

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Succession Cause 77 of 2002

BEDAN NJAGI NGANO.....APPLICANT

VERSUS

PHYLIS GRACE KARIMI.....1ST RESPONDENT

GICUGU NYAGA.....2ND RESPONDENT

RULING

By his application dated 15/7/2009, the applicant herein who is now the administrator of the estate of the deceased herein has sought several orders against the 2 Respondents i.e Phyllis Grace Karimi and Gicugu Nyaga.

It is not clear to me why Gicugu Nyaga has been joined as a Co-Respondent because none of the orders sought are against him. Indeed he has not even filed a replying affidavit to the said application.

The orders sought against the 1st Respondent are basically orders for the preservation of the deceased's Estate; rendering of accounts in respect of her dealings in the estate of the deceased; an order to compensate the beneficiaries of the deceased's estate and a declaration that she is a stranger to the said estate. In his supporting affidavit dated 15/7/2009, the applicant has averred that the 1st Respondent has entered into the estate of the deceased, cut down trees and other crops causing damage and loss to the estate which loss is estimated at 2 million. He has enumerated the loss and damage suffered under paragraph 4 of the said affidavit. On her part, the Respondent filed 2 affidavits in response. She has attached several annexures therefore. Her contention is that she is not a stranger to the said estate. She claims that she brought the plots in question from the 1st Applicant and from his late mother. Her annexures show the said agreements of sale and also her undertaking to pay hospital bills for the deceased which she said she did. She also financed the parties to pursue the Succession Cause in court. She therefore maintains that she is not a stranger to the said estate and that she has only fenced off and constructed buildings in the portions she has bought and paid for.

The Applicant's counsel submitted that the persons who sold the plots in question to the Respondent had no legal capacity to do so and so they could not pass Title to her. He therefore maintained that she is a stranger and the prayers sought ought therefore to be allowed.

I have considered the application along with the said rival affidavits and the annexures thereto. From the annexures, it is clear that the 1st Respondent did "***purchase***" some land from the Applicant and other beneficiaries of the deceased estate. I agree with counsel for the applicant though that the said beneficiaries lacked the legal capacity to dispose of the deceased's property.

In this case however, I note that the very person who sold the said portions and who is now the administrator to the estate is the one who has turned round and asked the court to declare the first Respondent a stranger to that estate. He is therefore seeking to benefit from

the an illegal situation he himself created. The court cannot allow him to have his cake and eat it. He sold the land to the 1st Respondent. He signed the agreement thus admitting that he had received the money in question while clearly knowing that he had no capacity to sell the deceased's estate. He who comes to equity must come with clean hands. This applicant's hands are overtly and badly soiled. This court as a court of equity cannot allow him to benefit from the illegality he himself took part in for his own benefit. The 1st Respondent may not be a beneficiary to the estate of the deceased but he is not a stranger either. She has a beneficial interest in the properties she bought from the applicant and her late mother. Now that the applicant is the legal administrator of the said estate, the most prudent thing for him to do is to apply for confirmation of the grant so that the estate can be distributed once and for all. The 1st Respondent is not an intermeddler in the deceased estate. She has a beneficial interest in the same. The situation on the ground should therefore be maintained until the shares of all the beneficiaries are finally determined.

The application dated 15/7/2009 is therefore dismissed with costs to the 1st Respondent.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 18th day of Feb 2010

In presence of:-Applicant- present, Respondent - present