



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 36 OF 2001

SUSAN WANJIKU NDUNG'U..... 1ST PLAINTIFF
PATRICK T NDUNGU.....2ND PLAINTIFF
KENETH M. NDUNGU.....3RD. PLAINTIFF
TERESA W. NDUNGU.....4TH PLAINTIFF

VERSUS

LILIAN WAMBUI NDUNGU.....DEFENDANT

JUDGMENT

The four plaintiffs are children of the defendant. The first plaintiff is married and is aged 29 years. The second plaintiff is aged 27 years. He has finished Form Four and has done some courses. He has not yet obtained a job. He lives with his mother. He went abroad for studies but came back. His mother would want him to go abroad for further studies and is prepared to pay for his studies. The 3rd plaintiff is 25 years old. He has done a course in accounts. He lives with his mother. His mother wants him to go to United States International University for studies. She is ready to pay his University fees. The fourth plaintiff is aged 21 years.

She has finished school. She lives with her grandmother. Plaintiffs father and the husband of the defendant – Joseph Ndungu Thuo died in 1981 when plaintiffs were young children. Deceased left two widows. The Public Trustee applied to be appointed the Administrator of his estate and he was so appointed on 16.9.82 in Succession Cause No. 531 of 1982. On 28.7.88, the public Trustee transferred L.R No 37/261 to the defendant in her own personal capacity and as a trustee for deceased children in common. The Public Trustee also transferred land Title No. Gatamaiyu/Kagaa/433 which is 6.8 Hectares to defendant in her personal capacity and also as a trustee for Susan Wanjiku, Kenneth Mathenge, Theresia Wamuyu and Patrick Thuo.

This was on 23.5.88. Deceased had another property – LR No. 209/9016 which the Public Trustee transferred on 13.6.88 to defendant and her children. The defendant has sold this property. Plaintiff now seeks orders mainly under S. 45 (f) of the Trustee Act that -

1. LR NO. 37/261/1 – Nairobi West do vest in the plaintiff's defendant having refused to convey the same after 28 days notice.
2. Plaintiffs to the exclusion of defendant he appointed joint trustees in their personal capacities as beneficiaries of the estate of Joseph Ndungu Thuo. 3. In the alternative, the plaintiffs he appointed Co-trustees with defendant in their personal capacities and on behalf of the defendant for the estate of Joseph

Ndungu Thuo

4. Defendant do personally pay the costs of this application Section 45(f) of the Trustee Act (Cap 167) gives court power to make a vesting order vesting land or interest there in any person and in any manner as the court may direct where a Trustee has willfully refused or neglected to convey land to beneficiaries for 28 days after the beneficiary has required conveyance of the land by the trustee.

Plaintiffs say that they have reached the age of majority and are desirous of having the trust terminated and trust property vested in them. They complain that defendant has not administered the trust properties in the best interest and for the welfare of the plaintiffs. The first plaintiff particularly gives details of the Maladminsitration of the trust properties by the defendant.

Firstly, defendant used LR No. 37/261/1 as security for a loan from the National Bank ltd which she failed to pay and the property was advertised for sale by Public Auction. The sale was stopped when Gerishon Gichuki (father-in-law of the first plaintiff) deposited shs 1,000,000 in a fixed Deposit account as additional security for the loan. Still the defendant did not service the loan and the Bank again gave statutory notice to sell the property. By then, Gerishon Gichuki had died and his wife Victoria Gichuki agreed to release about shs 900,000 from the fixed deposit of shs 1,000,000 to redeem the land. According to the first plaintiff, defendant has refused to refund the shs 900,000 to her mother-in-law. She states in paragraph 17 of the supporting affidavit that plaintiffs are desirous of LR 37/261/1 being vested in them so that they can make arrangements to service the debt due to the estate of the late Gerishon W. Gichuki.

Secondly, defendant has disposed of LR No. 209/9016.

Thirdly, defendant has sub divided land parcel no. Gatamaiyu/Kagaa/433 and has disposed of one sub division parcel no Gatamaiyu Kagaa/1348 to Frank George Njoroge

Defendant filed a long replying affidavit. She explains that she took a loan from the National Bank of Kenya ltd to buy a lorry but although she had repaid shs 1,724,922 to financiers the lorry was repossessed. She deposes that she sold a portion of Gatamaiyu/Kagaa/433

to raise money to repay the loan to the National Bank and that she paid shs 700,000 out of the proceeds. She states that she intends to transfer subdivision no 1345 to Kenneth Mathenge sub-division no. 1346 to Teresa Wamuyu and sub-division No.1347 to Patrick Thuo Ndungu.

According to the defendant, she has used part of the proceeds of sale of a portion of Gatamaiyu land and proceeds of sale of L.R No. 209/9016 to build four shops and three flats on the Nairobi West property. It is also her Case that she has brought up her children and has given them good education and that the 2nd, 3rd, and 4th plaintiffs still depend on her.

I have studied the submissions by the defendants counsel. He submits inter alia; that:

- (a) The Trust the subject of this maker is not a written instrument
- (b) We are simply dealing with the distribution of deceased's intestate estate and the applicable law is the law of the succession Act – Sections 32 to 42 of the Law of succession Act
- (c) That the law applicable to the distribution of the deceased's estate is the Kikuyu customary law and under that law first plaintiff who is married is not entitled to inherit her fathers estate
- (d) That defendant has a life interest under section 35 of the law of succession Act and that with regard to 2nd, 3rd and 4th plaintiffs, Court can only make an order regarding Nairobi West Property if a proper application is filed. According to him, this application is improperly before the court having been brought under the wrong rules an the Act.

(e) The main aim of bringing the present application is to enable the estate to pay the alleged sum of shs, 1000,000 paid by Gerishon Waruiru Guchuki and that the court cannot be asked to adjudicate on the debt through this application.

The Assents executed by the Public Trustee in favour of the defendant show that Joseph Ndungu Thuo died intestate on 19.3.81 and that the Letters of Administration was given to the Public Trustee in succession case No. 531 of 1982 on 16/9/82.

It is true that deceased having died before 1.7.81 when the Law of Succession Act commenced, his estate by virtue of S. 2(2) of the Law of Succession Act is subject to the Written Laws and Customs applying at the time. It is also true that Kikuyu customary of succession applied to his estate. But we are not dealing with the administration of the deceased estate at this stage. The Public Trustee filed a succession cause and he was appointed as administrator. The heirs of the deceased estate were determined in the succession cause as the defendant and the four plaintiffs. That is why the public Trustee conveyed the assets comprising of the estate to the defendant in her personal capacity and as a Trustee for the four deceased's children in Common. The Abstract of title for L.R No. 37/261/1 has not been annexed. But the entry of 23/5/88 of Title No. Gatamaiyu/Kagaa/433 in the proprietorship section reads:

“Lilian Wambui Ndungu in her personal capacity and also

Trustee for Susan Wanjiru, Kenneth Mathenge Theresia Wamuyu and Patrick Thuo”

Similarly entry no. 3 dated 13/6/88 in the Abstract of Title for L.R No. 209/9016 reads:

“Transfer (Assent) to Lilian Wambui Ndungu in her own

capacity and as trustee for Susan Wanjiku, Patrick Thuo,

Kenneth Mathenge and Teresa Wambui”

I assume that the transfer in respect of L.R No. 37/261/1 reads the same became the Assent dated 28.7.88 in respect of the same property reads the same as the Assent in respect of L.R No. 209/9016. The fact that the four plaintiffs were registered as beneficiaries of L.R No. 37/261/1 and Land title No. Gatamaiyu/Kagaa/433 means that heirs of the state were determined in the succession case. The defendant is estopped by the Deeds (title of L.R No. 37/261/1 and Gatamaiyu/Kagaa/433) from denying that the first plaintiff is a beneficiary and from going back to pre-Administration period.

Having said that, it is important to observe that the Assent in respect of L.R No. 37/261/1 and title No. Gatamaiyu/Kagaa/433 do not identify the share of each of the five beneficiaries. The Assents merely transfers the deceased's interest “unto the widow of the deceased, in her personal capacity and as a trustee for the deceased children as tenants in common”

The registered transfers in those two titles do not however shows that the five beneficiaries are even tenants in common.

It follows that, although the four plaintiffs and the defendants were identified as beneficiaries to the estate during the administration of the estate the share of each of the five beneficiaries was not identified. The reason could be because the estate of the deceased was subject to Kikuyu Customary Law pursuant to s. 2(2) of the law of Succession Act. But as Section 2(2) of the Law of Succession Act further provides the administration of estate of persons dying before the commencement of that Act (that is 1/7/81) should commence or proceed so far as possible in accordance with the law of the succession Act.

In my view, section 35 of the Law of succession Act applies to this dispute. The defendant has a life interest in the two suit properties and by section 35(2) she has a power of appointment of the capital of the estate..By section 35(3), if any child considers that defendant has unreasonably withheld the power of appointment, he has a right to apply to court for appointment of his share and the court has jurisdiction

after giving due weight to the principles set out in section 35(4) to make any appropriate order. Reading section 35(5) and section 41 of the Law of Succession Act together, it seems that the two properties are held in trust for the four plaintiffs in equal shares subject to defendant's life interest and also subject to defendant's power of appointment. It seems from section 35(5) that, subject to the power of appointment, the two properties can only be divided amongst the four plaintiffs equally after the death or remarriage of the defendant.

From the foregoing, it is my view that in view of the provisions of Section 35 of the Law of the Succession Act, this application should not have been brought under the Trustee Act. The plaintiffs should have, instead filed any appropriate application under section 35(3) of the Law of Succession Act.

Consequently, I dismiss the application with no orders as to costs.

E. M. Githinji

Judge

6.11.2002

Miss Kamau present

Mr. Nderitu

Order: Ruling to be typed and copy to issue to Miss Kamau and Mr.

Nderitu as prayed.

E. M. Githinji

JUDGE