



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 110 OF 2002

IN THE MATTER OF THE ESTATE OF NGUGI MUCHUGU KARUU - DECEASED

DAVID KIARIE NGUGI.....PETITIONER

JUDGMENT

1. The Applicant herein **David Kiarie Ngugi** vide his summons dated 14/3/2016 prayed for the following orders.

1. That David Kiarie Ngugi and Peter Wainaina Ngugi be vested with all the powers and duties of administration of the estate of the deceased Ngugi Muchungu Kamau .

2. That parcels No. Trans Nzoia/Suwerwa/1296, 1297, 1298, 1299, 1300, 1301, 1302 and 1303 or any other number being subdivisions of parcel of land title number Trans Nzoia/Suwerwa/259 to revert to the original land title number Trans Nzoia/Suwerwa/259 in the name of the deceased Ngugi Muchungu Kamau.

3. That the certificate of the confirmed grant issued to Hannah Njeri Ngugi on the 21st day of October 2004 be amended to identify shares of all the beneficiaries.

4. Costs

2. The matter having been mentioned severally was finally ordered that the same should proceed by way of oral evidence. The respondent did file their responses as well as the other beneficiaries namely the purchasers.

3. Before looking at the evidence tendered orally by the parties its appropriate to set down the history of this cause. The deceased herein died on 17th December 2002 leaving behind the following beneficiaries.

1. Hannah Njeri Ngugi – Widow
2. John Muchungu – Son
3. Peter Wainaina – Son
4. Jane Wanjiru – daughter
5. Daniel Muriuki – Son
6. Timothy Kamau – Son
7. Samwel Njenga – Son.

5. The widow did apply for the letters of administration and was granted and the same confirmed on 21st October 2004. The deceased left behind land parcel No. Trans Nzoia/Suwerwa/259 measuring 16 acres. The court granted the widow the aforementioned parcel of land, which was eventually transmitted to her.

6. Thereafter, she decided to sell a portion of the said parcel of land after having it subdivided. Infact the same was transferred to various 3rd parties who included;

- a) Paul Gachera Ndichu – 1 acre
- b) Solomon Mwaniki Wangoi – 2 acres
- c) Patrick Mwika Kairitha – 1 acre
- d) Makutano Secondary school – 5 acres

7. The Applicant did object to the said sale for the reason that the same was a family land and there was need to have a consent from the rest of the beneficiaries. The Administrator Hannah Njeri Ngugi filed a suit No. 133 of 2012 at ELC Court Kitale against the Applicant herein David Kiarie Ngugi for purposes of an order to have the caution placed on the register be removed. The basic reason was for the Administrator to be permitted to sell part of the land so as to get money to pay for the hospital bill for Sammy Ng'ang'a one of her son as well as a beneficiary.

8. The court in dismissing the application noted that the said Ng'ang'a was not sick as alleged by the mother. The court went ahead to state that:-

“ It is not disputed that the land in issue was registered in her name by way of transmission upon the demise of her husband. This is therefore family land which is not only for the benefit of the applicant but also for the benefit of her other children, the Respondent included. The applicant is advanced in age and her children have the right to protect the family land -----”.

9. It appears then that after this ruling of 29th January 2013 the caution was however removed and the land subdivided and transferred to various parties as stated above. The court then ordered the parties to proceed by way of viva voce evidence.

10. The evidence can be summarised as follows.

PW1 David Kiarie Ngugi stated that he was not a party to the whole transaction when the mother decided to dispose off the land. He said that as far as he was concerned the land was a family land and that he did not participate in any family meeting authorising such sale. He protested vide the caution he placed on the register. Nonetheless her mother sued him to compel him remove the caution but the court rejected her request. He argued that those who have sold their portions should give the purchasers their portion.

11. **PW2 Sammy Ngare** also a son to the deceased denied that he was ever sick to the extent that he needed her mother to sell the land to support him on medical bills. He prayed that the title do revert to the estate .

12. **DW1 Timothy Kimani** also a son stated that the land was sold by the deceased after a family meeting convened by their mother. On cross-examination he said that they had a copy of Justice Obaga's ruling when they went to the Registrar for the removal of the caution.

13. **DW2 Jesca Kinya** on behalf of Makutano Secondary School testified that the school purchased land from the widow measuring 5 acres for a sum of kshs 2.5 million. The same was transferred to the school and there is title no. Trans Nzoia/Suwerwa/1303 in its favour. That the school paid the entire purchase consideration. They have annexed the sale agreement and copy of title to their replying affidavit.

14. Having heard the parties, what is clear therefore is that the late Hannah Njeri Ngugi disposed the parcel of land without full consent of all the family members especially the Applicant.

15. The court has perused the ruling dated 29th January 2013 which the court refused to order the removal of the caution. The titles namely Trans/Nzoia/Suwerwa/1298 in favour of Patrick Mwika Karithe was issued on 22nd July 2013, Makutano Secondary school Trans Nzoia/Suwerwa/1303 on 14/8/2013, Solomon Mwaniki Wangoi Trans Nzoia/Suwerwa/1296 on 14/8/2013 , Paul Gachera Ndichu – Trans Nzoia/Suwerwa/1299 on 13/8/2013.

16. Obviously all were issued when the court had delivered its ruling.

17. There is a letter dated 2nd July 2013 attached to the affidavit of Hannah Njeri Ngugi dated 15/11/2014 which was addressed to the Applicant David Kiarie Ngugi in respect to the caution on the suit parcel of land . The same stated that:

“ The caution that was placed by you on 19/7/2012 and having being heard by the undersigned after objection to the removal is hereby removed under Section 73 (4) of the L.R.A. 2012.”

18. The Land Registrar H.C. Mutai signed and a copy given to Hannah Njeri Ngugi.

19. It means therefore that as at the time of removing the caution the court order was still subsisting. The land Registrar could not have proceeded under S. 73(4) of the LRA 2012 to remove the caution. There was no appeal against the said ruling by Justice E. Obaga. It thus remained an order till a contrary order was issued.

20. **Section 37 of the Laws of Succession Act** clearly spells out the duties of a surviving spouse. The same provides that;

“ A surviving spouse is entitled to a life interest under the provisions Section 35 or 36 with the consent of all co-trustees and all children of full age or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance.

Provided that, in the case of immovable property, the exercises of that power shall always be subject to the consent of the court.”

21. There was no consent of all the beneficiaries to the estate. Neither was there any consent of the court.

22. By its ruling of 4/12/2014 my brother Karanja – J stated as follows:-

“Clearly , the court did not give consent to the sale or intended sale of part of he estate property which is immovable property comprising land portion Plot No. 259 Suwerwa Settlement scheme. However such consent may be sought prior to the transfer of part of the property to third parties.”

What therefore is the way forward? It is admitted by the Respondent that their mother sold the land for her own upkeep and maintenance. Some of the beneficiaries have directly benefited from the proceeds and they have admitted as much.

23. The sale was nevertheless illegal to the extent that no consent was obtained from all the beneficiaries or from the court. Further the existing caution was removed despite a court ruling in existence. The logical thing therefore is to have the land revert to its original wholesome title. The beneficiaries should therefore agree on a mode of distribution taking into consideration the interest of the purchasers who they acknowledge. Infact it appears it is only PW1 and PW2 whose interest had not been taken into consideration.

24. The purchasers shall therefore be treated as creditors to the estate and the administrator after taking care of those who have not benefited should proceed to consider their interest.

25. In the premises it is ordered that:-

1. Titles number Trans Nzoia /Suwerwa/1296, 1297, 1298, 1299, 1300, 1301, 1302 and 1303 are hereby cancelled forthwith and the original title No. Trans Nzioa/Suwerwa/259 is hereby restored.

2. Those who have already obtained the titles are hereby ordered to physically surrender them to the Land Registry appropriately and unconditionally.

3. The beneficiaries do proceed to apply for the distribution of Land Parcel No. Trans Nzoia/Suwerwa/259 appropriately taking into account the courts perspective.

4. Pending the above distribution the status quo be maintained on the ground.

5. Costs in the cause.

Delivered, signed and dated at Kitale this 3rd day of April, 2019.

H.K. CHEMITEI

JUDGE

3/04/19

In the presence of:

Mr Ingosi for the Applicant

Respondent in person

Court Assistant – Kirong

Judgment read in open court.