



**In re Estate of Serah Wanjiru Njenga (Deceased) (Succession Cause
29 of 2016) [2024] KEHC 15752 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE 29 OF 2016
GL NZIOKA, J
NOVEMBER 21, 2024**

IN THE MATTER OF THE ESTATE OF SERAH WANJIRU NJENGA (DECASED)

BETWEEN

ESTHER WAITHERA NJENGA PETITIONER

AND

JOSEPH KIBUTHU MAHINDA 1ST OBJECTOR

JOSEPH GAKIO NJENGA 2ND OBJECTOR

JUDGMENT

1. On 16th day of February 2016, Esther Waithira Njenga (herein “the Petitioner”) petitioned the court for letters of administration intestate in relation to the estate of Serah Wanjiru Njenga (herein “the deceased”).
2. The petitioner gave a list of the deceased’s surviving beneficiaries at paragraph 4 of the affidavit in support of the application comprising of five (5) daughters, one (1) son and (1) grandson.
3. The succession cause was gazetted vide Kenya Gazette Notice No. 3491 dated 13th May 2016 and on 17th June 2016 the court issued the petitioner with Grant of Letters of Administration Intestate.
4. On 18th October 2016, Joseph Kibuthu Mahinda (herein the “1st protestor”) filed a protest to the confirmation of grant and on 4th November 2016, summons for revocation and/or annulment of grant of administration was filed by one Joseph Gakio Njenga (herein “the 2nd objector”). The petitioner filed a response to the notice of protest and summons vide a replying affidavit dated 11th May 2017.
5. However the summons for revocation of grant was withdrawn and a protest filed instead. The parties agreed to deal with the matter vide filing affidavits and presenting the witnesses for cross-examination.



6. The hearing of the matter proceeded on 24th July 2019. PW1 Joseph Kibuthu relied on two affidavits he swore dated 18th October 2016 and 25th May 2017. His main evidence is that, he purchased 12 acres of the land known as Nyandarua/Ol Aragwai/14 from the deceased on 19th September 1983 and 23rd June 1984 respectively, hence he is entitled to be included in this cause as a beneficiary.
7. That, the parties executed a valid sale agreement and at the time of the deceased death he had paid the entire sale price to the deceased although the land had not been transferred to him.
8. In cross-examination, he stated that, he was aware the total acreage of the subject land was 41 acres and that the deceased was entitled to 21 acres only. He also conceded that, he knew the deceased had 5 to 6 children and that, the deceased was holding the land as a trustee. That, she did not have the title to the subject-land and that she told him about the case which she would sort out.
9. In the further cross-examination by the petitioner, the witness stated that he did not conduct a search before the sale agreement was executed. Similarly, he did not go to the Land Control Board for consent to transfer the land. He was shown a receipt showing that, he paid Kshs 40,000 only and he acknowledged it and conceded that he is not in physical occupation of the subject land. Further that he placed a caution on the land in the year 1985.
10. In re-examination he stated that, he has never been invited to the Land Control Board and that, the land did not have a title in the year 1985.
11. The 2nd protestor Joseph Gakio Njenga testified that the subject parcel of land described as Ol Aragwai plot No. 14 did not belong to the deceased as she was holding the title as a trustee.
12. Further that the parcel of land was a subject of Succession Cause No. 35 of 1975 at Tulaga District Magistrate's court wherein the deceased was appointed a trustee and ordered that she would be "changed" if she mishandled the trust and be replaced by the 2nd protestor.
13. That in the year 1984, the deceased started selling the land to third parties without his knowledge or consent and he placed a caveat over the land. Further he warned the potential buyers of engaging in the purchase of the land. He further argued that the deceased is only entitled to two and half (2½) acres of that land.
14. That, he prays that the court appoints him as a trustee of the subject land be allowed to carry on sub-division, as the deceased who was appointed a trustee is no more.
15. Further that the court order that the bank account No. 1115983261 held at KCB with funds from KETRACO being compensation for erecting electricity power lines on the subject land be frozen.
16. He further prayed that Peter Karanja be appointed co-trustee with him and that, the petitioner be ordered to "submit" the original title deed to court for perusal and facilitation of sub-division.
17. In cross-examination the objector reiterated that, when the 1st objector told him about the purchase of the land, he warned him that, the deceased had no land to sell, as she was a trustee.
18. In further cross-examination by petitioner's lawyer he stated that, the subject land was not supposed to be shared equally between the two wives of the deceased. He denied attempting to sub-divide the land.
19. The petitioner testified to the effect that, the 1st objector failed to honour the agreement between him and the deceased by failing to pay the full purchase price and therefore the sale agreement is not enforceable.



20. That, the 1st objector was evicted from the subject land in the year 1985 when he failed to pay the decretal sum and has never occupied the land again. That, the initial sum paid was converted into lease fees for the period he tilled the land.
21. Further the 1st objector placed on a caveat on the land but the deceased applied to have the caveat removed.
22. That, the 2nd objector has never been a chairman of the family. That at no time during the life of the deceased did the 2nd objector/ protestor claim for any share in the land. Further, he did not comply with the order issued at Tulaga Court as he did not pay the loan on the land, which was paid by proceeds of the sale of the deceased's land in Limuru.
23. She argued that Peter Karanja Njenga is her younger brother and being the first born she is well versed to deal with the Estate. She denied the alleged mishandling of the deceased's estate, and/or selling any land as claimed. She maintained that, the entire land and bank account credit balance belong to the deceased and that the subject land is to be shared equally among the seven (7) siblings of her deceased mother.
24. In cross-examination the petitioner stated that, the deceased was the only wife of her father. That she learnt of the 2nd protestor's mother after her father's death.
25. However, she conceded that, the title to the subject land indicates the holder has it in trust and according to her, in trust for her and her siblings. That, the 2nd family was left out as they did not pay for the land, which the deceased paid Kshs. 17,908.60 to redeem the land.
26. In further cross-examination she maintained that, the land was never sold to the 1st objector and that he was evicted and he conceded vide a letter dated 6th February 1965 that he paid Kshs. 40,000 for the land.
27. In re-examination the petitioner maintained that the purchase price of the land as per the sale agreement was Kshs. 110,000 and only Kshs. 40,000 was paid therefore the sale was not concluded.
28. The last witness, one Isaac Kago testified that he attended the proceedings at Tulaga Court whereby the court told the parties to go and settle the arrears on the land. That later the deceased told him she wanted to sell the land to pay off the loan on the subject land herein.
29. In cross-examination the witness stated that, he was not aware of the sale of land to pay arrears but knew of the idea to sell. He denied being aware of anyone cultivating part of the land.
30. The petitioner testified further and produced additional documents which includes a green card in the name of the deceased, a sale agreement in relation to land Lari/Kiengege/255, sold for Kshs 90,000 and Land Control Board consent.
31. The matter herein was disposed vide filing of submissions which I have considered herein. At the conclusion of the hearing of the matter and in considering the same I find that the following issues have arisen for consideration:
 - a. Whether the subject land belong to the deceased and/or whether she was holding it in trustee for her children; or
 - b. Whether the land belong to the deceased's husband Silvanus Njenga Kirangi and therefore should be shared equally among his two alleged families
 - c. Whether the deceased herein sold her land in Lari and used the proceeds to pay off the loan on the subject land herein.



- d. Whether the deceased sold any land to the 1st objector.
 - e. Whether the 2nd objector is entitled to half of the property of the deceased herein.
 - f. What orders should the court make, and
 - g. Who will pay the costs of the suit.
32. In addressing the afore issues, it suffices to note that the law is settled that he who alleges prove. The first issue to prove is whether the deceased herein owns the subject land to the exclusion of all the other claimants herein.
33. In this regard, the petitioner has provided a certified copy of green card. A closer perusal of the contents thereof reveals the following
- a. On 13th September 1984, a land certificate was issued to the deceased, and
 - b. On 19th February 1984 an entry was made on the title that read that; “restriction no dealing as Sera Wanjiku Njenga is registered “As Trustee”.
34. Pursuant to the afore, it is clear the land certificate issued to the deceased was issued to her to be held in trust for the beneficiaries and therefore she could not deal with the land without the authority or consent of the beneficiaries. Consequently, all dealings in the subject land without knowledge or consent of the beneficiaries is null and void.
35. Furthermore, the green card indicates that on 21st February 1985, the 2nd objector placed a caution on the land claiming to have a beneficiary interest therein and on 8th May 1985 a caution was registered against the land by the 1st objector on the ground that he had a purchaser’s interest
36. Pursuant to the afore, several questions arise inter alia; as to when was the sale agreement between the 1st objector and the deceased signed? According to the sale agreement produced the same was signed by the parties on 19th September 1983.
37. However, from the entries on the green card it shows that when the subject sale agreement was signed the deceased had not been issued with the title deed to the subject property. The card shows the subject land was held by Settlement Fund Trustees from 25th November 1974 to 13th September 1984 when it was transferred to the deceased.
38. The question is, could the deceased sell what she did not have. The answer lies in the doctrine of nemo dat quo non habet (no one can pass title which he does not have). Consequently the purported sale agreement and/or sale of land between the 1st protestor/objector is null and void and unenforceable.
39. Even if the court were to consider the sale agreement as valid, the sale agreement states that the total purchase price of the land was Kshs 115,000 to be paid in instalments as indicated under paragraph 4, thereof.
40. It is therefore upon the 1st protestor to prove that he paid the total purchase price. So the question is, was the final instalment of the purchase price ever paid? I note from the averments in the affidavit of the 1st objector that, he paid the total purchase price but that averment is not supported by any evidence.
41. To the contrary, a letter dated 6th February 1985 from the firm of D.A Nyaga, the learned counsel Mr. Nyaga wrote to the 1st objector on behalf of the deceased indicating that, as per the agreement executed by the parties dated 19th September 1983, the 1st objector had paid Kshs 40,000 only which



- was equivalent to a parcel of land of 3½ acres. It also indicates that the 1st objector had fenced off 12 acres not paid for. The 1st objector/protestor was held to be a trespasser. This therefore supports payment of Kshs 40,000 only.
42. Furthermore the subject agreement states that, the transfer of the land was to be effected after the consent of the Land Control Board. It is conceded that the Land Control Board consent was not granted.
 43. Pursuant to the aforesaid, the only logical conclusion is that, there was no valid sale transaction between the 1st protestor and the deceased. As such the 1st objector cannot rely on the said sale agreement to claim any proprietorship rights in the subject land.
 44. However, it is acknowledged in the afore letter dated 6th February 1985 by D.A Nyaga that a sum of Kshs 40,000 was received by the deceased. The letter indicates that, the sum was equivalent to the sale of 3½ acres. There is no indication or evidence tabled before the court that, the subject sums of money was utilized for lease purposes or was paid for the same.
 45. Therefore it is the finding of this court that, the petitioner is duty bound to refund the Kshs 40,000 with interest or give the 1st protestor a parcel of land equivalent to 3½ acres. If the 1st objector utilized the subject land for any given period of time, then the same can be taken into account during the refund of the sums of money paid.
 46. As the petitioner has no counter claim against the 1st objector, the court cannot pronounce itself on the same. In fact the way to resolve the issue is for interest that is payable on Kshs 40,000 to be calculated from the date he was evicted to date. That rests the 1st objector's claim.
 47. As regard the 2nd protestor's claim, I note that the petitioner has annexed to the affidavit she swore on 15th May 2017, a copy of the judgment of Tulaga District Magistrate's Court. A perusal of that that judgment reveal that the court recognized the two widows of Silvanus Njenga Kirangi as his heirs in relation to the subject property being plot No. 14 Ol Aragwai and ordered that, they should inherit the subject property equally.
 48. That Hannah Wanjiru, the elder wife had surrendered her right to Joseph Gakio Njenga and that the land was a subject of interest in the Ministry of Land and could not be sub-divided until the loan was repaid. Consequently the deceased was appointed as Trustee, till the whole loan was repaid and the land shared equally. The court also that she would be changed subject to mishandling of the trust placed on her and 2nd protestor to take over.
 49. Pursuant to the afore judgment, the 2nd protestor was entitled to equal share in the subject property on condition the loan on the land was repaid.
 50. I note however, from a letter dated 16th November 1982 that, the deceased wrote to the chairman, South Kinangop Land Control Board stating that, the 2nd objector had failed to pay the equal share of the loan. That she had already paid to the scheme a total of Kshs 17,908 vide the receipts indicated therein.
 51. That, the 2nd objector/protestor had failed to refund her a total of Kshs 8,954 together with interest and other expenses. She went on to state that, the 2nd protestor would not share in the plot No. 14 Ol Aragwai scheme if he did not refund her money and other expenses since 1975.
 52. From the afore it is clear the deceased repaid the loan alone. There is no evidence tabled before the court to prove that, the 2nd protestor paid any money towards the loan.



53. In that case for the 2nd objector to get an equal share of the subject property he must pay back to the estate of the deceased 50% of the sum of money they paid towards the loan with interest and any other expenses incurred to date.
54. The upshot of the above is the following orders:
- a. That the claim vide a protest filed by the 1st objector/protestor based on the claim of purchaser's proprietor's interest in the subject land falls on the ground that:
 - i. When the sale agreements were executed in 19th September 1983 and 23rd June 1984 the seller had no land in her name to sell to him.
 - ii. Even then when the title was issued to her, she was prohibited from dealing with the land as she was holding the same as a Trustee and lacked capacity to sell.
 - iii. Furthermore, there is no evidence the Land Control Board consent was obtained to conclude the same, and
 - iv. No evidence of full payment of the purchase price.
 - b. That the petitioner having acknowledge receipt of Kshs 40,000 from the 1st objector to refund the same with interest from the date he was evicted from the land to the date of this judgment. Interest to be calculated on agreed rates or court rates.
 - c. The claim by the 2nd objector to the proprietorship interest in the subject property succeeds on condition that, he refunds the 50% of amount of money the deceased paid towards the loan and any other associated expenses together with interest from the date of payment to the date of this judgment.
 - d. In view of the nature of the matter and the finding of the court where neither party has fully lost or won, I direct each party do meet his/her own costs of the litigation.
55. The summons for confirmation of grant to be filed and prosecuted within 30 days of the date of this order herein, and upon resolution or compliance with the said orders unless otherwise set aside on appeal.
56. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 21ST DAY OF NOVEMBER 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Owour for the petitioner

Mr. Wairegi for the 1st protestor

Ms. Waweru H/B for Ms. Gachomo for the 2nd protestor

Ms. Doreen court assistant

