



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PROBATE & ADMINISTRATION CAUSE NO. 113 of 2006**

**IN THE MATTER OF THE ESTATE OF BIRURI KIHORIA (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**PETER RUO MAINA.....APPLICANT**

**AND**

**ROSEMARY WANGARE BIRURI.....1<sup>ST</sup> RESPONDENT**

**MARGARET NJERI BIRURI.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] Before the Court for determination is the Summons dated **18 October 2012** brought by the Interested Party/Applicant, **Peter Ruo Maina**, pursuant to **Section 47 and 70(b)** of the **Law of Succession Act, Chapter 160 of the Laws of Kenya**; and **Rules 49 and 73** of the **Probate and Administration Rules**. The orders sought by the Applicant are:

[a] That the Court be pleased to determine the Applicant's interest in all that piece of land known as **Loc.9/Kanyenyaini/394**;

[b] That the Court be pleased to order that all that piece of land known as **Loc.9/Kanyenyaini/394** do vest in the name of the Applicant, **Peter Ruo Maina** absolutely and without any encumbrances;

[c] That the Administrators of the Estate of the late **Biruri Kihoria** (Deceased) be ordered to forthwith execute transfer documents for all that piece of land known as **Loc.9/Kanyenyaini/394** and in default, the Deputy Registrar be ordered to execute all the requisite transfer documents in favour of **Peter Ruo Maina**;

[d] That the costs of the application be borne by the Estate.

[2] In support of the application, the Applicant deposed, in his affidavit sworn on **18 October 2012**, that he is a purchaser for valuable consideration of all that property known as **Loc.9/Kanyenyaini/394** (hereinafter the Suit Property) which is listed in the schedule of assets in the Petition for Grant of Letters of Administration Intestate dated **16 March 2006**. He further averred that on **30 May 2007**, he entered into an agreement for sale of the Suit Property with the beneficial owner, one **Teresia Wambui Njiri** at a consideration of **Kshs. 1,200,000/=**; which he paid in full and was thereupon given the original title deed for the property.

[3] The Applicant deposed that, before entering into the agreement for sale, he was advised by the seller, which advice he verily believed to be true, that the Suit Property was an *inter vivos* gift made to her by the Deceased during his lifetime, although he died before formal transfer could be effected in her favour. He added that he had no reason to disbelieve the vendor since, besides the assurances from her and people who knew the Deceased well, she also had in her possession the original title deed for the property which she handed over to him. That he accordingly expected the formal transfer to be executed in his favour by the Administrators as soon as possible; but this has not been done, notwithstanding that it is not in dispute that the property was given to **Teresia Wambui Njiri** by the Deceased during his lifetime.

[4] The Applicant annexed to his affidavit the Sale Agreement (**Annexure "PRM 1"**), a copy of the Title Deed for the Suit Property

(Annexure "PRM 3a") as well as Affidavits sworn in respect of this Succession Cause by the Petitioners, **Margaret Njeri Biruri** (Annexure "PRM 4") and **Rosemary Wangare Biruri** (Annexure "PRM 5). The application was conceded by the 2<sup>nd</sup> Petitioner while the 1<sup>st</sup> Petitioner, representing the 2<sup>nd</sup> House of the Deceased opposed the application. Notwithstanding previous orders herein that the interest of the Interested Party be determined during the distribution stage, the parties entered into a consent on the **10 July 2017** for the Applicant's interest in the Suit Property to be disposed of on the basis of the Supporting Affidavit, the annexures and the parties' written submissions.

[5] Counsel for the Applicant, **Mr. Ngigi Mbugua**, was of the submission that, since there is no dispute that the Suit Property was an *inter vivos* gift to **Teresia Wambui Njiri**, the said **Teresia Wambui Njiri** had the exclusive control of it and was at liberty to dispose of it as she deemed fit whether or not she had a Grant of Letters of Administration Intestate in respect of the Deceased's Estate. Counsel relied on **The Estate of Ruth Nyakanini Rukwaro (Deceased) [2016] eKLR** for a consideration of the conditions precedent for a gift *inter vivos*; and **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR** for an interpretation of the phrase "free property" for purposes of the **Law of Succession Act**.

[6] It was further the submission of **Mr. Ngigi Mbugua** that, having received a valid gift from the Deceased, **Teresia Wambui Njiri** was entitled to enter into a sale agreement for valuable consideration with the Applicant for the disposal of that property; and therefore that a resulting trust was thereby created in the Applicant's favour. Counsel cited the case of **Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR** in which the Court of Appeal held that a resulting trust automatically arises in favour of the person who advances the purchase money whether or not the property is registered in his name. It was thus the submission of Counsel that the Applicant has a good claim both in law and equity. He accordingly urged the Court to allow the application and grant the orders prayed for by the Applicant.

[7] On behalf of the 1<sup>st</sup> Petitioner/Respondent, it was the submission of **Mr. Songok** that no beneficiary is legally authorized to dispose of any part of the estate of a deceased person before confirmation of grant without the consent of the Court. It was therefore his postulation that the Sale Agreement dated **30 May 2007** between the Applicant and **Teresia Wambui Njiri** is null and void and cannot be the basis for securing the orders sought in the instant application. According to Learned Counsel, the proper procedure was for the said **Teresia Wambui Njiri** to pursue her claim during distribution of the Estate and if successful then dispose of her share as deemed fit. He added that, for the foregoing reasons, the Applicant is a stranger to the Estate whose participation herein is tainted by illegalities; and should therefore not be entertained by the Court.

[8] Having carefully considered the application, the averments set out in the Supporting Affidavit, including the annexures thereto; as well as the written submissions filed herein on behalf of the Applicant and the 1<sup>st</sup> Respondent, there appears to be no dispute that the Deceased, **Biruri Kihoria**, died intestate and left behind numerous assets as listed in the Affidavit in Support of Petition filed herein on **19 May 2006**. There is no dispute that, consequent upon his death, two of the beneficiaries, **Rosemary Wangare Biruri** (the 1<sup>st</sup> Respondent) and **Margaret Njeri Biruri** (the 2<sup>nd</sup> Respondent) petitioned the Court for Grant of Letters of Administration Intestate to the Deceased. The 1<sup>st</sup> Respondent is a step-daughter to the 2<sup>nd</sup> Respondent, whose is the First House.

[9] There is further no dispute that, on the **15 January 2007**, the parties consented to the Grant of Letters of Administration Intestate being issued to the two Respondents jointly. The Grant is yet to be confirmed to pave way for distribution of the Deceased's Estate, basically because of the wrangling that has been going on amongst the beneficiaries. In the interim, one of the beneficiaries, **Teresiah Wambui Njiri**, entered into a Sale Agreement with **Peter Ruo Maina**, the Applicant herein for the sale of one of the properties of the Deceased, namely, **Plot No. Loc. 9/Kanyenyaini/394** together with all the developments thereon, for a consideration of **Kshs. 1,200,000/=**.

[10] From the Applicant's perspective, that property does not form part of the free property of the Deceased for the reason that it was a gift given *inter vivos* to **Teresiah Wambui Njiri** by the Deceased; a fact that was expressly conceded to by the 2<sup>nd</sup> Respondent. There is similarly clear admission by the 1<sup>st</sup> Respondent that the Suit Property was indeed given by the Deceased to **Teresiah Wambui Njiri**. In her affidavit sworn on **31 October 2006** and filed herein on **1 November 2006**, a copy of which was annexed to the Applicant's Supporting Affidavit, the 1<sup>st</sup> Respondent averred thus at Paragraph 13 thereof:

"**THE deceased made the following gifts though not transferred and which I wish to uphold and confirm during succession**

...

**d) 4 acres farm in Muranga District - gift to Teresa Wambui complete with title.**

..."

[11] Accordingly, there appears to be no controversy that the Suit Property was given as a gift by the Deceased to **Teresiah Wambui Njiri**. The issue, as I understand it, is whether the Suit Property was a gift *inter vivos* properly so called and whether it is therefore excluded from the Deceased's free property as at the time of his death. In this regard, **Section 3** of the **Law of Succession Act** defines "**free property**" of a deceased as follows:

"**Free property, in relation to a deceased person, means the property which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.**"

[12] There is no gainsaying that the Suit Property belonged to the Deceased and that he was legally competent freely to dispose of it during his lifetime. The question to pose, however, is whether the Deceased's interest in the Suit Property was terminated by his death. A look at the Title Deed for the subject property, annexed to the Supporting Affidavit as **Annexure "PRM 3a"** shows that the property is still in the name of the Deceased; and that, since **23 September 1996** when the Title Deed was issued to the Deceased, no transaction has ever taken place in respect of the proprietorship of the property. What that means, to my mind, is that the Deceased's interest in the Suit Property was not

terminated by his death; and that the property naturally became part of the Estate for administration purposes in line with the relevant provisions of the **Law of Succession Act**. Indeed, in the Appendix annexed to the Affidavit in Support of the Petition for Letters of Administration Intestate, the Suit Property was listed under Item C as forming the assets of the Deceased.

[13] There may have been a clear intention on the part of the Deceased to give the Suit Property as a gift *inter vivos* to **Teresiah Wambui Njiri**, and he may have, for all practical purposes done so; noting that he handed over the Title Deed for the property to **Teresiah Wambui Njiri**. However, that gifting process was not completed during the Deceased's lifetime; the effect thereof being that, as at the date of his death, the property remained part of the Deceased's Estate. It is instructive that in **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20(1)** at **Paragraph 67** it is opined that:

**"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."**

[14] Accordingly, I would agree with the position taken by **Hon. Nyamweya, J.** in **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, that:

**"For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts... Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid..."**

[15] Clearly therefore the transaction between the Deceased and **Teresiah Wambui Njiri** having not been perfected by way of a registered Transfer, it would follow that the only way the intention of the Deceased can be realized is through transmission by the Administrators of his Estate. It was therefore foolhardy for the Applicant to enter into an arrangement for the sale of the subject property, a piece of property is listed in the Petition as part of the Deceased's Estate, before the property was lawfully transferred to **Teresiah Wambui Njiri** by the Administrators. I say so because **Section 45** of the **Law of Succession Act** is explicit that:

**"(1) Except in 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."**

Likewise, the proviso to **Section 82** of the **Law of Succession Act** is clear that **"...no immovable property shall be sold before confirmation of grant..."**

[16] The foregoing being my view of the matter, I would come to the conclusion that there is absolutely no basis for the Court to issue the orders prayed for in the application dated **18 October 2012**; there being a clear procedure in law for the distribution of the property of a deceased person. The application is therefore misconceived in my view. It is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**OLGA SEWE**

**JUDGE**