



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 236 OF 2001

IN THE MATTER OF THE ESTATE OF THE LATE KIBOI WAIGANJO (DECEASED)

CATHERINE NYAMBURA.....1ST APPLICANT

ROBERT MURAGE.....2ND APPLICANT

VERSUS

DAVID MURUTHI MUCHEMI.....RESPONDENT

RULING

1. The applicants moved this Court by way of summons dated 16/9/2020. They are seeking for the following orders:-

i. Spent

ii. The respondent David Muriithi Muchemi be compelled to deposit in Court within the next 30 days from the date hereof the title deeds and title documents over the deceased land No. Eldoret/Municipality/Block 1/33/1 and Eldoret/Municipality/Block 1/4/1 pending the hearing and determination of this cause.

iii. The Court be pleased to remove all entries registered after the demise of Kiboi Waiganjo (deceased) and Susan Wambui Kiboi (deceased) parcel land No. Eldoret/Municipality/Block 1/33/1 and Eldoret/Municipality/Block 1/4/1 pending the hearing and determination of this cause.

iv. An order of inhibition do issue, inhibiting registration of any charges, leases, transfers or other dealings over land parcel No.s Eldoret/Municipality/Block1/33/1 and Eldoret/Municipality/Block 1/4/1 pending the hearing and determination of this application and this suit.

v. An order do issue preserving the estate of the late Kiboi Waiganjo (deceased) to include but not limited to land No.s Eldoret/Municipality/Block1/33/1 and Eldoret/Municipality/Block 1/4/1 pending the hearing and determination of this application inter parties and thereafter pending the hearing and determination of this case.

vi. An order do issue prohibiting the respondent David Murithi Muchemi from intermeddling, collecting rent, reassessing tenants or in any way interfering with the estate of the late John Kiboi Waiganjo (deceased) pending the hearing and determination of this application interparties and thereafter pending the hearing and determination of this cause.

vii. The Court be pleased to appoint Cartherine Nyambura to collect rent from all the properties namely Eldoret/Municipality/Block1/33/1 and Eldoret/Municipality/Block 1/4/1 pending the hearing and determination of this application.

viii. Costs be paid by the respondent.

2. The grounds in support of the application are that the grant of letters of administration was issued on 29/11/2001 and confirmed on 18/6/2002 in favour of Susan Wambui Kiboi who is now deceased. She did not have any child upon her demise and that the application for substitution of an administrator was pending before Court. The respondent had fraudulently transferred the estate to himself and the same ought to be reverted back to the estate of the late Kiboi Waiganjo.

3. The supporting affidavit was sworn by Catherine Nyambura the daughter-in-law of the deceased administrator with authority from the 2nd applicant. It is her averment that the deceased did not include all the beneficiaries to the estate of the deceased Kiboi Waiganjo. The

respondent had transferred the deceased parcel of land to himself and this was done after the death of Susan Wambui Kiboi. He has failed to pay land rates which continues to accrue and he had further failed to repair the damaged houses.

Response:

4. The respondent opposed the application by filing his grounds of opposition dated 2/10/2020. He states that Muriithi Kiboi was given two parcels of land known as Eldoret Municipality Block 11/112 and 11/85 as per the certificate of confirmation of grant. The applicants had no valid claim over the properties of Susan Wambui Waiganjo which they had wasted away. The grant had been confirmed by the Court, which had now become *functus officio* and this is the wrong Court to challenge his registration of titles on the parcels of land.

5. In addition to the above, he averred that the applicants lack locus standi for they were not beneficiaries to the estate of the deceased. The application is therefore unmerited and the Court is urged to dismiss the same.

6. Further, the respondent filed a replying affidavit dated 19/10/2020 stating that the applicants had obtained Court orders by misleading the Court since they were after disinheriting what was rightfully his from the sister's estate. He had been raised by the deceased Susan Wambui from 1952 in Eldoret. That the deceased Waiganjo Kiboi had expressed that Susan Wambui was to inherit parcel number 1/4/1 and 1/33/1 and that with his aid she had developed the said plots, and therefore no person was entitled to dispossess the sister her properties. The deceased son Paul Francis was to inherit 2 plots: Eldoret Municipality Block No. 11/112 and 11/85 whereas he was to inherit Eldoret Block No. 11/384. The late sister Susan Wambui Kiboi transferred her two properties to him and the same was registered in both their names on 20/4/2004 and any challenge of the same should be made in the right Court.

Further Response:

7. The 1st applicant filed a further response deposing that the respondent was not a beneficiary to the estate of the late Kiboi Waiganjo as per section 29 of the Law of Succession Act. The deceased Waiganjo Kiboi died intestate and he did not leave behind any dependents. The late Susan Wambui Kiboi died on 15/9/2012 before fully administering the estate of the late husband and she had concealed some material facts to the Court.

8. In addition, she has the locus to bring the application as the daughter-in-law and the 2nd applicant as the grandchild of the deceased pursuant to section 41 of the Law of Succession Act. The transfer of the parcels of land was effected when they still belonged to the estate of the deceased Wanjohi Kiboi. The parcel number Eldoret/Municipality Block 11/12/did not form part of the estate of the deceased since it belonged to her husband and the same had been sold off.

9. The 1st applicant further deposed that the estate of the deceased be preserved from any intermeddlers or from any interference.

Submissions:

Applicant's Submissions:

10. It is their submission that the deceased Waiganjo Kiboi was the father to Francis Kiboi Waiganjo who was the husband to the 1st applicant and father to the 2nd applicant. Therefore they are entitled to be beneficiaries by dint of section 29 of the Laws of Succession. The Court was referred to **Re-Estate of Hesbon Shimei Nyong'o (deceased) (2018) eklr.**

11. Section 76 of the Law of Succession Act provides for any party to file an application together with rule 2 as read with rule 17(1) of the Probate and Administration Rules. In Re-estate of Veronichah Njoki Wakage (deceased) eklr Mosyoka J. stated as follows:

“...under part v grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents.....”

This Court was urged to find that the applicants had ***locus standi*** to file the application.

12. On jurisdiction this Court was urged to find that rule 73 of the Probate and Administration Rules empowers this Court to make necessary orders as may be necessary to make ends of justice.

13. The applicants are seeking the preservation of the estate of the deceased. They had been excluded when making the application to obtain a grant yet they were the rightful beneficiaries. The respondent had continued to intermeddle with the estate of the deceased contrary to section 45 and 82 of the Law of Succession Act.

14. The respondent's allegation that the deceased Kiboi Waiganjo had expressed on how his properties were to be distributed was false. The respondent had not produced any will to that effect. Section 9(1) (b) of the Law of Succession Act required that an oral will be made 3 months prior to the death. The respondent was relying on an unsigned letter to allocate himself the estate of the deceased. The letter was not in compliance with Section 11 of the Succession Act. It is their submission that the two parcels of land belonged to the deceased and therefore the same should be returned to the estate.

Respondent's submissions:

15. The respondents filed its submissions and urged that the applicant's further affidavit be disregarded for the reason that the same was not

served on them as per the Court order issued on the 7/12/2020.

16. It is his submission that the applicants are not beneficiaries to the estate of the deceased. They have not shown any prove that they are the daughter-in-law and grandson to the deceased Kiboi Waiganjo. They had gone ahead to intermeddle with the estate of the deceased contrary to section 45 of the Law of Succession Act.

17. The applicants had inherited their share of the estate of the deceased Kiboi Waiganjo. Eldoret Municipality Block 11/85 and 11/112 had been given to Muriithi Kiboi who is the husband to the 1st applicant. This was upon the letters of administration issued on 29/11/2001 and confirmed on the 17/10/2002. The said parcels have already been sold to another party as confirmed by the applicants.

18. Further the properties which had been inherited by the deceased Wambui Kiboi was given to her and this is being challenged after the death of Muriithi Kiboi husband to the 1st applicant and the death of Wambui Kiboi. The Court was urged to find the application was an afterthought and is full of malice. The Court became *functus officio* once it issued the grant for letters of administration and it cannot grant the orders being requested by the applicants.

19. It is urged further that the applicants are guilty of delay in challenging the grant. The grant had been confirmed in 2002 but only moved the Court in 2019. The applicants have not disputed the parcel of land known as Eld. Mun. Block 11/384 yet it was given to him vide the same grant confirmed on the 17/10/2002 which they are disputing. It is for the reason that the other two parcels which were inherited and occupied by the deceased Susan Wambui contain rental houses that the applicants are selfish for want of the rental income.

20. This Court has been urged to disregard the application and dismiss it with costs to them.

Analysis and determination:

21. The issues that arise for determination are as follows:

- i. Whether the estate in question is for the late Waiganjo Kiboi or Susan Wambui.
- ii. Whether this Court is *functus officio* once a grant of letters of administration is issued.
- iii. Whether the applicants are beneficiaries to the estate of Waiganjo Kiboi and Susan Wambui.
- iv. Whether this Court can grant the orders sought.

22. The applicants have moved the Court seeking various orders. The same is challenged by the respondent. The background of the application is that the late Waiganjo Kiboi died on the 4/6/2000. Susan Wambui Waiganjo filed a summons seeking for limited grant of letter of Administration. She listed herself as the only beneficiary as per affidavit annexed to the summons dated 18/6/2002. The records show the certificate of confirmation of grant was issued on the 17/10/2002. The shares to the estate were distributed as follows:

- i. Susan Wambui Waiganjo -286 Brooke Kenya Ltd shares, 390 National Industrial Credit shares, 1166 Barclays Bank of Kenya shares, Land parcel No. Eld. Munic Block 1/33/1 and 1/4/1.
- ii. Mureithi Kiboi -Land parcel No. Eld. Munic/Block No. 11/85 and 11/112
- iii. David Muruthi -land parcel number Eld. Mun Block 11/384

23. The application is premised on section 45 and 47 of the Law of Succession Act. The respondent urged that the applicants do not have the *locus standi* of which is the first issue for determination. The 1st applicant urged that she is the wife to the Mureithi Kiboi who is the son to the deceased Waiganjo Kiboi, and the 2nd applicant is the son to Mureithi Kiboi thus the grandson to Waiganjo Kiboi. Section 29 of the Law of Succession Act provides as follows:

- a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- b) Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half- sisters, as were being maintained by the deceased immediately prior to his death; and**
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

24. The 1st applicant is wife to the deceased son who had also died on the 23/12/2018. The son Francis Muriithi was entitled to be a dependant for purposes of Succession as stated above. In his absence the wife qualifies to be a dependant who can then file an application in regard to the estate of Waiganjo Kiboi. The 2nd applicant being the grandchild is qualified too. The case in the matter of the *Estate of Veronicah Njoki Wakagoto (deceased) eklr*, Justice Musyoka J. stated as follows on grandchildren:

“The deceased herein died intestate. The estate of a person who dies intestate in Kenya after 1st July 1981 is to be distributed in

accordance with part V of the Law of Succession Act. Section 32 has exempted certain classes of property in certain areas from part V of the Law of Succession Act. The law that applies to property so exempted from part v is, by virtue of section 33, the law or custom applicable to the deceased's community or tribe. The only exemption made under section 32 of the Act covered property in areas other than Murang'a where the deceased hailed from. This underlines the position that Kikuyu customary law is wholly irrelevant to succession to the estate of the deceased.

Under part v. grandchildren have no right to inherit their grandparents who died intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parent. In this case, the applicants mother survived the deceased. She is the one entitled under part v to inherit her mother, the applicant's deceased grandmother. The applicant clearly has no claim under part v so long as his mother survived the deceased.

25. The 2nd applicant herein is the son to Francis Muriithi who had inherited from the deceased estate. The 2nd applicant does not qualify to be a dependant for purposes of Succession to the estate of Waiganjo Kiboi.

26. The applicants are asking the Court to issue orders in regard to the estate of the deceased Waiganjo Kiboi. The wife to the deceased Susan Wambui had already been granted the letters of administration and distributed the estate. The husband to the 1st applicant was issued with his land Eld. Municipality block 11/85 and 11/112. The applicant's application is not premised on these parcels of land from their affidavits and application itself. The applicants were entitled to inherit from one Mureithi Kiboi. The applicants from the year 2002 when the grant was issued did not make any application urging the Court to preserve the estate of the deceased. The applicants have even gone further and disposed off their parcels of land as exhibited in their further affidavit dated 11/11/2020. They have an issue however with land that was given to the late Susan Wambui.

27. The land parcels number 1/33/1 and 1/4/1 had been confirmed to Susan Wambui Kiboi who is deceased and as per section 45 of the Law of Succession Act, the respondent who is the brother to the deceased was a dependant and is therefore a beneficiary to the estate of Susan Wambui Kiboi.

28. The applicants on prayer 'c' are urging the Court to vacate entries registered after the demise of Kiboi Waiganjo on parcels 1/33/1 and 1/4/1 and not their parcels of land which had been give to the late Francis Muriithi Kiboi and of which they sold off in 2019 after his death. The title deed marked as annexure Dmm1v shows the parcel number Eld. Muni. Block 11 was transferred to Beatrice Kanga Kibwi on the 30/5/2019. The deceased Wambui Susan had been registered as the proprietor on the 5/4/1990 and she had effected transfer to the late Francis Muriithi Kiboi the 1st applicant's husband on the 14/7/2004. Though this Court has jurisdiction to issue the orders sought by virtue of section 47 of the Law of Succession Act which empowers it with jurisdiction to hear and determine any dispute under the Act, its vivid from the foregoing that the application lacks merit and is therefore dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 9th day of March, 2021.

In the presence of:-

Mr. Magare for the applicant (absent)

Mr. Githiru for the Respondent

Gladys - Court Assistant