



SUCCESSION

- **Transaction over agricultural land between deceased and interested party required consent of the Land Control Board.**
- **Interested party in that case was not beneficiary to lay claim over the deceased estate.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE CASE NO. 421 OF 2004

IN THE MATTER OF THE ESTATE OF JEREMANO M'BENGI KABURI (DECEASED)

JUDGMENT

A grant was issued to Mary Kajuju Jerimano on 19th December 2005 in respect of this estate. The deceased had left the following assets.

- *L.R. KIAMURI 'A'/1484*

- *L.R. KIMAMURU 'A' 1550*

- *L.R. LOWER KAONGO/263*

The grant was confirmed on 17th October 2008. The protestor Esther Wanja M'Bengi filed an application dated 30th October 2008 seeking for an order to set aside the confirmation of the grant. The confirmation of the grant was set aside to enable the hearing of the protest by way of viva voce evidence. It transpired that the protest was only directed at the parcel Kaimuri "A" 1550. The protestor was one of the wives of the deceased. In the distribution which was set aside there was an interested party by the name Margaret Wanjiru Mukangu. The interested party was awarded two acres of the land which is the subject of the protest. The balance of the acres of that land were awarded to the protestor. There is not much dispute

over the evidence surrounding the claim of entitlement by the interested party to the two acres of land. The evidence is that the deceased borrowed Kshs. 40,000/= from the interested party on or about 20th April 1995. The agreement was exhibited before court. The terms of that agreement are as follows:-

1. ***The lender shall lend the borrower Kshs. forty thousand (Kshs. 40,000/=) in total.***
2. ***The borrower shall give the lender two acres of land in the title No. Kiamuri A. 1550 to cultivate for the security of the land.***
3. ***That the sum of Kshs. 30,000/= shall be given to borrower by the lender of which receipt is hereby acknowledged by the borrower.***
4. ***The rest of the money of Kshs. 10,000/= shall be given to the borrower by the lender at the end of May 1995.***
5. ***That in default of the borrower unable to repay the loan of Kshs. 40,000/= it is agreed the borrower shall transfer the two acres of land in the title No. Kiamuri A. 1550 to the lender.***

The deceased on entering into that agreement allowed the interested party to take possession of the two acres and to date the interested party has continued to cultivate those two acres. The deceased died on 7th May 1996 before repaying that loan. When the administrators sought confirmation of the grant in respect of parcel number 1550 they allocated the interested party the two acres that she cultivates. The contention of the protestor is that the interested party is not entitled to those two acres and that the whole portion of parcel number 1550 should be awarded to the protestor. In evidence, the interested party stated that on 5th May 2002 she went to the residence of the protestor to demand that she be repaid the money lent to the deceased. This verbal demand followed the written demand by Kahiu Mbugua & Associates Advocates dated 22nd April 2002 addressed to the protestor. The advocate by that written demand required the protestor to pay the interested party Kshs. 93,900/= which amount represented Kshs. 40,000/= being the loan to the deceased plus costs and interests. The interested party stated that when she made the verbal demand following that written demand, the protestor wrote a letter dated 5th May 2002 in her presence. That letter was exhibited before court and is in the following terms:-

“Nkuura Pry. School

***P.O. Box 73
Gaitu – Meru
5/5/2002***

***Kahiu Mbugua Associations
Meru South House
P.O. Box 22859
NAIROBI – KENYA***

***Dear Sir,
On behalf of Esther Wanja Jeremano and the entire family of Jeremano M’Bengi Kaburi we have***

agreed to refund two acres of land to Margret Wanjiru Mukangu. This parcel will be implemented from parcel No. 1550 Kimuri "A" Section.

Yours faithfully

**ESTHER WANJA JEREMANO
ID NO. 12498738."**

It is the interested party's case that in her getting the two acres it will be the fulfillment of her agreement with the deceased. Learned counsel Mr. Mwanzia further submitted in support of the interested party's case that the protestor had signed a consent to the confirmation of grant which allocated the interested party the two acres and that by implication the protestor was precluded from contesting the interested party's claim. The learned counsel for the protestor Mr. Gituma submitted that the interested party ought to have sued for the loan granted to the deceased. There are two issues in this matter. Firstly, is that there is no doubt the land the subject of this protest is land falling under the provisions of the Land Control Act Cap 302. That being so, the transaction between the deceased and the interested party ought to have abided by the provisions of section 6 (1) of that part. That section provides that transactions relating to agricultural land which fails to obtain consent renders any agreement pertaining to such land void. The relevant section provides that such transaction **"is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."**

The interested party did not obtain the consent from the Land Control Board as required by section 8 (1) of that Act. Section 8 (1) provides as follows:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto."

Such a consent of a transaction over agricultural land should be obtained within six months of making of the agreement. In this case, the interested party ought to have obtained consent by 20th October 1995. Having failed to do so, the interested party's right would only be to seek recovery of the money lent to the deceased which is Kshs. 40,000/=. There was no basis for demanding from the deceased estate Kshs. 93,500/=. The agreement between the deceased and the interested party did not provide for interests or costs before suit. Since parties are bound by the terms of the agreement the interested party is not entitled to interests and costs. The Court of Appeal in the case **Onyango & Another Vs. Luwayi [1986] KLR 513** in a transaction relating to agricultural land for which no consent was obtained as required by the Land Control Act stated:-

"By virtue of the Land Control Act (Cap 302) section 6 (1), the sale transaction was void for all purposes owing to the failure to obtain the consent for it from the divisional Land Control Board which had to be made within six months of the making of the agreement."

The second issue that I see in regard to the debt owed by the deceased estate to the interested party is as was submitted by the counsel for the protestor. He submitted that the interested party's right was to sue the estate of the deceased for the money lent to the deceased. The interested party is not a beneficiary of the estate of the deceased as envisaged by the Law of Succession Act. That being so she is not entitled to make claim of the deceased assets. Her claim should have been the subject of a civil suit against the estate. It is only after successfully prosecuting such a suit that the interested party would have a right to enforce such a judgment against the estate. In this case, the interested party did not sue the deceased estate. In the end, I find that there is merit in the protestor's case. That being so, the interested party's claim of two acres of the deceased land has no legal basis and is defeated. The judgment of the court is as follows:-

1. *The claim of two acres of a parcel number Kiamuri”A”/1550 by Margret Wanjiru Mukangu fails and is dismissed.*

2. *I order that the grant issued herein on 19th December 2005 be confirmed as follows:-*

1ST PARCEL NO. KIAMURI ‘A’/1484

a) *Naftaly Kiara – 3 Acres*

b) *Patrick Nkobi – 1 Acre*

C) *Mary Kajugu – Balance*

2ND PARCEL NO. KIAMURI ‘A’/1550

a) *Esther Wanja M’Bengi – Absolutely*

3RD PARCEL NO. KIAMURI ‘A’/1551

a) *Charles Kiroko – 1.5 acres*

b) *Jerika Karega – Balance*

4TH PARCEL NO. LOWER KAONGO/263

a) *Grace Gitundu – absolutely*

3. *That Margaret Wanjiru shall pay the costs of the protest to Esther Wanja M’Bengi.*

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO
JUDGE