



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 84 OF 2016

(FORMERLY NAIROBI SUCC CAUSE NO. 1077 OF 1993-NAIROBI)

IN THE MATTER OF THE ESTATE OF ROBERT MUNGAI GICHINJI (DECEASED)

RULING

1. On 22/08/2017, Gladwell Njoki Kangethe filed summons as the Applicant to substitute the name of Anne Mugure Muinamia-Administrator (deceased) with that of Gladwell Njoki Kangethe as Co-Administrator of the deceased's Estate herein. The said application was allowed on 1/3/2018.
2. On the same leg, Mr. Kamau, Counsel for the said applicant sought directions on point (e) in the Ruling of Musyoka J on whether land known as KIKUYU/KIKUYU/805 is part of the estate.
3. The court directed the Administrators and beneficiaries to file their affidavits in respect of the question of inclusion of KIKUYU/KIKUYU/805 as part of the estate and there after oral submissions.
4. George Livingstone Ndungu Mungai filed his affidavit as one of the Administrators herein on 24/7/2018. He deponed that his step mother one Annie Mugure Muinamia, despite a caution being placed on the suit property by his brother-in-law one George Gitao Moroko, still managed to have the plot transferred into her name. He deponed that the step-mother was only entitled to a life interest and the same does not allow her to sell any part of the estate otherwise the sale would be unprocedural, uncalled for and unlawful. Finally he urged court to order that the suit property form part of the deceased's estate and order cancellation of the title deed in the name of Samuel Miruru Githinji.
5. George Gitao Moroko filed his affidavit as the son-in-law to the deceased. He deponed that he assisted George Livingstone Ndungu place a caution against his father's land with KIDFAMACO. That after several years he found out that the property had been transferred to Annie Mugure Muinamia and upon enquiry, she alleged to have paid for the property but could not prove the same.
6. Mwaura Gitukui Mbembe filed his affidavit as well. He deponed that he is the Chairman at KIDFAMACO. He deponed that the name of the owner of plot number 805 had been altered from Robert Mungai to Annie Mugure. He contended that it's only the real owner who can transfer property or his legal representative thus he believed that the transfer was not genuine.
7. Gladwell Njoki Kangethe filed her witness statement on the same issue as the co-administrator herein and Annie Mugure's daughter. She stated that her mother was sole proprietor of the suit property which she later sold to Samuel Muiruri Githinji and it's for this reason that the said property was excluded from the estate of the deceased as all the beneficiaries were aware of the same. She contended that the objectors took almost 20 years to raise the issue and as such the property does not constitute the estate of the deceased.
8. Samuel Muiruri Githinji also filed his sworn witness statement. He stated that he bought the suit property from Annie Mugure in the year 2010 and the same was transferred to him and he has been in occupation since then and is not aware of any fraud or irregularity as there was no caution placed on the title thus no notice of a competing interest.
9. In submissions, counsel for the Applicant submitted that the said plot was owned by Robert Gichinji and was transferred by Annie Mugure on 13/9/91. The transfer was said to have been done without proper letters of administration and no receipts or documents was produced to prove ownership by Annie Mugure.
10. Mr. Nganga for the Respondents submitted that the application is opposed as the property does not form part of the estate of the deceased. That a lease was issued on 1/6/1993 and the title document is in the name of Annie Mugure and the registration of property cannot under Section 24 of the Land Registration Act, the title cannot be challenged. He contended that his client has been the owner since 1994 thus Section 7 of the Limitation of Actions Act applies as there can be no recovery after 12 years. The application was said to be an afterthought and in any event, the property was not included in the grant issued in 1994.

11. The court has considered all the material canvassed herein. Directions had been given on 1/3/18 (**Ngugi J**) and on 28/6/18 (**Meoli J**) that the question whether the land parcel No. KIKUYU/KIKUYU BLOCK 1.805 formed part of the estate of deceased herein was to be tried by way of viva voce/affidavit evidence (with cross examination of deponents). On the date set for hearing, however counsel elected to proceed by way of oral arguments relying on the affidavits already on record. Section 107 of the evidence Act provides that:

“ (1) **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) **When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”**

12. It is the contention by the deceased’s son **George Livingstone Ndungu** a co-administrator to the deceased’s estate that the subject land parcel belonged to his deceased father and that, without lawful authority, his co-administrator (now deceased) **Anne Mugure Muinamia** transferred the land parcel to herself before succession proceedings had been filed and concluded. His evidence of the alleged ownership are the annexures **MGM 1** and **GGMI** referred to in the affidavits of his two witnesses **Mwaura Gitukui Mbembe** and **George Gitau Moroko** respectively, who swore affidavits in support of his claim.

13. Unfortunately none of the affidavits contain the annexure referred to. Nonetheless the court was able to trace in the ELC cause No. 1519/14 which was transferred to the High Court a copy of the annexure referred to in the said affidavits (both refer to a photocopy of a book kept by KIDFAMACO) the land buying company from whom the deceased had allegedly acquired the land parcel. The ELC cause related to the said land parcel and was filed in 2014 by George Livingstone Ndung’u against the late Annie Mugure Muinamia and another. Therein the said copy is annexed to the affidavit of **George Livingstone Ndungu** sworn in support of the motion filed on 5th December 2014 and marked as annexure “**GLN1**”.

14. According to George Livingstone Ndungu and his witnesses herein this annexure is a copy of the page of a notebook kept by KIDFAMACO regarding details and ownership of plots. This record has a list of names column, a supposed plot numbers column and apparent addresses of the persons whose names appear in the column next to the respective plots. Item 179 therein lists the name **Robert Mungai Gichinje** which is apparently cancelled and replaced with the name **Anne Mugure Muinamia** against plot 805. There is an endorsement beside the name, a portion of which reads “per chief’s letter 13/9/91”. This entire record is hand written and contains many alterations.

15. What the court is being asked to conclude from this record is that the deceased administrator, on the strength of the alleged chief’s letter, transferred to herself plot 805 previously owned by the deceased. First of all, there is nothing on the annexed page to suggest that the deceased was a member of KIDFAMACO and that the list proffered was the list of owners of the plots whose numbers are reflected next to the names. Secondly no share certificate or evidence of payment in respect of the purported plot is proffered. Moreover the alleged chief’s letter was not produced.

16. The alleged present custodian of this record is **Mwaura Gitukui Mbembe**. He did not tender any other record to support the copy exhibited. It is clear from the depositions of this witness that he has no personal knowledge of the transactions recorded in the much-hyped copy of records. One would have hoped that officers of KIDFAMACO who handled the disputed transaction would have given evidence. In my view, the most difficult aspect relating to this record is that it is replete with cancellations and alterations, is unsigned and has no supporting records.

17. A court of law cannot accept such a record at face value as proposed by Livingstone and his witnesses. The more intriguing question is why George Livingstone Ndungu who was involved during the initial proceedings filed herein failed to have the subject property included in the list of the deceased’s assets. His affidavits suggests that he was always aware of the existence of the land parcel owned by his father at KIDFAMACO. He claims to have instructed **George Gitau Moroko** to pursue the issue with KIDFAMACO. The grant was confirmed on 19th May 1995 but it was not until 2012 that George Livingstone Ndungu raised the matter regarding the Kikuyu plot in this cause.

18. There is uncontroverted evidence in the affidavit of **Gladwel Njoki Kangethe** that the deceased administrator was registered as the proprietor of the subject plot in 1993 and subsequently transferred it to **Samuel Mururu Githinji** in 2010. Strong evidence is required to successfully challenge the said title. No such evidence has been brought in this cause.

19. The court takes the view that the claim by George Livingstone Ndungu has not been borne out and rules that the subject plot has is not been demonstrated to be an asset within the estate of the deceased for purposes of this cause. Parties are therefore directed to file an application to confirm the grant herein as ordered by **Musyoka J**, within 21 days of today’s date. This cause began as P & A 1077 of 1993. Litigation must come to an end.

Parties will be own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF APRIL 2019

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C. MEOLI

JUDGE

In the Presence of:-

Mr. Kamata for Petitioner George Livingstone Ndungu

Miss Kori holding brief for Mr. Njuguna for Gladwell Njoki Kangethe

Court Clerk - Kevin