



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1131 OF 1991
IN THE MATTER OF THE ESTATE OF WILLIAM KUNGU
NDWARU (DECEASED)

FLORENCE WAMBUI KUNGU.....PETITIONER

VERSUS

STEPHEN KAMUYU NDWARU

ESTHER NYHA NDWARU.....OBJECTORS

RULING

The Grant of letters of administrator to the estate of William Kungu Ndwaru was given to Florence Wambui Kungu and Gabriel Kinyanjui Ndwaru on 27.1.94. After Gabriel Kinyanjui Ndwaru died the Grant was amended to leave Florence Wambui Kungu as the sole administratrix of the estate.

There was a dispute on the distribution of the estate between the administratrix and her two step children. One of the disputes concerned the distribution of the land title no Dagoretti/Rituta/10 which measures about 7.84 acres.

That is the land on which Florence Wambui Kungu was living with her husband. While dealing with the dispute on the distribution of the estate I received evidence from Florence Wambui Kungu (PW1) Gabriel Kinyanjui Ndwaru (PW2) – younger brother of deceased and from Father Edward Muiruri Ndwaru (PW3) – also brother of deceased, among the other witnesses.

The evidence showed inter alia, that deceased had sub divided land title no. Dagoretti/Rirutta/10 into four portions marked A, B, C, D and that he had decided to sell portion D which was one acre to pay a bank loan and discharge land title No. Dagoretti/Rirutta/10 from any encumbrance. But he died before the sold that portion and before he paid the loan.

There was also evidence that after his death his wife Florence Wambui Kungu his brothers and the family decided to sell portion D to Charles Muchemi/Ikinya for shs 2.2 million.

There was evidence that Mr. Muchemi Ikinya initially paid shs 800,000 which was used in the loan repayment and thus land title no. Dagoretti/Rirutta/10 was saved from forced sale by the Bank. Mr. Gabriel Kinyanjui Ndwaru (PW2) then an administrator of the estate categorically stated in 22.11.96 that the administrators would transfer portion D to Charles Muchemi Ikinya and further said.

“The family gave possession of portion D to Mr. Muchemi in 1991. Muchemi has build a semi

permanent houses. He has fenced the portion. He has installed water and electricity. The portion occupied by Muchemi is about once acre,"

On his part Father Edward Muiruri Ndwaru said concerning sale of Portion D

"We decided to sell plot D according to the wishes of the deceased. Charles Muchemi Ikinya was interested in buying plot D. Plot No. "D" is approximately one acre. Mr. Ikinya offered to buy the plot at shs 2 million. He agreed to pay shs 1 million first to be paid to the Bank We gave him permission to elect temporary structures on plot D for renting pending transfer"

On 13.6.96 Florence Wambui Kungu said in part on cross examination by Mr. Mboroki:

"I agreed with Charles Muchemi Ikinya that I would give him plot D which is part of plot No. 10 after this case to compensate him for his money. Charles Muchemi has constructed iron sheets building with 28 rooms for rental...."

Ultimately, the court gave Stephen Kimuyu Ndwaru and his sister Esther Nyiva Ndwaru half acre each from land title no. Dagoretti/Riruta/10.

The rest of the land – Dagoretti/Riruta/10 was given to Florence Wambui Kungu and her children. As the Ruling dated 3.3.99 shows the court took pains to see that the respective shares of Stephen Kamuyu Ndwaru and Esther Nyiva were not located in the portions which were already developed. The court found that there were buildings in portion A & B but no building in portion B. The court then ordered that the two do get their shares from portion B which was not developed.

The Grant was thus confirmed on 3.3.99 and Dagoretti/Riruta/10 distributed as follows:

1. Portions A and C to be registered in the name of Florence Wambui Kungu on her own behalf and in trust for John Ndwaru, Peter Nguku, Susan Njeri and George Chege in equal shares
2. Stephen Kamuyu – portion B – ½ acres Esther Nyiva Ndwaru - portion B – ½ acres Florence Wambui Kungu – Balance of portion B –
3. Charles Muchemi Ikinya – portion D to be registered in his name upon completion of the payment of the balance of the purchase price The court found that there was a balance of purchase price of about shs 1.1 million at that time.

The court distributed that money taking into account, inter alia, the legal fees for transfer of portion D to Muchemi and costs of the proceeding Stephen Kamuyu Ndwaru and Esther Nyiva Ndwaru were each given shs 100,000 from the balance of purchase price.

The certificate of the confirmation of the Grant has been registered against the title of Dagoretti/Riruta/10

Florence Wambui Kungu filed the application dated 14.3.2000 which mainly sought correction of errors in the certificate of confirmation of the Grant. On 25.7.2000 prayers no 3, 4, and 5 were allowed.

The respondents in that application are Stephen Kamuyu Ndwaru and Esther Nyiva Ndwaru. The rest of the prayers in the application arise from dispute on the partition of portion B to excise the half acre given to each of the respondents. Her case is fully stated in her further affidavit sworn on 28.4.2000. In short she wants her share of portion B to be located at the extreme end lower left side (from Ngong Road) where there is an old borehole. Florence Wambui considers the borehole as a valuable development.

On the other hand Mr. Stephen Kamuyu Ndwaru prefers that his half acre share be located at the same place where there is a borehole. According to him he is not interested in the borehole. He prefers that

portion because that portion is near the Murram Road and also because it is adjacent to his other plots – nos 2410, 2411, 2412, 2413, 2414. According to him, the borehole was sunk in 1963. It is 160 ft deep. He agrees that it would be very expensive to dig the same well today.

I agree with Florence Wambui Kungu that the Borehole is a major development on the land and that while giving the respondents ½ acre each on portion B the intention of the court was to locate their respective shares in an undeveloped portion of the land. This is clear from the ruling of 3.3.99. That is why the court did locate their shares in either portion A or C. The documents relating to the borehole are annexed to the further affidavit of Florence Wambui Kungu filed on 2.5.2002.

The borehole was sunk by Florence's deceased husband. A permit to sink the well had to be obtained. The deceased then entered into a contract with a company to sink the well. There are four steel pillars erected around the borehole. Although the borehole is not in use there is no doubt that it is a major development. Mr. Stephen Kamuyu Ndwaru does not admittedly need the borehole. In my view it is just that the share of Florence Wambui in portion B be location on the site of the borehole. That finding together with the orders made on 25.7.2000 settles the dispute brought by Florence Wambui through the application dated 14.3.2000.

There are also two application dated 7.7.2000 and 30.11.2000 brought by Charles Muchemi Ikinya.

In the application dated 7.7.2000 Mr. Muchemi Ikinya seeking an order that Florence Wambui Kungu, Peter Nguku Kungu and Chege Kingu be cited for contempt for destroying his fence on portion D. By prayer 6 of that application, he seeks an order that Florence Wambui Kungu be ordered to immediately execute the transfer of portion B to him.

By the application dated 30.11.2000 Mr. Charles Muchemi Ikinya seeks an order that he be allowed to deposit the balance of the purchase price for plot D in the sum of shs 900,000 – Shs 600,000 to be deposited immediately and balance of shs 300,000 within 90 days.

According to Mr. Muchemi Ikinya, the whole of portion D was sold to him for shs 2.2. million. He states that there were two agreements of sale each for half acres; that he initially paid shs 800,000 for the first agreement, shs 300,000 for the second agreement and later shs 200,000 – total shs 1.3 million.

Florence Wambui Kingu agrees that the two half acre portions comprising portion D were sold to Muchemi Injuya for shs 2.2 million but she claims that Mr. Muchemi Ikinya paid only shs 1,100,00 for one half acre and took possession of half acre only. She is only willing to transfer half acre to Muchemi Ikinya.

I have already referred to the evidence of Florence Wambui Kungu, Gabriel Kinyanjui Ndwaru and Father Edward Muiruri Ndwaru given in the dispute on the distribution of land title No Dagoretti/Rirura/10 between Florence Wambui Kungu and her two step children Mr. Charles Muchemi Ikinya did not participate in that dispute. The evidence of those three family members show that the family of William Kungu Ndwaru including Florence Wambui Kungu sold portion of D which is one acre to Charles Muchemi Ikinya in 1991 to raise money to redeem title Dagorreti/Riruta/10 which the bank intended to sell. The three witnesses candidly told the court that Charles Muchemi Ikinya paid shs 800,000 which saved the whole land from the auctioneers hammer and that the family gave possession of the whole portion D which is one acre. It is admitted particularly by Mr. Gabriel Kinyanjui Ndwaru that Charles Muchemi Ikinya fenced the whole of portion D, Installed Water and electricity and build semi – permanent houses.

According to Mr. Muchemi Ikinya he has built 48 semi - permanent houses on one half acre portion. He has also built 11 shops on the same half acre. He has built 20 toilets on the other half acre portion. Florence Wambui Kungu states that she did not give him possession of the other half acre although she admits that Charles Muchemi has fenced the other half acre and had kept old vehicles there.

Mr. Leonard George Kiuna (DW3) gave evidence in the present dispute. He was friend of William

Kungu Ndwaru (deceased) and also a friend of Charles Muchemi Ikinya. He is the one who looked for a buyer of portion D on behalf of the family of William Kungu Ndwaru and he is the one who persuaded Charles Muchemi Ikinya to buy the plot.

According to his evidence, Muchemi Ikinya was given possession of the whole portion D after he paid shs 800,000 the initial deposit and later shs 300,000.

DW3 confirmed that he is the one who fenced portion D on behalf Muchemi Ikinya.

I have considered the grounds of objection to transfer half acres in the evidence of Florence Wambui Kungu and in her affidavit sworn 19.3.2001.

It is true that there is now a bad relationship between Florence Wambui Kungu and Charles Muchemi Ikinya. But this bad relationship is as a result of the portion of one half acre which Florence Wambui claims that Muchemi Ikinya has not paid for.

From the evidence, there is overwhelming evidence that the estate of William Kungu Ndwaru sold the one acre portion marked D of land title no. Dagoretti/Rirutta/10 in 1991. There is also overwhelming evidence that the estate gave possession of the one acre portion to Charles Muchemi Ikinya in 1991 and that Charles Muchemi Ikinya took possession of the whole of portion D. The evidence of Florence Wambui Kungu that she gave Muchemi Ikinya possession of only one portion of half acre is inconsistent with the terms of the two agreements of sale dated 9.8.91 and 13.11.91 respectively.

By the agreement dated 9.8.91 the estate sold $\frac{1}{2}$ acre of part D at shs 1,100,000. The purchaser was to be given possession upon payment of shs 800,000. The balance of the purchase price was to be paid within 7 days after the registration of the formal transfer.

The agreement 13.11.91 was by the special condition no. 1 supplemental to the agreement of 9.8.91. By the latter agreement, the estate sold the remaining $\frac{1}{2}$ acre portion of part D at shs 1,100,000. The payment of shs 300,000 for the purchase of additional half acre is acknowledged in clause 3 of the agreement.

By the special condition no. 2 and 3, Charles Muchemi Ikinya was given possession of the entire portion D upon the payment of the shs 300,000 and upon the signing of that agreement.

By the two agreements Charles Ikinya paid shs 800,000 for the first half acre of portion D and shs 300,000 for the second half acre of portion D and was given possession of both portions comprised in part D.

The balance of purchase price was to be paid upon the signing of a formal transfer in favour of Charles Muchemi Ikinya. The estate has not claimed the balance of the purchase price from Charles Muchemi Ikinya and has not offered to execute a formal transfer. Therefore there is no evidence of breach of the terms and conditions of the two agreements by Muchemi Ikinya.

Secondly, there is no suit for rescission of the contract by the estate against Charles Muchemi Ikinya. These proceedings are not a suit and court has no jurisdiction to interfere with the contract through these proceedings.

Lastly and more importantly, the issue raised by Florence Wambui Kungu regarding portion D is res judicata because the court on 3.3.99 ordered that portion D be registered in the name of Charles Muchemi Ikinya.

The balance of the purchase price in respect of portion D was distributed to the beneficiaries and the Grant of letters of administration was infact confirmed. The effect of orders of 3.3.99 is that the one acre comprised in portion D of Dagoretti/Riruta/10 was conveyed to Charles Muchemi Ikinya. There was no appeal against the orders of 3.3.99.

The application by Florence Wambui Kungu dated 14.3.2000 did not seek to set aside the orders dated 3.3.99 awarding portion D to Charles Muchemi Ikinya. The application merely sought the correction of some errors contained in the certificate of the confirmation of the Grant. Those errors were corrected by the consent orders given on 25.7.2000.

There is no formal application before me in the present proceedings which challenges the orders of 3.3.99. It follows that I have no jurisdiction in the present proceedings to reconsider the orders made on 3.3.99 regarding conveyance of portion d to Muchemi Ikinya.

Land reference no. Dagoretti/Riruta/10 has not been officially partitioned because the four sub divisions A, B, C, D, made by deceased William Kungu were not registered.

Both Florence Wambui Kungu and Stephen Kamuyu Ndwaru have prepared sketch sub division plans of portion B Neither of those plans is an approved plan. I refrain from approving any of those sketch sub divisions plans.

For the foregoing reasons I order that further to the orders of 3.3.99,

1. The share of Florence Wangui Kungu in portion B of L.R. Dagoretti/Riruta/10 be located where the borehole is constructed.
2. For avoidance of doubt the court has not approved either the sketch subdivision plan produced by Florence Wangui Kungu or the one produced by Stephen Kamuyu Ndwaru. Parties at liberty to sub divide portion B in any manner to be approved by the Nairobi city Council on condition that borehole will be located in Florence Wambui's portion
3. Charles Muchemi Ikinya to deposit the balance of the purchase price of portion D in court within 30 days.
4. Florence Wangui Kungu now to complete the administration of the estate
5. Costs of parties in the proceedings to be paid from the estate

E. M. Githinji

JUDGE

13.3.2003

Mr. Njogu present

Mr. Mboroki present

Mr. Mugambi present

Mr. Mathenge present