



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Agnes Maria Lesingo (Deceased) (Succession Cause
126 of 2015) [2023] KEHC 4059 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 126 OF 2015**

TM MATHEKA, J

MAY 5, 2023

**IN THE MATTER OF THE ESTATE OF AGNES MARIA LESINGO
(DECEASED)**

BETWEEN

HENRY SIGEI PETITIONER

AND

STANLEY CHERUIYOT LESINGO PROTESTOR

RULING

Introduction

1. It is said that there is certainty in some events in our lives. The date we enter this world, the date we are born and the date we exit, the date we die. The matter before me turns on whether Agnes Maria Lesingo died on the April 13, 2013 or May 3, 2013. The date of death in a succession cause has never been so crucial as in this case.
2. This matter was commenced through a citation by the petitioner Henry K. Sigei whereby he sought to have the citee (protestor herein) Stanley Cheruiyot Lesingo take out letters of administration intestate for the estate of the deceased herein. The basis of his citation was that he had purchased a portion of 2 acres of the land described as plot No 1281(*vide* card No 02792 measuring approximately 5 acres) from Agnes Maria Lesingo the deceased but she passed on on April 26, 2013 before transfer could be effected in his favor. It is his position that he paid the sum of Kshs 300,000/= as evidenced by the exhibited sale agreement made on the April 19, 2013.
3. The citee, a son to the deceased failed to take out the letters and upon the court being satisfied that he had been properly served; the petitioner was allowed to take out the letters of administration. There was a delay in obtaining the certificate of death and according to the affidavit sworn by the citor on February 18, 2016, there was confusion on the date of death. He annexed a letter from the chief Nessuit



location dated September 2, 2015 stating that the burial permit bore the wrong date of death of April 13, 2013, yet the death was May 3, 2013. The letter clearly bears an alteration from May 2, 2013 to May 3, 2013. On the basis of that letter he obtained a certificate of death showing that the date of death was May 3, 2013

4. Consequently, the petitioner filed the petition on March 15, 2016 and followed the prescribed process culminating in an application for confirmation of grant dated December 1, 2016. The beneficiaries of the estate were served with the summons for confirmation and they reacted by filing an affidavit of protest.

The Protest

5. The affidavit was sworn on May 30, 2018 by Stanely Cheruiyot Lesingo the protestor and he deponed that he had authority of his sister Jecinta Chelangat Lesingo to make the depositions. He deponed that the deceased was their biological mother but denied. That she passed away on May 3, 2013 as indicated in the death certificate. He deponed that she died on April 13, 2013 and exhibited a burial permit as SCL 1.
6. He deponed that the petitioner used unorthodox means to secure the death certificate without their consent and authority. That they only became aware of this matter after being served with the application for confirmation of grant. That they have been in occupation of plot No 1281 Nessuit for over 20 years and have even put up temporary structures. He exhibited a photograph as SCL II. He deponed that he has no other place to call home and is suspicious of the petitioner's claim being brought after the demise of their mother and not during her lifetime.
7. Further, he depones that if the applicant has any lawful claim on plot No 1281 Nessuit, he should pursue it in the Environment and Land Court and not in the Succession Court.
8. The petitioner opposed the protest through his replying affidavit sworn on August 6, 2018 in which he reiterated that the deceased died on May 3, 2013 and not April 13, 2013 as alleged. He deponed that he had initially been informed that the deceased died on April 26, 2013 and proceeded to file his citation bearing the incorrect date but he later learnt the correct date through the area chief. The chief's letter is exhibited as HKS 1. That it was the deceased's family which corrected the date of death and the chief acted accordingly. He exhibited a letter from the family as HKS 2 and the corrected death certificate as HKS 3.
9. He deponed that the deceased's family facilitated the publishing and distribution of the deceased's burial program which indicates the correct date of her demise as May 3, 2013. A copy of the program is exhibited as HKS 4. He denied using unorthodox means to secure the death certificate and deponed that the area chief and Registrar of Births and Deaths are available for cross examination if needed.
10. He deponed that the protestor was fully aware of this matter as he was served with the citation and subsequent hearing/mention notices as required by law. The copies of served notices are exhibited as HSK 5. That the grant of letters of administration was duly published in the Kenya Gazette and the waiting time adhered to. The gazette notice is exhibited as HSK 6. Further, he deponed that this court has jurisdiction to hear and determine the claim herein.
11. The matter was heard through *viva voce* evidence.

Petitioner's Case

12. Petitioner's witness 1 was Stephen Meli. He testified that he was the Registrar of Births and Deaths in Nakuru. He was aware that Agnes Lesingo is deceased as per their records. He was given the burial



- permit record by the chief and it showed that the death was reported. When the record was presented, it showed that death was on April 13, 2013 and according to their records; the reportee was Stanley Cheruiyot Lesingo. The burial permit was issued to him.
13. Further, he testified that in 2013 he was not the Registrar in Nakuru but the date of death was later changed to May 3, 2013. The 2 documents availed to confirm that were; a letter from the office of the chief and a burial program showing that death occurred on May 3, 2013. The letter from the Assistant Chief was dated November 2, 2015 and he identified it as annexure KHS 2 in the replying affidavit. He also identified the corrected certificate of death No 0xxx3 and a copy of the burial program as annexures HKS 3 and 4 respectively. He testified that the certificate of death was corrected on the strength of those documents.
 14. On cross examination, he said that he could not tell whether May 3, 2013 was the real or false date of death as he was not there at the time of death. He did not know whether the date given by the protestor was false as they rely on the report from the assistant chief. He said that a burial permit comes from the office of the assistant chief and upon being shown the burial permit; he confirmed that it was from the said office. Upon being shown the burial programme and informed that it was not for the protestor's mother, he said that he did not know the deceased's children. On being told that the date of birth for protestor's big sister was 1986 and not 1992, he said that he did not know the history of their family.
 15. Petitioner's witness 2 was Joseph Rotich Kipkones. He testified that he is the Senior Chief in Nessuit, Njoro Sub County. The letter of November 2, 2015 was written by his deputy Joseph Lesingo who had retired from the job. He testified that according to his investigations, Agnes Lesingo died on May 3, 2013 and he wrote a letter on September 2, 2015 which he identified as annexure HKS 1. He termed the allegation of date of death being April 13, 2013 as untrue and urged the court to look at his letter as evidence. He said that HKS 2 was written by Joseph Lesingo and addressed to the Registrar of births and deaths. He said that the family was known to him and the deceased called him 'mjomba' (uncle). That he knew her date of death was May 3, 2013 and he also knew when she was buried. He said that he also saw the burial program and identified it as HKS 4.
 16. On cross examination, he confirmed that he referred the protestor to the office of the assistant chief for the burial permit because that is where they are issued. That despite sending the protestor to the assistant chief, he would know about the wrong date because he would be given the report. He stated that the matter involved family members. He got to know that the permit was wrong after 3 to 4 months afterwards. On being told that the deceased's brothers were 3 but the history indicated 4, he said that he could not be asked about history as he was essentially a relative in the extended family. He said he did not know who James Lesingo named in the program was. That he and the family of the protestor got to know one another in 1982. On being asked about how he would know about the death and not history, he said he conducted investigations after learning that the burial permit contained incorrect information. That he even reported to the assistant chief who confirmed that the story was not correct.
 17. Henry Kipruto Sigei the petitioner. Testified that he is a farmer in Nakuru and he purchased 2 acres of land from the deceased at the price of Kshs 300,000/= which he paid in cash before an advocate. He identified the sale agreement as HKS 5. The land in question is plot No 1281-5 acres. That he cultivated the land but when Agnes died, her son denied him occupation. That Agnes died on May 3, 2013 and her death was reported to the area chief.
 18. He testified that Stanley Lesingo was served from the start and identified the affidavits of service as HKS 5. That the burial permit obtained by Stanley was not okay as it indicated date of death as April 13, 2013 instead of May 3, 2013. That he went straight to the chief who wrote a letter and advised



him to take it to the registrar. The registrar issued him with a correct death certificate. His interest in the land is 2 acres.

19. On cross examination, he said that he was aware that the deceased was sick but did not know it was cerebral malaria. On being asked why he gave the deceased Kshs 300,000/= during her sickness, he said that she was not that sick and had been sick for one month. On being asked why he paid the money without knowledge of the deceased's children, he said that he only paid after the deceased informed her children that she was selling the land. That he relied on the deceased's information to proceed with the transaction. On being asked who the witness for the agreement was, he said that they transacted at the advocate's office. Ask what he had done to obtain the family's consent he said that the protestor had disagreed with the mother and was away. That the deceased was at home by herself. He said he could not have informed the protestor's uncles because it was not their business

Protestor's Case

20. The protestor testified that the deceased was his mother and the petitioner was not related to him in any way. That he was not aware about any land sale by his mother when she was alive. That if the petitioner had bought any land, there would have been beacons on the land. That there was no evidence of any payment or witness to the purchase. That he was on the land with his sister and their children.
21. On cross examination, he confirmed that his mother Agnes Lesingo was deceased and that the land belonged to her. That the petitioner was claiming 2 acres out of 5. That the deceased had 2 children; himself and Jacinta.
22. His sister Jacinta Chelangat testified that the deceased was her mother and the protestor her brother. That the petitioner did not buy any land from their mother. That she was 28 years old when her mother died and she never saw the protestor buying any land. That they would have been aware of the sale.
23. Protestor's witness 3 was Doreen Chepkemei. She testified that she is not related to Jacinta and Stanley but she worked in their home from 2009 until their mother died. The deceased was her great friend and she (witness) never heard about any land sale when the deceased was alive.
24. On cross examination, she said that she worked for the deceased in the shamba and had also leased part of the deceased's land.
25. After the close of the hearing, the parties filed their respective submissions.

The Submissions

The protestor's submissions

26. The protestor has identified the following as the issues for determination:-
- a. Whether the deceased was the legal owner of the property.
 - b. Whether the petitioner's intention to interfere with the subject property is illegal.
 - c. Whether the grant of letters of administration issued on March 15, 2016 was obtained fraudulently and should be revoked.
 - d. Whether the purported sale agreement of the suit property dated April 19, 2013 is valid and executable in law or fraudulent and illegal.



e. Who bears the costs of this suit?

27. On issue (a), the protestor submits that plot No 1281 Nessuit (suit property) is registered in the deceased's name and there is no dispute about that.
28. On issue (b), he submits that the property of a dead person should be preserved until valid letters of administration are issued. That any attempt to interfere with such property constitutes intermeddling and is punishable in law. He submits that the petitioner sought to have the suit property subdivided into two.
29. On issue (c), he submits that the application leading to the issuance of the grant was marred with irregularities and was done illegally. That the date of death indicated in the citation documents is April 26, 2013, the one in the disputed death certificate is May 3, 2013 and the correct one in the burial permit is April 13, 2013. He submits that there must have been collusion by certain individuals to have issues turn out to what they are.
30. He relies on rule 26 of the *Probate and Administration Rules* (P&A Rules) for the submission that letters of administration should not be issued to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. He cites Nairobi HC succession cause No 890 of 2003 (*Estate of Muriranja Mboro Njiri*) where the court stated that:-

“I am satisfied that the grant obtained in Nakuru Court was not made in accordance with the laid down statutory requirement. The consent of Milka Njeru Muriranja, widow of the deceased, was not obtained. She never participated in the proceedings in that she never executed any of the mandatory forms to support the application.”
31. He relies on section 76 of the *Law of Succession Act* for the submission that the proceedings to obtain the grant were defective hence it should be revoked.
32. The protestor did not submit on issue (d).
33. On issue (e), he submits that costs largely follow the event but the court has discretion to determine the party that meets the costs.

The Petitioner's Submissions

34. With regard to the date of demise of the deceased, the petitioner submits that he called witnesses and produced exhibits which confirmed that the date on the burial permit was erroneous and that the correct date was May 3, 2013. He contends that the protestor did not produce any evidence to support his allegation that the deceased died on April 13, 2013 and not May 3, 2013. He also contends that the protestor did not produce a contradicting burial program if the one presented before court was not legitimate.
35. With regard to how the petitioner obtained the death certificate, he submits that the Registrar, Chief and Assistant Chief hold public offices for the benefit of the public and their actions were not for the benefit of either party. He submits that there is no proof that illegal or unorthodox means were employed in acquiring the death certificate.
36. With regard to his interest in the suit property, the petitioner submits that he purchased the same from the deceased and a sale agreement was duly executed. He submits that the sale agreement meets the threshold set in section 3 (3) of the *Law of Contract Act* and that he proceeded with the purchase after ensuring that the deceased's children were aware of it. He contends that the protestor did not dispute



the production of the sale agreement into evidence neither did he dispute its validity and contents. He relies on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR where the court stated:

“What is justice? Justice is conscience; not personal conscience but the conscience of the whole humanity (see Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppels shall apply in such cases. Lord Denning in *Hussey v Palmer* [1972]3 ALL ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. it is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”

37. He submits that since the deceased died before effecting transfer and there being a valid sale agreement between the parties, a constructive trust came into effect in the interest of justice and fairness. He relies on the case of In *Re Estate of Nasotokini OleSane alias Nasotokini Lesane (deceased)* [2019] eKLR for the submission that a purchaser does not lose his rights over the parcel of land because there was no transfer of land during the survivorship of the deceased even where the land is controlled agricultural land. That the right of such a purchaser is elevated to an equitable constructive trust. in the same case, the court went on to hold that:-

“62. In my view, the transaction between the deceased and protestors created a constructive trust in favour of all the parties who paid the purchase price. I am inclined to make a similar finding as that of the Honourable Lady Justices in Macharia Mwangi Maina case, that constructive trust relating to land subject to the *Land Control Act* is enforceable. And this view is guided by the overriding objectives of the appellate courts as well as the need to dispose substantial and not technical justice.”

38. With regard to service upon the protestors, he submits that they were served with all the relevant notices and the affidavits of service duly filed. Further, he submits that after applying for letters of administration, a gazette notice was published as required and the protestors did not raise any objection.

39. The petitioner submits that the protestor acknowledged receipt of the summons for confirmation of grant and his signature thereon is consistent with the one in the documents which were previously served on him. He contends that the protestor did not seek to challenge any of the affidavits of service or to have the process servers cross examined.

40. On whether this matter should have been filed in the land court, he submits that no dispute arose between him and the deceased that would have occasioned the filing of a claim against her in the land court prior to her demise or after. Further, he submits that a claim cannot be brought against a deceased person as it would be null and void He relies on the case of *Estate of Nasotokini* (supra) for the submission that a purchaser’s interest can only be pursued under the Law of Succession because of the nature of the equitable principle of constructive trust.

41. Finally, the petitioner submits that he has followed the prescribed procedure in pursuing his interest as a purchaser and for that reason, the grant should be confirmed. He submits that he made full disclosure of all the material facts including the survivors of the deceased and the nature of his interest in the estate. He contends that the protestor comes before this court with dirty hands and has no intention of taking out the letters of administration.



42. I have carefully considered the rival pleadings, the evidence I heard and the submissions by each party. The decisive issue for determination is when did the deceased herein die. Upon making that finding what orders should issue?

When Did The Deceased Die?

43. The petitioner's position is that the deceased died on May 3, 2013 but the protestors insist that she died on April 13, 2013. This date is important because it has a direct bearing on the alleged sale agreement between the petitioner and deceased which is said to have been made on April 19, 2013.
44. It is admitted by the Chief Joseph Rotich Kipkones that the protester went to his office seeking a burial permit. The chief sent him to his deputy one Joseph Lesingo who issued the burial permit to the protester because it was the work of the assistant chief to issue burial permits. It is noteworthy that the burial permit was issued on the May 20, 2013 indicating that the deceased had died on the April 13, 2013. The date of issue was not in contest as it is admitted by the chief that that is when the protester went seeking for the same. What is noteworthy is that the person who would have debunked this theory that this information was wrong was the person who issued this permit, the assistant chief. He is closest to the people in his sub location and would know better than the chief. That explains why the chief herein told the court that it was the work of the assistant chief to issue the burial permits. This permit, unlike the process to correct the date was issued so soon after the death of the deceased.
45. The petitioner's affidavit in support of the citation sworn on the February 24, 2015 states that the person whose estate he was pursuing died on the April 26, 2013 yet this burial permit was in existence since May 20, 2013. The chief claims to have been aware of this 'false' date within three to four months meaning by August 2013. Why did he not do anything about it then if he is telling the truth? Why would he wait for this petition to reveal that anomaly? These unanswered questions create a doubt as to the authenticity of the evidence changing the date from April 26, 2013 to May 2, 2013 and to May 3, 2013.
46. What were the sources of this information yet neither the chief nor the petitioner were members of the family of the deceased? These sources of this information are unknown.
47. It is also noteworthy that efforts to 'correct' that information on the date of death came over two years after the death and burial of the deceased. The family knows when their mother died. My view is that the person disputing that ought to avail evidence to establish the alternative date he is presenting.
48. What is this evidence: letters from chiefs, without calling the maker of the burial permit. The Registrar of Births and Deaths who confirms that the original report was that deceased died on April 13, 2013. He has no means of verifying this information other than from the same chiefs. Even the letter from the chief has alterations from changing the 2 in May 2, 2013 to a 3 to make it May 3, 2015.
49. The evidence by the chief that they conducted in investigations is not credible as he does not say from which sources. Put to task over his alleged relations with the family of the deceased he was at a loss as he could not verify information in the burial program, hiding behind the terms extended relative. The burial program was discredited by the family of the deceased and appears to have been made to support the new date of death. It contained incorrect information about the family which even the chief who claimed to be a relative could not explain.
50. In my view the petitioner did not present sufficient evidence to discredit the evidence by the protester with respect to the mother's date of death.



Has the petitioner established himself as a creditor of the estate?

51. Section 66 (d) of the LOSA recognizes the creditor of any estate to approach the probate court and obtain grant to protect and secure their interest. The petitioner did this by presenting a sale agreement which indicates he paid money to the deceased for a portion of two acres of her land. This was challenged by the protester. The petitioner has submitted that it would be unjust for him to have paid money for the land and to be left without recourse. The halls of our justice system have a recourse for him if indeed he did so, and he can prove it. In these proceedings however, other than the sale agreement there is no other evidence to prove what is says. There was no witness and nobody else was aware of the alleged sale. No evidence of such an amount of money having been paid yet according to him she died a week after receiving the money. That is an issue he ought to pursue with the administrator of the estate.
52. Having found that the evidence by the family that the deceased died on the April 13, 2013 is unchallenged, it is unlikely that she would execute the sale agreement dated April 19, 2013 placed before court.
53. In the circumstances the protest succeeds;
1. The grant issued to the petitioner be and is hereby is revoked.
 2. The protesters to take lodge a petition for grant letters of administration for the estate of Agnes Maria Lesingo within 60 days hereof.
 3. Each party bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH MAY 2023

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MUMBUA T MATHEKA

JUDGE

In the presence of:

Saringi Momanyi & Co Advocates

Stanley Cheruiyot Lesingo

