



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 33 of 1997

JERICA GATWIRI 1ST PETITIONER/APPLICANT

AGNES AGITI M'MAGIRI 2ND PETITIONER/APPLICANT

VERSUS

REBECCA MPINDA OBJECTOR/RESPONDENT

CHARLES MIRITI K. MUGAMBI INTENDED INTERESTED PARTY

RULING

There have been enough litigation in this cause. I have, for instance, before me two applications which were argued together in order to save judicial time. The first application dated 29th November 2004 seeks, in the main, two orders, namely an order directed to the OCS Nkubu Police Station to provide security during sub-division of the properties forming part of the estate and secondly an order to cancel land title No. NKUENE/KITHUNGURI/3 and registration of the same either in the name of the deceased or the two administratrix for distribution.

The application is premised on the grounds that the respondent has blocked the distribution of the estate by chasing away the surveyor from NKUENE/TAITA/313, one of the properties left by the deceased. That the police are reluctant to take action without an order of this court.

It is further deposed that NKUENE/KITHUNGURI/3 has been transferred to one Mangiriti Nchumbi Thuraira since 1999, while the respondent has rented NKUENE/TAITA/313 and further that she has vowed not to allow its sub-division. Although Mr. B.G. Kariuki for the intended interested party indicated that he had filed a replying affidavit to the application, there is no such evidence on record. I do not see how his client would have replied to this application filed in 2004 when he is seeking in the next application to be joined in these proceedings.

The respondent, on the other hand filed a replying affidavit filed on 17th June 2005 in which she argues that the 1st administratrix, Jerica Gatwiri has abandoned her matrimonial home and is living with one Daniel Kinoti as his wife. That she intends to sell the estate and spend the proceeds with the said Daniel Kinoti. That there was no agreement on the distribution of the estate. That the respondent occupies of NKUENE/TAITA/313 with her family. That the same had been given to her husband (now deceased) by the deceased during his lifetime.

She has sworn that for these reasons she would not allow any surveyor on the land in question. That the ruling of 18th October 2004 has been challenged on appeal as it purports to distribute the estate of the

deceased to strangers.

I have most carefully weighed these arguments and hold the following opinion on the matter. This cause was filed way back in 1997 by Robert Muriungi Magiri, the son of the deceased, Mburugu Nkaabu. There was an objection by the 2nd applicant/administrator. On 25th May 1999 the original petitioner Robert Muriungi Magiri died and he was subsequently substituted by his widow in the cause.

On 13th May 2002 the temporary grant which had been issued to the original petitioner, Robert Muriungi Magiri was revoked and the two administratrix appointed to jointly administer the estate and a fresh grant issued to them on 31st May 2002. The grant was subsequently confirmed on 26th October 2004, in terms of the ruling of Sitati, J dated 18th October 2004.

On 1st November 2004 the respondent filed a notice of appeal of her intention to challenge the above ruling in the Court of Appeal. Simultaneously with the notice of appeal the respondent also filed chamber summons dated 1st November 2004 seeking review of the ruling in question and stay of execution of the same.

The applicants, on the other hand brought on 29th November, 2004 the instant application. Although on 14th December 2004 it was directed by Sitati, J that the two applications dated 1st November 2004 and 29th November 2004 be heard together, only the former was heard. After arguments, the court (Sitati, J) dismissed the application on three grounds, namely that conditions for the grant of order of review under Order 44 rule 1 of the Civil Procedure Rules were not satisfied; that the respondent having filed a notice of appeal was precluded from seeking review; and that the order sought to be reviewed was not extracted and annexed to the application.

By her application dated 10th May 2005 the respondent sought stay of execution of the orders in the ruling in question dated 18th October 2004. That application and another brought by the applicants for injunctive relief were heard together and in my ruling delivered on 8th November 2007 both were dismissed. That is enough by way of background information.

As I have stated, the present application seeks two substantive orders – police supervision during subdivision of the deceased person's property, especially NKUENE/TAITA/313 and secondly an order of cancellation of land title No. NKUENE/KITHUNGURI/3 and the registration of the same either in the names of the applicants or the deceased.

The certificate of confirmation of the grant was issued on 26th October 2004. In it the four parcels of land left by the deceased were distributed among the dependants and two buyers. The respondent was aggrieved and filed the application for review and stay of execution while at the same time preferring a notice of appeal.

The application for review and stay of execution, I have stated, was dismissed. A second attempt to stay execution of the ruling of 18th October 2004 also failed. The only thing left is for the respondent to file and prosecute her appeal in the Court of Appeal. As things stand now, all that is left is the implementation of the certificate of confirmation of the grant – as the notice of appeal without more cannot operate as a stay of execution or proceedings. See Order 41 rule 4 of the Civil Procedure Rules. If the applicant was indeed aggrieved by the decision under consideration the appeal ought to have been filed and even probably argued.

It is four years since the notice of appeal was filed. Was it intended for purposes of obtaining of stay of execution? The two applicants having been appointed administratrix of the estate of their deceased husband and the temporary grant issued to respondent's husband having been revoked and grant confirmed in favour of the applicants, I find no reason to delay the distribution of the estate any further.

Orders issued in a civil litigation must be executed without the involvement of the police. However, in

rare cases, the court may order police supervision if it is apparent that there is a threat to security; and even then the role of the police is purely to maintain law and order.

In the present case the applicants have averred that the respondent turned hostile to the surveyor when the latter visited NKUENE/TAITA/313 on 24th November 2004 chasing them away. In her own affidavit in reply to this application, the respondent has stated in no uncertain terms that she would not accept any surveyor on that parcel of land for any survey work.

There is no doubt that NKUENE/TAITA/313 was the property of the deceased. The chief of Nkuene location in his letter of 10th July 1996 confirmed this fact in support of the respondent's husband's petition. A certificate of official search dated 30th July 1997 puts the issue of ownership of this property beyond question. I am also persuaded that NKUENE/KITHUNGURI/3 was registered in the name of the deceased. It is alleged but not rebutted that this parcel of land has been transferred to a third party, Mangiri Nchurubi Thurania since 1999 before the grant of representation was issued. According to a copy of certificate of, official search filed in this cause, that parcel of land is registered under the Registered Land Act.

The whole purpose for the enactment of the Law of Succession Act is to preserve the estate of a deceased person. It follows therefore that before one is issued with a grant of representation one cannot purport to distribute or transfer the estate. See **Virginia Wambui Otieno V. Joash Ougo and Another** (1988), IKAR 1048 and **Troustick Union International & Another**, Civil Appeal No. 145 of 1990. Indeed it is an offence under section 45 of the Law of Succession Act to intermeddle with such property. The transfer of NKUENE/KITHUNGURI/3 to one Mangiriti Nchurubi Thurania before the issuance of a grant was an act in futility and no property was passed. The property reverts to the estate and it is so ordered.

It is further ordered pursuant to the provisions of section 143 of the Registered Land Act that the register be rectified by cancellation of the names of Mangiriti Nchurubi Thurania and restoration of the name of the deceased. The dependants to move with dispatch and work together to ensure peaceful distribution. During the survey for subdivision of NKUENE/TAITA/313 and NKUENE/KITHUNGURI/3 the O.C.S. Nkubu police Station is directed to supervise the exercise and in general maintain law and order.

In other words, the applicant's application dated 29th November 2004 is allowed. Each party to bear own costs.

I turn now to consider the second application dated 12th September 2006 which seeks two main prayers. First the applicant seeks to be joined in the cause as an interested party and secondly that the court reviews its orders of 18th October, 2004 and direct that the applicant be awarded 0.40acres from NKUENE/TAITA/313 before distribution to the dependants. The applicant states that he purchased 0.40 acres aforesaid on 17th January 1997 and 21st April 1998 from Robert Muriungi Magiri the original petitioner, the husband of the respondent in the first application. That the applicant is in actual possession and further that at the time of entering into the purchase agreement the said Robert Muriungi filed the present succession cause. That the said Robert Muriungi died before the cause was finalized and his widow, the respondent in the first application agreed to honour the agreement. The applicant has also averred that he has been excluded in the distribution of the estate hence the instant application.

The administratrix have opposed the application on the grounds that the application is defective, bad in law, and is an abuse of the court process; that the agreement of sale was a nullity as the purported vendor had no authority or capacity to transact on the estate of his deceased father and in any event the provisions of the Land Control Act were not complied with.

From the bar, counsel for the respondent in the first application supported only the prayer for review of the ruling of 18th October 2004 but was uneasy with the issue of purchasers. I reiterate what I have said in the first application regarding the alleged purchaser (the applicant herein). To emphasis the point, however, section 45 of the Law of Succession Act is explicit as to how the estate of a deceased person ought to be dealt with. It provides that unless expressly authorized by the Act itself, or any other written

law or by a grant of representation under the Act, no person is permitted to take possession or dispose of, or intermeddle with any property of a deceased person.

If further emphasis is necessary, I wish to set out the provisions of section 55 of the Law of Succession Act which states:-

“55(1) No grant of representative, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed.....”

So that even where a person has been issued with a temporary grant he is prohibited from disposing of the estate until the grant is confirmed. It is clear therefore that Robert Muriungi had no capacity in the first place to sell to the applicant a property registered in the name of his deceased father. His widow similarly has no capacity even to assure the applicant of any land from the estate unless after the distribution she surrenders her share to him.

I have noticed that there were also person on the other side who purchased in the similar manner. But that having been sanctioned in the ruling of 18th October 2004 and subsequently provided for in the confirmed grant, it can only be challenged on appeal to the Court of Appeal.

In the result I find no merit in the instant application which I hereby dismiss with costs to the two administratrix.

Dated and delivered at Meru this 24th day of October 2008.

W. OUKO

JUDGE