



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO. 8 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE PETER NJOROGE MWENJEKU (DECEASED)

- DAVID NJUGUNA CHEGE.....1ST APPLICANT
- SOLOMON NJIROGE GACHUGI.....2ND APPLICANT
- JULIUS NDURE MWAURA.....3RD APPLICANT
- PAUL MWENDA NJUGUNA.....4TH APPLICANT
- FRANCIS NDERITU MUIGAL.....5TH APPLICANT
- JAMES NGUGI KOIGI.....6TH APPLICANT
- RACHAEL WACEKE GATUA.....7TH APPLICANT
- JOSEPH MURIITHI WACHIRA.....8TH APPLICANT
- JOHN GITHINJI KARIUKI.....9TH APPLICANT
- JOHN NDUFIA MWANGI.....10TH APPLICANT
- FRANCIS GICHUKI MACHARIA.....11TH APPLICANT

-AND-

- PATRICIA WAMBUI NJOROGE.....1ST ADMINISTRATOR/RESPONDENT
- STEPHEN GITHAIGA.....2ND ADMINISTRATOR/RESPONDENT

-AND-

- MARY MUTHONI NJOROGE.....PROTESTOR

RULING

1. Through a chamber of summons application dated 10/02/2020, the Applicants sought orders that:

i. Spent

ii. Spent

iii. That the court order of 16/07/2017 specifically order 2 & 3 directing the surveyor Nyandarua South to visit the deceased's land parcels namely Nyandarua/Wanjohi/ 1198,1466, 1467, 1767 and 1648 consolidate them and share them into 16 equal

parts be amended and/or rectified to order that the Applicant's interest in the estate of the deceased comprised in the aforesaid lands be marked out on the grounds before distribution of the residue of the land amongst the named beneficiaries while factoring in their respective vendor's entitlement to the estate.

iv. That the surveyor, Nyandarua South do prepare a consolidated distribution schedule of the deceased's estate incorporating the Applicant's interest on the ground.

v. Costs in the cause.

2. The application is based upon the affidavit of David Njuguna Chege, the 1st Applicant herein.

3. In the aforementioned supporting affidavit dated 10th February 2020, the 1st Applicant averred that the deceased had two houses and that prior to his demise he had divided his estate amongst the members comprising the two houses and that he has retained a portion of land measuring about 5 acres for himself. That the mutations had been registered and title documents processed explaining the genesis of the four title documents which were all previously under one title.

4. That the deceased in essence subdivided his land with the sons being allocated about 2.5 acres and the daughters being allocated 0.5 acres.

5. That together with the co-applicants, they bought the respective parcels from the dependents on the dates and from the dependents as listed in paragraph 7 of the supporting affidavit. (See also DNC-1 – a true Photostat copy of the bundle of purchase documents executed between some of the Applicants and the stated members of the deceased's family)

6. That the Applicants had participated in the succession process and had attended court during the hearing of summons of confirmation before the objection proceedings herein arose besides meetings of the dependents of the estate convened by the local administration on the court's direction such meeting having been held on 05/07/2019 at the chief's office and report emanating wherefrom was filed in court. That their issue was when they would get their title documents and not whether or how the land was owed by the various members of the deceased's family.

7. That in the last paragraph of the court's judgement of 13/12/2018, the court recognized the fact that the petitioners may have sold some of the land and it is only them who knew what is available for distribution before proceeding to give parties more time to agree on distribution failure whereof it would order the land to be distributed in terms of **Section 40 of the Law of Succession Act** i.e. be shared equally between the 16 beneficiaries.

8. That the 16 beneficiaries to the estate did not agree leading the court on 16/07/2019 to order the surveyor Nyandarua south to visit the deceased's parcel of land and share them into 16 portions.

9. That the effect of the direction without a rider that the shares of the purchaser be marked out first on the ground is such that the Applicants are at risk of losing their lands lawfully purchased from the deceased and some from the members of his estate or being displaced from portions that they were already in occupation of.

10. That some of the Applicants such as the 3rd Applicant bought is parcel from the family on the understanding that the family required monies to file the succession case herein.

11. That the court having rendered itself on the entitlement of each of the dependents of the deceased to the estate of the deceased, the Applicants humbly request the court to give them a soft landing by ensuring that their portions are secured before sub-dividing the property.

12. That the Applicants are already in occupation of the respective portions and some of them have developed them and have only been waiting for the succession process in respect of the deceased' estate to be completed on the understanding that their interests would be secured in the process given that their purchases were done in the open and they have been in possession for many years.

13. The Protestor herein in her replying affidavit dated 13/03/2020, averred that the Applicants application ought not to be granted for the following reasons: -The Applicants illegally bought the portions of land claimed before confirmation of grant from persons who had no capacity to sell the same. The said transactions amounted to intermeddling with the deceased's estate which is criminally culpable. That allowing the application would amount to rewarding a commission of crime.

14. That the petitioner gambled with the opportunity given to them by the court after the judgement to distribute the state immediately after the judgment leading to the orders of 6th July 2019. The Applicants have no locus standi to bring the instant application as they are not beneficiaries of the deceased's estate.

15. That there is no basis upon which a review can be granted in this matter as the Applicants all along knew of the pendency of the instant succession proceedings and failed to bring themselves on board before the same was concluded. Additionally, the Protestor submitted that none of the agreements annexed to their application show that all the transactions were entered into during the pendency of the instant succession proceedings. Further, that the deceased died intestate and the allegation that he had divided his estate amongst members of his two houses has no factual or legal basis.

16. The Protestor concluded by asserting that she is vehemently opposed to any review of the order made on 16/07/2019 as the same was correctly made after considering the law applicable. She further relied on several authorities as attached on the list of authorities dated 13/03/2020 namely ***In Re Estate Of Michael Gachichi Mbui (Deceased) (2016) eKLR, In Re Estate of Mugo Kariuki (Deceased) (2016)***

ISSUES, ANALYSIS AND DETERMINATION:

17. In the instant case, there is only one issue for determination namely, whether the Applicants have made out a case for the amendment or rectification of the court order made on 16th July 2017 specifically order 2 and 3.

18. The deceased herein died intestate on 19th February 2000 and Patricia Wambui, a widow to the deceased and Stephen Githaiga Mwenjeki, a son to the deceased were issued with letters of grant of representation dated 24/03/2009. The Protestor filed an affidavit of protest against the confirmation of grant in which she objected the mode of distribution of the deceased's estate because she had been left out. After, the court in its judgement dated 13/12/2018, gave orders that the parties have some time to try and agree on distribution of the estate failing to which the distribution will proceed in terms of **Section 40 of the Law of Succession Act**, that is, to be shared equally between the 16 named beneficiaries including the Protestor.

19. Consequently, the court on 16/07/2019 ordered that:

i. That since parties failed to agree on distribution on the ground, the surveyor Nyandarua South to visit the land and share it into 16 equal parts i.e. Nyandarua/Wanjohi/1198, 1466, 1467, 1767 and 1648.

ii. That the said plots be consolidated for redistribution.

iii. That the surveyor do file his report on 04/11/ 2019.

20. The Applicants then filed the present suit to protect their interest as purchasers of part of the aforementioned Nyandarua/Wanjohi/1198, 1466, 1467, 1767 and 1648. A perusal of the pleadings and supporting documentation by the Applicants reveal that the Applicants bought the parcels of land from some of the beneficiaries of the estate on dates ranging from 2006 to 2012. Some of these dates are way before the grant was ever issued and all are certainly before the same was confirmed.

21. Needless to say, 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 intention of the Law of Succession Act is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed.

22. In Re Estate of Paul M'Maria (Deceased) [2017] eKLR the court stated that:

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

23. In **Re Estate of John Gakunga Njoroge [2015] eKLR** Murithi J held:-

“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.....

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:-

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

24. Furthermore, **Section 45 of the Law of Succession Act** prohibits dealing with properties belonging to a deceased person before obtaining grant. It states:

“(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 person.”

25. On the other hand, **Section 82 of the Act** provides:

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

ii. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

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

26. Therefore, applying the law, the sale of portions of Nyandarua/Wanjohi/1198, 1466, 1467, 1767 and 1648 on the various dates ranging from 14/11/2006 to 11/11/2012 to the Applicants was in contravention of the Law of Succession Act and thus an illegality. Notably, as the Protestor stated, the Applicants or some of them were fully aware of the pendency of the succession proceedings. Anyone who purchased property from the estate before issuance and confirmation of the grant did so at his own peril. In any case, the two administrators lacked capacity to deal with the property without the consent of all beneficiaries of the estate including the Protestor.

27.. In *Benson Mutuma Muriungi vs. C.E.O. Kenya Police Sacco & Another [2016] eKLR* the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

28. Ironically, the court in its judgement of 13/12/2018 noted that the Respondents seem to have sold part of the deceased’s estate irregularly and that is why they wanted to lock out the Protestor. Consequently, based on the instance of illegality through intermeddling, this court is therefore tied and cannot grant the orders sought by the Applicants. The upshot of the above is that it is my considered view that the Applicants’ application has no merit and thus the court makes the orders;

i. The instant application is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4TH DAY OF OCTOBER, 2021

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CHARLES KARIUKI

JUDGE