



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 169 of 2009

IN THE MATTER OF NDUBI M'ITIRITHIA.....DECEASED.

EVANGELINE KAGUMO NDUBI.....PETITIONER

VERSUS

CYPRIAN KITHARA NDUBI.....OBJECTORS
AND

JAPHET KINYUA.....1ST INTERESTED PARTY

HENRY KITHIA.....2ND INTERESTED PARTY

JUDGMENT

There are three applications being heard together. The first application is by the 1st interested party and is dated 17th February, 2012. It has been brought under S.47 of the Law of Succession Act and 73 of P&A Rules. It is seeking:

An order lifting the inhibition order placed on the land parcel no. Abothuguch/Gaitu/1236.

The application is premised on the grounds that the 1st interested party lawfully bought the property from the 1st petitioner who sold the land to him as her beneficial share of the estate of the deceased.

The 2nd application is by the 1st administrator/petitioner dated 26th March, 2012. It seeks:

- 1. That the grant of letters of administration issued to the 1st petitioner Evangeline , the objector Cyprian and two others Benjamin and Cornelius be confirmed;**
- 2. That the inhibition registered against two parcels of land namely Abothuguchi/Gaitu/2820 and 2822 be lifted;**
- 3. Finally that the land parcel No Abothuguch/Gaitu/1233 be included in the list of assets and that the same be distributed to Cyprian Kithara Ndubi.**

The grounds for the application are two

1. That the original Land Parcel No. Abothuguchi/Gaitu/1236 was the entitlement due to Evangeline Kagumo and the daughters of the deceased namely Elizabeth, Joyce, Pricilla and Lucy. Since the other beneficiaries were adequately provided for during the life time of the late Ndubi Itirithia.
2. That some portions of land from the subdivisions of the original title No. Abothuguch/Gaitu/1236 have now been sold to third parties.

The final application has been brought by the objector Cyprian. It is a chamber summons dated 18th May 2012. It is brought under section 47 of the Law of Succession Act and Rule 73 of the P and A rules it is seeking two prayers in the alternative

1. That the transfer of LR Abothuguchi/Gaitu/2820 and 2822 to Japhet Kinyua and to the petitioner respectively be cancelled and the same revert to the name of the deceased. Alternatively

2. the petitioner be ordered to give full and accurate account of all the monies she received from the sale of Abothuguch/Gaitu/2820 and 2822 and that money be deposited in court pending distribution of the estate. This application is premised on the following ground:

1. That two parcels of land were transferred to the petitioner and a third party Japhet Kinyua Mwangera after obtaining the grant fraudulently. That the properties should revert to the deceased for distribution.

All the parties have invoked section 47 of the LSA in support of their applications. That section provides:

“ 47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:”

The advocates to the parties agreed to dispose of the three applications by way of written submissions which were to be highlighted. Mrs. Ntarangwi represented the 1st Petitioner while Mr. Mulango Mwenda appeared for 3rd and 2nd petition cum objectors and Mr. J. G. Gitonga appeared for both interested parties. Each of these advocates has filed written submissions which I have considered.

The background to this cause is that the 1st Petitioner filed this petition for the grant of letters of administration intestate. The asset forming the estate of the deceased, who was husband of the 1st Petitioner, was LR. No. Abothuguchi/Gaitu/1236, measuring 0.822 hectares. The 1st petitioner subdivided the property into, inter alia Abothuguchi/Gaitu/2820 and 2822. She sold the said land to the two interested parties. The grant was confirmed on 29th June, 2009 but subsequently on application by the objectors who were the sons of the 1st petitioner, in an application dated 15th February, 2010 the grant confirmed to the 1st petitioner on 29th June, 2009 was revoked. Basically the reasons for the revocation were for reason some of the beneficiaries had not signed the consent and for the fact the 1st petitioner sold the suit property before the grant was confirmed contrary to the clear provisions of section 82(b) (ii) of the Law of Succession Act. The letters of administration that had been issued to the 1st Petitioner were revoked and a fresh grant issued to the 1st petitioner jointly with Cyprian, Benjamin and Cornelius all sons of the 1st petitioner.

The issues that are not in dispute are the names of the beneficiaries of the estate of the deceased as stated in the form P & A 5 filed herein. There is also no dispute that the assets in dispute in this petition is Abothuguchi/Gaitu/2820 and 2822 which came out of the subdivision from the original title Abothuguchi/Gaitu/1236. It is also not in dispute that Abothuguchi/Gaitu/ 2820 and 2822 are registered in the names of Japhet Kinyua Mwangela and Henry Kithia M’Mwangera.

The issues for determination are:

Who are the beneficiaries entitled to the assets forming the estate of the deceased?

Should the titles Abothuguchi/Gaitu/2820 and 2822 be cancelled; or alternatively should the administrator be made to account for the money received from the sale of the portions from the said parcel of land?

Whether section 93 of the Law of Succession Act provides protection to the interested parties?

The objector's submissions are that the 1st petitioner did not have capacity to dispose of the movable property of the deceased because the grant of letters of administration had not been confirmed by the court. I do not wish to belabor the objectors' argument regarding the 1st petitioner's capacity to dispose of the suit properties because that was the subject of the court ruling of 18th May, 2011 which revoked the grant issued to the 1st Petitioner; and which ordered a fresh grant to be issued to the current four petitioners. That ruling also issued an inhibition order over the property Abothuguchi/Gaitu/2820 and 2822. The court has therefore already dealt with the issue of capacity of the 1st Petitioner as at the time of the sale and the subsequent subdivision.

Mr. Mulango Mwenda has urged this court to order a cancellation of the two titles on the grounds that the two purchasers, the interested parties in this succession cause are not protected under section 93 of the Law of Succession Act. Mr. Mulango Mwenda urged that section only protects a purchaser where there is a confirmed grant. The objectors have suggested a mode of distribution of the assets of the estate to the effect that the remaining asset be shared equally among all the beneficiaries of the deceased as set out in paragraph 6 of the replying affidavit and protest dated 9th July, 2012.

The Interested parties position is that at the time the two parcels of land was sold to them, the 1st petitioner was the legal representative of the deceased and that she had obtained confirmation of the grant before the revocation and further that the sale ought not to be vitiated or titles cancelled.

The 1st petitioner position is twofold. She urges that the deceased in his lifetime had provided for all the beneficiaries except the 1st petitioner and her daughters, a fact which the objectors do not deny. She contends that the gifts to the beneficiaries should be taken into account when considering the issue of distribution of the remaining asset.

The 1st petitioners affidavit sets out the land given to the objectors by the deceased before he died at paragraphs 7, 8, 9,10 and 11. The 1st petitioner has annexed the green cards for each of these parcels in her said affidavit. She also explains that in respect of the parcel of land given to the 1st objector/2nd petitioner it was omitted from the list of assets and that she has sought a rectification to include it so that the transfer to his name can be accomplished.

The 1st petitioner contends that she sold the land which was her entitlement to the interested parties and the titles to them ought not to be cancelled.

There is no dispute who the dependents of the deceased are. Section 29 of the LSA sets who dependents, where relevant to this case, are as follows:

“29. For the purposes of this Part, “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;...”

The LSA under section 28(d) that when considering distribution gifts given to the beneficiaries by the deceased during his/her lifetime must be taken into consideration. Section 28(d) provides as follows:

“28 In considering whether any order should be made under this part, and if so what order, the court shall have regard to-

(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime”

The 1st petitioner has annexed all the green cards of land given to the beneficiaries by the deceased during his lifetime. The objectors do not deny that they were fully provided for by the deceased. It has also been shown that the beneficiaries who did not get any share from the deceased estate are the widow, 1st petitioner, and her daughters. The only asset these could share is the land **Abothuguchi/Gaitu/1236**. That is the parcel that has been subdivided into **Abothuguchi/Gaitu/2820 to 2822**.

From a consideration of these applications, the filed affidavits and the submission by counsels to the parties I am fully satisfied that the land in issue **Abothuguchi/Gaitu/1236** was the 1st petitioners share of the deceased estate to be shared with her daughters as set out in her supporting affidavits. The objectors have no claim to this parcel of right and have no right to ask for any accounting in its respect.

The 1st petitioner sold part of the parcel of land to the two interested parties before the grant was confirmed by the court. That action cannot be used to deny the interested parties of the property they bought as they are protected by the law. Further the other beneficiaries had already been provided for and have no further claim. Section 93 of the Law of Succession Act should therefore protect the interested parties titles. It provides as follows:

“93. (1) A transfer of any interest in immovable or movable property

made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant...”

Having come to these conclusions I rule as follows:

- 1. That letters of administration issued to the petitioner Evangeline Kagumo Ndubi, Cyprian Kithara Ndubi, Benjamin Mwithia and Cornelius Kinge Ndubi be and are hereby confirmed.**
- 2. That the inhibition registered against two parcels of land namely Abothuguchi/Gaitu/2820 and 2822 be lifted.**
- 3. That the land parcel No Abothuguch/Gaitu/1233 be included in the list of assets and that the same be distributed to Cyprian Kithara Ndubi.**
- 4. That Abothuguchi/Gaitu/2822 be shared equally between Evangeline Kagumo Ndubi, Elizabeth Kiburio, Joyce Kathambi Priscilla Ntiritwa and Lucy Gakii.**
- 5. Each party will bear their own costs of the applications.**

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF NOVEMBER, 2012.

LESIT, J.

JUDGE