



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO.56 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE MUNENE MUGO NCACU (DECEASED)

FRIDAH KANJA MUTHAURA.....1ST PETITIONER

STELLA NYAI MUTHAURA.....2ND PETITIONER

VERSUS

ELIAS MICHENI MUGO.....1ST OBJECTOR/PROTESTOR

BERNARD MURIITHI MUGO.....2ND OBJECTOR/PROTESTOR

J U D G E M E N T

1. This cause relates to the estate of the late **MUNENE MUGO NCACU** who died intestate on 3rd November 2011 at Kenyatta Hospital resident at Meru South. The petition for letters administration herein listed the following as dependants surviving the deceased:

- i) Fridah Kanja Muthaura - widow
- ii) Yvonne Kendi Munene
- iii) Betty Kawira Munene - children

2. As per the said Petition the following are listed as comprising the estate.

- (i) Karingani/Weru/275
- (ii) Karingani/Mugirirwa/1916
- (iii) Karingani/Mugirirwa/1921
- (iv) Mwalimu Sacco Shares
- (v) Motor vehicle No. KZR 934
- (vi) Death Gratuity

3. When this petition was filed an objection was filed by **ELIAS MICHENI MUGO** and **ALPHAXARD M'ITHAI NKARI** over the ownership of parcels No. Karingani/Mugirirwa/1916 and 1921 contending that the two parcels do not form part of the estate. This court will return back to that dispute later in this judgment.

4. This court vide a grant of letter of administration dated 13th July 2017 appointed Fridah Kanja Muthaura and Stella Nyai Muthaura administratrixes of the estate of the deceased herein. The administratrixes vide Summons for Confirmation of Grant dated 9th March 2018 applied for confirmation of grant proposing to have the estate of the deceased distributed as follows:

- a) Karingani/Mugirirwa/1916 - Frida Kanja Muthaura
- b) Karingani/Mugirirwa/1921 - Fridah Kanja Muthaura
- c) Karingani/Weru/275 - Fridah Kanja Muthaura
- d) Death Gratuity and Savings from Mwalimu Sacco Society - Fridah Kanja Muthaura.

5. The Petitioner's proposal elicited sharp protests and objection by Elias Micheni Mugo and Bernard Murithi Mugo the 1st and 2nd protestors respectively. The protestors have both filed affidavit of protest sworn separately on the same day 5th October 2018.

6. The main bone of contention is that parcels numbers Karingani/Mugirirwa/1916 and 1921 do not form part of the estate and that the Petitioner/Administrator has wrongly listed them as assets comprising the estate.

7. The protestors have exhibited copies of Registration Certificates (commonly referred to as green cards) to show that the two properties have never vested to the deceased but Alphaxard M'Ithara Nkari, the original proprietor and the late father of the deceased herein and the two protestors herein. The protests herein were canvassed through *viva voce* evidence.

The Petitioners case:

8. The Petitioner (PW1) testified that the deceased was her late husband and that upon a customary marriage, they both settled in their matrimonial situated as Karingani/Mugirirwa/1916 which according to her was her husband's share gifted to him by her father in law, Alphaxard M'Ithara Ngari. She claimed that besides that parcel, her late husband or the deceased herein was also gifted parcel No. Karingani/Mugirirwa/1921 where the deceased reportedly planted tea.

9. She added that they both bought parcel No. Karingani/Weru/275 and that they were blessed with two children namely Betty Kawira and Yvone Kendi.

10. The Petitioner further testified that in the year 2004 her father in law wanted to give his children his parcels of land and that towards that end he went to Land Control Board with the deceased herein and signed Transfer Form in favour of the deceased herein after Land Control Board issued a consent dated 28th October 2014. She tendered both the consent from Land Control Board and a duly executed Transfer Form dated 10th December 2004 in respect to parcels Karingani Mugirirwa/1916 as P. Exhibit 1. At the same time she also tendered consent to transfer dated 21st October 2004 from Land Control Board in respect to Karingani/Mugirirwa/1921 duly executed by the late Alphaxard M'Ithara Nkari in favour of the deceased herein.

11. The Petitioner further told this court that the deceased died on 3rd November 2007 while her father in law died in 2009 and that before long her brothers in law, the protestors herein, transferred the two parcels to their names with Elias Micheni Mugo and Bernard Murithi Mugo registering themselves as joint owners on 9th April 2008.

12. According to the Petitioner she went to the District Land Registrar and lodged a complaint who reportedly agreed with her that the titles to the two parcels had been irregularly issued and summoned both the protestors through a letter dated 21st April 2008. She told this court that she was residing in parcel 1916 and had planted tea in parcel 1921 where she was picking tea and exhibited a document from Weru Tea Factory to show that she delivered tea until 2009. She claimed that the 2nd protestor began picking her tea from 27th January 2009 after chasing her away from her matrimonial home. She added that the protestors cut down her trees and her crops before poisoning her water well. She claimed that she went to court to stop further destructions but the protestors disobeyed the orders.

13. She denied the suggestions put to her that she has since been re-married claiming that one Charles Kibeu is her business partner and that she now lives in a rental house in Chuka Town.

14. She conceded under cross-examination that the protestors obtained titles in 2008 when the registered owner, her father in law, was alive. She however claimed that her father in law was not a literate man and may have been misled. She contends that her father in law did not change his mind about giving the deceased herein the two parcels now in contention in this cause.

15. In her written submissions through M'Njau and Mageto Advocates, the Petitioner contends the deceased built a matrimonial home in parcel No.1916 and planted tea in parcel 1921 after his father Alphaxard M'Ithara Nkari gifted him the two parcels just like he had gifted the other sons other parcels of land. She contends that her late father in law undertook all the legal steps to have the 2 parcels transferred to the deceased herein. She avers that at the time the deceased was bedridden and was unable to complete the process of registration despite having all the requisite documents (consent from Land Control Board and transfer form) has further insisted she was the only widow of the deceased and has never remarried. She avers that the deceased was buried at the matrimonial home and none of the protestors raised any issue.

16. The Petitioner submits that the late Alphaxad M'Ithara Nkari gave the two parcels Nos. 1916 and 1921 to the deceased as a gift *inter vivos* and has cited **Section 42** and Halsbury's Law of England to buttress her arguments that the gifts were valid because the deceased gave out the parcels freely and was senile at the time. She further cites the decision in **Peter Nderitu Kibui –vs- Ann Muguru Kibui** (No citation) which she claims outlined three conditions for a gift to be valid as follows:-

- i) An unequivocal intention to make to make a gift. Intent to transfer must be immediate, unequivocal, and irrevocable

ii) Acceptance of the gift by donee

iii) Donor has to divest himself/herself of the property and no evidence of change of mind.

In her view, the petitioner submits that her late father in law met all the above conditions and faults the protestors' suggestion that the deceased failed to pay their late father a token of Kshs.450,000/-.

18. The Petitioner has further submitted that her evidence has not been controverted by the protestors insisting that her rights are equitable because she was in possession of the two parcels. She has cited a decision in Henry Muthee Kathurima –vs- Commissioner of Lands and Another [2018] eKLR to support her contention.

19. Petitioner has further contended that the acquisition and registration of the objects/protestors herein was fraudulent and an infringement to the right of the deceased to own property under **Article 40 of Constitution of Kenya 2010**. She has insisted that it is trite law that where title to a parcel of land is obtained through fraud or misrepresentation such title is invalid and cannot form a basis of any transaction. She has cited a Mombasa HCC Civil Case No.121 of 2009 Bernard Otieno Okoth (suing as the administrator of the estate of Elizabeth Auma Agunda) –vs- Riyaz Abdulkarim Pasta and Another to buttress her contention. She submits that the protestors have not tendered lawful documents to support the transfer of the two parcels to them.

20. On jurisdiction of this court to determine the dispute of the 2 parcels herein, the petition contends that **Section 72 of the Law of Succession Act** and **Rule 73 of P&A Rules** give this court inherent powers to handle the matter and that **Article 159** of the Constitution provides that substantial justice should be an overriding factor that should see the cancellation of the Registration of the 2 parcels and ownership reverted back to the estate of the deceased herein for purposes of distribution of the same to the beneficiaries. She also contends that she has established that the deceased was the owner of parcels Karingani/Mugirirwa/1916 and 1921 and that the parcels forms part of the estate in this cause.

The Protestors case

21. The 1st Protestor Elias Micheni Mugo through his affidavit of protest sworn on 29th October 2018 has averred that he is one of the brothers of the deceased herein. He has deponed that he has proprietary interests over parcels Karingani/Mugirirwa/1916 and 1921 and that he is registered with his brother Benard Murithi Mugo, the 2nd protestor herein who has sworn a similar affidavit sworn on 5th October 2018 exhibiting 2 title deeds in respect of the said parcels and copies of Green Cards showing that ownership moved from Alphaxard M'Ithara Nkari to them on 9th April 2008.

21. The protestors contend that the said two parcels of land did not vest in the deceased but was transferred directly from the original proprietor Alphaxard M'Ithara Nkari, their late father. They claim that the parcels were gifted to them by their father with condition that every beneficiary was paid Kshs.150,000/- per acre as a token which consideration was reportedly to be used by their late father to refurbish his house and for his upkeep. It is their case that the deceased herein failed to pay their late father as agreed and that their late father changed his mind. They have pointed out an affidavit sworn by their late father to that effect. That affidavit was sworn on 16th February 2009 before Senior Resident Magistrate Court Chuka Law Courts and it avers clearly that the deceased had changed his mind about transferring the two parcels to the late Munene Mugo Ncacu, the deceased herein and that any purported transfer would be a forgery.

22. The Protestors have further averred that this court sitting as probate court lacks jurisdiction to entertain and determine issues arising from the acquisition and registration of the two parcels in their favour. It is their contention that that the right court to determine matters pertaining ownership of the two parcels is Environment and Land Court.

23. They insist that the two parcels do not form part of the estate and should not be treated as such.

24. In his evidence before court Elias Micheni Mugo (DW1) the 1st protestor conceded that the petitioner was married to his late brother the deceased herein but refuted claims that they grabbed the two parcels of land from her. He told this court that their late father willingly surrendered the titles to them and executed transfer in their favour. He claimed that the 2nd protestor paid Kshs.300,000/- to their late father after the deceased herein failed to pay.

25. The 2nd Protestor (Benard Murithi) testified and reiterated the evidence given by the 1st protestor. He confirmed that he paid Kshs.300,000/- to his late father as a token for the two parcels. He further claimed that the Petitioner was a wife to this late brother but has since re-married though he conceded that he had no evidence to prove that fact. He (DW3) denied the suggestion that they were summoned by the District Land Registrar because of irregularities in the transfer of the two parcel insisting that the transfers were regular and was done with the blessings of their late father who was the original owner when pressed to show Land Control Board Consents, the Protestor conceded that he had none.

26. Jackson Muriithi (DW3) a witness called by the Protestors told this court that he was a neighbour to the parties in this cause. According to him, the Petitioner re-married but could not tell when and whether the alleged union was formal. He told this court that all he knew was that he Petitioner moved away after the demise of her late husband the deceased herein.

27. The Protestors have submitted through Ms Kijaru, Njeru & Co. Advocates that they are registered proprietor of the two parcels and have cited the provisions of **Section 26 Land Registered Act No.3 of 2012** which states that certificate of title issued by the Registrar upon registration shall be taken to be *prima facie* evidence of ownership subject to encumbrances or restrictions endorsed in the certificate and that such ownership can only be challenged on grounds of fraud or illegality.

28. The protestors contend that their late father effected the transfers in his lifetime and that he went to the Land Registrar to answer queries or claims of fraud which in their view held no water.

29. The Protestors further contend that the deceased at the time of his demise did not have titles to the 2 parcels and could not dispose if he willed. They have cited **Section 3 of Law of Succession Act** to buttress their contention that the two parcels cannot form part of the estate.

Analysis and Determination:

30. This court has considered both the Petitioner's and protestors' cases. The main issue in this matter really is whether or not parcels numbers Karingani/Mugirirwa/1916 and 1921 form part of the estate of the deceased and whether or not this court is seized with the jurisdiction to determine disputes over ownership of land.

Whether parcels Karingani/Mugirirwa/1916 and 1921 form part of the estate of the deceased:

31. To decipher the above issue in the context, we need to go back to the Statute (**Law of Succession Act Cap 160**) which provides a clear definition on what as "**estate**" of a deceased entails. **Section 3 (1)** provides that an estate

"means to free property of a deceased person"

"Free property" is defined by the same Section as

"Property which (deceased person) was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death."

Pausing there for a minute, it is abundantly clear from the facts presented that the deceased person had been gifted the two parcels 1916 and 1921 by his late father, Alphaxard Nkari. The applications to the Land Control Board dated 14th October 2004 the consents from Land Control Board, dated 28th October 2004 and duly executed Transfer of land Forms dated 10th December 2004 are sufficient proof of that fact.

32. On the other hand the question posed in the context of the above definition on what constitutes "**free property**" is whether the deceased could freely dispose the two parcels without completing the process of transfer. The answer to that question even without considering the other subsequent intervening factors like deceased's father changing his mind at the 11th hour is in my considered view in the negative. The deceased at the time of his demise could not dispose the two parcels despite having documents in his favour even assuming his father Alphaxard M'Ithara Nkari had not changed his mind and there is no doubt that he subsequently changed his mind for whatever reason. The affidavit sworn by Alphaxard M'Ithara Nkari on 16th February 2009 before Senior Resident Magistrate Chuka, Principal Magistrate Court in my view is sufficient demonstration of that fact.

33. It is also evident that the two parcels are registered in the name of protestors. The Petitioner has alleged that the transfer or acquisition of the two parcels by the protestors was fraudulent and irregular. This brings me into the next crucial question for determination in this cause.

Whether this court has jurisdiction to determine the dispute between the Petitioner and the Protestors.

34. The main bone of contention by the protestors in this cause has to do with the two disputed parcels Karingani/Mugirirwa/1916 and 1921. The Protestors on one hand are claiming proprietary interests or ownership of the 2 parcels while the Petitioner claims that the two parcels were gifts *intervivos* given to the deceased by his now late father Alphaxard M'Ithara Nkari and that the protestors who are brothers to the deceased fraudulently and irregularly registered themselves as owners after the demise of their deceased brother.

35. The Protestors have denied the allegations but more importantly they have questioned the jurisdiction of this court to deal with the claims and counter claims made. It is true that jurisdiction of this court like any other court is a crucial matter because it donates power to the court to entertain and determine the issue (s) in controversy.

36. It is trite that jurisdiction flows either from the Constitution or legislation. The Protestors contend that issues touching on use and occupation of land should be canvassed at the Environment and Land Court pursuant to the provision of **Article 162(2)** of the Constitution which grants that court jurisdiction. **Article 162(2)** of Constitution of Kenya states as follows:-

" (a) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to....."

(b) the environment and the use and occupation of and title to land....."

The Environment and Land Court Act No.19 of 2011 is an act of Parliament passed to give effect to **Article 162(2) (b)** of the Constitution of Kenya to establish courts to hear and determine disputes relating to the environment and the use; occupation and title to land. **Section 13(2)** of the Statute clearly gives jurisdiction to the Environment and Land Court to hear and determine disputes relating to boundary ownership and other issues relating to land.

37. The Petitioner has invoked the inherent power of this court in her submissions and has stated that under **Article 159** this court is empowered to administer substantial justice and has urged this court to look at the substance of her allegations rather than technicality of where it should be canvassed. This court has looked at the jurisdiction this court as a Probate and Administration Court and **Section 2(1)** is clear that the Act (Law of **Succession Act Cap 160**) is applicable to all cases of intestate and testamentary succession of the estate of deceased persons dying after and before the commencement of that Statute. I have already outlined above what constitutes “**an estate**” of a deceased person. The Law of Succession Act is designed to deal with the intestate and testamentary succession and the administration of estates of deceased persons. It was not designed so to speak to deal with ownership disputes relating to land.

36. While it is true that under **Section 47** of the **Law of Succession Act** and **Rule 73** of Probate and Administration Rules, this court is donated inherent power to make such pronouncements or such orders as are just and expedient, the present **Constitution of Kenya 2010** limits such powers under **Article 165(4) (b)** from extending to issues falling under **Article 162(2)**.

38. The Petitioner has raised pertinent matters relating to how the Protesters acquired the two parcels in dispute herein which *inter alia* include the fact that the protestors have not exhibited consents from Land Control Board. However the proper court seized with requisite jurisdiction to interrogate and determine those issues is the Environment and Land Court as demonstrated above. There is nothing in my view that prevent an administrator of an estate for pursuing a claim in the Environment and Land Court and if successful he/she can come back to the probate court for distribution of the same. The Environment and Land Court is well placed and infact seized with the jurisdiction to determine issues related to whether acquisition of the properties in dispute were fraudulent, illegal or irregular. This court as probate court concerns itself with only assets forming the estate as defined by Statute (Law of Succession Act Cap 160). This court therefore lacks jurisdiction to determine who the true legal owner(s) of the two parcels (1916 and 1921) is or are and to that extent I am unable to treat the said two parcels as part of the estate at this stage.

39. This court considered the evidence tendered and I am satisfied that the free or net estate of the deceased in this cause comprise the following:-

- i) Karingani/Weru/275
- ii) Death Gratuity and Savings from Mwalimu Sacco Society.

The beneficiaries are:-

- i) Fridah Kanja Muthaura
- ii) Yvone Kendi Munene &
- iii) Betty Kawira Munene

In the end this court hereby confirms the grant made on 13th July 2017 in the following terms:-

a) Karingani/Weru/275

Frinda Kanja Muthaura for her benefit and in trust for :

- (i) Yvone Kendi Munene
- (ii) Betty Kawira Munene

(b) Death Gratuity and Savings from Mwalimu Sacco Society- To be given to Frindah Kanja Muthaura in trust for Yvone Kendi Munene and Betty Kawira Munene.

I will not make any order as to costs so each party to met own costs.

Dated, signed and delivered at Chuka this 12th day of February 2020.

R.K. LIMO

JUDGE

12/2/2020

Judgment dated signed and delivered in the open court in presence of Mageto for Petitioner and Muriuki holding brief for Kijaru for protestors.

R.K. LIMO

JUDGE