



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO. 21 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH IBWA MBURI ALIAS JOSEPH IBWA (DECEASED)

CELINA GAKUNYI KABURI..... PETITIONER

VERSUS

JUDY MBURA JOSEPH.....OBJECTOR

AND

LUCY GATUMI KWAMWARA1ST PROTESTOR

VIRIVINA KAMIIRA MIGWI..... 2ND PROTESTOR

PAUL MUTUMA.....3RD PROTESTOR

BONIFACE KIMATHI NJERU..... 4TH PROTESTOR

REGINA NJAGI..... 5TH PROTESTOR

PATRICK MUGAMBI NJAGI.....6TH PROTESTOR

JACINTA KAMWARA..... 7TH PROTESTOR

PETER KIRIMI KATHENYA..... 8TH PROTESTOR

R U L I N G

Background

1. This cause relates to the estate of the Late Joseph Ibwa Mburi alias Joseph Ibwa (deceased). The widow, Celina Gakunyi Kaburi, petitioned for Grant of Letters of Administration Intestate vide **Chuka Succession Cause No. 5 of 2007**. She was appointed the administratrix and a grant was issued on 07/11/2007 and confirmed on 11/03/2009 (hereinafter referred to as the **“initial grant”**).

2. According to the Certificate of Confirmation of Grant issued on 11/03/2009, the estate was to be divided as follows:

a. Tharaka/Tunyai“A”/1635

- i. Joseph Kinyua Njagi – 2 Acres
- ii. Celina Gakunyi Kaburi – Balance thereof

b. Tharaka/Tunyai“A”/1140

- i. Stephen Mugai Gakumo – 1 Acres

ii. Silas Mutwiri Rwamba – 1 Acres

iii. Lucy Gatumi Kamwara – 1 Acres

c. Tharaka/Tunyai“A”/1143

i. Domenic Njagi Joseph - Whole

3. Following the confirmation of the initial grant, the administratrix distributed the properties accordingly to the identified beneficiaries. The beneficiaries consequently obtained their respective titles and some sub-divided and sold their shares to third parties. The protestors herein all claim to be purchasers for value and that they acquired titles following the confirmation of grant in 2009 and subsequent subdivision.

4. The Objector herein applied for the revocation of the initial grant on the ground that she was left out during the distribution of the estate, yet she is the deceased's daughter. The application was not opposed. On 24/06/2019, the initial grant was revoked, and all consequential orders reversed. The estate reverted to the deceased's name and a fresh grant was issued to the administratrix. The administratrix was then ordered to involve all the beneficiaries and notify them of any step taken in the administration of the estate.

5. By an application dated 17th July 2019, the administratrix sought for the confirmation of the fresh grant. She proposed the following mode of distribution:

a. Tharaka/Tunyai“A”/1635

i. Joseph Kinyua Njagi – 2 Acres

ii. Celina Gakunyi Kaburi – Balance thereof

b. Tharaka/Tunyai“A”/1140

i. Stephen Mugai Gakumo – 1 Acres

ii. Silas Mutwiri Rwamba – 1 Acres

iii. Judy Mbura Joseph – 1 Acres

c. Tharaka/Tunyai“A”/1143

i. Domenic Njagi Joseph - Whole

6. In response to the summons for confirmation of grant, the Protestors herein filed their respective Affidavits of Protest. The court directed for the parties to explore an out-of-court settlement that would narrow down the issues and that the parcels that have issues to proceed for trial. A consent was consequently reached with regards to the parcels that had been sold to the 2nd – 8th Protestors. This court however ordered that the consent was untenable in view of the protest by the 1st Protestor who was left out of the consent. The protest by the 1st Protestor dated 02/12/2019 thus proceeded for hearing.

1st Protestor's Case

7. The 1st Protestor (PW1) is a niece to the Petitioner/Administratrix. She stated that sometime in 2008, she bought one acre of land out of land parcel no. South/Tharaka/Tunyai/'A'/1140 through her father, Francis Kamwara (PW2). She alleges that the Petitioner approached PW2 with an offer to buy the land. PW2 then approached PW1 because he did not have money. PW1 alleges that she agreed to buy the land in question and that it is his father who dealt with all the transactions that followed. She referred to a land agreement marked as "LGK1" which is annexed to her affidavit of protest and stated that she paid the full purchase price of Kshs. 80,000/= for the land. It was further her testimony that at the time the agreement was made, the land in question had been leased to one Stephen Mugai and that the parties agreed that PW1 would take over possession of the land after the said lease expired.

8. PW2 was Francis N'Kamwara M'mureitha, the father to PW1. He corroborated PW1's testimony that the Petitioner and her children had approached him to buy the land in question. He then approached PW1 who agreed to buy the land and he then followed up on the transactions. According to him, the land belonged to the Objector herein. They allegedly formalized the agreement at the Chief's office and thereafter, he transmitted the payments to the Objector through an account she allegedly had with Equity Bank.

Respondent's case

9. DW1 was Celina Gakunyi Kaburi, the Petitioner/Administratrix. She stated that the deceased had three properties which he owned. She filed a succession cause in 2016 but the same was not finalized as the grant was not issued. DW1 denied that she sold land to either PW1 or PW2 and stated that she was not privy to any agreement purporting that the land was sold. She also denied receiving money from the 1st Protestor.

10. DW2 was Judy Mbura Joseph. She also denied entering an agreement with PW1 for sale of land parcel no. 2803 or any other land parcel. She denied receiving money from the PW1 or PW2 towards sale of land. DW2 stated that she has never had any bank account with Equity Bank. She however admitted that she knew Stephene Muigai as she had leased the land in question to him. She also admitted that she leased the land despite it belonging to the father.

Submissions

11. The parties filed written submissions. The 1st Protestor cited the case of **Morris Mwiti Mburugu v. Denis Kimanthi M'Mburugu [2016] eKLR** and submitted that she was a purchaser for value just like the other protestors. She stated that the administratrix and the objector were only out to deny her share of the land because they have an outstanding grudge with her. The 1st Protestor further submitted that she took possession of the subject suit in 2013 after the expiration of the lease given to Stephen Muigai over the land in question.

12. On their part, the administratrix and the objector filed their written submission jointly. They submitted that the purported sale agreement between the Objector and the 1st Protestor was fatally defective and not legally binding. They further submitted that the Objector did not have authority to sell the land at the time and as such, allowing the agreement to stand would amount to intermeddling with the estate of the deceased.

Issue for determination

13. From the evidence on record and the submissions by the parties, the main issue for determination is whether or not this court should allow the application for confirmation of grant dated 17th July 2019 in view of the protest by the 1st Protestor. To reach its determination, it is my view that this court ought to analyse:

- a. Whether the subject estate is indebted to the 1st Protestor; and
- b. Whether the application for confirmation of the grant should be allowed.

Analysis

14. In this case, the deceased died intestate on 14th September 2003. It is not contested that the deceased was survived by the following beneficiaries:-

- a. Celina Gakunyi Kaburi – Wife
- b. Jacob Nkari Joseph – Son
- c. Judy Mbura Joseph – Daughter
- d. Domenic Njagi – Son

15. It is also not contested that the estate of the deceased comprised of three properties namely:

- a. Land parcel no. Tharaka/Tunyai “A”/1635
- b. Land Parcel no. Tharaka/Tunyai “A”/1140
- c. Land Parcel no. Tharaka/Tunyai “A”/1143

16. The initial grant was issued on 07/11/2007 and subsequently confirmed on 11/03/2009. As per the copies of the green cards on record, the corresponding titles for the said land parcels were transferred to Celina Gakunyi on the following dates:

- a. Tharaka/Tunyai “A”/1140 - 11/08/2011
- b. Tharaka/Tunyai “A”/1635 - 12/08/2011
- c. Tharaka/Tunyai “A”/1143 - 23/06/2012

17. Having established the above, the first issue for determination by this court is whether the estate is indebted to the 1st Protestor.

Whether the estate is indebted to the 1st Protestor

18. The land in question forms part of Tharaka/Tunyai “A”/1140. PW1 testified that she bought the land from the Objector vide a sale agreement which she annexed to her affidavit of protest as “LGK1”. The agreement is dated 02.08.2008. She stated that she bought it pending the finalization of the succession cause. PW1 also produced a lease agreement marked as “LGK2” which was made between the Objector and one Stephen Muigai Gakumu on 16/05/2007. It was for 1 (one) acre in parcel no. Tharaka/Tunyai “A”/1140. The lease was for

a duration of 5 years starting July 2007. Clause 3 of the lease clearly indicated that the subject land was "...registered in the name of JOSEPH IMBWA the father of the lessor..."

19. As stated above, the original grant was confirmed on 11/03/2009. The purported sale agreement between the Objector and the 1st Protestor was entered in 2008 before the grant was confirmed. **Section 45** of the Law of Succession Act, Cap 160 of the Laws of Kenya (hereinafter "the Act") provides as follows:

"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.

(2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

20. In the case of Muriuki Hassan v. Rose Kanyua and 4 others [2014] eKLR which the Administratrix and the Objector have cited in their submission, Makau J considered a similar situation as the present case where there was a sale of property belonging to an estate before succession was undertaken. This is a persuasive authority in which the court pronounced itself as follows:

"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

21. Another persuasive authority on this issue which has also been cited by the Administratrix and the Objector is the case of In Re Estate of John Gakunga Njoroge [2015] eKLR where Murithi J held as follows:

"10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."

15. For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant."

22. In Jane Kagige Geoffrey & another v Wallace Ileri Njeru & 2 others [2016] eKLR, this court opined as follows:

"The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily. The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between of the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court. Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril."

23. From the foregoing legal authorities, it is my view that the validity of the agreement between the Objector and the 1st Protestor is not relevant in this cause as the purported sale of land before confirmation of the grant was done without the sanction of the court. The effect of the purported sale fell afoul of **Section 45 and 82(b) (ii) of the Law of Succession Act**. The Act under **Section 82(b)(ii)** provides mandatorily that-

"No immovable property shall be sold before confirmation of grant."

It follows that the purported sale of immovable property to the protestor before confirmation of grant was unlawful and this court cannot enforce it. The protestor's claim does not fall within the jurisdiction of this court. It is trite that court's jurisdiction is donated by the Statute. In this case the **Law of Succession Act** outlines the application of the Act. It states at **Section 2(1)**:

2.(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

The jurisdiction of this court is spelt out under **Section 47 of the Act** which provides:-

“ The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

Such disputes must relate to intestate or testamentary succession. Third party disputes with dependants like the present one are not the preserve of this court and must be filed in the courts with jurisdiction. The Objector could not and did not pass good title to the 1st protestor. The alleged sale was in blatant breach of the **Law of Succession Act** and in my view, the estate of the deceased is therefore not indebted to 1st Protestor.

24. The next issue for determination is whether the summons for confirmation of grant dated 17th July 2019 should be allowed.

Whether the grant should be confirmed

25. The application for the confirmation of grant dated 17th July 2019 is supported by a consent of confirmation of grant dated the same 17th July 2019. The beneficiaries named under the application for confirmation have all consented on the proposed mode of distribution and include:

- a. Celina Gakunyi Kaburi
- b. Joseph Kinyua Njagi
- c. Stephen Mugai Gakumo
- d. Judy Mbura Joseph
- e. Silas Mutwiri Rwamba
- f. Domenic Njagi Joseph

26. I note that Jacob Nkari Joseph was listed as a son of the deceased in the letter dated 11th March 2019 by the Sub-Chief of Tunyai Location. He has however been left out of the proposed mode of distribution and has also not given his consent to the proposed mode of distribution of the estate. I also note that the beneficiaries listed include Joseph Kinyua Njagi, Stephen Mugai Gakumo, and Silas Mutwiri Rwamba. From the record, the three are not heirs of the deceased but are purchasers for value who purchased portions of the estate from the actual beneficiaries after the death of the deceased. They are not dependants of the estate of the deceased.

27. In view of the foregoing, it is my view that in order to preserve the deceased's estate and serve substantive justice in accordance with the provisions of the Act, the application for the confirmation of grant dated 17th July 2019 cannot be confirmed at this point.

The administratrix should make provision for all the beneficiaries and show the court that all the dependants are catered for and consent to the mode of distribution. I note that there is a consent between the administratrix and 2-8 protestors which should be factored in during the confirmation of grant. The proviso to **Section 71(1) of the Law of Succession Act** provides that the grant shall not be confirmed until the court is satisfied as to the respective identities of all persons beneficiaries entitled. It is therefore pre-mature to order that the grant be confirmed.

In conclusion:

I find that the protest by the 1st protestor Lucy Gatumi Kamwara is without merits and is dismissed. The administratrix is given 60 days within which to move the court to confirm the grant in compliance with this ruling.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF JULY 2021.

L.W. GITARI

JUDGE

20/7/2021

Ruling has been read out in open court.

L.W. GITARI

JUDGE

20/7/2021