



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 533 OF 2012

IN THE MATTER OF THE ESTATE OF CHARLES MWANIKI KAMARA (DECEASED)

RAHAB WANJIKU KAMARA.....APPLICANT

VERSUS

MARY WANGECHI KAMARA.....RESPONDENT

RULING

Brief facts

1. This application dated 9th September 2020 is brought under Rule 73 of the Probate and Administration Rules. It seeks for orders for cancellation of titles of land parcels AGUTHI/GATITU/332, AGUTHI/GATITU/4617, AGUTHI/GATITU/4618, AGUTHI/GATITU/4619 and AGUTHI/GATITU/4620 as well as orders for the respondent to account for rent he has collected in respect of land parcel AGUTHI/GATITU/332 in the sum of Kenya Shillings Four Million (Kshs. 4,000,000/-).
2. In opposition of the said application, the respondent filed a Replying Affidavit dated 16th October 2020. One of the administrators, Rose Muthoni Kamara, also filed a Replying Affidavit dated 16th November 2020.

The Applicant's Case

3. The applicant is a co-administrator to the estate of the deceased alongside the respondent herein. It is the applicant's case that on 6th February 2013, the court granted injunctive orders against the respondent restraining her from selling or alienating the estate pending the determination of the cause. At the time, the respondent was in the process of selling land parcel AGUTHI/GATITU/332 for a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000).
4. The applicant contends that the premises on L.R. AGUTHI/ GATITU/332 has accrued rent of over Kenya Shillings Four Million (Kshs. 4,000,000) to which the court ordered that the said monies be deposited in a joint account in the names of the advocates for the parties. However, no monies have been deposited in the said account to date.
5. The applicant further contends that the respondent has fraudulently transferred four titles AGUTHI/GATITU/4617-4620 to herself despite the land being ancestral and family land. Further applicant states that the respondent has sold land parcels numbers LAIKIPIA SALAMA MURUKU BLOCK 1/428, 1/686, 1/480 and 1/668 and EUASO NYIRO SUGUROI BLOCK V/85. As such, the applicant prays that the court cancel the titles and restore them to the deceased's names.

The Respondent's Case

6. It is the respondent's case that she is one of the administrators of the estate and a widow of the deceased and that the deceased and herself owned land parcels AGUTHI/GATITU/4617 – 4620 jointly. As such, the said properties do not form part of the estate but they automatically revert to her upon the death of the deceased.
7. The respondent contends that having been issued with the Grant of Probate on 29th July 2012, she proceeded to transfer land parcel AGUTHI/GATITU/332 in her name on 14th February 2013. It is further stated that the objection to the grant was filed on 19th June 2013 and the will was revoked on 22nd January 2020. She further states that although there was a court order issued on 6th February 2013 restraining the sale or alienation of the estate property pending the hearing of the summons for extension of time to file an objection, she was not aware of the same by the time she presented the documents for transfer.

8. The respondent confirms that the deceased leased out the said premises to the Ministry of Interior and Coordination and National Government but she adds that the said tenant has not paid rent to the extent that she had to levy for distress for the rent. As such, she was not in a position to deposit any money in the joint account pursuant to the court order issued. The respondent further states that in any event land parcel AGUTHI/GATITU/332 was matrimonial property and together with the deceased they raised their children there and though they moved out of the said premises, she is entitled to the said property.

9. It is the respondent's case that contrary to the allegations made by the applicant, land parcels LAIKIPIA SALAMA MURUKU BLOCK 1/428, 1/480, 1/686 and 1/668 and EWASO NYIRO SUGUROI BLOCK V 85 were sold by the deceased during his lifetime.

10. One of the administrators, Rose Muthoni Kamara, swore an affidavit in which she reiterates what the applicant has stated. She adds that the deceased's children who are deceased have children despite been married and therefore, their children ought to be included as beneficiaries in the deceased's estate. She further states that the respondent ought to surrender all the titles in respect of the properties in court and that all the titles in the joint names of the deceased and the respondent should revert to the estate. She concludes by stating that the rent collected in respect of the properties be paid into the joint account of the advocates on record.

11. Parties agreed to dispose of the application by way of written submissions. The applicant put in written submissions but the respondent did not file any submissions. A summary of the applicant's submissions is as follows:-

The Applicant's Submissions

12. The applicant reiterates the contents of her affidavit and relies on the case of **Munyasya Mulili & 3 Others vs Sammy Muteti Mulili [2017] eKLR** and **Rule 73 of the Probate and Administration** rules to support her contention that this court is clothed with the jurisdiction to cancel titles, which have been obtained fraudulently and illegally.

13. The applicant further relies on **section 55 and 82 of the Law of Succession Act** and submits that distribution of property cannot be carried out before confirmation of grant is undertaken. The applicant relied on the case of **Jane Wanjiru Muchiri vs Phoebe Watetu Muchiri & 2 Others (unreported) In the Estate of Solomon Muchiri Macharia** to buttress her position. The applicant submits that in the instant case the grant of letters of administration intestate was issued to the petitioners on 22nd January 2020 and that the transfers, sales and registration of titles took place before the grant of letters of administration was confirmed. The certificates of official search indicate that titles in respect of land parcels AGUTHI/GATITU/4617-4620 were issued to the respondent on 14th February 2015, 12th March 2014 and 14th February 2013 respectively. The applicant further relies on the case of **Madison Moroko Nyamweya vs Benard Magara Maroko & Another [2016] eKLR** and submits that no immovable property shall be sold before confirmation of grant. As such, since the grant issued on 29th January 2020 has not been confirmed, the respondent was not authorized by law to deal with the properties as she did. Further, a purchaser's interest can only be protected under the Act if such purchase took place after the confirmation of the grant. As such, the respondent has no legal standing to enter into a legally enforceable sale agreement with any party. The applicant relies on the cases of **Mumbi Mwathi vs Stephen Ndungu Mwathi [2012] eKLR** and **Santuzza Billoti alias Mei Santuzza (deceased) vs Giacario Balasconi [2014] eKLR** to support her contention.

14. The applicant further submits that the acts of the respondent amount to intermeddling pursuant to section 45 of the Law of Succession Act and thus the court ought to cancel the titles in respect to land parcel AGUTHI/GATITU/4617 – 4620 and AGUTHI/GATITU/332 and restore the titles in the name of the deceased. The applicant adds that the court do issue an order for the respondent to account for the rent she has been collecting from the estate.

Issues for determination

15. The issues for determination are:-

- a. Whether the applicant has made out a case to warrant the granting of orders of cancellation of title numbers AGUTHI/GATITU/4617-4620 and AGUTHI/GATITU/332 so as to revert to the name of the deceased.
- b. Whether the respondent should account for the rent collected from L.R. AGUTHI/GATITU/332 and deposit it as earlier ordered by the court.

The Law

Analysis of facts

16. **Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules** grants a succession court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. Such powers include cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court.

17. The applicant has sought an order of cancellation of titles that the respondent obtained fraudulently and irregularly. The power to do so was discussed in the case of **Santuzza Bilioti alias Mei Santuzza (Deceased) vs Giancarlo Falasconi (2014) eKLR** where the court held that:-

“...the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

18. Having keenly perused the court record, it is apparent that the respondent filed a petition for grant of probate of written will on 29th July 2012. The applicant and two other objectors, Nelson Kamara Mwaniki and Rose Muthoni Kamara contested the petition for the grant of the will and filed objections to the grant of probate. They filed their respective objections, answers to the petition and petitions by way of cross – applications on 18th June 2013. The said petition was determined by the court on 22nd January 2020 in which the court revoked the will and declared that the deceased herein died intestate. Notably, during the pendency of the petition, the applicant filed an application seeking injunctive orders to restrain the respondent from selling or alienating the estate to which the court granted a temporary injunction restraining the respondent from selling or alienating the estate. Thus in those circumstances it is evident that the grant of probate was heavily contested. In that regard, it is strange that the respondent feigned ignorance that since she was issued with the grant of probate she had the mandate to transfer the properties in her names. This argument does not prove satisfactory because looking to the titles, it is evident that she transferred the parcel of land numbers AGUTHI/GATITU/4617 – 4620 and the titles issued to her on 14/2/2013, 14/2/2013, 12/3/2014 and 14/2/2013 respectively. During this duration the applicant together with the objectors had made their sentiments clear that they were contesting the will of probate.

19. In any event, even if the respondent claims that she believed that since she was granted probate solely **Section 82 (b)(ii) of the Law of Succession Act** is clear that **“No immovable property shall be sold before confirmation of grant.”** This has been expounded in case law in the case of **Njoki Gacheru Ndiuni vs Dadson Githenji Wahome & 3 Others [2016] eKLR** where the court held:-

“The effect of this is that property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by law. Such authority emanates from a grant of representation, and any such person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

20. In the present case, the respondent filed a petition for grant of probate of written will on 29th July 2012. The petition was contested by the applicant and two objectors who filed their various applications on 18th June 2013. The said petition, as stipulated above was determined by the court on 22nd January 2020. In that regard, the respondent was not authorized by law to deal with the property of the deceased. The mere fact that the respondent was named the sole heir in the will did not give her a right to disregard the laws of succession governing the administration of the estate of the deceased person.

21. Moreover, since it has been established that the respondent had no legal capacity to deal with the estate of the deceased, it follows that any purchases made during the pendency of the petition are also void. Having perused the attachments to the applicant’s affidavit, the sale agreement in respect of land parcel LAIKIPIA/SALAMA/MURUKU BLOCK 1/428 it is clear that the said agreement was entered into on 21st May 2015, between the purchaser and the respondent. This period was during the pendency of the petition and therefore since the purchase took place before confirmation of grant was carried out. In this regard, I am of the view that the applicant has made out a case to warrant the cancellation of titles AGUTHI/GATITU/4617 – 4620 and AGUTHI/GATITU/332 and the same shall revert back to the name of the deceased. Consequently, the respondent should account for all rents paid in respect of land parcel number AGUTHI/GATITU/332. The respondent had no legal capacity to enter into a legally enforceable sale agreement and therefore the purchase may be voided.

22. On the argument that title numbers AGUTHI/GATITU/4617 -4620 were jointly owned by the respondent and the deceased, this court is not clothed with the jurisdiction to determine ownership of land in ordinary circumstances. However, concerning matters where the deceased has a share in the tenancy in common, a succession court has jurisdiction to deal with the land only to the extent of the deceased’s share and may also determine whether the share of the deceased forms part of his estate for purposes of distribution.

23. The applicant annexed official searches and other documents showing that the properties complained of as having been illegally or fraudulently sold to 3rd parties originally belonged to the deceased and have been transferred during the pendency of this case.

24. The deceased died on 13th November 2011 and this case was filed by respondent on 30/05/2012 together with a written will which the court revoked and appointed the respondent Rahab Wanjiku Kamara and Rose Muthoni Kamara as joint administrators of the deceased’s estate. During the pendency of this cause orders for preservation of the estate have been issued by the court. Judge Wakiaga directed that status quo be maintained on 16/02/2013 while Ngaah J on 14/06/2017 issued orders restraining the respondent from selling or alienating any assets of the estate pending the determination of the case.

25. The record shows that the respondent was registered as proprietor of four(4) parcels of land as follows:-

L.R Aguthi/Gatitu/4617 on 14th February 2013

L.R. Aguthi/Gatitu/4618 on 14th February 2013

L.R Aguthi/Gatitu/4619 on 12th March 2014

L.R. Aguthi/Gatitu/4620 on 14th February 2013

26. The dates of issue of titles for the four parcels of land in favour of the respondents was about one(1) year after the death of the deceased. Searches filed by the respondent together with her petition show together with her petition show that the four parcels of land were registered in the names of the deceased and that of the respondent. The respondent claims that the parcels were jointly owned and that the proprietary interests reverts to her solely upon the death of the deceased. In this regard, I note that the shares of the deceased and those of the respondent in the said parcels of land are not indicated in the land register.

27. Section 101(1) of the Registered Land Act Cap 300 Laws of Kenya(now repealed), provided that when land is registered in the names of

more than one person, it should be indicated whether such persons are joint proprietors or proprietors in common. The current registration is in my view ambiguous and cannot be interpreted to mean that the deceased and the respondent were joint proprietors. This being the position, the respondent cannot take over the share of the deceased in the guise of joint ownership. The specifications of the type of ownership or any other transfer instruments to convey the legitimate expectations of the two tenants have not been produced to cure the ambiguity.

28. Section 91 of the Land Registration Act provides:-

91(2) "Except as otherwise provided in any written law where the instruments of transfer of an interest of land to two or more persons does not specify the nature of their rights, there shall be a presumption that they hold the interests as tenants in common in equal shares.

91(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

91(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

29. In a case with similar facts, that of Philip Sawe & Arap Bokuti[2013]eKLR the court held:-

"It is a maxim of equity that "equality is equity". Related to this "equity leans against joint tenancies". It follows that equity will presume a tenancy in common where there is no express or other fair and practical basis upon which a property may be distributed among two or more claimants."

30. I am well guided by the law and by the case of Philip Sawe Bokuti. I am of the considered view that the deceased is entitled to equal shares of L.R. Aguthi/Gatitu/4619,4617,418,4619 and 4620 while respondent holds the other half share.

31. For purposes of this succession cause, half share of each of the four aforementioned parcels forms part of this cause.

32. In regard to L.R. Aguthi/Gatitu/332, the deceased during his lifetime had entered into a four(4) year lease with the permanent Secretary, Ministry of Local Government on 23/07/2008. The lease was to expire in July 2012. In a letter to the respondent dated 05/02/2013, the Permanent Secretary advised the respondent to obtain the full grant to acquire all the proprietary rights before she could execute the sale agreement. This is evidence of an attempt to dispose of the property by the respondent who may have approached the Ministry to buy the property. The counsel for the co-administrator Rahab Wanjiku Kamara wrote to the Permanent Secretary to halt the said transactions pending the disposal of this cause.

33. It is deponed that the respondent transferred L.R Aguthi/Gatitu/332 to her name despite the fact that the property was in the name of the deceased.

34. Although the applicant did not attach the current search of L.R Aguthi/Gatitu/332, the respondent admits transferring the land to her name on the strength of the grant of probate issued to her before the same was revoked. The respondent further depones that she was not aware of the court order issued on 06/02/2013 to restrain her from selling the land.

35. The respondent had been issued with a grant of probate written will on 29/07/2012 which was objected to by the applicant and other family members in this cause. It was revoked on 22/01/2020. In my considered view, any property transferred to a beneficiary or to a 3rd party based on a grant of probate that is later revoked must revert to the name of the deceased. The reason is that the foundation of such proprietorship was destroyed upon revocation of the grant of probate. The effect is that such property must be put together with other assets of the deceased for purpose of fresh distribution. Such a transaction is subject to nullification for the foregoing reasons.

36. The respondent in response to the allegations of failure to comply with the orders of the court for depositing the rent collected from L.R Aguthi/Gatitu/332 said that she was not aware of the injunctive orders granted by the court and further that no rent has been paid. She further said that she at one time had to distress for rent against the tenant.

37. I have perused the record and noted that the counsel for the respondent Mr. Mungai Kivuti participated in the proceedings that led to the issue of the orders given and confirmed. This was after she challenged the interim orders issued in favour of the applicant on 05/02/2013.

38. Regarding the orders issued by Ngaah J the applicant through her then advocate Gori Ombongi participated in the proceedings having filed the necessary responses. It is clearly indicated in the orders of the court that Gori Ombongi for the respondent was heard.

39. I do not find any merit in the respondent's claim that she was not aware of the orders for preservation of the estate and to restrain her from selling the assets of the deceased during the pendency of this case.

Conclusion

40. Having considered all the foregoing, I am of the considered view that the applicant has before this court established the grounds in support of his application dated 9th September 2020 which I hereby allow in the following terms:-

a. That titles for L.R Aguthi/Gatitu/4617, 4618, 4619, 4620 are hereby cancelled and shall revert to the names of the deceased

Charles Mwaniki Kamara.

b. That the title for L.R. Aguthi/Gatitu/332 is hereby cancelled and shall revert to the names of the deceased Charles Mwaniki Kamara and the respondent Mary Wangeci Kamara.

c. That the respondent do account for rent collected from L.R. Aguthi/Gatitu/332 to date.

d. That the respondent do comply within 30 days with the orders made on 14th June 2017 in this cause in regard to depositing of the rent collected in L.R. Aguthi/Gatitu/332 in an interest earning account in the advocates on record for administrators herein bearing in mind that Messrs Judy Thongori Company has since taken over this cause from Gori Ombongi & Company Advocates.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 7TH DAY OF OCTOBER, 2021

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 7TH DAY OF OCTOBER 2021