



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 217 OF 2003

IN THE MATTER OF THE ESTATE OF DAVID WILLIAM KIGUMI KIMEMIA (DECEASED)

BENSON KIMEMIA.....APPLICANT/OBJECTOR

VERSUS

SALOME WANJIRU KIGUMI.....1ST RESPONDENT/PETITIONER

JORAM KIMEMIA.....2ND RESPONDENT/PETITIONER

AND

ABRAHAM KOPKOSGEI CHELANGA....PROPOSED INTERESTED PARTY

RULING

1. The notice of motion dated 2nd May 2019 is made pursuant to **section 47 of the Law of Succession Act and Article 50 of the Constitution** where the applicant (**ABRAHAM KOPKOSGEI CHELANGA**) is seeking the following orders:

- a) THAT ABRAHAM KIPKOSGEI CHELANGA be granted leave to join the proceedings as an interested party.
- b) THAT the Applicant/Objector and Respondents/Petitioner serve upon the interested party all prior court documents including the application dated the 27th February 2019 and all the responses thereto.
- c) THAT cost of this application be provided for.

2. The application is premised on the grounds that he is an innocent purchaser for value of property number **Eldoret Municipality block 15(West farmers)/1020 measuring 0.1000 Ha and Pioneer Ngeria Block 19(EATEC)/1114 measuring 1 acre.**

3. He explains that the said properties formed part of the deceased's properties which he had purchased from the 2nd respondent/petitioner and had been allocated to the 2nd respondent/petitioner as the beneficiary by virtue of the grant of letters of administration which the objector/applicant seeks to revoke vide an application dated 27.2.2019. He wished to be enjoined so that he can protect the interest in the properties. In his supporting affidavit he deposed the same grounds.

4. The Objector (**BENSON KIMEMIA**) filed his replying affidavit in opposition of the said application on the 14th Day of June 2019. The 2nd Respondent filed his Replying affidavit in support of the said application on the 19th Day of July 2019. The 1st Respondent has never filed a reply to the said application. The objector by a replying affidavit dated 14.6.2019 describes himself as a son to the late **David William Kigumi Kimemia** and he had five siblings **Sylvia Wambui, Edith Muthoni, Jacinta Wanjiru, Joram Kimemia** and himself. That the proposed interested party had relied on a disputed certificate of grant to claim his interest, yet he was not an innocent purchaser for value and the present proceedings challenged the legality of the grant and the confirmation of the same. It is contended that the interested party had not acquired the interest from the deceased and therefore he could not suffer any prejudice. That in case he suffered any prejudice, then the sale agreements had provided the way forward. The court is urged to dismiss the application to serve justice to the beneficiaries to the estate of the deceased.

5. The 2nd petitioner filed his affidavit in support of the intended interested party. He deposed that the petition for letters for grant was filed on 8.10.2003 and the same was granted to his mother **Salome Wanjiru Kigumi** and himself, his siblings having given their consent to making of grant of administration intestate to persons of equal or lesser priority through **form 38**, the same was gazetted on 19.3.2004 and since there was no objection grant was issued on 23.6.2005. He contends that **Sylvia Wamboi, Edith Muthoni, Jacinta Wanjiru and Benson Kimemia** swore a joint affidavit dated 4.8.2005 agreeing to them being granted letters of administration. All the beneficiaries signed

the consent on mode of distribution dated 24.11.2005. The court confirmed the grant and a certificate was issued, though the same was rectified on 14.5.2007.

6. The estate of the deceased was thus distributed to all the beneficiaries, he sold his part of the property known as **Eldoret Municipality block 15(West Farmers) 1020 measuring 0.100 Ha and Pioneer/Ngeria(EATEC) 1114** to the applicant herein, as the property had already been distributed and there was no pending case in court. He further deposed that any decision that the court made would affect the proposed interested party and thus urged the court to allow the instant application.

7. The Proposed interested party in his written submissions has argued that the objector sought to revoke the grant dated 14.5.2007, yet the proposed he had bought the said properties from the 2nd respondent on 8.1.2019 and 18.1.2010, by virtue of the latter being a beneficiary to the estate of the deceased and the grant that had been issued by the court. That in the event of the said grant being annulled or revoked it would affect his interest in the parcels of land, and he stands to suffer irreparable damage. The court was referred to **Betty Muindi Wilson & 4 Ors v. Mathew Ndunda Wilson & 18 ors (2017) eKLR**.

8. The 2nd respondent in his submissions pointed out that the estate of the deceased was distributed to the beneficiaries who have developed, improved, utilized and some have disposed off their entitlement. He had sold his entitlement to the proposed party, thus any decision will affect him and in support of his position, he cites **Trusted Society of Human Rights Alliance v. Mumo Matemu[2014]eKLR and Communications Commission of Kenya & 4 ors v. Royal Media Services Ltd & ors** where the court pronounced itself on who is an interested party. The court was urged to allow the application. See also **Cyprian Andama v. Director of Public Prosecution & anor [2018] eKLR**.

9. The objector submits that the proposed interested party's claim that he had acquired a purchaser's interest in the property of the estate through a sale agreement entered into by one of the administrators **Joram Kimemia** was done without consent of the other family members, and did not make him a creditor to the estate, thus he cannot be protected by the law as envisioned under **section 93 of the Succession Act**. The court is urged to dismiss the application. The holding in **Johnson Muinde Ngunza & anor v. Michael Gitau Kiarie & 12ors [2017] eKLR** was cited in support of this argument.

10. Further, that not being a creditor to the estate and there being no guarantee that the 2nd respondent would remain the absolute owner of the property since there were objection proceedings already filed, then the application has no leg upon which to stand.

11. In addition, that the proposed interested party had not met the threshold required as a bonafide purchaser for value as set in **Ibrahim v. Hassan & Charles Kimenyi Macharia (2019) eKLR** where the court laid out the test for a bona fide purchaser, that a party had to prove the following:

“...he holds certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, the vendors had apparent valid title, he purchased without notice of any fraud and that he was not party to any fraud”.

The /objector contends that the interested party was aware the property formed part of the estate of the deceased and that is probably why they included the clause on consent by family members, thus implying parties were aware of unsettled issues in the estate. The registration of the property in the 2nd respondent's name was the reason of his application to revoke the granted which had been issued by the court, and that in **Ibrahim v. Hassan & Charles Kimenyi Macharia (supra)** and **Monica Adhiambo v. Maurice Odero Koko (2016) eKLR**, the courts had opined that fraudulently acquired titles to property of a deceased estate were not immune from revocation.

Objectors/petitioners submission

12. In addition, the objector maintains that the application is a delaying tactic intended to divert the succession proceedings to the detriment of the beneficiaries of the deceased's estate, as there is a suit in **Eldoret E&L case no. 9 of 2019** where the 2nd respondent has sued the 1st respondent and a third party for allegedly being the registered owner and in occupation of property known as **Pioneer/ Ngeria Block 1(EATEC)/1114 and Eldoret Municipality block 15(West Farmers)/1020** was still undeveloped.

13. The court is urged by the 2nd respondent to refer to **Trusted Society of Human Rights Alliance v. Mumo Matemu(supra)** where the Supreme Court held that:

“while an interested party has a ‘stake/interest’ directly in the case, the court went to further hold that, “Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause”

14. The above decision is clear on who an interested party is. The intended party alleges that he bought the said properties from the 2nd respondent, there are annexures of two sale agreements of two parcels of land. He averred that he purchased the same and thus he is a bona fide purchaser for value. The objector strongly opposes the same claiming that the intended party only wants to delay this cause and to frustrate the whole litigation. Further that the grant he is relying on is the same he seeks to be revoked. The issues raised by the objector are very critical that the party has to be allowed into the proceedings then the whole issue on how he acquired can be ventilated.

15. Further in **Skov Estate Limited & 5 Others V Agricultural Development Corporation & another [2015] eKLR** Munyao (J) stated the following in dismissing an application for the applicants to be enjoined to the suit because they purchased the suit property from the plaintiffs' person;

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

16. The application is seeking to enjoin **ABRAHAM KIPKOSGEI CHELANGA** in this suit, whose interaction and engagement with a co-administrator/beneficiary of the estate has been confirmed by the 2nd petitioner. If he is denied a chance to participate in this cause of action then issues shall remain unresolved since, the 2nd respondent was a co-administrator with the 1st respondent and it was the 1st respondent’s submission that the consent of the other beneficiaries was not given.

17. The issues as to whether the proposed interested party is not protected by **section 93 of the Succession Act** and whether the actions of the 2nd respondent was illegal at the time of the sale of the properties the certificate to the grant had been issued and the properties had been distributed directly affects the proposed interested party who cannot have his interest condemned unheard. The fact that there is another related matter before the Environment and Land Court only confirms that the applicant is a party with deep interest in an asset which had been distributed from the estate. I agree that it is in the interest of justice, and no prejudice shall be occasioned to the objector or the 1st respondent if the application is allowed. I hold and find that the application is merited and is allowed with costs to the proposed interested party.

E-Delivered and dated this 4th day of May 2020 at Eldoret

H.A. OMONDI

JUDGE