



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 409 OF 2006

**IN THE MATTER OF THE ESTATE OF NAMAN KAMAU MWANGI ALIAS KAMAU
MWANGI (DECEASED)**

PRISCA NYAKERARIO KAMAU.....APPLICANT

VERSUS

JOYCE MUTHONI KAMAU.....RESPONDENT

RULING

Naman Kamau Mwangi alias Kamau Mwangi died testate on 27th May 2005, leaving two widows **Prisca Nyakerario Kamau** and **Joyce Muthoni Kamau**. After the deceased's death, the widows petitioned the court for probate of the written Will (**Ex.PMK2**) and a Grant of Probate of written Will was issued on 14th February 2007 – (**KMK3**). Thereafter, the Respondent Joyce Muthoni went ahead and registered the land parcel **Kisii/Gesima Settlement Scheme 1224** measuring 16 acres into her own name. According to Prisca, the Applicant herein, the land had been registered in the name of the deceased as per the land certificate exhibited as (**PMK5**). When the applicant conducted a search at Nyamira Land Registry on 25th August 2010, she discovered that the Respondent had transferred the land to herself contrary to the deceased's wishes and will. That is what has prompted the application dated 16th November 2010, in which the applicant seeks three prayers as follows;

(2) THAT the Respondent herein, JOYCE MUTHONI KAMAU be summoned to show cause why she should not be committed to civil jail for intermeddling with the Estate of the Deceased.

(3) THAT Title No. KISII/GESIMA SETTLEMENT SCHEME/224 obtained unlawfully by the Respondent be cancelled.

(4) THAT the District Land Registrar Nyamira be ordered to retain the original title in the parcel of land known as KISII/GESIMA SETTLEMENT SCHEME/224 in the names of the Deceased Naman Kamau Mwangi pending the hearing and the determination of this case.

The applicant denied that the said land belongs to the Respondent as deponed in her affidavit in reply because the Respondent could not have got the land pursuant to orders in **Nyamira Senior Resident Misc. Case No. 30 of 2007** because by then, the deceased had died and could not have been served with the proceedings.

In opposing the application, the Respondent **Joyce Muthoni** filed a Replying Affidavit dated 14th December 2010, in which she depones that the suit land belongs to her, having obtained the title on 20th October 2008, (**JMKA**) as a result of the Judgment in **Nyamira Senior Resident Magistrate Misc. No.**

30 of 2007 (JGKII). The Respondent denied that the property formed part of the deceased's estate. Mr. Kimatta, the Respondent's counsel, urged that the application is premature because it had to be determined that the transfer of the land is illegal.

I have now considered the affidavits and submissions on record and the Will allegedly left by the deceased which is still at the centre of this succession dispute. Whereas Prisca contends that the deceased left a Will, Joyce denies that fact. I have seen the title to the disputed land. It was registered in the names of the deceased on 26th November 1986. As of 27th May 2005 when the deceased died, it was still in the deceased's names and was only transferred to the Respondent's name on 30th October 2008, well after the deceased's death on 27th May 2005.

I have had occasion to read the proceedings before the Land Disputes Tribunal in Borabu Divison, Nyamira District **Case No. 3 of 2004 – Kamau Mwangi (Plaintiff) Vs Muthoni Kamau (Defendant)**. This court finds it curious that the Tribunal's award is undated. However, it seems the hearing at the Tribunal commenced on 27th April 2004 and the deceased Kamau Mwangi was present. A reading of the award clearly shows that the deceased did not attend all the proceedings despite summons. The Senior Resident Magistrate's Court order adopting the award was made done on 3rd June 2008. The award had been filed in that court for adoption on 1st August 2007, over 2 years after the deceased had passed away. There cannot have been representation for the deceased since this matter was already in court and both the applicant and respondent were the administrators or executors of the deceased's Will.

It is obvious that the proceedings before the Senior Resident Magistrate's Court and the decision of the Tribunal were irregular as the deceased was long dead when they were made. Joyce Muthoni was well, aware that her husband was deceased and yet went ahead with the proceedings before the Tribunal. The said proceedings before the Tribunal are an illegality. Since the deceased died during the pendency of the proceedings before the Tribunal, the suit property became part of the deceased's estate and could only be administered within these proceedings. Joyce should have waited to prove her rights to the suit land in this succession cause.

Even though there is no challenge to the proceedings before the tribunal, before me, it is obvious that the Tribunal acted without jurisdiction when it purported to deal with disposition of land registered under the Registered Land Act. That decision is a nullity and is for challenge on that basis. I do recognize that there is a process through which the award of the Land Disputes Tribunal and order of the Senior Resident Magistrate's Court in **Misc. CAP No. 30 of 2007**, adopting the award, can be attacked or challenged and the applicant should pursue that procedure so that all orders and acts subsequent to the orders of the tribunal can be annulled or set aside.

The Respondent has not acted in good faith as regards the transfer of the title into her name during the pendency of these succession proceedings. However, the court cannot grant the prayers sought. But in order to do justice to the parties and give the applicant sufficient time to take the necessary steps towards having the title respecting the subject suit land revert to the deceased's estate, I direct that Joyce Muthoni Kamau be restrained from disposing of or dealing with the said land in any manner adverse to the deceased's estate or wishes, till further orders of this court. In the meantime, the applicant is allowed 6 months within which to bring a challenge to the decision of the Borabu Nyamira Land Disputes Tribunal and award of Senior Resident Magistrate's Court, Nyamira failing which this matter should proceed to its conclusion as it is. The Court directs that each party bears its own costs.

DATED and DELIVERED this 24th day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:

Mr. Simiyu for Applicant
No appearance for Respondent
Kennedy – Court Clerk