



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2237 OF 1999

IN THE MATTER OF THE ESTATE OF KIARIE MANGECE (DECEASED)

AND

SAMUEL THUO BARU OBJECTOR/APPLICANT

VERSUS

RUTH NJAMBI KIARIE ADMINISTRATOR/RESPONDENT

R U L I N G

Ruth Njambi Kiarie on 1st November 1999 by her petition dated 30th September 1999 petitioned this court for a grant of letters of administration intestate to the estate of her deceased husband, Kiarie Mangece sometimes written Kiarie Mangeche who died on 17th September 1981. The court having issued her with the grant on 25th February 2000, Ruth Njambi Kiarie became the Administrator of the estate of the deceased. But as she was still waiting for the maturity of the period after which she could file an application for confirmation of that grant, Samuel Thuo Baru, the Objector herein on 6th June 2000 filed his Objection dated 24th May 2000.

He proceeded to file, on 19th June 2000, his answer, dated 15th June 2000, to petition and included annexures thereon. On the date he filed his answer to petition, he also filed his petition by way of cross petition also dated 15th June 2002 to be joined as an administrator of the estate of the deceased and also as a beneficiary in order to safeguard his interest as a purchaser of a portion measuring 0.25 acre from parcel of land No. DAGORETTI/WAITHAKA/155 he claims he bought from the deceased in August 1981.

It is clear from the documents then filed that the Objector was filing those papers as if he was at the stage before a grant of letters of administration was issued. That is why he was asking to be joined as a co-administrator without also asking for the revocation of the grant. Without asking for the revocation of the grant which had been issued to the Administrator on 25th February 2000, I do not see how the Objector hoped to become a co-administrator while the grant already issued to Ruth Njambi Kiarie alone remained unrevoked. That mistake by the Objector therefore stands as an obstacle on the way taken by the Objector towards the realization of his desire to become a coadministrator.

Perhaps the Objector realized that mistake that is why he latter on 18th December 2000 filed his affidavit of protest dated 18th December 2000 probably thinking that affidavit was going to add strength to his case. But I do not think there was any improvement. In the first place, the affidavit of protest is also filed as if it is a protest in a situation where a grant of letters of administration is yet to be issued. What the affidavit is doing, therefore, is to try and support what is stated in the Objector's documents previously filed without asking for revocation of the grant while at the same time the affidavit purports to be a

protest against a proposed confirmation of

“ the grant of letters of Administration intestate made to Ruth Njambi Kiarie in this matter on the 21/1/2000.”

Secondly, the affidavit of protest makes a mistake of stating that the grant was made on 21st January 2000 when there is no such a grant and as a result the protest becomes ineffective. Thirdly, the affidavit of protest is said to be filed under

“Rule 40 (5) of the Law of Succession Act Cap. 140 of the Laws of Kenya”

when there are no such provisions in the Laws of Kenya. In any case, the provisions cited, even if they do exist do not apply in this matter and therefore the affidavit of protest is rendered legally ineffective upon the grant of letters of administration issued to the administrator.

If on the other hand, the Objector intended to use Rule 40 (5) of the Probate and Administration Rules under the Laws of Succession Act, Cap. 160 Laws of Kenya, then the affidavit of protest was misconceived because as at 18th December 2000, the Administrator had not yet filed her summons for confirmation of grant and those provisions cannot be properly employed where summons for confirmation of grant has not been filed. In this matter, the Administrator filed her summons dated 6th February 2001 for confirmation of grant on 8th February 2001 and there is no evidence that thereafter the Objector filed an affidavit of protest to that summons which is yet to be prosecuted.

That being the position, does the Objector's desire to be joined as a beneficiary help him out? Although the Administrator's petition for the grant mentioned survivors of the deceased, it did not make it clear who the beneficiaries were. But that had to be made clear and the beneficiaries specifically mentioned during the application for confirmation of grant. Properly, when the Objector's objection remained undetermined, the Administrator should not have filed her summons dated 6th February 2001 for confirmation of grant. But she went a head and filed it on 8th February 2001. In paragraph 5 of her affidavit dated 6th February 2001 in support of the summons for confirmation of grant of administration intestate, the Administrator says that the beneficiaries are

“the surviving persons of the deceased.”

Those are the people named in paragraph 2 and paragraph 3 of that affidavit. The name of the Objector is not included and as I have already stated, the Objector has not filed a summons of protest under Rule 40 subrule (5) or subrule (6) of the Probate and Administration Rules. But even if such an affidavit of protest were filed, since the summons for confirmation of grant is still pending and having been filed under Rule 40 (1) of the Probate and Administration Rules while the Objector's petition by way of cross petition herein is supposed to be under Rule 17 (1) and (5) of the same rules, the said Affidavit of protest would not have been available in support of the Objector's petition dated 15th June 2000.

It follows that the Objector's desire in his petition by way of cross petition to be joined as a beneficiary does not help the Objector out. Further points to note are that the Objector never cited the provisions of the law under which he filed his Objection to the making of grant, his answer to the Administrator's petition and his petition by way of cross petition, yet that was important in this matter where those documents were filed after the grant of letters of administration had been made by the court and the complaint documents also filed outside the period specified in The Kenya Gazette, Gazette Notice No. 299 of 21st January 2000 which specified 30 days from that dated. My attention has not been drawn to any evidence of the court's extension of the time to lodge the objection.

Having said the above, I should add that from the evidence before me, I find no dispute that the Objector entered into an agreement with the deceased whereby the two agreed that the deceased sells to the Objector and the Objector purchases from the deceased a portion of land measuring 0.25 acre from land parcel number DAGORETTI/WAITHAKA/155 at the purchase price Kshs 8500/= which sum of money was paid by the Objector to the deceased with the exception of Kshs 1000/= which was to be paid later on

completion of the transaction.

The dispute between the Objector and the Administrator arises simply because the Administrator is saying that her deceased husband kept the transaction secret from her and she did not, therefore, participate in the transaction or know anything about the transaction and that it was not until during the burial of her husband when she heard the Objector claiming he had bought that portion of land from her husband. As such, she says she is not willing to let the Objector be registered as owner of the portion of land the Objector bought. From the evidence the transaction or the agreement for sale was in the second half of August 1981 and the last payment so far, of the purchase price, was effected on 5th September 1981.

The deceased, the seller, died on 17th September 1981. But on 27th August 1981 the deceased and the Objector as well as the deceased's coowner of the same parcel of land DAGORETTI/WAITHAKA/155 had completed and signed an official application for consent of land control board. That parcel of land was owned by the deceased and his step brother called Ndungu Mangeche as co-owners each holding half undivided share out of 6.4 acres. Unfortunately the deceased died before the consent of land control board was obtained. I am told that Ndungu Mangeche has also died. The portion of land bought by the Objector had not, therefore, been transferred to him when Kiarie Mangeche, the deceased died. It be noted that although the application for consent had been signed by the deceased and the Objector, according to Section 8 (3) of the Land Control Board, no application for consent had been made because the application signed by the deceased and the purchaser objector was not delivered to the land control board. I have been given no evidence of such delivery.

The parcel of land No. DAGORETTI/WAITHAKA/155 is agricultural land registered under the Registered Land Act, Cap. 300 Laws of Kenya. As such a sale or other disposition of or dealing with that land is covered by the provisions of the Land Control Act, Cap. 302 Laws of Kenya where Section 6 states:

“ (1) Each of the following transactions:-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

Section 7 of the same Act states:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person to whom it was paid, but without prejudice to Section 22.”

Section 22 states that where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person pays or receives any money; or enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that persons shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

Section 8 (1) of the Land Control Act makes the position clear by stating:

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of agreement for the controlled transaction by any party thereto.”

Using the last date in the agreement between the deceased and the Objector being the date 5th September

1981, six months from that date was 4th March 1982. It was unfortunate that the deceased died before consent of the land control board to the transaction was obtained by the deceased and the Objector. The application for consent had not even reached the land control board. The application had not been presented to the board. Had the consent been obtained, the sale could have been enforceable against the Administrator under the Law of Succession Act. But since no consent was obtained, the sale became void after 4th March 1982 and for this court to enforce it against the unwilling Administrator, the court will be acting contrary to the provisions of the law I have been referring to above from the Land Control Act. Doing so will not be acceptable as the law must be obeyed and courts are there to see that the law is obeyed for the rule of law to take root in the society.

From what I have been saying above, therefore, and in summary form, the Objector's objection as reflected in his Objection dated 24th May 2000, his answer dated 15th June 2000, his petition by way of cross petition also dated 15th June 2000 as well as his affidavit of protest dated 18th December 2000 be and are hereby dismissed with costs to the Administrator for the following reasons:

Firstly, each one of those documents having been filed without due regard to the applicable law, each document is incompetent, misconceived and bad in law.

Secondly, the court cannot and should not enforce a sale or disposal of or dealing with agricultural land which has become void for lack of consent of the land control board.

Thirdly, the Objector cannot be made a co-administrator without the existing grant of letters of administration having been revoked.

Delivered, dated and signed at Nairobi this 24th day of May 2002.

J.M. KHAMONI

JUDGE