



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 169 of 2007

IN THE MATTER OF THE ESTATE OF PASKWALE NGARUNI KIAMBATI (DECEASED)

JUDGMENT

Rose Kaima Ngara (Rose) petitioned for grant of Letters of Administration to her late husband's estate namely Paskwale Ngaruni M'Kiambati (deceased) (Ngaruni). She listed their 8 children and herself as persons surviving Ngaruni (deceased). She also listed parcel No. NKUENE/MITUNGUU/1197 as the asset of the estate and stated that the estate had no liabilities. A grant was issued on 3rd April 2008 and was confirmed on 5th May 2008. What is for consideration in this judgment is the summons for revocation filed by Daniel Mutwiri Nkabu (Mutwiri) dated 10th June 2008. Mutwiri deponed in the supporting affidavit that he entered into an agreement of sale of parcel No. NKUENE/MITUNGUU/117 whereby he was buying one acre of that land from Ngaruni (deceased) and M'Safari M'Kiambati. Ngaruni (deceased) and M'Safari jointly owned parcel No. 117. That land was subsequently subdivided and Ngaruni (deceased) obtained registration in his name over parcel No. 1197.

After subdivision Ngaruni (deceased) inadvertently obtained consent to transfer only one acre of land to Mutwiri. When the mistake was realized, Mutwiri deponed that Ngaruni (deceased) applied for consent to transfer the one acre but died before that application was entertained. In his summons for revocation, Mutwiri sought for revocation on the basis that his interest in one acre of deceased land had not been taken into account at distribution of the estate. Although Mutwiri argued that the process of obtaining grant followed by Rose was illegal, I am unable to find that illegality in this matter. Rose's petition was gazetted on 22nd February 2008. The grant was issued to Rose on 3rd April 2008. S. 67 (1) of the Law of Succession Act provides:-

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

The thirty days provided for in that section, within which after gazetment had expired in the case of the petition of Rose. There was no illegality in the issuance of a grant to Rose in this matter. Rose by an application brought under certificate of urgency sought the confirmation of grant before the expiry of 6 months required under Section 71 of the Law of Succession Act. On 5th May 2008 this court after considering that application granted confirmation as prayed. The confirmation of that grant was also not illegal as can be seen from the above outline of the process. It need to be stated that Mutwiri's application was supported by M'Marete M'Kiambati who is the elder brother of Ngaruni (deceased). M'Marete deponed in his affidavit:-

“That in his death bed my late brother informed me that he had sold 1.00 acre to the said Mutwiri and requested me to look after his young family which included a suckling baby at the time of his death.

That my late brother also informed me that it was only him who was selling the 1.00acre and the portion of M’Safari was not to be affected.

That the agreement was signed by both brothers because they were then joint proprietors.”

The issue to consider is whether the alleged transaction of Mutwiri purchasing one acre of parcel No. 1197 is legally enforceable against the estate of Ngaruni (deceased). Rose on her part denied that the transaction existed. The transaction is not evidence by a written agreement for sale. The only agreement provided by Mutwiri related to parcel No. 117. The same indicated that the vendors were Ngaruni (deceased) and M’Safari. That agreement does not support Mutwiri’s assertion. Even the deposition of M’Marete does not assist Mutwiri since M’Marete did not state the parcel number from which Ngaruni (deceased) stated he sold one acre to Mutwiri. But perhaps of most importance is that there is no consent for the transaction from the Land Control Board in respect of the purchase of that one acre. Such consent in accordance with the provisions of section 8(1) of the land Control Act should have been obtained within 6 months of the agreement.

The agreement relating to the transaction over parcel No. 117 was entered into on 26th April 1996. The consent annexed to Mutwiri’s application related to the purchase of the whole parcel No. 1197.

The transaction which Mutwiri seeks to endorse against the estate of Ngaruni (deceased) is per Section 6(1) of the Land Control Act:-

“..... void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given consent in accordance with this Act.” In KAHIA V. NGAGA (2004) EA 75, the Court of Appeal held:-

“The land transaction in this case required Land Control Board consent and became void for all purposes in the absence of that consent. Any money or consideration paid in the course of the transaction became recoverable as a debt by the person to whom it was paid.”

In response to the issue herein before, I find that the transaction alleged by Mutwiri is unenforceable against the estate of Ngaruni (deceased) for lack of Land Control Board consent.

The judgment of this court is that summons dated 10th June 2008 is dismissed with costs being awarded to Rose Kaima Ngara.

Dated and delivered at Meru this ...26th ...day of June.... 2009.

MARY KASANGO

JUDGE