



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A NO. 80”A” OF 1999

IN THE MATTER OF THE ESTATE OF WARURU WANJOGU (DECEASED)

JOSEPH KURIA WARURU.....OBJECTOR

=VERSUS=

JOHN NJOGU WARURU.....PETITIONER

AND

WILLY KIPKURURI CHERUIYOT.....INTERSTED PARTY

RULING

The late **Waruru Wanjogu** (hereinafter “**the deceased**”), passed on 7th October, 1992 intestate and was survived by **Joyce Wanjiru** (widow), **John Njogu** (son), **Joseph Kuria** (son), **Robinson Ruguu** (son), **Mwangi Waruru** (son), **Wambua Waruru** (daughter), **Wanjiku Sipora** (daughter) and **Wangui Waruru** (daughter). On 21st April, 1999, **John Njogu Waruru** applied for a grant of representation to the estate of the deceased which grant was issued on 10th May, 2000. On 2nd August, 2000, the said **John Njogu Waruru**, (hereinafter, “**the petitioner**”) applied for confirmation of the said grant. In the affidavit in support of the application, he averred, *inter alia*, that the only asset of the estate, **LR No. 11127/125**, South of Eldoret was to be registered solely in his name for distribution later. A Certificate of Confirmation of Grant was then issued on 21st September, 2000. The same was rectified on 3rd October, 2003. The mode of distribution was however not indicated. It is that grant, which is the subject of the present application which was lodged on 21st September, 2006. The application is for revocation or annulment of the grant and is brought under the provisions of section 76 of the Law of Succession Act. It has been brought by **Joseph Kuria Waruru**, **Livingstone Ruguu Waruru** and **Mary Wambui Ndafa**. It is predicated on the single ground that the petitioner, **John Njogu Waruru** failed to proceed diligently with the administration of the estate. The application is supported by an affidavit sworn by **Joseph Kuria Waruru** (hereinafter, the “**1st Objector**”). He has deponed, *inter alia*, that the family had agreed that the petitioner be the sole petitioner for the grant of representation and that the only asset of the estate be sold to one **Robert Bunei**; that notwithstanding the family agreement, the Petitioner purported to sell the said asset to one **Willy Kipkurui Cheruiyot** (hereinafter, “**the interested party**”); that the Petitioner has kept the proceeds of the sale to himself without accounting for the same and that the Petitioner, by his actions,

intends to disinherit the Objectors.

The application is opposed and there is a replying affidavit sworn by the Petitioner. He has deponed that he indeed disposed of the said asset to the interested party when **Robert Bunei**, the original buyer, failed to raise the agreed purchase price; that he purchased a plot at Ndundori for the 2nd Objector and another plot at Nakuru for their mother; that the interested party has not paid balance of purchase price in the sum of Kshs 840,000; that the family agreed that he would purchase plots for three (3) beneficiaries from half of the purchase price and the remaining would cater for the rest of the beneficiaries; and that in the premises, he has proceeded diligently with the administration of the deceased's estate.

The interested party has also opposed the application on the basis of a replying affidavit sworn on 4th December, 2006. He has deponed, *inter alia*, that he indeed purchased the only asset of the estate from the petitioner and paid Kshs 840,000/=; that balance was to be paid on transfer; that he is in possession of the said asset and is willing to pay the balance of purchase price and that he stands to suffer irreparable harm if the grant is annulled or revoked.

In due course, directions were given that the application be disposed of by way of *viva voce* evidence. Late **Kaburu Bauni J.** took the testimonies of the 1st Objector and the Petitioner. It would appear from the record that **Ibrahim J.**, as he then was, also heard the evidence of the Petitioner. It fell upon me to hear the testimony of the interested party.

The parties restated the averments in their respective affidavits. On the conclusion of evidence, counsel agreed to file written submissions which were in place by 3rd October, 2011. Again, the submissions elaborated the parties' stand-points taken in their pleadings.

Having considered the petition, the objection and the affidavits filed and further having considered the evidence and the submissions of counsel, the issue in controversy is simple and straightforward. It is this: Has the Petitioner failed to proceed diligently with the administration of the deceased's estate? The facts are not really in dispute as they are largely agreed.

The Petitioner and the Objectors are all children of the deceased. They are however, not the only beneficiaries of the estate of the deceased. The deceased was also survived by **Joyce Wanjiru** (widow), **Ruth Muthoni Mwaura**, (daughter), **Jane Wataku** (daughter) and **Stephen Mwangi Waruru** (son).

It is also common ground that the estate of the deceased comprised only one asset namely: **LR. No. 11127/125**, Eldoret. It is also not disputed that the Petitioner had the authority of all the beneficiaries to commence the succession proceedings. It is further agreed that due to the then prevailing clashes, the family agreed to dispose of the said title to one **Robert Bunei** and that the said purchaser failed to raise the agreed purchase price. Disagreement set in thereafter.

The Petitioner purported to sell the said asset to the interested party. He did so unilaterally. Although he averred that the other beneficiaries had knowledge of the sale, the agreement of sale which he executed with the interested party is silent on the point.

I have perused the agreement. The Petitioner did not disclose therein that he was selling the said asset on his own behalf and on behalf of the rest of the beneficiaries. It is plain that the petitioner purported to sell the asset as if it was his absolutely. The interested party puts the issue beyond dispute. In his affidavit in opposition to the application, he deponed, *inter alia*, that he purchased the asset from the petitioner who confirmed to him that he had the capacity to sell the same. The interested party does not suggest in the said affidavit that the petitioner disclosed the rest of the beneficiaries.

The said sale would in any event fail further scrutiny. First, I have perused the application for confirmation of grant. The shares of each beneficiary were not identified. The admission that the same were to be identified later meant that the application for confirmation was premature. Secondly, the said asset is agricultural land. The sale of the same was controlled under the Land Control Act. In the event,

the transaction is void under section 6(1) of the as consent of the relevant Land Control Board was never sought and obtained.

In all those premises, I have come to the conclusion that the Petitioner has failed to proceed diligently with the administration of the estate of the deceased. I therefore allow the Objectors' application dated 19th September, 2006. The grant of representation made to the Petitioner and confirmed on 3rd October, 2003 is revoked.

I order that a fresh grant of representation be made to the Objectors and the Petitioner who shall without delay seek confirmation of the same. The dispute between the Petitioner and the Interested Party cannot be resolved in these proceedings. The Interested Party is at liberty to commence proceedings against the Petitioners as he deems fit.

With regard to costs, I observe that the Petitioner and the Objectors are children of the deceased and all originally desired to sell the said asset of the estate. The Interested Party dealt with the Petitioner who was then armed with a grant of representation duly confirmed. In the premises, I order that each party shall bear his or her own costs of the application.

It is so ordered.

DATED AND DELIVERD AT ELDORETTHIS 7TH DAY OF NOVEMBER, 2011.

F. AZANGLALALA
JUDGE

Read in the presence of:-

1. **Mr. Tarus** holding brief or **Mr. Limo** for Petitioner and
2. **Mr. Kimani** holding brief for **Mr. Githinji** for the Objector.

F. AZANGALALA
JUDGE
7/11/2011