



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Case 102 of 2000

IN THE MATTER OF THE ESTATE OF NGUKU MACHARIA (DECEASED)

PETER MWANGI NDUKU.....PETITIONER

RULING

The petitioner herein, Mwangi Nguku obtained Grant of Letters of Administration Intestate in respect of the estate of the late Nguku Macharia, his father, on 18/5/2000. One of the assets of the estate was a parcel of land registered as **LOC 9/KANYENYAINI/921** whose approximate area is 1.62 hectares.

On 9/1/2002 the petitioner applied for confirmation of the aforesaid Grant but before the same was confirmed, one Muraguri Samson Mwituria (hereinafter referred to as "***the second protestor***") filed an affidavit of protest against confirmation of the grant under **rule 40(6)** of the Probate and Administration Rules. In the said affidavit, he deposed that on 23/2/2000 he entered into an agreement with the petitioner by which the petitioner agreed to sell to him a portion of the said premises now registered as **LOCATION 9/KANYENYAINI/1495** (hereinafter referred to as the "***suit premises***") measuring 1.01 hectares for a consideration of Kshs.300,000/- per acre. The second protestor paid to the petitioner a sum of Kshs.194,285/- on 23/2/2000 and subsequently paid the balance of Kshs.186,200/- on diverse dates between 25/3/2000 and 4/2/2000, making a total of Kshs.380,485/- in full satisfaction of the agreed purchase price.

It was a term of the said agreement of sale that the suit premises would be sold with vacant possession and free from all encumbrances and that the petitioner would remove from the land any trespassers, licencees and/or squatters. At the time of the said agreement, the land in question was registered in the name of the petitioner's father, Nguku Macharia and the petitioner undertook to process this succession cause and facilitate transfer of the suit premises to the second protestor. He therefore urged the court to order transfer to him of the suit premises which he had purchased.

In cross examination by Mr. Kahiga for the petitioner, the second protestor agreed that no consent of the area Land Control Board was obtained in respect of the said transaction. He said that he was waiting for the finalisation of the succession cause which had been filed by the petitioner before they could seek the said consent.

The petitioner had admitted in his replying affidavit that he received a sum of Kshs.380,485/- from the second protestor and that he was committed to transferring to him the suit premises once the grant was confirmed.

The first protestor, Charles Mwangi Mutwangure filed his affidavit of protest on 7/11/2002 and stated that the suit premises came into existence after partition of the original parcel of land known as **LOC 9/KANYENYAINI/921**. He said that the petitioner's father sold to him 2.5 acres of the original parcel of

land at a price of Kshs.24,200/- and on 17/6/1980 they attended Kangema Land Control Board and obtained consent to subdivide the said property. He further deposed that they applied for consent to transfer the parcel of land which he had purchased and even the petitioner's father signed the transfer form in his favour but before they could obtain consent of the Land Control Board the first protestor fell sick and was admitted to Kenyatta National Hospital but the petitioner's father passed away on 29/6/95 before the said consent to transfer had been obtained.

The first protestor further stated that on 3/12/1999 he gave to the petitioner Kshs.16,000/- for the purpose of filing this succession cause but he was surprised to learn that the petitioner had not named him as a beneficiary of the deceased's estate. He therefore urged the court to order transfer of the suit premises to him.

On 27/5/2005, the advocates for the petitioner and the first protestor agreed by consent that their respective clients be at liberty to give viva voce evidence in support of their claims. The court also granted same liberty to the second protestor who was unrepresented.

In his testimony before the court, the first protestor said that he purchased the suit premises on 28/1/1979 at a price of Kshs.40,000/-. He said that he paid a sum of Kshs.24,400/- because a portion of the land measuring 1.5 acres had been sold to another person and so the first protestor purchased 2.5 acres. The sale agreement was written in Kikuyu language and the same as well as the English translation thereof were produced as exhibits D.1(a) and 1(b) respectively. The agreement showed that the first protestor paid Kshs.24,200/- and the balance was Kshs.15,800/-. He said that they applied for Land Control Board consent to sub-divide and transfer 2.5 acres to him and the Kangema Division Land Control Board gave the said consent on 15/4/1980.

The remaining 1.5 acres was bought and transferred to Samuel Mwangi Mukui. The application for consent as well as the letter of consent were produced as D. Exhibit 2 and 3 respectively.

The letter of consent showed that the said Land Control Board granted the aforesaid consent and the consideration in respect of the 2.5 acres was Kshs.40,000/-.

Shortly after the said consent was obtained and before the petitioner's father could sign a transfer in favour of the first protestor, the latter got sick and was admitted in a hospital and when he was discharged, he went to see the petitioner's father so that he could execute the transfer. However, the petitioner's father died before he executed the transfer. Before the first protestor purchased the suit land, he had been using it since 1961 and planted tea bushes thereon.

The petitioner said that the first protestor wanted to buy a portion of his late father's land but was unable to raise the full purchase price since he paid a deposit of Kshs.24,200/- leaving a balance of Kshs.15,800/-. He further stated that his father told him that he refunded the said deposit but he had no personal knowledge of the same. He denied any knowledge of the Land Control Board's consent which was produced by the first protestor. He said that when he moved from Kanyenyaini to Longonot, he left the suit premises under the care of the first protestor who is his brother in law. He said that the first protestor lent him a sum of Kshs.16,000/- in 1999 and according to him, it was not given as payment of the balance of the purchase price, it was just for his personal use. The petitioner left Kanyenyaini in 1961 and since then he had not occupied the suit premises.

Having carefully considered all the affidavits on record and the oral testimony which were tendered by all the parties herein, I find that although the petitioner and the second protestor purported to enter into a sale agreement dated 23/2/2000, the same is null and void and is not enforceable in law. The second protestor knew that the petitioner had not obtained letters of administration in respect of his late father's estate and as such he had no capacity to enter into the said agreement. Even if he had, a personal representative cannot sell an immovable property of an estate before confirmation of the grant. The transaction was unlawful and M/S Gathaara & Co. Advocates knew that the sale agreement was contravening the express provisions of **Section 45 of the Law of Succession Act**. The petitioner should therefore refund the sum of Kshs.380,485/- paid to him by the second protestor whose protest is hereby dismissed.

As far as the first protestor's claim is concerned, there is some variance between what he stated in his affidavits sworn on 10/3/2005, 7/11/2002 and what he told the court on 27/5/05. In the said affidavit, he deposed that after entering into the sale agreement with the petitioner's father in respect of the suit premises, they made an application for consent to sub-divide land parcel number **LOC 9/KANYENYAINI/921** and the consent was granted on 17th June, 1980. It further stated that the petitioner's father died before consent to transfer the 2.5 acres excised out of the aforesaid parcel of land could be given.

However, in his oral evidence he stated that the application to sub-divide the said parcel into two portions and transfer one of them were made on the same application and both consents were granted. That is clear from the certified copies of the application and letter of consent that were produced in court as D. Exhibits 2 and 3 respectively. The first protestor was to get 2.5 acres and Samuel Mwangi Mukui the remaining 1.5 acres. What had not been done by the time the petitioner's father died was the signing of a transfer in respect of the 2.5 acres parcel of land to the first protestor.

Though no reason was given for the variance between the two versions of the transaction in so far as the issue of consent to transfer is concerned, I accept and hold that Kangema Division Land Control Board received the aforesaid application and granted the said letter of consent. There was a sale agreement between the first protestor and the petitioner's father dated 29/1/79, Exhibit D.4(b), and the petitioner was a witness thereof. There was then a different agreement between the first protestor and Mr. Samuel Mwangi Mukui on 15/4/80 as to who was going to get what portion of the land. The application for consent of the Land Control Board was signed by the two buyers and the petitioner's father.

Mr. Kahiga argued that there was no consent of the Land Control Board in respect of the sale agreement of 27/1/1979 and submitted that the consent that was granted on 17/6/1980 was in respect of the application dated 15/4/1980. In the circumstances, he stated, the agreement of 27/1/1979 was void because it contravened the provisions of **Section 6(1) of the Land Control Act Cap 302**. He sought to rely on the Court of Appeal decision in **WAMUKOTA VS DONATI** [1987] KLR 280. While in the above decision it was correctly held that sale of agricultural land is void for all purposes unless the Land Control Board consent to the sale is obtained in accordance with the provisions of the said Act, in the same authority it was also held that once consent has been given by the Land Control Board, it is final and conclusive and cannot be questioned by any court. The area Land Control Board had before it a valid application for consent and upon considering the same, it granted the consent aforesaid. The first protestor has been in occupation since then and the said consent was not questioned in any forum save that the petitioner tried to sell the same parcel of land to the second protestor over 23 years later. I hold that the first protestor is lawfully entitled to the land which he is occupying and further hold that the petitioner's application for confirmation of grant be amended to exclude the suit premises which lawfully belong to the first protestor. Upon confirmation of the said grant, the petitioner should execute a transfer of the suit premises in favour of the first protestor. The first protestor's costs shall be met by the petitioner.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of February, 2006.

D. MUSINGA

JUDGE

14/2/2006

Ruling delivered in open court in the presence of Mr. Karanja holding brief for Mr. Kahiga for the petitioner and N/A for the first protestor and second protestor in person.

D. MUSINGA

JUDGE

14/2/2006