



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 801 OF 2013

RE ESTATE OF NGII NGETHI (DECEASED)

JOHN MUSEMBI SYENGO.....ADMINISTRATOR

VERSUS

PAULINE MBATHA NDETHI.....PROTESTOR

JUDGMENT

1. Ngii Ngethi (hereafter *the deceased*) died intestate on 15th August 1969.
2. A citation was lodged by John Musembi Syengo (now the administrator) who claimed that he was a creditor; and, that the heirs had refused to take out letters of administration. The citation was served upon the protestor and eight other persons named in paragraph 6 of this judgment.
3. The creditor claimed that between the years 1985 and 1988, he purchased 2½ acres out of the deceased's land known as Ithanga Phase II Plot No. 305 (hereafter *the suit land*). The purchase price was paid in various instalments to the protestor. In a supplementary affidavit sworn on 17th February 2014, he claimed that he took possession in 1985.
4. The citees failed to enter an appearance. On 25th February 2014, the court (*Ngaah J*) directed the citor to apply for a grant. The grant was issued on 17th March 2016. The administrator then lodged a summons for confirmation of grant on 18th October 2016.
5. On 22nd October 2018, the protestor entered an appearance through counsel together with an affidavit of protest. She averred that the administrator is a stranger or impostor; and, that there is no evidence that the deceased was indebted to him.
6. She said that the only survivors of the deceased were:
 - a. Pauline Mbatha Ndethi – Widow and co-wife
 - b. Nduku Nyumu Mwinzi - Daughter
 - c. Margaret Katutu Njoroge – Daughter
 - d. Kaveso Maingi – Daughter
 - e. Sarah Muneer Phillip - Daughter
 - f. Bonface Muasya – Grandson
 - g. Margaret Ngina Maingi – Granddaughter
 - h. Rose Kavini Mativo – Granddaughter
 - i. Julius Mwololo Ngethi – Grandson.

7. The protestor opposed the proposed distribution as “*fraudulent, inequitable and unacceptable*”.
8. The core issue before the court is thus whether the administrator is a *creditor* of the estate. Paraphrased, is the administrator entitled to 2½ acres of the suit land?
9. On 7th May 2019, I directed that the protested summons be determined by *viva voce* evidence. Despite being served, the protestor did not attend the hearing.
10. The administrator (PW1) relied largely on his further witness statement dated 26th June 2019. He claimed that the deceased had “*married*” the protestor under *Kamba* customs to bear children for her. In 1985, well after the death of the deceased, the administrator entered into an agreement with the protestor for sale of part of the suit land.
11. He produced the sale agreement (exhibit 1). The consideration for the initial one acre was Kshs 6,000. He paid Kshs 500 on 14th December 1985; Kshs 500 on 11th January 1986; Kshs 3,000 on 16th January 1986; Kshs 1,300 on 24th January 1986; and the balance of Kshs 700 on 2nd February 1986. He said that the boundary of the land was marked the same day.
12. On 21st September 1987, he paid Kshs 3,000 being the full purchase price for an additional half-acre. There was then a further agreement on 28th December 1987 for purchase of yet another acre for consideration of Kshs 4,750. On the latter date he paid Kshs 2,750. A further Kshs 600 was paid on 6th January 1988.
13. All those payments were made in the presence of witnesses. Some of the witnesses, such as Nicholas Ngusa (PW2) and Manyolo Kanyalu (PW3) testified that they either drew or attested to the agreement at the Chief’s Office, Ithanga Location.
14. Like I have stated, the protestor did not take to the stand or cross examine the witnesses. I have no cause to doubt the administrator or his witnesses. However, this claim is dead fish in the water for two main reasons. Firstly, the deceased, who was the owner of the land, died way back in 1969. There was *no* agreement for sale of the land between *her* and the administrator.
15. Secondly, no one took out letters of administration to her estate. The agreement for sale was first made in 1985 between the administrator (as purchaser) and Pauline Mbatha Ndithe (the protestor). That was about 16 years since the death of the deceased. The protestor had *no* grant over the estate or *legal power* to sell the land. Paraphrased, she may have been entitled to it as a survivor but in the absence of a confirmed grant, she was *intermeddling* in the estate.
16. Section 45 of the **Law of Succession Act** provides:
- (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.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration. [underlining added]
17. I readily find that the sale agreements between the administrator and the protestor contravened the statute and hence *void*. It is also not clear whether any requisite regulatory consents were obtained. What that means is that the sale is *unenforceable* as against the estate of the deceased. It follows that the claim by the administrator as a creditor fails and is *dismissed*.
18. However, and I say so *obiter*, if the administrator is well advised, he has a remedy of pursuing the payments or for breach against Pauline Mbatha Ndithe *in person* independent from the estate of Ngii Ngethi (deceased).
19. In the end I order as follows-
- a. That the claim by the administrator as a creditor for 2½ acres out of the estate of Ngii Ngethi (deceased) fails and is dismissed.
- b. That the grant issued to John Musembi Syengo (the administrator) on 17th March 2016 is hereby declared inoperative and void.
- c. That the protestor (Pauline Mbatha Ndithe) shall apply for a *fresh grant* for confirmation by the court.
20. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.
- It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 6th day of October 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Mwangi Ben holding brief for Mr. Njiraini for the administrator instructed by R. M. Njiraini & Co. Advocates.

No appearance by counsel for the protestor.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.