



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Succession Cause 396 of 1994**

**IN THE MATTER OF THE ESTATE OF STANLEY MAORE .....DECEASED.**

**GEOFFREY M'MAUTA M'BARUTUA.....PETITIONER**

**V E R S U S**

**M'MAUTA KAMUNDE.....OBJECTOR**

**Law of Succession Act**

- *Persons entitled to apply for letters of Administration.*
- *As between relatives – a creditor of intestate or intestate’s relative may apply for letters of Administration.*
- *Where an intestates has applied, he may on evidence be displaced by the intestate’s creditor.*
- *A contract of sale of land for value coupled with possession is enforceable.*
- *The creditor of the deceased may take out letters of administration instead of any relative – Law of Succession Act, (Cap 160, Laws of Kenya) S. 66.*
- *Locus Standi has nothing to do with blood relationship. It entails not merely the right to bring action but a right to be heard in a forum.*
- *The law applicable to intestate estate in 1978 was the African Wills Act Cap 169, Laws of Kenya, (1962 Ed) Law of Succession Act Cap 160 s. 99)*
- *The Land Control Act will not be used to frustrate legitimate contracts for sale of land.*
- *It is against public policy to use law as an instrument of fraud*
- *Land whether registered or unregistered is a commodity for sale.*

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**RULING**

The issue in this Ruling is who between the Petitioner and the Objector ought to be appointed the

administrator of the estate of the late Stanley Maore.

The facts are not in dispute. The late Stanley Maore (hereinafter called “the deceased”) is said to have variously died in 1969 and on 10<sup>th</sup> August 1992. If he died in 1969 he was survived by his widow Salome Karoki who remarried and by his father Isaya M’Barutua Kajugi and his brothers John Kiunga and a step brother Geoffrey M’Mauta. If he died in 1992 he was survived by the Petitioner Geoffrey M’Mauta M’Baruta (the Petitioner)

On 20<sup>th</sup> day of December 1994 the Petitioner applied for letters of administration to the estate of the deceased in the capacity of being his brother. On 22<sup>nd</sup> September 1995, M’Mauta Kamunde (the Objector) filed both an objection to the Petition being appointed administrator of the estate of the deceased and also filed a Cross-Petition for a Grant of Letters of Administration to himself.

As the matter was deadlocked in court, the Hon. Mr. Justice Kasanga Mulwa made an order by consent of the parties on 25.11.2002 and referred the matter for arbitration by the District Officer (D.O.) Igembe Central Division under terms to be formulated by counsel and the award be filed within 90 days.

Counsel was however unable to agree on whether the administration should be conducted under the aegis of the court or under the provisions of the Arbitration Act, 1995. Mr. Ashford Riungu learned counsel for the Objector thought that the Arbitration be conducted under the provisions of the Arbitration Act 1995, and filed a Preliminary Objection to urge that position. That objection was declined in a Ruling delivered on 31<sup>st</sup> July 2003 by the Hon Mr. Justice Kasanga Mulwa.

In the meantime, the arbitration before the D.O. was finalized, and an award was filed in court under a letter dated 21.02.2003. That award was read before the parties by the Senior Deputy Registrar on 24.02.2003. The award was set aside in a Ruling delivered on 28.02.2006 by Hon. Lady Justice Sitati.

The Preliminary Objection and Arbitration having failed to solve the dispute, the parties opted to adduce oral evidence on the claims of each, the Petitioner and the Objector. At the close of the oral evidence each of the parties’ respective counsel filed written submissions.

The Petitioner’s case supported by his two witnesses (Stanley M’Maingi Kiambati Kimunya and Benjamin Mutua) was summarized by Mr. Kiogora learned counsel in the following submissions:-

- 1) the Objector has no locus standi in the estate of the deceased since he is not a dependent, creditor or relative of the deceased;
- 2) the Objector is alleged to have bought the suit land from the father of the deceased. Petitioner denies that the Objector ever bought any land from the deceased the registered proprietor of the suit land;
- 3) there was no privity of contract between the deceased and the Objector as the agreement was entered into between the Objector and the father of the deceased;
- 4) the suit land does not belong to the deceased’s father as the deceased acquired the same as a first registration as evidenced by the certified copy of the register and the deceased was not a trustee of his father and neither did the deceased’s father have any letters of administration to enable him sell the estate of the deceased nor did he the deceased’s father have a power of attorney to sell the land of the deceased,
- 5) no consent was obtained from the Land Control Board to effectuate the sale of the suit land, hence the same is still registered in the name of the deceased and it forms his estate,
- 6) there is no relationship by blood or otherwise between the deceased and the objector and that the latter is a stranger to the deceased and the Petitioner,
- 7) the Objector admitted in cross-examination in court that he bought the land from the father to the

deceased hence he committed a fraud and illegality by buying property from a person who has no title to the same. This admission is contained in paragraph 5 of his cross-petition dated 27.09.1995.

- 8) the deceased did not sell any land to the Objector,
- 9) that the Objector alleges to have bought the suit land in 1978 but that by that time the suit land had not been registered in the name of the deceased until the 13.10.1986 hence it was not available for sale in 1978,
- 10) that the transaction between the Objector and Petitioner's father is a nullity in law,
- 11) that the Petitioner replied to the Objection on 26<sup>th</sup> February 1996 and he deponed inter alia that there was no written contract for sale of land between his brother and the Objector.
- 12) That there was no blood relationship between the deceased and the Objector, a stranger to the deceased and the Petitioner.

The submissions by Mr. Ashford Riungu, other than highlighting the evidence of the Objector's witnesses, namely Salome Karoki and David Nkanatha who testified that he bought the suit land from the Petitioner's father, not the deceased, did not answer the above submissions by the Petitioner. There is however broad agreement that the deceased having died on or about 1969, could not of course sign any agreement with the Objector. There would be no privity of contract between the deceased and the Objector. Like the expression goes "dead men tell no tales" indeed dead men cannot sign any contract. For that reason the Objector could not have been a creditor of the deceased. They had no relationship at all. So the authorities cited by the Objector's counsel Re-Katumo & Another [2003] E.A. 502 have no relevance to the situation in this case. So also is the case of MUIGAI & ANOTHER VS K.C.B [1995 - 1998] EA. 201

The issue which both counsel for the Petitioner and the Objector have ignored is the relationship of father and son which the deceased, Stanley Maore, had with his father Isaya M'Barutua Kajugi. Salome Karoki (O.W.1) testified inter alia that she was married to the deceased Stanley Maore for 10 years, and upon his death, she went and remarried one John Ntoruru with whom she had seven children. She had no children with Stanley Maore, but that he had a parcel of land the title of which she used to keep. Upon his death, he gave the title documents to Maore's father one Isaya M'Barutua, she testified that it is not true that Maore died in August 1992. He died in 1969 at Meru General Hospital at an unknown age.

When cross-examined by Mr. Kiogora, Salome Karoki was categorical that Stanley Maore (the deceased) had one brother and two sisters, and that is the truth, that the Petitioner is not a brother to the deceased, Stanley Maore. She insisted that the Petitioner is not a brother of the deceased Stanley Maore and that it is M'Barutua who sold land to M'Mauta Kamunde the Objector as the land came from Maore's father Isaya M'Barutua.

O.W.2 David Kimathi testified likewise O.W1. (Salome Karoki). He however clarified that the Petitioner was a step brother to the deceased Stanley Maore. He testified that it was Isaya M'Barutua the deceased's father who sold the suit land to the Objector in 1978. He and another person, John Kajungu witnessed the sale at an Advocate's office when the Objector paid the last installment. He also testified that thereafter the Objector took possession of the land and planted tea bushes and shortly thereafter Isaya died. The son, John went to Mombasa and never came back. He too confirmed that the land sold belonged to Stanley Maore, it had been demarcated but that titles had not been issued when Stanley died in 1969. He confirmed that Stanley Maore was married to Salome Karoki but had no children, and that upon the death of her husband, she went back to her people and she re-married. He also confirmed that the Objector uses the land on which he has planted tea bushes, different types of trees, bananas and yams, and that the petitioner has never used the said land. He has his own parcel of land.

In cross-examination by Mr. Kiogora, O.W.2 clarified that the Petitioner's father had three 3 sons, Stanley Maore, John Kyunge and Geoffrey M'Mauta. He reiterated his evidence in-chief that Stanley

Maore died in 1969, that title was issued in his name in 1980, that the land is still in the deceased Stanley Maore's name, he had never been to any land control board and that the Petitioner has his own parcels of land.

In his evidence in Chief the Petitioner confirmed that the land was given by the deceased but the title was issued in the name of Stanley Maore, denied any sale to the Objector, nor the existence of any agreement between his father and the Objector. He maintained that his brother, Stanley Maore died in 1992 and not in 1969. He confirms that the suit land is planted with tea bushes, bananas and miraa, He concurred with the testimony of Salome Karoki that Stanley Maore died of stomach pains, and that she got married to someone else. He confirmed also that the objector has use of the suit land. He confirmed Salome Karoki's evidence that the deceased Stanley Maore died at Meru General Hospital.

In cross-examination the Petitioner confirmed that his father gave land to the deceased in as much he also gave land to his other children including the Petitioner. He admitted that the Objector bought the land not in 1978 but in 1988. He denied Salome Karoki's evidence that his brother died in 1969, or that Salome Karoki's got her first child in the re-marriage in 1972 and called that testimony untrue or lies.

In re-examination by Mr. Kiogora, the Petitioner testified that he was not present when the agreement for sale was made between the objector and his father and confirmed that the Objector is in occupation of the land although the land is still in the name of his brother Stanley Maore.

#### ANALYSIS OF EVIDENCE & SUBMISSIONS OF THE LAW.

Having set out at length the submissions for the Petitioner, the evidence on either side, I reiterate the issue set out at the beginning of this Ruling who as between the Petitioner and the Objector should be appointed the administrator to the estate of the deceased Stanley Maore. Before we answer that question, it is necessary to respond to the eleven or so issues raised, by Mr. Kiogora in his submissions.

Firstly I do not agree that the objector has no locus standi in this matter. He may be no relative of the Petitioner but locus standi has nothing to do with blood relationship. It means not merely the right to bring action, but also the right to be heard in a forum. From the evidence of both the Petitioner and the Objector, the Objector is in possession of the only asset left by the deceased Stanley Maore. If he is not appointed the administrator of the deceased's estate and the Petitioner were appointed, he has still to be heard. His choice of seeking audience is by way of Cross-Petition for Grant of Letters of Administration;

Secondly, the Objector did purchase the suit land from the deceased's father. The agreement for sale produced by the Objector testified to that fact.

Thirdly, dead men do not tell tales, and cannot be expected to enter into contracts, there is obviously no privity of contract between the deceased and the Objector, the Objector did not purchase the land from the deceased. He purchased the land registered in the deceased's name from the deceased's father.

Fourthly, the Petitioner testified that it was the Petitioner's father who allotted the land to be registered in his son's, Stanley Maore's name. It was family land although Stanley Maore obtained first registration.

Fifth, no doubt no Land Control Board was obtained, but there is an enforceable contract of sale by purchaser for value, and in possession. The Land Control law will not be used to frustrate legitimate contracts for sale of land. It is against public policy to use a law as an instrument of fraud.

Sixth, purchase of land belonging to a deceased person through his living father cannot be illegal or fraudulent. It would have been indeed illegal and fraudulent if it was purportedly bought from the deceased.

Seventh, the evidence of O.W.2 David Kanathi was that the suit land had been adjudicated and registration was pending and that is why even the Petitioner obtained his title in the 1980's. Land whether registered or unregistered, is a commodity available for sale.

Eighth, that transaction (sale) cannot be a nullity.

So what is the ultimate answer to the ultimate question, who should be appointed the administrator to the estate of Stanley Maore?

Before answering this question it is necessary to answer another question, namely what is the purpose of appointing any person administrator of the deceased's estate? The primary purpose as expressed by Section 75 of the Law of Succession Act is to vest all the property of the deceased in the personal representative. If that be the purpose, is justice achieved by appointing or vesting the deceased's property in the hands of a person who seeks to wrest it from a person with a superior claim like a purchaser in occupation or possession? I do not think so.

There is another reason why the Petitioner herein should not be appointed administrator of the deceased Stanley Maore's estate. It is that he has no interest in the suit land. It may have belonged to his brother before the brother's death. After his death the interest primarily reverted to his father Isaya M'Barutua Kajugi who by an agreement dated 10<sup>th</sup> August 1978 made between himself (Isaya M'Barutua Kajugi) as 1<sup>st</sup> Vendor, and his son John Kuinga (2<sup>nd</sup> Vendor) and M'Mauta Kamunde (the purchaser) sold the land to the said purchaser.

That agreement is enforceable in two respects. It is enforceable as a contract under Section 3(3) of the Law of Contracts Act (Cap 23, Laws of Kenya), there was a contract in writing it was signed by all parties, and it was witnessed by persons who were present. In this case the Agreement entitled "Land Purchase" and dated as aforesaid 10<sup>th</sup> August 1978 was witnessed by an Advocate Mbaya who was also a Commissioner for Oaths.

The second reason why that agreement is enforceable is to be found in the fact that the current Law of Succession Act (Cap 160, Laws of Kenya) did not come into effect until 1<sup>st</sup> July 1981 and its provisions are not applicable to the question of succession to the land in question in this Cause. By Section 99 of the Law of Succession Act, the Law applicable at the time was the African Wills Act, [Cap 169 of the Laws of Kenya 1962 Ed ). Section 4 of that Act provided inter alia that:-

Nothing this Act shall affect any law of adoption or intestate succession or otherwise the administration of intestate estate.

The law applicable to administration of intestate estate was the Indian Succession Act (Act X of 1865) s. 35 of which said-

35. "If the estate's father be living he shall succeed the property" As of the time of the death of Stanley Maore, the law applicable on intestacy was the Indian Succession Act 1865. Section 35 is similar to the common law of most African patrilineal communities that upon the death of a child the inheritance is through the father when he is living.

In this case, I am satisfied with the evidence adduced by the Objector that the deceased Stanley Maore died in 1969. The sole purpose of the discreditable evidence of the Petitioner and his witnesses was to fit into his scheme, that the brother died in 1992 when the evidence clearly points to the brother's death in 1969, it defeats both logic and plain common sense that a father (Isaya M'Barutua) and his other son John Kiunga would sign away his son's property in 1978 while his son was alive throughout the transaction. The petitioner's evidence is simply not credible.

The answer to the ultimate question as to who between the Petitioner and the Objector should be appointed the administrator of the estate of Stanley Maore the original and still registered proprietor of land title NUMBER KIEGOI/KINYANKA/1006 is that the person entitled to be so appointed is the Objector, M'Mauta Kamunde and not the interloper GEOFFREY M'MAUTA M'MAUTA, even if he were half brother of Stanley Maore.

There shall therefore be orders that the Objector be and is hereby appointed sole administrator of the estate of the late Stanley Maore to the exclusion of any other party.

As this matter has been in the court corridors for over fifteen years, I further direct that there shall issue to the Objector a certificate of confirmation of grant simultaneous with the issue of the Temporary Grant.

The Objector shall also have the costs of the cause herein.

There shall be orders accordingly.

**Dated, Delivered and Signed at Meru this 13<sup>th</sup> Day Of July 2009**

**M. J. ANYARA EMUKULE**

**JUDGE.**