



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 870 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE KIBAYA MURIUKI (DECEASED)**

**MICHAEL KAMAU MWANGI.....APPLICANT**

**VERSUS**

**MERCY WANJIRA NYAMU.....RESPONDENT**

**RULING**

1. The estate relates to the late **KIBAYA MURIUKI (DECEASED)** who died on the 14<sup>th</sup> July, 2015;
2. The Grant in dispute was issued on the 2/05/2016 to the respondent herein one Mercy Wanjiru Nyamu (**‘Mercy’**) who was a sister in law of the deceased; and it was confirmed on the 15<sup>th</sup> October, 2009;
3. The applicant initially filed a Protest on the 6/08/2016 and thereafter on the 19/08/2016 he lodged a Caveat; on the same date he proceeded to file the instant application for the Revocation of the Grant under the provisions of Section 76 of the Law of Succession Act, Rule 44 of the Probate and Administration Rules and Article 159 (2)(d) of the Constitution 2010 stating that he had a purchaser’s interest in part of the estate of the deceased specifically in the parcel of land known as **Lower Muhito/Ngamwa/118** herein referred to as **‘the subject property’**; in the application he claims that the respondents had obtained the Grant to the deceased’s estate without disclosing to the court his interest in the estate; and he sought the order set out hereunder;

(a) That the Grant of Letters of Administration to Mercy made on the 2/05/2016 be revoked or annulled on the grounds of concealment of material fact;

4. To support his claim the applicant relied on his Supporting Affidavit made on the 19/08/2016; the respondent Mercy filed her response to the application on the 7<sup>th</sup> November, 2016; directions were taken on the 28/09/2012 that the matter proceed for hearing by way of **‘viva voce’** evidence; all the parties gave oral evidence and hereunder is a summary of the applicant’s case and the respondent’s response;

**APPLICANT’S CASE**

5. The applicant stated in his testimony that he had entered into a Sale Agreement with Kibaya Muriuki (Deceased) to purchase the subject property; the agreement was dated the 2/12/2014 and the purchase price therein was Kshs.200,000/- per acre; the total purchase price for 5.8 acres was Kshs.1,160,000/-; he had made payments to the vendor directly by way of (x1) cheque in the sum of Kshs.200,000/- and (x6) vouchers for which the deceased had duly signed; and had paid in total a sum of Kshs.950,000/-; when subjected to cross-examination on the mode of payment he stated his payments were not in accordance

with Clause 1 of the Sale Agreement; the contravention in payment arose because the deceased kept on requesting for money; otherwise the agreement had stipulated that payment of Kshs.200,000/- was upon execution of the Transfer Documents and upon submission of the fully executed documents at the Lands Office; and the balance was payable upon successful transfer of the property to the Purchaser;

6. He stated that he was a director of Century Consultants Ltd and that he had been given a specific mandate to enter into the instant transaction on behalf of the company;

7. He had conducted a search to confirm whether there was any caution placed over the land; and then he and the deceased applied for Consent to Transfer from the Mukuruweini Land Control Board; when they attended the Land Board the deceased told the board members that he had no family or relatives;

8. He produced a receipt for payment for the application for the Consent together with the Letter of Consent; he confirmed that the Application for the Land Board Consent was dated the 31/06/2015 which was six (6) from the date marked on the Sale Agreement; the transaction took a long time because the deceased was awaiting the issuance of his ID Card; during that time he kept paying the deceased upon request.

9. The Sale Agreement, copy of the Cheque, bundle of Vouchers, the Consent Letter the receipt and Application for Consent were produced and marked as **“PEXh.1a-e”**;

10. Unfortunately the deceased passed on before signing the Transfer and before putting the applicant into possession; he confirmed the existence of Succession Cause No.19/2016 that he had instituted in Mukuruweini in which he had cited one Wahito Kirega Kibocho (**‘Wahito’**) whom he cited for the reason that, upon conducting a second search at the Lands Office he had found that she had placed a Caution over the property; the pleadings in the Mukuruweini Succession Cause were produced and marked as **“PEXh.2”**; that he had no knowledge of the relationship between the respondent and the deceased as he had all along indicated to him that he had no wife and no children and no relatives at all;

11. He also learnt of an existing and pending Succession Cause that had been lodged in the Nyeri High Court; and was of the opinion that when the Succession Cause was instituted by Mercy she may not have known of his dealings with the deceased; he did not know what relationship she had with the deceased and concurred under cross-examination that there was no concealment by her;

12. When referred to the Sale Agreement executed by himself and the deceased; he stated that the witnesses had appended their signatures on the agreement as well but confirmed that all their signatures were not appended in the presence of an advocate nor witnessed by one; the deceased’s signatures on the documents were not matching but this arose due to the age of the deceased who was 80 years of age when they started the transaction; the other anomaly was that the deceased’s Identity Card Number was not consistent; on the Sale Agreement it read [xxxx] whereas on the Application for Land Board Consent it read [xxxx]; he confirmed that the ID Numbers were dis-similar but his explanation was that this anomaly arose because at the time of signing the agreement the deceased did not possess an ID Card and only had a waiting card with the first serial number; which the parties opted to use; later in 2015 when the deceased obtained his ID the second serial number was the one appearing thereon;

13. He told the court that there were other persons not known to him that were utilizing the land; that he continued to incur losses and expenses as he had a pending milk project and the equipment was being stored at a warehouse;

14. The applicant called Kennedy Kibanya to testify as the witness who had appended his signature on the Sale Agreement; he recalled that the subject property was known as Plot No,118 located in Lower Wahito and that it was being sold at Kshs.200,000/- per acre and that the acreage was 5.8 acres; he stated that he was present when the two parties executed the sale agreement; and was always present when the monies were being paid out to the deceased who always signed the vouchers; and verified that the signatures on the payment vouchers were his;

15. He prayed that the Grant be revoked and that the land be distributed to him.

### **RESPONDENT'S CASE**

16. Her evidence in response was, that she knew the deceased who was the brother of her husband; that the family consisted only of the two brothers and one step-sister known as Wahito who was from the 2<sup>nd</sup> house; that the deceased resided in Endarasha and passed on there; and was buried in Kariara; that the deceased had only one property which is the subject property and that it was family land and the deceased held it in trust for the family;

17. Upon his demise she petitioned for Letters of Administration together with Wahito; that she did not conceal anything because she did not know of the applicant nor did she know of the transaction between the applicant and the deceased; that she knew of the deceased's day to day activities and that it was not possible for the deceased to have sold anything before notifying her;

18. That she did not know of the Citation Cause in the Mukuruweini Court; she took out the Letters of Administration by herself and included Wahito therein; that she intended to share the property with her step-sister in law Wahito;

19. The respondent prayed that the application be dismissed with costs.

### **ISSUES FOR DETERMINATION**

20. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether the applicant had a valid and enforceable contract with the deceased;

(ii) Whether to revoke the Grant;

### **ANALYSIS**

#### **Whether the applicant had a valid and enforceable contract with the deceased;**

21. The applicant contends that prior to his death the deceased entered into a Sale Agreement with the deceased which agreement was produced as evidence and the same is dated the 2/12/2014; the deceased agreed to sell the subject property and the applicant agreed to buy the land for the sum of Kshs.1,160,000/-; the applicant paid to the deceased the total sum of Kshs.950,000/- leaving a balance of Kshs.210,000/-; the agreement was duly executed by the applicant and the deceased in the presence of both their witnesses; but during cross-examination various anomalies were raised by the respondent and contended that the agreement was intended to defraud the estate of the deceased; which brings into issue whether these anomalies affect the validity of the agreement;

22. The following are the key elements that determine whether an agreement entered into by the parties was valid and enforceable; the first is capacity and competence of the parties which this court finds to be a non-contentious issue; the applicant produced a Sale Agreement which goes to show that there was an offer made by the deceased which was duly accepted by the applicant and that the parties had it reduced into writing; therefore there was consensus-ad-idem and a written agreement which are the second and third element;

23. The fourth element relates to the identity of the parties which must be ascertainable; in this instant the applicants name and the deceased appear on the agreement; an anomaly that was raised by the respondent relates to the inconsistencies of the deceased's national identity card; on the agreement it is handwritten and reads as [xxxx] whereas the Identity Card No on the Application for Land Board Consent reads as [xxxx]; the applicant confirmed that the ID Numbers were dis-similar but gave an explanation that this anomaly arose because at the time of signing the agreement the deceased did not possess a National

Identity Card and only had a waiting card with this first serial number; the parties opted to use this number; later in 2015 when the deceased obtained his ID the second serial number was the one that was used and appears on the Consent Letter; the respondent did not offer any other ID serial number of the deceased to controvert this explanation therefore this court finds the applicants explanation to be reasonable and satisfactory and that it resolves any apparent inconsistency;

24. Another anomaly raised by the respondent was that all the parties together with their witnesses appended their signatures on the agreement and that these signatures were not appended in the presence of an advocate nor witnessed by one; the applicant called PW2 who acknowledged that he witnessed the parties appending their respective signatures to the agreement and also confirmed that the signature on the agreement was his very own; it is this courts considered view that the appending of the signatures in the presence of the parties respective witnesses sufficed;

25. The respondent further raised the issue of the deceased's signatures on the various documents; that the signatures were not matching; this court finds the applicants explanation to be satisfactory that this could have arisen due to the deceased's advanced age who was 80 years of age at that the time they started the transaction;

26. Next is whether the subject property is identifiable; the property is described as Plot No.118 situate in Lower Muhito; the identity of the property is clearly stated in the agreement; the identity of the property is also not in dispute;

27. The consideration is stated as Kshs.200,000/- per acre and the acreage is stated as being 5.8 acres; the applicant produced cheques and vouchers that demonstrate that the applicant paid a total of Kshs..960,000/- and that the sum of Kshs.210,000/- was still outstanding; his witness **PW2** also corroborated the consideration and methods of disbursement; this element is found to be satisfactorily proved; the anomalies in payment in this instant cannot invalidate the agreement; in any event the payments indicate that deceased was paid more than the requisite deposit of Kshs.200,000/- and any balance outstanding according to the agreement was due and payable upon successful registration of the Transfer; which never happened due to the demise of the deceased;

28. There is also an element of the legality of the agreement; in this instant from the evidence adduced by the applicant the transaction was a controlled dealing as the subject property was an agricultural land without the consent of the relevant land control such a transaction involving agricultural land is void for intents and purposes; refer to the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR;**

29. The applicant produced a Consent Letter to Transfer which suffices as evidence that the consent was duly obtained and further gave a reasonable explanation that the delay in completing the transaction was occasioned by the deceased not being in possession of a national identity card;

30. All in all this court is satisfied that there is no evidence that the Sale Agreement is a means by which the applicant intends to defraud the estate of the deceased and finds that the applicant has a valid interest in the property of the deceased; which then leads to whether the applicant can seek the orders for revocation;

### **Whether the applicant can seek orders to revoke the Grant;**

31. This court notes that the applicant has premised his application on the issue of concealment; but he has only cited Section 76 of the Law of Succession Act (**'the Act'**) without setting out the particular sub-section; this technicality in the head title shall be over-looked and it shall be presumed his application is premised on Section 76(b) of the Act;

32. Despite the applicants' assertions on concealment there was an admission by him that he did not know the respondent neither did he know of the deceased's step sister White; this arose from the fact that throughout the period of transacting the deceased held out that he had no relatives; likewise the

respondent in her evidence confirmed that the applicant was a stranger to her and she was not aware of the transaction between the deceased and the applicant; that she only came to know about the applicant and the transaction when she was served with the instant application; indeed it would be ironical to accuse a party of concealment of material facts that were totally unknown to her;

33. It is trite law that had the respondent known that the applicant had an interest as a purchaser she would have been obligated to have personally involved the applicant at all stages and obtained his written consent; there is absolutely no evidence tendered by the applicant indicating that the respondent had knowledge of the applicant's existence and that of the Sale Agreement and it therefore follows that there was no concealment;

34. This court is satisfied that the respondent has demonstrated that the Grant was not obtained in a manner that rendered it defective in that it was not obtained by the making of an untrue allegation of fact; and at the time of obtaining the Grant this court is satisfied that there was no concealment of pertinent facts by the respondent;

35. As the respondent is yet to have the Grant confirmed the applicant having been found to have an interest as a creditor to the deceased's estate has an opportunity to take another bite at the cherry by filing a protest;

### **FINDINGS**

36. In light of the foregoing this court makes the following findings;

(i) The Sale Agreement is found to have been valid and that the applicant has a valid interest in the estate of the deceased;

(ii) This court finds that at the time of obtaining the Grant there was no concealment of pertinent facts by the respondent;

### **DETERMINATION**

37. The application is found lacking in merit and it is hereby dismissed;

38. The applicant is at liberty to file a Protest against the mode of distribution of the estate;

39. Each party shall bear their own costs.

Orders Accordingly

**Dated, Signed and Delivered at Nyeri this 9<sup>th</sup> day of January, 2019.**

**HON. A. MSHILA**

**JUDGE**