



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO 425 OF 2009
(ORIGINAL NAIROBI H.C. SUCCESSION CAUSE NO. 2489 OF 2009)

IN THE MATTER OF THE ESTATE OF JOHN MWANIKI KAHIRO (DECEASED)

MARY NYAMBURA MWANIKI
STEPHEN WAWERU MWANIKI
RHODA WANJA MWANIKI
CHARLES KAHIRO MWANIKI PETITIONERS

VERSUS

GILBERT MAINA MWANIKI
RAHAB WANGUI MWANIKI OBJECTORS

AND

SISTERS OF THE GOOD SHEPHERD
(REGISTERED TRUSTEES)..... INTERESTED PARTY

RULING

By **summons dated 28th April 2009**, two of the administrators of this estate, MARY NYAMBURA MWANIKI and STEPHEN WAWERU MWANIKI sought various orders against their two co-administrators, RHODA WANJA MWANIKI and CHARLES KARIRO MWANIKI. Two of the orders sought were:-

“1.

2. That thecourt be pleased to bring into the estate of JOHN MWANIKI KAHIRO (Deceased) the following property:

Land Reference Number NGONG/NGONG/35448.

3. That the court be pleased to issue conservatory orders of prohibition, prohibiting any or any further dealing in the said parcel, L.R. NGONG/NGONG/35448 pending determination of thiscause or further orders of (the) court.

4.”

On 2nd July 2009 the court granted an interim conservatory order. That interim conservatory order has been extended from time to time, but it appears from the record that the summons dated 28th April 2009 has never been heard fully. Nevertheless, the interim conservatory order had the effect of bringing land parcel L.R. NGONG/NGONG/35448 into the estate of JOHN MWANIKI KAHIRO, the Deceased in this cause.

It was claimed in the supporting affidavits that the property belonged to the Deceased before he died and that it was fraudulently transferred to one GILBERT MAINA MWANIKI two weeks **after** the Deceased died. No documents were annexed to support these allegations. It was further alleged that Gilbert Maina Mwaniki later fraudulently transferred the property to the Interested Party herein, SISTERS OF THE GOOD SHEPHERD (REGISTERED TRUSTEES) (hereinafter called **Sisters of the Good Shepherd**). Sisters of the Good Shepherd, in their turn, came to court by **summons dated 14th August 2009**, which is

the subject of this ruling. They seek the main order to set aside the order of 2nd July 2009. Their case is set out in the supporting affidavit sworn by one SISTER DOROTHY NDUMBA KINYUA (**Sister Dorothy**), the Chair of the board of trustees of Sisters of the Good Shepherd.

Sister Dorothy has sworn that Sisters of the Good Shepherd are the registered proprietor of L.R. NGONG/NGONG/35448; that the same was sold to them by Gilbert Maina Mwaniki for valuable consideration; that the property had been transferred to Gilbert by one SHUKURU OLE SAIYANDOT; and that the property has never belonged to the Deceased, JOHN MWANIKI KAHIRO. Copies of various documents are annexed to the affidavit.

There is a replying affidavit sworn by MARY NYAMBURA MWANIKI and filed on 18/09/2009. In this affidavit it is asserted that the Deceased had "sought" to purchase what was to become L.R. NGONG/NGONG/35448 from its original owner, Shukuru Ole Saiyandot, and that towards this end he occupied the same.

A supplementary affidavit sworn by Sister Dorothy was filed on 12th October 2009 in response to the replying affidavit.

There is also an affidavit by one MARY WANJIRU SHUGURU, the widow of SHUKURU OLE SOIYANDET (or OLE SOIYANDET SHUKURU). She denies that the Deceased JOHN MWANIKI KAHIRO ever purchased L.R. NGONG/NGONG/35448 from her husband.

This application was heard on 24th May 2010. The hearing date was given in court on 10th March 2010 in the presence of counsels for all the parties. However, at the hearing there was no appearance for the Petitioners/Administrators.

All the affidavits referred to above are lengthy and with many documents annexed to them. I have read and considered all of them. The background that emerges from the totality of the material now before the court is as follows:-

1. The original parcel of land, L.R. NGONG/NGONG/241, was owned by SHUKURU OLE SAIYANDOT. He subsequently sub-divided this land into two parcels, L.R. NGONG/NGONG/14002 and 14003.
2. In February 1992 Shukuru Ole Saiyandot sold and transferred to the Deceased JOHN MWANIKI KAHIRO parcel No. 14002 and retained parcel No. 14003 in his name.
3. The Deceased John Mwaniki Kahiro died on 28th June 2005.
4. At some point Shukuru Ole Saiyandot sub-divided parcel No. 14003 into two parcels, Nos. 35448 and 35449.
5. On 14th July 2005 he transferred to GILBERT MAINA MWANIKI parcel No. 35448.
6. On 6th December 2008 Gilbert Maina Mwaniki transferred parcel No. 35448 to Sisters of the Good Shepherd (Registered Trustees) who are now the registered proprietors of the land.
7. At some point the title of Gilbert Maina Mwaniki to L.R. NGONG/NGONG/35448 was challenged before the local land disputes tribunal which apparently held that it did not have jurisdiction to deal with the issue of title.
8. A complaint of fraud in respect to the same title had also been lodged with the Criminal Investigation Department of the Kenya Police against Gilbert Maina Mwaniki. It appears that the police did not file any charges against him.
9. It appears that L.R. NGONG/NGONG/35448 was purchased from Shukuru Ole Saiyandot by RAHAB WANGUI MWANIKI, the mother of Gilbert Maina Mwaniki. She apparently asked Shukuru to transfer the land to her son Gilbert.
10. There may or there may not have been a relationship between the Deceased JOHN MWANIKI KAHIRO and RAHAB WANGUI MWANIKI. Rahab and her son Gilbert filed herein **summons dated 16th October 2009** for revocation of the grant issued to MARY NYAMBURA MWANIKI, STEPHEN WAWERU MWANIKI, RHODA WANJA MWANIKI and CHARLES KAHIRO MWANIKI. Rahab has claimed that she was the Deceased's second wife (the first one being Rhoda) and that Gilbert is the Deceased's son with her. These claims have been strenuously denied by Mary Nyambura Mwaniki in her replying affidavit. The summons for revocation of grant is yet to be heard, and the less said of it in this ruling the better.

One thing is clear: there is not a single document annexed to any of Mary Nyambura Mwaniki's affidavits that tends to show that L.R. NGONG/NGONG/35448 was ever purchased by the Deceased. All available evidence tends to show that the land was in fact bought by Rahab Wangui Mwaniki and she had it

registered in her son's name, Gilbert Maina Mwaniki. This land never formed part of the Deceased's free estate at the time of his death. It is significant that the land was not listed in form P & A 5 (supporting affidavit sworn in support of the petition for grant.)

Whatever claims to this land the Deceased's estate may have cannot be adjudicated in this succession cause. The primary obligation of a succession court is to determine the beneficiaries of a deceased's person's free estate and their respective shares thereof. The challenge by the estate of the Deceased to Gilbert Maina Mwaniki's title to L.R. NGONG/NGONG 35448 ought to be litigated in a proper civil action commenced under the Civil Procedure Act and Rules. It must also be remembered that the property is now registered in the name of a third party, SISTERS OF THE GOOD SHEPHERD, who apparently acquired it for valuable consideration without notice.

Having said all that, I am satisfied that land parcel L.R. NGONG/NGONG/35448 did not belong to the Deceased at the time of his death and does not form part of his estate. I therefore have no hesitation in setting aside the order of 2nd July 2009. It is so ordered.

I will award costs of this application to the Interested Party against the Petitioner's/Administrators. It is so ordered.

DATED THIS 21ST DAY OF OCTOBER 2010

H. P. G. WAWERU
JUDGE

DELIVERED THIS.....DAY OF 2010