



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 273 of 1996

IN THE MATTER OF THE ESTATE OF M'ITUMA KARUTU(DECEASED)

NICHOLAS NJOGU M'ITUMA.....1ST RESPONDENT

JOSEPH MBAE M'ITUMA.....2ND RESPONDENT

SAMUEL MUTUA M'ITUMA.....3RD RESPONDENT

VICTOR KIRAI M'ITUMA.....4TH RESPONDENT

PATRICK KIUNGA M'ITUMA.....5TH RESPONDENT

JOSPHAT MAGAJU M'ITUMA.....6TH RESPONDENT

VERSUS

ERNEST KIRUJA M'ITUMA.....1ST RESPONDENT

DANIEL MURIITHI M'ITUMA.....2ND RESPONDENT

RULING

The Respondents who are six brothers have brought a summons application dated 25th August 2008. The application has been brought under sections 47 and 94 of the law of Law of Succession Act which provides as follows:

“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:

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

“94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.”

It is also brought under Rule 73 of the P&A rules which provides as follows:

“73. The court shall, within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof”.

The Respondents seek four prayers as follows:

- 1. That the respondents be ordered to account for the pecuniary proceeds in form of rent from the deceased’s rental premises erected on plot No. 12 situate at Nkubu Market effective 27/3/2006 until determination of this application, and the same be shared out equally, amongst the eight heirs of the deceased estate.**
- 2. That the honourable court be pleased to order the sale of the deceased’s share (half) of plot No. 12 situate at Nkubu Market, and sharing of the proceeds amongst the eight heirs of the deceased’s estate.**
- 3. That the 1st respondent be ordered to be collecting the monthly rent in respect of the deceased’s rental premises erected on plot No. 12 situate at Nkubu Market and then share the same equally amongst the eight heirs.**
- 4. That the Respondents be condemned to pay costs of this application to the Respondents.**

The application is further supported by the affidavit sworn by the 1st Nicholas Njogu on same, date and a supplementally affidavit by the same Respondent dated 6th February, 2009.

The Respondents have filed a replying affidavit sworn by the 1st Respondent dated 29th October, 2009. The gist of their response is that the Succession Cause is settled and final grant confirmed and that any party aggrieved by it should apply to annul entire grant. The Respondents suggest that instead of selling the plot the subject matter of this application it should be valued and both Respondents pays the Respondents its value.

I have considered this application together with the affidavits sworn by Respondents and respondents. I have also considered the written submissions by Mr. Mokuia for the respondents and Ms Mithega advocate for the Applicants

There is no dispute that the applicants and Respondents are all brothers and beneficiaries of the deceased estate. It is not disputed that the grant was confirmed on 7th November, 1997 and that all the dependants took their respective shares of the estate. The only share which is in dispute is plot No. 12 at Nkubu Market.

This is not the first time the applicants have challenged the manner in which the plot No. 12 was shared out. They filed an application in rectification of grant which application was dismissed by Hon. Lenaola Judge who ruled that the 1st Respondent should hold the plot in trust for the rest. They have now come with the current application seeking prayers as stated above. Prayer 3 should be considered as an alternative order prayer 2 to have meaning.

The Applicants position is that the Respondent earn an income from the plot in question and that same should be shared out to all dependants because it forms part of the estate of the deceased. It is the Respondents contention that the deceased share of the plot brings an earnings of 6,000/- a month and they seek to have the 1st Respondent account for the earnings from the plot since 27th March, 2004 when he

was ordained by court to hold it in trust.

The Respondents' position is that the plot was co-owned with another one Stephen, and that in the circumstances the deceased dependants share of the plot has not been determined. They have also annexed an Enforcement Notice issued by County Council of Meru Central as proof the only building on the plot was pulled down. The Enforcement Notice is not very legible. The Respondents have contested the Respondents contention and maintain that the Enforcement Notice was never implemented and that the original building still stands on the plot with five rooms being the deceased share. The Respondents also maintain that the deceased share in the plot has been determined and is clearly marked out on the ground.

The issue whether any income is earned from the plot No. 12 Nkubu Market is contentious. None of the parties Respondents and respondents have filed any documentary proof of the structures on the ground or of earnings earned. In the circumstances I make no finding either way.

This court has power under the law of Succession Act to make such orders as may be expedient (See S.47 of the LSA). From all the affidavits for and against the application, and submissions by both counsels I do find that the best way to resolve the application is by giving effect to the views of the parties herein. In the supporting affidavit sworn on behalf of the Applicant Minutes of a meeting held in the office of the Area Assistant Chief on the 16th September 2006 are annexed. In that meeting except the 2nd Respondent, all other dependants resolved to have the plot sold and the money shared out to the dependants.

In the Respondents affidavit, they suggest that both of them pay to the Respondents the value of the plot so that they may keep it within the family in tandem with the deceased's wishes. They have annexed the Chief's letter filed simultaneously with the Petition in this Cause as proof of deceased's wishes regarding the plot.

Having taken into account what the Respondents and Respondents have stated in their respective affidavits, I think that the correct orders to make in this matter are as follows:

- 1. The 1st and 2nd Respondents herein do buy the deceased share of the (half) plot No. 12 situated at Nkubu Market and that the proceeds of the sale be shared among the six Applicants**
- 2. In order to enforce (i) above the Respondents and Respondents may have the plot valued by a professional Valuer at a cost the parties will meet.**
- 3. Since this is a family matter each party to bear their own costs.**

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF DECEMBER 2012

**LESIIT, J.
JUDGE.**