on the case of **IN THE MATTER OF MUNGAI AND MUNGAI & ANOTHER (1995-1998)EA 206** where the 2 customary wives were allowed to object by virtue of Section 3 (5) of the Law of Succession Act.

It is the Petitioners' contention that the only remedy open to the Objector is to sue the estate after the Grant of Letters of Administration for specific performance of the contract or for damages for breach of contract. He accuses the Objector of intermeddling with the estate by filing the Objection and relies on the case of **GITAU & 2 OTHERS VS WANDAI & 5 OTHERS (1989) KLR 231** where the court held that a contract of shares in land which eventually became void amounted to intermeddling with the property of the estate contrary to Section 45 of the Law of Succession Act.

Objections for the making of a grant are provided for under Sections 67, 68, 69 and 70 of the Law of Succession Act. These sections do not provide who is entitled to bring an objection. It is my opinion that any person who has an interest in the estate of the deceased is entitled to bring forth an objection and have his right determined before the court can give an order on distribution of the assets of the deceased. The Act does recognise adverse interests especially those of creditors and at Section 66 provides-

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

1. **surviving spouse or spouses, with or without association of other beneficiaries;**
2. **other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
3. **the Public Trustee; and**
4. **creditors:**

From the evidence that has been presented before this court, it is clear that the Objector has an interest in the suit property having entered into a sale agreement and paid the full purchase price for the same. I find that the documents that have been produced were executed by the deceased and he understood the contents and full meaning thereof as there was even produced a copy of the Kikuyu translation of the agreement dated 21/2/1995 (exhibit 8b). I distinguish this case from that of **GITAU (Supra)** as in that case, the transaction was found to be void hence unenforceable unlike the present case where the Objector has valid rights over the suit property. The Objector is therefore a creditor for purposes of Section 66 of the Law of Succession Act and I do find therefore that he is entitled to bring the objection herein.

The Second issue that has been raised is whether the suit property is free property that is capable of being distributed to the beneficiaries under Cap 160. It has been submitted on behalf of the Petitioners that the deceased was the owner of the suit property and the same therefore now belongs to the administrators of his estate and not to the purchaser. He claims that there is no jus accrescendi as in cases where the property is held in common.

The Law of Succession Act at Section 34 provides-

34. A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

“Free property in relation to a deceased person” is defined under Section 3 as *the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.*

The question here is therefore whether the deceased was legally competent freely to dispose the suit property during his lifetime. It has already been proven that he entered into an agreement to sell the property and to transfer the same to the Objector's father and thereafter to the Objector having already parted with the original title deed. He therefore could not legally dispose the same at his own free will as the Objector had the right to stop any such disposal and apply to court for an order of specific performance.

The evidence that has been presented before this court shows that although the suit premises was registered in the name of the deceased at the time of his death, he had already sold and parted possession with it. It was no longer his and had no interest in the same, which interest could be passed on to his dependants. This property does not therefore form part of the estate of the deceased within the meaning of Section 3 of the Law of Succession Act. However, I do not think sufficient evidence has been presented to warrant listing or even declaring the applicant as the sole beneficiary by virtue of being a purchaser at this point. To my mind this property is simply not available to be listed as part of the assets of the deceased because of the transaction that had commenced. If it were to be listed for distribution, parties would be prejudiced and my view is that the applicant is at liberty to pursue the administrators of the late Mwangi Kibiringwe's estate with a view of completing the transaction in terms of transfer. He would certainly not be able to make such pursuit if the property is listed for distribution.

I therefore direct that the property LR NO. 8285/676 be omitted from the assets to be distributed in the deceased's estate. It is only to this extent that the application succeeds. Costs of this application shall be borne by the petitioners.

Delivered and dated this 12th day of October, 2012 at Nakuru.

**H A OMONDI
JUDGE**