



**REPUBLIC OF KENYA**

**High Court at Meru**

**Succession Cause 298 of 2003**

**IN THE MATTER OF THE ESTATE OF EDWARD KIRIMI MUTHAMIA.....DECEASED.**

**GRACE KARAMANA.....PETITIONER**

**VERSUS**

**SARAH NKATHA.....1<sup>ST</sup> OBJECTOR**

**FRIDAH MWARI.....2<sup>ND</sup> OBJECTOR**

**RHODAH GATWIRI MUTHAMIA.....3<sup>RD</sup> OBJECTOR**

**FRANCIS MBAYA M'MUGAMBI.....PROTESTOR**

**JUDGEMENT**

The petitioner Grace Karamana filed this petition on 18<sup>th</sup> August 2003 for a Grant of Letters of Administration intestate in respect of the estate of her deceased husband. The said Grant of Letters of Administration intestate was issued to the petitioner on 19th November 2003.

Before the Limited grant was confirmed, the 2<sup>nd</sup> Objector one Fridah Mwari filed summons for revocation and or annulment of Grant. She sought for the following orders:

**1. A declaration that the proceedings to obtain grant were defective in substance for reason:**

**(a) There was no full inventory of the assets and liabilities of the deceased estate;**

**(b) That the Grant was obtained fraudulently by the petitioner by making false statement in absence of the objectors who claim beneficial interest against the estate of the deceased by concealment from court of the following material facts:**

**i)the petitioner failed to discLSAe that the deceased had obtained land parcel number Abothuguchi/Mariene/1231 by way of fraud by conspiring with the then proprietor who is our further /husband to the 1st objector in order to defeat justice by not honoring decree in Land Dispute Tribunal case number 20 of 2002.**

**ii)the petitioner failed to discLSAe that the deceased had his share of land namely Abothuguchi/Mariene 1226 which prior to his death he had sold to one GtongaNgeera at a**

**consideration of Kshs. 65,000**

**iii) failing to disclose to the court that there was a pending case in regard to land parcel number Abothuguchi/Mariene 1231 vide land dispute tribunal case no. 20 of 2002**

**iv) the petitioner failed to disclose to the court that land belonged to father in law M'Muthamia Stanely Mbogori who had colluded with the deceased during the pendency of the tribunal case and fraudulently transferring the suit land, while the same was family land and the objectors were entitled to a share thereof.**

The 1<sup>st</sup> Objector filed a supporting affidavit of even date in which she sets out the facts of her case. In brief the objector contends that there was fraud involved in the transfer of the land to the deceased from the previous registered owner of the land. The objector states that the objectors in the application filed a case before the Land Dispute Tribunal No. 20/2002. The 2<sup>nd</sup> Objector stated that the case was resolved in their favour in that it was ordered that the Objectors should get their share of land from family land. The Decree from the award from the Land Disputes Tribunal is annexed. It shows in part:

**“That plots parcel No. ABOTHUGUCHI/MARIENE 1231 be shared among the three wives.”**

The Petitioner filed a replying affidavit dated 13<sup>th</sup> May, 2004. In brief the Petitioner contends that the parcel of land in question was given to the deceased who is her husband by his father at a time he was sharing land to all his children. The Petitioner stated that the award from the LDT was read out in court after her husband's death yet the Objectors did not disclose that to the court.

The father of the deceased STANLEY M'MUTHAMIA has also sworn an affidavit dated 29<sup>th</sup> November, 2004. He deposes that he had indeed given his deceased son the property in issue and that the objectors were not entitled to inherit the deceased since he had a family of his own.

There was another development when one, Francis Mbay filed an affidavit of protest on the grounds that he is entitled to 1 ¼ acre out of the said land. He annexes an agreement in writing dated 4th June, 2003. He contends that he had entered into an agreement with the deceased to purchase 1 1/4 of the land at Kshs. 185,000 and that before the land could be transferred to him, the deceased passed on.

His main contention is that the petitioner did not include his name in the affidavit in support of the petition for letters of administration of the estate. He further contends that he had paid the petitioner Kshs. 184,239 towards the purchase price leaving only a partly amount which he claims he is ready to pay at once.

The parties took directions on the manner in which the application could be disposed off. The Objectors and the Protestor opted to give viva voce evidence. Each of them gave their evidence. The evidence is on record. I have considered it fully. The Petitioner on her part opted to rely on affidavit evidence and to give submissions. I have considered the affidavit evidence by all parties filed in respect of this application. I have also considered the submissions by the Petitioner's counsel.

There are several issues for determination which I will consider systematically. The first issue is **whether the Petitioner was entitled to apply for the letters of administration intestate.**

It is not in dispute that the petitioner is the wife of the deceased. Section 66 of the Law of Succession, hereinafter LSA gives the order of preference when determining who has priority to apply for a Grant. It provides in part thus:

**66. A gift made by will shall not of itself raise any presumption that the gift is intended to satisfy or to take the place of a gift, whether or not of equal amount, previously made to the same person by the testator in contemplation of death.**

The 1<sup>st</sup> Objector is a step-mother of the deceased while the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors are step-sisters of the

deceased. The law S. 66 of the LSA is clear from the above that a surviving spouse has priority to apply for the Grant of Letters of Administration over other beneficiaries. The Petitioner in this case, as widow of the deceased was therefore clearly and rightfully entitled to apply for Grant of Letters of administration in respect of the estate of her deceased husband within the meaning of section 66 of the Law of Succession Act CAP 160 of the Laws of Kenya.

The other issue to decide is **whether any case has been made out for the annulment and or revocation of the Grant.**

Section 76 of the Law of Succession Act CAP 160 of the laws of Kenya provides circumstances under which a Grant can be annulled and or revoked. The same provides as follows:

***“76. A grant of representation whether confirmed or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -***

***(a) that the proceedings to obtain the grant were defective in substance***

***(b) that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case***

***(c) that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(I) to apply for confirmation of grant within one year from the date hereof or such longer period as the court has ordered or allowed or***

***(II) to proceed diligently with the administration of the estate...”***

The Objectors invoked section 76 of the LSA in support of their application. The Objectors made allegations of fraud against the deceased and his father. The basis of the said allegation is a Decree from a Land Dispute Tribunal case no. 20 of 2002. I have set out what the Decree provided.

Counsel for the Petitioner has submitted that the Objectors have complained against the deceased and their common father of defrauding them by virtue of the LDT award and subsequent Decree. No complaint has been made against the conduct of the Petitioner whether at the time of obtaining the Grant in question or subsequent to obtaining the Grant due to failure to administer the Grant or due to the Grant being stale. The Objectors are not making any allegations against the Petitioner. They have not brought their application within the provisions of section 76 of the LSA. I find that the application to annul or revoke the Grant in this Cause has no merit.

Before I move to the next issue I must deal with one more point. The Objectors are claiming that their father has defrauded them by bequeathing land to his sons and leaving his daughters and wives out. Their father has sworn an affidavit in opposition to the application by the 2<sup>nd</sup> Objector. That means he is still alive. At least he was at the time this application was heard. If he is, the Objectors should file a suit against their father. There are many avenues they can pursue in order to claim their rights. For instance Article 60 (1) (f) of the Constitution provides as follows:

***“land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles;***

***(a) ...***

***(b)...***

(c) ...

(d) ...

(e) ...

**(f) elimination of gender discrimination in law, customs and practices related to land and property land...**”

In short, the Objectors cannot claim land from their father who is still alive through an objection in this suit.

I now turn to the issue as to **whether the Objectors are entitled to the suit property**. Section 29 of the LSA CAP 160 provides as follows:

**“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**

**(b) such of the deceased’s parents, step parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

The objectors are not dependants within the meaning of section 29 of the Act. They have not alleged that the deceased maintained them in any way immediately prior to his death. They are step-mother and step-sisters of the deceased. They never lived with him. Their claim over the deceased property does not lie under section 29 of the LSA. They are not entitled to the deceased property not being his dependants.

The last issue for determination is **whether the Protestor is entitled to the deceased’s land by virtue of being a purchaser**.

The affidavit of protest was filed by one Francis Mbaya M’Mugambi, the Protestor herein. He also testified in the case as earlier stated. It is his case that by an agreement in writing dated 4th June 2006, he bought 1 ¼ of the suit property from the deceased at Kshs. 185,000 but before the land could be transferred to him, the deceased passed on. He contends that the Petitioner took over the estate whereupon he entered into a fresh agreement with the petitioner to purchase the said portion, and that the petitioner has received Kshs. 184,239 as a substantial part of the purchase price.

The Objector has contradicted his evidence. In paragraph 1 of his affidavit he states that he entered into an agreement with the deceased for the sale of the latter’s land. He stated that the agreement is dated 4<sup>th</sup> June 2003. The agreement is exhibited in his affidavit. However the agreement dated 4<sup>th</sup> June, 2003 is between the Petitioner and the Protestor. The Protestor said he first paid the deceased for the parcel of land. He is however not specific about the amount he paid to him. The Protestor claims he entered into a fresh agreement with the Petitioner and that he paid 187, 239/- to her. He did not produce any proof of payment.

The agreement was witnessed and also commissioned. It was the Protestor’s duty to establish his claim that he was a purchaser and by that virtue, entitled to the piece of land he claims.

The Petitioner has not replied to the Protestor’s affidavit in protest. The burden of proof lay on the Protestor to establish the facts he relied upon on the required standard of proof on a balance of

probabilities. The Protestor failed to establish he was a purchaser. He could have brought an affidavit from the witnesses to the agreement or the one who commissioned the same. He could not establish that he made any payments whether to the deceased or the Petitioner. In view of the serious contradictions in the evidence of the Protestor, I find that he has not shown on the required standard that he was a purchaser or that he made any payments towards the purchase of the parcel of land. I find that the protest filed herein lacks in merit and is dismissed.

**In the result the objection and the protest filed herein lack in merit. I dismiss them both in total.**

I am mindful of the Petitioners submission that I make an order for costs in favour of the Petitioner. I decline to do so.

**I order that each party do bear their own costs.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2012.**

**LESIT, J.**

**JUDGE.**