



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1228 OF 2006**

**IN THE MATTER OF THE ESTATE OF SAMUEL KINYANJUI WAIGANJO (DECEASED)**

**JUDGMENT**

1. The summons that I am determining in this judgment is dated 7<sup>th</sup> September 2016. It is at the instance of Monicah Murugi Mungai, and it seeks confirmation of the grant made to her on 30<sup>th</sup> August 2016. According to her affidavit sworn on 7<sup>th</sup> September 2016 the deceased died on 13<sup>th</sup> May 1999. He had ten (10) children, being James Muigai Kinyanjui, Grace Wanjiru Njung'e, Monicah Murugi Mungai, Gladys Wamboi Mburu, Phyllis Njambi Kinyanjui, Richard Kungu Kinyanjui, Arthur Gichuru Kinyanjui, Reginald Ngugi Kinyanjui, John Brown Njenga and Charles Ng'ang'a Kinyanjui. The last two children are deceased. John Brown Njenga was survived by seven (7) individuals, being Lilian Eunice Waithera, Pauline Nungari, Patrick Kinyanjui, Jacqueline Maureen Wanjiru, James Erick and John Mburu Waithira; while Charles Ng'ang'a Kinyanjui as survived by his widow, Hannah Wanjiru. The assets that she proposes for distribution are LR Mwachiringiri Block 4/709, Dagoretti/Kinoo/2465, Dagoretti/Kinoo/595, 444 ordinary shares in ICDC, 1166 shares ordinary shares in Barclays Bank of Kenya, 359 ordinary shares in East Africa Breweries Ltd, 600 ordinary shares in KCB, and moneys in account number 100-123-601 KCB Kikuyu branch and in account number KNAD 6160 Kenya Post Office.

2. She proposes that the estate be distributed as follows -

(a) LR Mwachiringiri Block 4/709 to Samson Wachira, who had bought it from some of the beneficiaries;

(b) Dagoretti/Kinoo/2465 –

(i) ¼ acre to be sold and the proceeds thereof to be utilized to compensate Grace Wanjiru Njung'e, Monicah Murugi Mungai, Gladys Wamboi Mburu, Arthur Gichuru Kinyanjui and Reginald Ngugi Kinyanjui who had not benefited from the sale of LR Mwachiringiri Block 4/709 to Samson Wachira; and

(ii) 2 acres to be shared equally amongst the ten children of the deceased as tenants in common;

(c) Dagoretti/Kinoo/595 to be shared equally amongst the ten children of the deceased as tenants in common;

(d) 444 ordinary shares in ICDC to be shared equally amongst the ten children of the deceased or be sold and the proceeds shared equally amongst the ten children of the deceased;

(e) 1166 shares ordinary shares in Barclays Bank of Kenya to be shared equally amongst the ten children of the deceased or be sold and the proceeds shared equally amongst the ten children of the deceased;

(f) 359 ordinary shares in East Africa Breweries Ltd to be shared equally amongst the ten children of the deceased or be sold and the proceeds shared equally amongst the ten children of the deceased;

(g) 600 ordinary shares in KCB to be shared equally amongst the ten children of the deceased or be sold and the proceeds shared equally amongst the ten children of the deceased; and

(h) Moneys in account number 100-123-601 KCB Kikuyu branch and in account number KNAD 6160 Kenya Post Office to be shared equally amongst all the ten children of the deceased.

3. Edward Kihara Ngugi swore an affidavit of protest on 2<sup>nd</sup> October 2016 to that application. He claims that he purchased a portion of estate property on 29<sup>th</sup> January 2013 from Richard Kung'u Kinyanjui, who was then an administrator of the estate and another portion on 28<sup>th</sup> March 2013 from Phyllis Njambi Kinyanjui, he avers that he was shown copies of certificates of confirmation of grant at the time. He avers that the family met on 19<sup>th</sup> March 2007 and recognized his claim. He states that his interest has not been taken care of in the application for confirmation of grant now before the court. He pleads that his interest should be recognized like that of Samson Wachira. He submits that his purchase of the said property ought not to be affected by the orders that revoked the previous grant and cancelled all the transactions and

dealings founded on the said grant. He has attached copies of sale agreements showing that he had bought two portions from Dagoretti/Kinoo/2465.

4. The administrator has responded to the protest through an affidavit sworn on 8<sup>th</sup> November 2016. She says that she was under no obligation to inform of the protestor of the confirmation application as the protestor had no contract with the estate. She asserts that the protestor ought to pursue his claim against the party from whom he acquired the property. She states that the estate ought not to suffer because of the protestor's claim. She also mentions that she was aware of suits that the protestor had filed at the Environment and Land Court, being ELC Civil Suit Nos. 149 and 315 of 2013, which she submits the protestor ought to pursue to logical conclusion. She also states that at the time the protestors allegedly bought the said assets before the estate had been distributed and the specific share that was being sold to him had not been identified. She argues that the protest was premature, the protestor ought to wait for distribution and thereafter pursue the person who sold the property to him.

5. The other affidavit of protest is by Nicholas Karanja Kang'ethe, hereinafter known as the second protestor, sworn on 3<sup>rd</sup> March 2017, on behalf of Asa Agencies Services Ltd, in which company he is a director. He complains that the company was not served with the confirmation application. He states that the company had on 30<sup>th</sup> December 2011 entered into a sale agreement with James Mungai Kinyanjui, the then administrator of the administrator the estate, to acquire a portion of Dagoretti/Kinoo/2465. The company has paid a portion of the purchase price and he expressed willingness to pay the balance. He avers that the company was an innocent purchaser for value. He avers that the company had purchased a ¼ acre of the said land. He accuses the administrator of double standards for providing to devolution to one purchaser and not to the rest.

6. The administrator has responded to the second protest through her affidavit sworn on 8<sup>th</sup> March 2017. She says that she was under no obligation to serve the second protestor because it was neither a beneficiary nor a dependant of the estate. She asserts that the company ought to pursue its claim against the person who sold to it. She argues that the second protestor ought to await confirmation of the grant so that it can pursue its share from the person from whom she bought the property. She also argues that the agreement of sale does not state that the company was buying the property from an administrator. She also states that there was a clause in the agreement providing for refund of the purchase price in the event of default by the seller.

7. The rejoinder by the administrator elicited a reaction from the company, through a further affidavit sworn on 11<sup>th</sup> April 2017 by Nicholas Karanja Kang'ethe. He avers that as at the date of the purchase agreement James Muigai Kinyanjui was an administrator of the estate of the deceased, and by that date the grant had been confirmed. He states that the shares of the various beneficiaries had been indicated in the certificate of confirmation of grant. According to him the seller was entitled to not less than ¼ of the said property. He avers that the company contracted on the strength of the certificate of confirmation of grant. He states that distribution under the new dispensation the land may not be enough for the company to get the ¼ acre that it had purchased. He avers that there was collusion between the current and previous administrators to defeat the company's interest.

8. Directions were given on 7<sup>th</sup> June 2017 that the said application be disposed of by way of oral evidence.

9. The oral hearing commenced on 30<sup>th</sup> October 2017, with Nicholas Karanja Kang'ethe on the stand. His evidence in chief largely followed the averments made in all the affidavits that he has sworn in protest. On cross-examination, he stated that he only dealt with one administrator, for he never got to interact with the other administrator, J. Brown Kinyanjui. He stated that the property from which he was buying a portion had been allocated to several persons according to the certificate of confirmation of grant. He never got to meet the other persons. He understood the company to be buying the portion that was due to the person selling to them, although the certificate of confirmation of grant did not indicate the share that that person was entitled to get out of the land. The title deed was at the particular time in the name of the deceased. He visited the land and was shown the portion that the company was buying; the other beneficiaries of the said land were not present. He claimed that he had a claim against the estate as the seller was one of the beneficiaries. He stated that he had done a search before entering into the transaction, which showed that the property was registered in the name of the administrators. He said that he was informed by the seller that the other administrator, J. Brown Kinyanjui, was dead.

10. The second protestor called one witness, Edward Kimani Kung'u. He testified that he was a land agent, and it was he that linked up the second protestor with the seller. The total acreage of the land was two acres and what was being sold was a quarter thereof. He stated that they did a search of the property and it revealed that it was in the name of the deceased. They were also furnished with copies of the grant of representation and of the certificate of confirmation of grant. He stated that they also visited the court's registry and were informed that the documents were genuine. They also perused the court file, but he did not see the order made on 20<sup>th</sup> November 2007.

11. The first witness for the first protestor followed, Joseph Muhoro Njoroge. He stated that he was too was a land agent. He said that they did a search of the land and the same came out in the name of the deceased. A meeting was also held with all the beneficiaries on 19<sup>th</sup> March 2007. He said only two of the children of the deceased were not at the meeting, that is Mwaura and Brown. No one objected to the sale, and an agreement was drawn and signed by all, including the witness. He also facilitated the sales between the first protestor and Phyllis, Richard and Arthur. He stated that they were shown a proposed subdivision of the land. The first protestor moved into the land and put up temporary structures, which were later demolished. He stated that at the time of the transactions the property was still in the name of the deceased. He confirmed that the sale agreements were not signed by all the survivors of the deceased, but by only two witnesses. He said that he understood the sale to have been intended to raise money for the administration of the estate. He said that the agreement dated 19<sup>th</sup> March 2007 was signed by a majority of the beneficiaries.

12. The first protestor's second witness testified on 6<sup>th</sup> December 2017. He was the former Chief of Kinoo Location. He stated that the family of the deceased assembled in his office and agreed on the sales and the agreement was drafted in his hand. The understanding was that the family wanted to commence proceedings for the administration of the estate but they had no money. They agreed to dispose of a portion of the land to finance the same. He then produced the original agreement that was in his handwriting. The seller was selling what he was due to inherit and he was to get reimbursed later.

13. The first protestor himself testified on 11<sup>th</sup> April 2018. His evidence in chief was basically word for word what he averred in his various affidavits. He said that at the time of the sale he knew that the property was in the name of the deceased. After signing the agreement and paying the deposit, he called a meeting of all the survivors at the Chief's office at Kinoo to introduce himself and explain the agreement. The parties reached an agreement and signed a document before the Chief. He said that thereafter the parties got into disputes and the matter stalled. After confirmation the land was transferred to the names of the person named in the certificate of confirmation of grant from the name of the deceased. The new title was registered on 23<sup>rd</sup> October 2012. He moved into the land and put structures, which were later demolished. Thereafter the other persons in the title sold their shares to him. He said that when he was getting into the first sale transaction with James Muigai he knew he was buying his share of the land.

14. The administrator testified next. She said that after administration began there were disputes on distribution as the former administrator began to sell estate property, saying that the family had not agreed to sell. She explained that was why they resolved to move the court for revocation of his grant. She stated that the sales in question were done when court orders were in place. She said that all those transactions were not between the estate and the buyers. She stated that by the time the transactions were done the land had not yet be subdivided and therefore the administration was not yet complete. She asserted that the buyers ought to pursue their claims against the persons who sold the property to them. She conceded that she attended the meeting of 9<sup>th</sup> March 2007 and signed the agreement, acknowledging that the first protestor had bought land from James Muigai. She said that all her siblings attended the meeting except for two. Regarding the sale to Samuel Wachira, she said that the family met and sanctioned the sale and agreed that those who did not benefit from the sale would be compensated. She said that the buyers should wait for the family to subdivide the land before laying his claim to the property.

15. At the conclusion of the oral hearing, the parties have filed their respective written submissions which I have read through and noted the arguments made.

16. I note that the confirmation application is not opposed by any of the children or survivors of the deceased. The protest is by persons who had allegedly bought a piece of the estate. They are not claiming as heirs, but rather as persons who acquired a piece of the estate. Their transactions were not with the deceased before he died, and therefore they do not qualify to be defined as creditors of the estate. They dealt with individual survivors of the deceased, after the deceased's death, one of whom was an administrator. The question is whether their dealings were with the estate and therefore binding on the estate. Whatever the case, the protestors are inviting me to make a determination as to title to property as between them and the estate.

17. I am mindful of the provisions of Article 162 (2) of the Constitution which states as follows -

*'Parliament shall establish courts with the same status as the High Court to hear and determine disputes relating to –*

*(a) ...*

*(b) the environment and the use and occupation of, and title to, land ...'*

18. Article 162(2) should be read together with Article 165(5) of the Constitution which says -

*'The High Court shall not have jurisdiction in respect of matters –*

*(a) ...*

*(b) Falling within the jurisdiction of the courts contemplated in Article 162(2).'*

19. The issues raised by the protestors turn on matters of land or property law that are stipulated in the Land Act and the Land Registration Act, No. 3 of 2012. By virtue of section 101 of the Land Registration Act, any disputes relating to matters touching on disposition of land are to be dealt with by the Environment and Land Court, which is a court established under the Environment and Land Court Act, No. 19 of 2011, as envisaged in Article 162(2) of the Constitution. My reading of Articles 162(2) and 165(5) of the Constitution is that I, sitting as High Court, have no jurisdiction to determine whether the protestors herein acquired valid titles from the transactions the subject of these proceedings, and I equally have no jurisdiction to order that the proportions of land that they purchased be conveyed to them out of the estate by the administrator. That jurisdiction lies with the Environment and Land Court, and the High Court can only act upon a decree of the said court.

20. The sales herein affect only one property, that is to say Dagoretti/Kinoo/2465. What I should do in the circumstances is to set aside the said property by way of removing it from the schedule of the assets to be distributed, in terms of Rule 41(3) of the Probate and Administration Rules, to allow the protestors prove their respective cases against the estate at the Environment and Land Court in suits properly commenced in that behalf. The High Court should be in a position to dispose of Dagoretti/Kinoo/2465 only after the Environment and Land Court has declared the protestors rights thereto. In the meantime the rest of the assets shall be disposed of in the manner proposed by the administrator.

21. The final orders that I shall make in respect of the application dated 7<sup>th</sup> September 2016 are –

**(a) That the applicant herein, Monicah Murugi Mungai, is hereby confirmed as the administrator of the estate of the deceased;**

**(b) That the property known as Dagoretti/Kinoo/2465 is hereby removed from the schedule of the assets to be distributed to enable the protestors take action at the Environment and Land Court in respect thereof in the terms of paragraph 20 hereof;**

(c) That the rest of the assets shall be distributed in the terms set out in paragraph 2 of this judgment;

(d) That a certificate of confirmation of grant shall issue accordingly;

(e) That each party shall bear their own costs; and

(f) That should any party be aggrieved by the orders herein there is liberty to move the Court of Appeal appropriately within twenty-eight (28) days of the date herein.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>st</sup> DAY OF January , 2019**

**W. MUSYOKA**

**JUDGE**

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> DAY OF February , 2019**

**ASENATH ONGERI**

**JUDGE**