



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
SUCCESSION CAUSE NO. 745 OF 2015
(FORMELY MERU SUCCESSION CAUSE NO. 86 OF 2013)
IN THE MATTER OF THE ESTATE OF THE LATE ESTHER NAU PHARES- (DECEASED)

AND

JOHN MUNENE KINYUA.....1ST APPLICANT

HUMPHREY MUGAMBI NGETI.....2ND APPLICANT

VERSUS

EDWIN MARANGU MUTUNGA.....1ST RESPONDENT

BENJAMIN KARIUKI NGAI.....2ND RESPONDENT

R U L I N G

1. This cause relates to the estate of the late **ESTHER NAU PHARES** (deceased) who died on 27th July 2006 at Meru Hospital resident at Chogoria. The petition filed and the Chief's letter dated 24th May 2007 accompanying the petition indicates that the deceased died intestate leaving behind the following:

- i. James Kinyua Mutunga
- ii. Isaac Ntwiga Mutunga
- iii. Eunice Kaari Marangu
- iv. Mary Igoji Sese
- v. Edwin Marangu Mutunga

2. The estate comprised that property known as Mwimbi/Chogoria/2506. Edwin Marangu Mutunga, the petitioner was appointed the administrator of the estate herein on 30th July 2007. The same was confirmed on 9th April 2008 in the following mode of distributions;

- a) Edwin Marangu Mutunga - 0.25 acres
- b) Mary Igoji Mutunga - 0.10 acres
- c) Dollycus Wanja Mutunga - 0.10 acres
- d) Lisbeth Kaimuri Mutunga - 0.12 acres
- e) Ashford Karani Mburia

Nancy Wanja Karani - 0.25 acres jointly

f) Edwin Marangu Mutunga - 0.47 acres

g) Isaac Ntwiga Mutunga - To share balance

James Kinyua Mutunga

3. John Munene Kinyua and Humphrey Mugambi Ngeti vide Summons for Revocation of Grant dated 20th January, 2013 asked this court to revoke the grant cited above on the following grounds namely:-

i. That the Petitioner/Respondent Edwin Marangu Mutunga acted secretly and locked out beneficiaries and interested parties.

ii. That the Respondent acted dishonestly by filing separate suits and obtaining orders to defeat the interests of other interested parties.

iii. That the Respondent has sold part of the estate to the exclusion of others.

iv. That one of the buyers intends to use the portion securing a bank loan.

v. That the grant was obtained by fraud, making a false statement and concealment of a material fact namely that the deceased left a valid will before her demise.

vi. That the grant was confirmed by means of untrue allegations because presence of interested parties were not revealed to court.

vii. That the respondent did not inform this court of the presence of other cases in relation to the estate.

viii. That the Respondent's open dishonesty renders him unfit to administer the estate well.

4. The first Applicant through a Supporting Affidavit sworn on 12th February, 2013 has reiterated the above grounds adding that the deceased made a will on 8th July 2006 and passed away on 27th July 2006. The 1st applicant further depones that the Respondent unknown to the Applicants, file **Succession Cause No. 59 of 2007** indicating the beneficiaries as James Kinyua Mutunga, Isaac Ntwiga Mutunga, Eunice Kaari Marangu, Mary Igoji Sese and Edwin Maranga Mutunga when the persons were not mentioned in the will.

5. The 1st Applicant has further stated that when 2nd Applicant, Humphrey Mugambi realized what was going on, he went to court and applied for review of the confirmation of grant and that the court allowed it reverting the estate back to the deceased.

6. The Applicant also aver that the court noted that there was a civil suit vide **Meru Chief Magistrate's Court Civil Case No.119 of 2006** regarding the estate where the 2nd Applicant had sued claiming purchasers interests. The 1st Applicant also states that he applied to be included as a legal representative of the estate of the deceased on the strength of a limited grant issued via **Meru H.C Succession Cause No. 63 of 2007** and that while **Chuka Succession Cause No.59 of 2007** was pending, Benjamin Kariuki sued the Respondent vide **Chuka Principal Magistrate's Court Civil Case No. 76 of 2010** and that the Respondent failed to enter appearance deliberately which made the suit to proceed ex parte where all caveats on the property comprising the estate were lifted and the property was transferred to Benjamin Kariuki.

7. In his oral evidence in court, John Munene the 1st Applicant testified that he was a grandson of the deceased in that the deceased was mother to James Kinyua Mutunga (deceased) who was his father. He told this court that while his grandmother died in 2007 his father died in 2009. He insisted that Humphrey Mugambi, the 2nd Applicant is a purchaser of the part of the estate having purchased 1/2 acre from the deceased during her lifetime. He further confirmed that the Respondent in this cause is his uncle as he was a brother to his late father.

8. The 1st Applicant further testified that he was aware of a dispute between her grandmother, the deceased herein and the 2nd Applicant over the acreage he had bought as her grandmother was saying she sold 1/4 acre while the 2nd Respondent insisted he had bought 1/2 an acre. He however stated that the dispute was resolved after the demise of his grandmother and that the 2nd Applicant was allowed to take possession of 1/2 an acre in the estate where he has put up permanent structures.

9. It was the 1st Applicant's case that his grandmother had gifted all her children including the Respondent who allegedly got parcel No.2502 and that deceased remained with parcel No.2506 where she allegedly sold 1/2 an acre and willed away the rest through a written will. He accused the Respondent for secretly selling the estate and having the estate transferred through a court order in a civil suit while the succession cause was pending.

10. He also confirmed in cross-examination that he benefitted from a share given to his late father and that the share is not part of the estate (2506) in this cause.

11. Humphrey Mugambi (PW2) in his evidence stating that though he is a purchaser in the estate, his interest was overlooked by the Respondent. He also added that he is living on the half acre he bought and that Benjamin Kariuki secretly obtained title after the

Respondent filed several cases to effect the transfer.

12. The Respondent has opposed this application through a Replying Affidavit sworn on 20th September, 2013. He deposes that this application is a collusion between the Applicants who are also parties in Meru Chief Magistrate's Court Civil Case No.119 of 2006. He denies about existence of a will saying that the same could have been executed under duress and coercion because the deceased at the time was allegedly senile.

13. The Respondent has further doubted the authenticity of the will stating that there was no way the Applicant as a grandson could have been favoured more than him as son. He further avers that he did not file the succession cause secretly as he had blessings from all the family members. He has justified the purchase of the estate by Benjamin Kariuki stating that he purchased the property when there were no restrictions or inhibitions and justified the orders obtained vide Chuka Chief Magistrate's Court Civil No. 76 of 2010 stating that the same were lawful. He confirmed that he executed an agreement after he sold the estate to Benjamin Kariuki.

14. He also confirms that the deceased had other parcels of land which she had transferred to her children including himself in her life time and that she had remained only with parcel No.2506 measuring around 0.76 Ha or 2 acres. He further states that there was no will and that he divided the estate and gave all the beneficiaries a share though the shares are far from equal.

15. The Respondent conceded under cross-examination that Benjamin Kariuki Ngai sued him while the Succession was pending and that they entered into a consent to remove the inhibition (caution) that had been placed by court in Succession Cause No. 59/2007. He also conceded that the 2nd Applicant had taken possession of part of the estate during the lifetime of the deceased but that he did not notify him about the succession cause.

16. Benjamin Kariuki Ngai, the Interested Party in this cause also opposed this application vide a Replying Affidavit sworn on 20th September, 2013. He has deposed that he is a lawful registered owner of the parcel that comprised the estate (L.R. Mwimbi/Chogoria/2506) after purchasing it from the Respondent at a total consideration of Kshs.900,000/-. He further added that he had earlier paid Isaac Ndiga, a brother to the Respondent Kshs.120,000/- for a 1/4 of an acre. He further added that the Respondent did not transfer the land parcel to him and that he filed a suit where a consent was entered and the court issued an order directing that all cautions placed on the property be lifted and he be registered as the owner of Mwimbi/Chogoria/2506. He states that he is aware that the 2nd Applicant Humphrey Mugambi has been in occupation of part of the estate and that he has filed a case in the ELC to have him evicted. He further added that he was unaware that there was a succession dispute pending in court when he carried out all the transactions. He stated that the transaction happened very quickly as they entered into an agreement on 23rd July 2010 and by 28th September 2010 he had been registered as the owner after filing a consent in court. He however feigned ignorance on how the consent was entered affecting a Succession Cause No. 59/2007 where he was not a party.

17. Analysis and Determination

This court has considered this summons and the evidence presented by the Applicants. I have also considered the response made by both the Respondents and Benjamin Kariuki Ngai, the Interested Party. What is not in dispute in this application is the fact that the 1st Respondent is the appointed administrator in this cause which initially was Chuka Principal Magistrate's Court Succession Cause No. 59 of 2007 before it was transferred to Meru to become High Court Succession Cause No.86 of 2013 before coming back to this court to be registered as Chuka High Court Succession Cause No.745 of 2015.

18. It is not in dispute that the 2nd Respondent Benjamin Kariuki Ngai, is now the registered owner of the property that comprises the estate herein courtesy of a sale agreement with the 1st Respondent and a consent order obtained vide Chuka Principal Magistrate's Court Civil Case No.76 of 2010.

19. It is also not contested that the 2nd Applicant, Humphrey Mugambi Ngeti, occupies part of the estate and took possession of that portion during the lifetime of the deceased. The Respondent has conceded that when he petitioned for letters of administration he did not notify the 2nd Applicant about the succession cause. To that extent, the applicant's claim that there was concealment is well grounded.

20. The record in this cause shows that the grant was confirmed on 9th April 2008 and distribution was done in favour of all the children of the deceased save for Eunice Kaari who appears to have been left out perhaps on account of the fact that she was married. I note from the record that on 28th February, 2008, the cautions on the estate were lifted to allow for the distribution but the same was set aside by a court order on 7th September, 2009 where the court cancelled all subdivisions and directed the property to revert back to the name of the deceased. The Respondents went behind that order albeit in a clever way by filing a separate civil suit vide Chuka Principal Magistrate's Civil Case No. 76 of 2010 and entering a consent that vacated the inhibition order in Succession Cause No.59 of 2007. That in my considered view was improper, irregular and an abuse of court process. A party cannot file a case and enter a consent that affects another case pending where he is not involved. The 1st Respondent and the 2nd Respondent appears to have thought of a short cut and did circumvent due process of law through a deliberate and calculated effort to misuse a court process to mislead and cause a miscarriage of justice.

21. The Provisions of **Section 76 of Law of Succession Act** provides that a grant can be revoked at any time whether confirmed or not on account of any of the following:-

- a) Defect of proceedings
- b) Fraud, false statements of concealment.

c) Untrue allegations of fact.

d) Failure to proceed with the administration diligently

The Respondents herein are culpable in the manner in which they proceeded to effect the transfer of the estate to the 2nd Respondent. Both parties clearly knew about the pendency of a succession cause and inhibition orders but went behind it by filing a separate civil suit against each other and entering a consent to cleverly remove the inhibitions on the property they knew comprised the estate. The 2nd Respondent feigned ignorance of the process used to confer him title to the estate but looking at him during trial one could get the feeling that he obviously knew that something was not right. I have also taken note of the speed at which the estate changed hands after the sale. The agreement of sale was entered on 23rd July, 2010 and by 28th September 2010, restrictions had been removed through a manipulated court process and the 2nd Respondent had been registered. That was fraudulent and intended to defeat the dispute pending in succession cause. The end result is that the property of a deceased person changed hands through a court process (civil suit) instead of a Succession Cause process as provided under Law of Succession Act. The Respondents in effect intermeddled with the estate by tampering with ownership contrary to the provisions of **Sections 55 and 82 of Law of Succession Act**. The transaction and procedures used by the 1st Respondents to transfer the estate to the 2nd Respondent was riddled with illegalities and procedural irregularities. The law certainly cannot come to aid such maneuvers nor protect any attendant beneficiary. It was irregular and improper for the Respondent to collude by filing a separate suit in order to circumvent a pending succession cause where the interests of the beneficiaries were yet to be adjudicated upon and determined.

22. This court finds that the administrator/1st Respondent administered the estate improperly and compromised the interests of the estate by entering into a consent vide **Chuka Principal Magistrate's Court Civil Case No.76 of 2010** that had the effect of disposing the estate contrary to the provisions of **Law of Succession Act**. I also find that Respondents cleverly legally sanitized fraud through **Chuka Principal Magistrate Court Civil Case No.76 of 2010** to defeat the ends of justice. In such circumstance this court must invoke the provisions of **Section 76 and Rule 73 P&A Rules** by revoking the grant issued on 30th July 2007 and confirmed on 9th April, 2008. I direct that the transfer effected on the estate comprised in that property known as Mwimbi/Chogoria/2506 through an order which I have found irregular and illegal for all purposes be and is hereby reversed and the said property shall revert back to the deceased's name **ESTHER NAU PHARES** pending the determination of this cause. Since there is allegation of the existence of a written will, this court directs that the question of validity of the written will shall first be canvassed to enable this court to determine whether the deceased died testate and therefore grant probate or died intestate and therefore grant letters of administration and to whom.

In view of the age of this cause I direct the parties to take directions forthwith upon the delivery of this ruling in order to fastrack the determination of this cause. I shall not make any order as to costs at this stage.

Dated, signed and delivered at Chuka this 3rd day of June, 2019.

R. K. LIMO

JUDGE

3/6/2019

Ruling signed, dated and delivered in the open court in presence of all the parties, and Murithi for 1st Applicant and holding brief for Kariuki for 2nd Applicant and Ithiga for all Respondents.

R.K. LIMO

JUDGE

3/6/2019