



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 614 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE KAMAU KUNG'U (DECEASED)

WANJIRU KAMAU.....PETITIONER

VERSUS

JULIA WANGARI KAMAU..... PROTESTOR

AND

CHARLES KUNGU KAMAU & 11 OTHERS.....BENEFICIARIES

R U L I N G

1. Before me is the summons dated 22nd July 2019 and filed on even date. It is brought under two certificates of urgency of Joseph Karanja Mbugua Advocate, one of the same date and the other of 3rd December 2019. It is filed under the provisions of **Section 47, 83(e) and 83 (g) of the Law of Succession Act and Rules 73, 25 (5) of the Probate and Administration Rules**. It seeks orders;

(a) *Spent*

(b) *Spent*

(c) *THAT this Honourable Court do order the Protestor to deposit the following original Title Documents to this Court for safe keeping pending the hearing and determination of this cause:-*

(a) *NJORO NGATA BLOCK 1/2492*

(b) *NJORO NGATA BLOCK 7/434 (Chumo)*

(c) *NAKURU MUNICIPALITY BLOCK 2/351*

(d) *NAKURU MUNICIPALITY BLOCK 2/487*

(e) *NAKURU MUNICIPALITY 2/519*

(d) *THAT a court order be issued directed upon the DCIO (Nakuru Divisional Criminal Investigation Office) to investigate and file his/her report on how land parcel No. NJORO NGATA BLOCK 1/2493 was sold and transferred to third parties when there were and still there exists valid court orders of injunction granted by this Honourable Court on 5th April 2012 by her Ladyship Hon. Justice H. Omondi, and which orders were duly registered with the ministry of lands Nakuru.*

(e) *THAT pending the hearing and conclusion of this cause, this Honourable Court be pleased to issue an order of injunction restraining the Protestor by herself, her agents, her servants and her workers from selling, disposing, alienating, charging, leasing, offering as security or in any way intermeddling with the following parcels of land:-*

(a) *NJORO NGATA BLOCK 1/2492*

- (b) NJORO NGATA BLOCK 7/434 (Chumo)
- (c) NAKURU MUNICIPALITY BLOCK 2/351
- (d) NAKURU MUNICIPALITY BLOCK 2/487
- (e) NAKURU MUNICIPALITY 2/519
- (f) THAT the costs of this Summons be borne by the protestor.

2. The grounds for the summons are set out on its face thus;

1. THAT under section 45 of the Law of Succession Act, no person should handle, take possession, dispose off, or otherwise intermeddle with the free property of a deceased person unless authorized by law or by Grant of representation.
2. THAT in GITAU & TWO OTHERS – VS – WANDAI & 5 OTHERS [1989] KLR 231, it was held that the act of one of the parties to the succession cause of entering into a Sale Agreement before a Grant of representation was issued and or confirmed amounted to intermeddling with the affairs of the deceased's estate.
3. THAT in KATUMO & ANOTHER [2003] 2 EA 508, the court stated that altering the state or condition of an asset belonging to, or forming part of the deceased's estate amounts to intermeddling with the asset of the deceased person.
4. THAT in the Matter of the estate of MOHAMMED SALEH SAID SHERMAN also known as MOHAMED SWALEH SHERMAN DECEASED, MOMBASA HIGH COURT CIVIL CASE NO. 145 OF 1998, the court held that the Law of Succession Act provides for protective powers to be exercised against wrongful disposal of intermeddling with any free property of a deceased person except as provided for under the act. In the opinion of the court, the spirit of the Law of Succession Act gives the court wide jurisdiction in dealing with testamentary and administrative issues. This is through section 47 which gives the court jurisdiction to entertain any application and determine any dispute under the Act and to issue such decrees and order as it may deem expedient.
5. A beneficiary is entitled to full and accurate information on the accounts and state of the Estate, how the estate's assets have been dealt with and how the estates funds have been invested.
6. THAT the protestor in cahoots with one beneficiary (Gladys Wacera Kamau and her husband Reuben Muchai) have intermeddled, and run down the deceased's estate to detriment of the other beneficiaries.

It is also supported by the affidavit of Charles Kung'u Kamau sworn on 22nd July 2019 on his behalf and behalf of eleven (11) of his siblings whose consent is annexed.

3. The gist of his affidavit is that after the death of their father Kamau Githua Kung'u on 30th July 2006 their mother, Julia Wangari Kamau (the protestor in this cause) refused to file for letters of administration of the estate. Their step mother one Wanjiru Kamau, now the administrator, was then directed by the court to file the cause which she did. That she was issued with grant on 7th May 2007. That even then their mother, Julia, continued to intermeddle with the estate prompting an injunction on 5th April 2012 from this court to preserve the estate.

4. The applicant accused the respondent protestor of many things, including;

- i) Causing LR Njoro/Ngata Block 1/2493 to be subdivided and sold to third parties without orders of the court. That though this parcel of land was given to her as a gift by the deceased it formed part of the estate under Section 42 Law of Succession Act.
- ii) Using the proceeds of the sale in (i) to purchase Njoro/Ngata Block 7/434 (Chumo) in cahoots with another beneficiary, their sister Gladys Wacera Kamau. That this parcel of land is part of deceased's estate. That Gladys proceeded to charge this property to a third party - LETSHEGO K. Limited on 8th July 2014 at Ksh. 1.4 million.
- iii) That Njoro/Ngata Block 1/2492 though gifted to their mother forms part of the estate, but she proceeded together with Gladys and her husband named as Reuben Muchai to offer the said parcel to LETSHEGO Security for loan of Ksh. 3,000,000.00. According to the applicant the protestor was arm twisted by Gladys and her husband to do so.
- iv) That this is evidence that their father's properties are not safe in the hands of the protestor as she appears not to be in control and that is the reason why the injunction sought needs to be granted.
- v) That all the beneficiaries/applicants are truly suffering because only the protestor and Gladys Wacera Kamau and her husband are benefiting from all rental incomes from the deceased's properties: they are also beneficiaries of other deals affecting the deceased's properties without recourse to the other parties entitled to the estate.

5. Annexed to the affidavit are the documents relied on;-

ü Certificate of death of deceased

ü Copy of order of 8th December 2006

ü Grant of letters of administration

ü Court order of 5th April 2012

ü Copies of receipts from lands

6. The protestor filed a replying affidavit sworn on 2nd August 2019 on 5th August 2019 through the firm of Gordon Ogola, Kipkoech & Company Advocates. She expressed surprise at the application deponing that she had no problem with her children, the applicants. In response to the accusations in the affidavit sworn by the applicant she deponed;

(i) That these issues had been raised before and dealt with by this court and the record would be on her witness. She made reference specific pleadings by herself.

a. *Replying affidavit filed on 23rd April 2012 in response to the petitioner's application dated 3rd April, 2012,*

b. *Replying affidavit sworn on 18th October 2013 in response to Chamber Summons dated 10th October 2013,*

c. *Supplementary affidavit filed on 24th October 2013,*

d. *Replying affidavit sworn on 28th April, 2016,*

e. *Affidavit of protest filed on 15th February 2017.*

(ii) That Njoro Ngata Block 1/2492 and 2493 were gifted to her long before deceased died and were registered in her name on 27th September 1999 and did not form part of the estate but could be taken into account during distribution of the rest of the estate as provided for under under Section 42 Law of Succession Act.

(iii) That Njoro Ngata Block 7/434 Chumo was registered in the name of Gladys Wacera Kamau.

(iv) That the record would show that Nakuru Municipality Block 2/519 was bequeathed to her through the partial confirmation of grant issued by court on 23rd July 2018.

(v) That Nakuru Municipality Block 2/351 was registered in the joint names of deceased, herself, Stephen Kanyi Kamau and Mary Nyambura Kamau and now belonged to the surviving registered proprietors.

(vi) That Nakuru Municipality Block 2/487 was registered in the name of deceased. She denied intermeddling and since she was not the administrator she had no powers to sell the property.

(vii) That she had never been served with the alleged injunctive orders of 5th April 2012, and that as a widow and beneficiary of the estate, she could not be enjoined from her property.

(viii) That if the applicants had any claims over the properties in her name they were free to pursue those claims at the ELC but the same could not be entertained by this court.

(ix) That in any event the deceased had distributed his estate through his own handwritten wishes which she annexed as JWK1.

7. In oral arguments Mr. Karanja Mbugua reiterated the grounds for the application and submitted that the protestor was generally intermeddling with the estate. That the applicants were her children and they wanted an injunction to stop her. That for instance she had collected rent from the estate for the last fourteen (14) years and had never accounted. That the children felt she was not being fair to them, that the property she claimed as hers was subject to **Section 42 of the Laws of Succession Act**.

8. The application was opposed by Mr. Nandwa for the protestor. He submitted that no evidence had been tendered to support the allegations of intermeddling. That there was no contest that Njoro/Ngata/Block 1/2493 had been gifted to protestor *inter vivos*, and even under **Section 42 of the Law of Succession Act**, it did not form part of the estate. Similarly, Njoro/Ngata/Block 1/2492 was in the protestor's name having been registered in 1999 and for the claims on those this court lacks jurisdiction. Regarding Nakuru Municipality Block 2/519, that the grant under which it was bequeathed to her had not been revoked, and even the allegation of rent collection had not been proved.

9. That this application was *res judicata* seeking similar orders as one that was brought on 4th April 2012. That if the protestor had meddled in spite of alleged orders of injunction the way for the applicants was to cite her for contempt vide **Section 7 of the Civil Procedure Act**. That with regard to her property she was protected by **Sections 24, 25, 26 of the Land Registration Act**, and as for Nakuru Municipality Block 2/351, the property now belonged to the surviving registered proprietors.

10. In his rejoinder Mr. K. Mbugua argued that ownership by the survivors of Nakuru Municipality Block 2/351 depended on the type of registration, whether joint owners or owners in common because if they were joint owners then it was owned in equal share; that this issue was yet to be determined. That *res judicata* could not apply as none of the cited applications had been decided on merit by any court and the application referred to had been abandoned. That the protestor had life interest over the estate.

Analysis and Determination

11. The issue to be determined here is whether the application and the prayer sought have any merit. Have the applicants established that the named properties are indeed part of the estate? Is there evidence of intermeddling? Is there evidence of fraudulent dealings? Is this matter *res judicata*?

12. The issue of *res judicata* was raised and denied. The record will show that on 5th December 2012 this court did issue TEMPORARY injunction pending the hearing inter-partes of the application that had been filed on 4th December 2012. That inter-partes hearing appears not to have happened and no permanent injunction was ever obtained. The temporary orders issued and being relied on by the applicants lapsed after fourteen (14) days. No evidence was tendered to show that in those fourteen (14) days the protestor had done specific things to warrant the allegations of disobedience of court orders. There is no evidence of extension of that order, except the concession in submission that the application was abandoned to pave way from the hearing of this case. The issue of *res judicata* does not arise but, having an application pending seeking similar orders and then filing another is an abuse of the court process. Except for the submission that the application was abandoned I did not see any such orders in the file.

13. Is there evidence of intermeddling? The allegations made against the protestor as serious. It is not lost to this court that the applicant are children of the protestor and the deceased. They appear to have this fear that their sister one Gladys and her husband one Reuben are the ones pulling all the strings causing the protestor to do the things she is accused of.

14. Now to the facts, the applicants have not supplied the court with evidence.

i) That the protestor is generally intermeddling, as defined by **Section 45 of the Law of Succession Act**. In any event, it is a criminal offence punishable by a fine or imprisonment. No evidence that any report has been made to the police to that effect.

ii) To the specifics I must agree with counsel for the protestor that these remain to be allegations. There is nothing to support any of them, rent collection, subdivision and sale of property, purchase of other property with proceeds from sale of parts of the estate, nothing at all. The protestor has averred and it is demonstrated by certificates of search that the 2 properties Njoro/Ngata Block 1/2492 and 2493 were registered in her name in 1999. Do these form part of the estate as averred? **Section 42 of the Law of Succession Act**, clearly states: -

42. Previous benefits to be brought into account Where— (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

It states here that the property will be taken into account to determine the share of the one who has already been gifted. This will happen when the net estate intestate is being distributed.

15. Nakuru Municipality Block 2/519 was bequeathed to her, through partial distribution and she was bequeathed the whole share. There is nowhere in the grant that states it was a life interest. It simply states, whole share. The applicants could have protested/objected to that bequest but it was done at the application for the administrator and proceeded without any objection. How then can they accuse her of intermeddling?

16. There is no evidence that 7/434 was brought with proceeds from the estate, as none has been tendered of the alleged subdivision and sale. In any event neither Gladys nor Reuben nor Letshego Kenya Limited is a party to this application to enable them to respond. The protestor has responded aptly, that the said property is in the name of her daughter and she had no control over it.

17. There is only one property in the name of the deceased Nakuru Municipality Block 2/487. The protestor has denied any intermeddling and more has been demonstrated. As for the property registered in four (4) names, Nakuru Municipality Block 2/351, the title deed does not state whether it is joint or in common, but more importantly no intermeddling has been demonstrated.

18. No evidence of rent collection by the protestor has been provided.

19. As it is no prima facie evidence of intermeddling has been demonstrated.

20. As to the issue of an order to DCIO, no basis has been laid for the same. The protestor had demonstrated that the property, as at the time of death of deceased in 2006, had been registered in her name for seven (7) years. If the applicants have issue as to how the same came to be in her name, that is up to them to report their complaint to the appropriate forum for appropriate action.

With regard to the legal provisions relied on, Rule 73 is about the inherent power of the court to ensure justice is done and protect its processes from abuse; Section 47 of the Law of Succession is about the jurisdiction of this court. Section 83 is about the duties of personal representative. The sections cited state:

(e) Within 6 months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of

the deceased and a full account of all dealings therewith up to the date of the account...

(g) Within 6 months from the date of the confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court the full and accurate account of the completed administration.

It goes without saying that the protestor is NOT the *personal representative* of the Estate of the deceased herein. These provisions of the law do not apply to her. The applicants should be seeking these answers from the administrator of the estate, who is the person empowered to do those things and is obligated by the law to provide the account and complete the administration of the estate.

21. Likewise **Rule 25 (5)** of the **Probate and Administration Rules** states,

“the court after the making of a grant may at any time and from time to time require the personal representative to render a true account of the estate of the deceased and of the administration of it.”

This rule speaks for itself, the mandate and obligation is the for personal representative, and in this case it is not the protestor. The rules define a personal representative as;

“A person to whom a grant of representation has been made and is still subsisting.”

Obviously the protestor is NOT.

22. Hence again the court cannot call upon her to carry out tasks that the law does not require of her. The applicants need to appreciate one thing, that the answers they seek lie with the administrator who is obligated by law to account for the estate.

23. On the issue of life interest **Section 35, 36 and 37 Law of Succession Act** speak to this, that the surviving spouse is entitled to among other things, *“out of the net intestate estate, a life interest of the whole remainder”*. Herein the estate has not been distributed. *“net intestate estate”* is clearly defined, it is what remains after all debts, liabilities and expenses have been paid. This estate has not even been administered, so the net intestate estate is not known yet.

24. In conclusion, all I am saying is that this application has not established any legal or factual basis from the prayers sought. I therefore find that it lacks merit. It is dismissed with costs to the protestor.

Delivered, Dated and Signed at Nakuru this 7th day of May, 2020.

Mumbua T. Matheka

Judge

In the presence of:- VIA ZOOM

Edna Court Assistant

Gordon Ogola, Kipkoech & Company Advocates N/A

M/s Karanja-Mbugua & Company Advocates (K. Mbugua Present)