



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 457 OF 2010

In The Matter Of The Estate Of M'chokera M'ramare Alias Chokera Ramare (Deceased)

M'NDEGWA NCOKERA.....PETITIONER

Versus

SALOME KAINDA M'RINTARA.....PROTESTER

JUDGMENT

1. **M'CHOKERA M'RAMARE (“the deceased”)** died intestate on 18th February 1994. On 21st September 2010 Salome Kainda M'Rintara filed a citation to accept or refuse letters of administration intestate. However, on 26th November 2012 M'Ndegwa Ncokera filed for letters of administration citing **LR. No. NYAKI/THUURA/1902** measuring 2.79 Ha, as his only asset. An introduction letter by the Chief of Rwanyage Location cited the following as the deceased's dependants;

- a) Elizabeth Mariti M'Chokera(deceased) - Wife
- b) M'Ndegwa M'Chokera - Son
- c) Julius Marira M'Chokera - Son
- d) Gladys Gaitenga M'Chokera - Daughter
- e) Henery Kiogora M'Chokera - Son
- f) Rose Karwirwa Kiambi - Daughter
- g) Janet Karuru Kinoti (deceased) - Daughter
- h) David KiriinyaNcebere - Interested Party

2. On 25th September 2013 letters of administration were granted to Chokera Ramare. He filed summons for confirmation of grant on 19th August 2015 and proposed the mode of distribution as follows;

LR NO. NYAKI/THUURA/1902

- a) David Kiriinya Ncebere - 1.00 Acre
- b) Gladys Gaitenga M'Chokera - ½ Acre
- c) M'Ndegwa Ncokera - to share the
- d) Julius Marira M'Chokera - balance
- e) Henery Kiogora M'Chokera- equally

Protest

3. Nevertheless, on 30th September 2015 Salome Kainda M'Rintara filed an affidavit of protest averring that she is the wife of the M'Muraa M'Aritho and his legal representative having obtained grant. Her late husband bought 1 acre from the deceased in 1980 to be exercised out of LR. NO. NYAKI/THUURA/1902 and the deceased gave him vacant possession. Both parties attended the Land Control Board and consent was given for subdivision. Thereafter, the deceased entered the said portion of land and destroyed crops and trees and her late husband sued him in SRMCC NO. 273 OF 1984 and judgement was entered in his favor. The deceased agreed to add ½ acre in lieu of the decretal sum and left a will to that effect (annexed and marked **SKM 2**). Her late husband took the dispute over the 1 acre to the tribunal, case No. 42 of 2008 where a decision was made that 1 acre be issued to her husband. She added that her late husband had earlier bought 3 acres from the deceased and had been transferred. In spite of these facts, she noted that the mode of distribution by the petitioner left her out and gave the land to David Kiriinya Nchebere. She reiterated this during the testimony she gave in court.

Submissions by protestor

4. The protestor argued that Section 47 of the Law of Succession Act gives this court powers to deal with any dispute that is brought before it and so, this court has jurisdiction to decide upon the beneficial interest that the protestor claims against the estate of the deceased. They relied on section 51 (2) (b) of the law of succession act that binds the petitioner to list down all known assets and liabilities of the deceased which the petitioner failed to do.

5. Concerning the one acre they cited **In re Estate of Joseph Mutua Munguti (Deceased)[2018] eKLR** where it was stated in paragraph 49 that

“As regards the claim by the Creditors, it is also clear from the documents exhibited that there was an agreement entered into between the Deceased and the Creditors for the sale of 5 acres of a land parcel then known as Mavoko Town Block 3/2510 from the deceased for the sum of Kshs.3 million. There is further evidence that the sale agreement bore a thumbprint purporting to be that of the Deceased and the agreement was made before an advocate. Copies of Bank statements have been annexed showing payments made together with copies of the relevant cheques all in the name of the Deceased. There is also a Letter of Consent issued by the Athi River Land Control Board approving the subdivision of Land Parcel No. Mavoko Town Block 3/2510 into three portions as well as a mutation form. There is also a copy of the transfer form duly executed.

The court then proceeded to distribute the estate in that suit to the heirs and the creditors who were purchasers for value from the deceased.

6. As regards the claim for ½ an acre they asked the court to set it aside in accordance with rule 41 (3) of the probate and administration rule which provides:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

7. They cited **Re estate of Alice Mumbua Mutua (deceased) 2017 Elkr** and **Meru High Court Succession Cause No. 480 'A' of 2010 (in the matter of the Estate of Mwarania M'Inoti** in support.

Petitioners' submissions

8. On the other hand, the petitioners submitted that, purchasers are not dependants under section 29 of the law of succession act and that at best he could be a creditor to the estate whose debt should be claimed against the administrator under section 86 of the act. They argued that even under that section the administrator is only bound to pay debts against the estate that are enforceable in law. They argued that the purchase of the 1 acre of land was on 10th November 1980 according to the sale agreement which was over 38 years ago. They quoted Section 4 (1) (a) of the Limitation of Actions Act Cap 22 where a claim based on contract may not be brought after the end of six years from the date on which the cause of action accrued. On that basis, they urged that the agreement is not enforceable in law.

9. They contended further that according to the doctrine of privity, a contract may only be enforced by the party to the contract or his legal representative and not by spouses or other 3rd parties. In cross examination the protestor established that she had not filed any succession cause in respect of the purchaser's estate.

10. The protestor claimed to be in possession of the land since 1987 however petitioner argued that if this were true they would claim under the doctrine of adverse possession and noted that it was not true as her late husband in the Land Disputes tribunal stated that he was not in possession of the land. The petitioner also noted that the will the protestor submitted into evidence, was dated 30th March 1995 while the deceased herein died in 1994.

11. Finally, the petitioners argued that the protestor did not provide sufficient documentary evidence to prove that they were awarded damages in **Meru PMCC No. 273 of 1984** and that it was agreed that the ½ an acre would be taken in lieu of costs and urged the court to find that the protestors claim does not lie in the realm of the law of succession but in the ordinary civil courts and therefore proceed to dismiss the protest with costs.

ANALYSIS AND DETERMINATION

12. I have carefully perused the applications, affidavits, submissions and the record in its entirety. I find the issue for determination to be;

a) *Whether the protestor has a beneficial interest on 1 ½ acre in LR NO. NYAKI/THUURA/1902?*

b) *How LR NO. NYAKI/THUURA/1902 should be distributed?*

13. **In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** it was stated as follows:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above. ”

[14] In this case, it is the petitioner’s argument that the protestor is not a dependant in this case and at best is a creditor. The law provides for persons beneficially interested- a phrase that would encompass creditors. The dispute herein has arisen before confirmation and was filed as a protest. It certainly falls upon the court to deal with the questions herein within rule 41(3) of the Probate and Administration Rules which has been explained in a masterly fashion in the case of Re Alice Mumbua Mutua (supra). Such matters as the protestor having been in occupation of the land in issue for a considerable period of time as well as those on limitation of actions are to be determined by the Environment and Land Court for which that jurisdiction has been reserved under Article 162 (2)(b) of the Constitution and section 13(1) and (2) of the Environmental and Land Court Act. I am aware that the protestor had also informed the court that her husband had previously bought 3 acres from the deceased herein which was successfully transferred to him. The question would be; why it took so long for them to transfer the 1 acre? But again, that concern will be decided by the land court. These issues are of real worth in justice and it would be an injustice not to allow resolution of such weighty matters which arise before distribution of the estate as provided in law. In passing, I have noted in my experience as a judge that unscrupulous beneficiaries use the law of succession to trod upon rights of persons who purchased land from the deceased except that the deceased died before completing the transaction. I should say that such parties should know that the law may call upon the personal representatives of such deceased person to compete lawful transactions of the deceased. In other words, lawful transactions are enforceable against the personal representatives of the deceased.

15. Consequently, I order that the 1½ acre in LR NO. NYAKI/THUURA/1902 in dispute herein shall be set aside to await resolution of the questions herein by ELC. The rest of the land shall be distributed as follows;

I. David Kiriinya Ncebere - 1.00 Acre

II. Gladys Gaitenga M’Chokera - ½ Acre

III. M’Ndegwa Ncokera, Julius Marira M’Chokera and Henery Kiogora M’Chokera - to share the balance equally

IV. Grant is confirmed to the extent I have expressly stated above.

Dated Signed and delivered in open Court at Meru this 17th day of January, 2019

.....

F. GIKONYO

JUDGE

In presence of

Kimathi for Mwangi E.G for protestor

Mwarania for petitioner – absent

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F. GIKONYO

JUDGE