



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 67 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE MUGIRA NGARUNI (DECEASED)

NKANATA MUGIRA.....PETITIONER/APPLICANT

VERSUS

MARY KAJUGU.....RESPONDENT

J U D G E M E N T

1. This cause relates to the estate of the late **MUGIRA NGARUNI** (deceased herein) who died on 26th December 1998 intestate leaving behind the Petitioner and **PETER MURUNGI MUGIIRA** as the surviving dependants.
2. **NKANATA MUGIRA**, the Petitioner herein was appointed the administrator of the estate of the deceased through a grant of letters of administration issued in *Meru High Court vide Succ. Cause No.624/12* on 9th January 2014. That cause was later transferred to this court and registered as this current cause.
3. The Petitioner moved this court vide Summons for Confirmation of Grant dated 12th June 2019 asking for confirmation of grant which he inadvertently stated as having been issued on 7th March 2016. The grant as per the court record was made on 9th January 2014 and issued on 9th January 2014.
4. The Petitioner proposed that the estate comprising that property known as Mwimbi/Central Magutuni/309 be vested to him. That proposal elicited a protest from Mary Kajugu Marete who filed an affidavit of protest sworn on 25th June 2019 claiming purchaser's interest over the entire estate insisting that her late husband Daniel Marete Rachi purchased the parcel on 16th December 1976, and that she together with late husband took possession of the said parcel after purchasing the same from the deceased.

The Petitioner's case:

5. The Petitioner (PW1) testified and told this court that the deceased had only 2 children, himself and one Peter Murungi Mugiira. He further testified that his brother had been given a parcel in Tunyai and that they had agreed that he takes up the estate herein as his share. He added that the deceased had no relationship with the Protestor and denied that his late father (deceased herein) had sold parcel No. L.R Mwimbi/Central Magutuni/309 and stated that he was unaware of any sale agreement. He also denied suggestions that the protestor was in occupation of the estate.
6. In his written submissions filed on 4th June 2020, the Petitioner submits that the deceased left behind only two dependants himself and Peter Murungi Mugiira and that the deceased died intestate leaving behind two parcels of land namely Mwimbi/Central Magutuni/309 and 847.
7. The Petitioner contends that when he was waiting for confirmation of grant vide *Meru High Court Succ. Cause No. 624 of 2012*, he realized that the parcel 309 had changed hands and that the protestor herein Mary Kajugu had got herself registered as the owner vide *Chuka Chief Magistrate's Court Succ. Cause No. 1 of 2000*. He submits that the grant was later revoked upon his application and has contended that the burden of proof laid upon the protestor to prove that she had *locus standi* to make her claim in this cause.
8. The Petitioner has also challenged the protestor's claim stating that this court lacks jurisdiction to entertain it.
9. On *locus standi*, the Petitioner contends that the Protestor did not obtain letters of administration to represent her late husband to lodge a protest in this cause and that prior to substitution she had not obtained letters of administration to claim on behalf of her late husband. He relies on the case of *Rajesh Pranjivan Chudasama -vs- Sailesh Prankisan Chadusama [2014]* and *Milicent Mbatah Mulavu & Another - vs- Annah Ndunge Mulavu & 3 others [2018] eKLR*.

10. The Petitioner has secondly challenged the Protestor's claim on the estate on grounds of jurisdiction stating that this claim should be launched at ELC Court. He has relied on the case of Nelson Karugumi -vs- Josephine Wakeru Wamboka [2015] eKLR where the court observed that a Succession Cause is not the right forum for settling land disputes involving 3rd parties who are not the defendants. It further noted that it was of the view that it should not determine the validity or otherwise of the agreements entered into between the Protestors and the deceased in so far as the land transaction is concerned but that the same should be canvassed before a court with the requisite jurisdiction. He also relies on the case of Re Estate of M'Muriani M'Mugwika [2019] where the court also held that it had no jurisdiction on the issues relating to ownership of land. The Petitioner urges this court to find that the ELC Court is the proper forum to determine whether the late Daniel Marete Rachi purchased the estate herein and whether the sale agreement is valid.

11. The Petitioner further asserts that the sale agreement dated 16th December 1976 between the late Daniel Marete Rachi and the deceased herein is not enforceable because in his view **Section 4 of Limitation of Actions** provide that actions founded on contract cannot be brought after 6 years while an action to recover land cannot be brought after 12 years. According to the Petitioner, the Protestor's claim on the estate is time barred. He faults the protestor for not enforcing the contract from 1976 until 1988 when the deceased died stating that the protestor took 22 years from the time of the contract to the time the deceased died. The Petitioner points out that the protestor lives in an adjacent parcel next to the estate and had no reason to delay his action because he lived next to the deceased and could have easily traced him. He relies on the case of Joseph Mungai Wanene -vs- HFCK [2017] eKLR in his contention that **Limitation of Actions Act** protects defendants against unreasonable delay in bringing actions against them.

12. The Petitioner submits that the evidence of the Area Chief cannot be taken seriously since the Chief stated that he came to know about the dispute in 2012.

13. The Petitioner further contends that there was no consent from Land Control Board and that as per **Sections 6 and 8 of Land Control Act**, the transaction was null and void. He relies on the case of David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others [2014]eKLR where the Court of Appeal held that all transactions involving agricultural land are void for all purposes unless the Area Land Control Board has sanctioned them and that doctrines of equity could not apply against express provisions of a statute. The applicant contends that the Protestor's occupation also offends **Section 22 of Land Control Act**.

The Protestor's case:

14. Mary Kajugu Marete has filed an affidavit of protest sworn on 25th June 2020 to the Summons for Confirmation of Grant herein. The Protestor depones that her late husband Daniel Marete Rachi, was initially a party in this cause as a protestor that upon his demise she came in to substitute him and that she is the administratrix of his estate. She has however failed to annex a grant to that effect but I will come back to that issue shortly.

15. The Protestor claims that her late husband through a sale agreement dated 16th December 1976 purchased the whole of that parcel known as L.R. Mwimbi/Central Matuguni/309 from the deceased herein and has exhibited the sale agreement an acknowledgment of a receipt of legal fees by Kirugara Advocate who drew up the agreement.

16. The Protestor further depones that upon purchase of the said parcel, the deceased herein relocated to Meru Central before effecting the transfer and later passed on before effecting the formal transfer. She claims that her interest as a purchaser is well known event to the Area Chief and that upon purchase they took possession and planted trees and have been utilizing it.

17. According to the Protestor, her late husband was an innocent purchaser for value.

18. Benard Mutembei, the Area Chief Iruma Location was summoned by this court to come and shade light on the occupation of the parcel indispute. He told this court that he came to learn about the dispute in 2012 and that he knew that the deceased in this cause had sold the land parcel No. Mwimbi/Central Magutuni/309 to the late Marete M'Arachi the husband of the Protestor herein. According to the Area Chief the buyer did not pay full consideration to the deceased before he died. He testified that the disputed parcel is adjacent to the land belonging to the late Marete and that no one is living on it but that both parties in this cause have planted trees and crops on it.

19. In her written submissions through M/s Mbogo and Muriuki Advocates, the Protestor has submitted that given the evidence she tendered at the trial court and corroborated by the Area Chief, then the conclusion that her late husband bought parcel No.309 from the deceased herein is irresistible.

20. She further submits that she joined this proceedings upon substituting her late husband Daniel Marete Rachi who died during the pendency of this cause. She urges this court to find that she had proved her entitlement to the entire estate herein.

Analysis and Determination:

20. The Protestor's claim is this cause on the estate is hinged on her late husband's purchase which has been established through a written agreement witnessed by C.M Kirugara Advocates on the 16th December 1976. The Petitioner has faulted that agreement contending that it is not enforceable in law because it is time barred and that the transaction is bad in law for want of consent from Land Control Board.

21. There is no dispute that the deceased in this cause left behind two dependants surviving him who are in law entitled to a share in the estate but as observed above the Protestor claims she is entitled to the entire estate because her late husband bought it in 1976.

22. The issues for determination cropping are as follows: -

- a) Whether the agreement entered into between the deceased herein and the Protestor's husband is enforceable in law.

- b) Whether the transaction between the deceased and the Protestor's husband is void and anullity for want of consent from Land Control Board.
- c) Whether this court has jurisdiction to deal with the Protestor's claim.
- d) Whether the Protestor has *locus standi* to file the protest herein.

(a) Whether the contract between the deceased herein and the Protestor's late husband is enforceable in law

23. There is no doubt that the deceased in this cause and the Protestor's late husband entered into a written sale agreement in respect of L.R. Mwimbi/Central Magutuni/309. The Petitioner has only challenged its validity not its presence. This court has looked at the provisions of **Section 4 (1) of the Law of Limitations Act** which provide as follows:-

"(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
a) Actions founded on contract....."

There is no doubt that the protest herein is based on a contract entered more than 40 year ago. The protestor did not seek for extension of time to lodge her claim which means that strictly speaking on the face of it the said contract cannot be enforced because the same is not valid by dint of **Section 4 (1) Limitations of Actions Act** cited above.

In the case of **Abraham Gina Adams (suing as the administrator of the estate of the late Geofrey Adams Ogwa) -vs- James Ouma Natolio [2015] eKLR** the court held as follows:

“However, I hasten to add that an order of specific performance isa remedy or relief for breach of a valid and enforceable contract. The suit seeking the relief or remedy must in addition be filed within the period prescribed. The provision of Section 4 (1) of the Limitations of Actions Act Chapter 22 of Laws of Kenya provides as follows;

‘ 4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action arose –

- a. **Actions founded on contract.**
- b.
- c.
- d.
- e. **actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”**

There is no doubt that the period of about twenty two years had lapsed from the date of the sale agreement to the date this suit was filed. No leave for extension of time to file the suit outside the six year period has been exhibited before this court. The late Geoffrey or anybody else claiming under him or for his estate on the agreement dated 10th March, 1991 needed to commence such a claim within the time prescribed under Section 4 (1) of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.”

24. In light of the above this court finds that in the absence of extension of time to commence action for recovery of land, the Protestor's claim is untenable in law. Moreover there is denial by the protestor herself that she did not obtain leave of court.

(b) Whether the transaction is void and a nullity by operation of law

25. The Petitioner has contended that the estate herein is an agricultural land and that is not denied. He further submits that there was no consent from Land Control Board sanctioning the transaction between the deceased and the Protestor's husband. It is not contested that **Section 6 of Land Control Act** specifically state that sale of any agricultural land requires a consent of Land Control Board of the area the parcel of land is situate and that in the absence of a consent the transaction for all purposes is null and void. Now in this matter again there is no denial by the Protestor that the deceased herein and her late husband failed to get a consent of Land Control Board. In fact the Area Chief who testified in this matter may have provided a hint as to why the parties did not bother to go to Land Control Board and formalize the transaction. The Area Chief Mr. Bernard Mutembei stated that the purchaser, Mr. Marete (deceased) had not paid the entire consideration by the time the deceased in this cause passed on. But even assuming the total consideration had been paid as per the agreement dated 16th December 1976 between the deceased and the purchaser, there is no reason or explanation given as to why from 1976 to 1998 when deceased died (a period of 22 years) the parties did not go to Land Control Board or make attempts to formalize the deal.

26. The Protestor made a significant claim that she took up the possession immediately after the transaction I term it significant because had she proved the fact to the required standard then perhaps she could have based her claim on constructive trust and claim, though the deceased still remain with the title of the parcel he held it in trust for the purchaser. However a trust is a matter of fact which must be proved and the *onus* of proof laid on the one alleging and the protestor's claim here is not based on trust.

In the case of Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri [2014] eKLR, the court held that constructive trust doctrine of estoppel apply in vendor- purchaser sale transaction despite lack of consent of the Land Control Board.

27. The Petitioner herein claimed that they are in possession of the disputed parcel and that is why this court on its own motion summoned the Area Chief to come and shade light as to who is in occupation of the said parcel. However when the Area Chief came to court he could not clearly state who was in possession or use of the parcel. What he was clear about was that the said parcel is adjacent to parcel owned by the purchaser (Protestor) and that while the Protestor had planted trees on it, the Petitioner had also planted mangoes on the same parcel. He also testified that no one occupies that parcel for now. That lack of clarity in respect to possession/use and occupation of the parcel negated the Protestor's claim that she and her late husband had taken exclusive possession and use of the parcel. In that regard this court finds that the Protestor's claim on the estate based on possession hence creation of constructive trust in her favour cannot stand the test of law. In the absence of consent from Land Control Board sanctioning the transaction and the absence of proof of constructive trust, the protestor's claim on the estate is simply cannot stand the test of law.

(c) Whether this court is seized with the jurisdiction to determine the Protestor's claim

28. There is no doubt that if the Protestor's claim on the estate was based on trust, this court could have been seized with the jurisdiction under **Law of Succession Act** because then under **Section 3(1)** this court could have been called upon to determine whether the parcel No. L.R. Mwimbi/Central Magutuni/309 comprised "**free estate**" of the deceased or not and whether it was a liability. The protestor's claim however appears to be solely based on contract and for the same to be actualized, the protest requires specific performance of the contract. In my view the proper court to determine the enforceability of the contract, is the ELC Court. To that extent I am persuaded by the decisions of Estate of M'Muriani M'Mugwika (deceased) [2019] eKLR and Nelson Karugumi -vs- Josephine Wakera Wamboka [2015] eKLR cited by the Petitioner that this court lacks the requisite jurisdiction to determine the Protestor's claim as framed.

(d) Whether the Protestor has locus standi to protest

29. The Protestor herein has pleaded that she is proceeding with this protest because she is the administratrix of her late husband's estate. She has however failed to demonstrate that she has a grant of letters of administration of the estate of her late husband, Daniel Marete Rachi (deceased). The provisions of **Section 82 (a) Law of Succession Act** provides that a personal representative is the only person who has the power donated in that Section to sue on behalf of estate of a deceased person. It is clear in this matter that the Protestor herein has failed to show that she has capacity to sue or enforce a right or action that survived her deceased husband. In the case of Isaiah Masira Momanyi -vs- Daniel Omwoyo & Another [2017] eKLR, the court held as follows:-

“With respect I do not agree that failure to obtain a grant of letters of administration to a deceased estate to enable one to acquire capacity to file a suit on behalf of the deceased estate would be a mere procedural technicality. The law is express that a deceased estate can only be represented by a person who is duly authorized to do so.”

The same position obtains in the case of Alexander Mutunga Wathome -vs- Peter Laru Tumbo & Another [2015] eKLR where the court stated:-

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

In light of the above it is clear that the protest herein is really untenable in law because the Protestor lacks capacity apart from the other flaws in her claim to the estate. The only avenue open for her is perhaps to acquire capacity and pursue her claims in the right forum.

In the end this court finds no merit in. The protest is dismissed. The grant issued on 9th January 2014 is hereby confirmed in terms of Paragraph 6 of the Affidavit of Nkanata Mugira in support sworn on 12th June 2019. I shall make no order as to costs so each party to bear own costs.

Dated, signed and delivered at Chuka this 8th day of July 2020.

R.K. LIMO

JUDGE

8/7/2020

Judgment dated, signed and delivered in the open court in presence of Matiri for Petitioner and in the absence of Kariuki for Protestor.

R.K. LIMO

JUDGE

8/7/2020