



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 327 OF 2014

IN THE MATTER OF THE ESTATE OF KUNG'U WAMWERE (DECEASED)

LUCY WANJIRU NJENGA

JOHN KIGWA NJENGA

GEORGE MUHIAB

JACINTA NDUTA

PAUL KIMANI KANYI.....APPLICANTS

VERSUS

HANNAH WAMBUI NJENGA

JACINTA WANGUI MWANGI

JOSEPH NJOROGE MBURU.....RESPONDENTS

RULING

1. By a summons dated 5th November 2018, Lucy Wanjiru Njenga, John Kigwa Njenga, George Muhia, Jacinta Nduta and Paul Kimani Kanyi seek orders;

1. Spent

2. Spent

3. The Grant of Letters of Administration of the estate of KUNG'U WAMWERE (DECEASED) made to HANNAH WAMBUI NJENGA, JACINTA WANGUI MWANGI and JOSEPH NJOROGE MBURU issued on the 4th October 2018 be revoked.

4. THAT the applicants herein be included as beneficiaries in the estate of KUNG'U WAMWERE (deceased).

5. Costs of this application be borne by the respondents.

2. The application is premised on the grounds;

a) **THAT** the proceedings to obtain the grant were defective in substance.

b) **THAT** the grant was obtained fraudulently by making false and misleading statements and by concealment from the court of something material to the case.

c) **THAT** the respondents did not include us in the list of beneficiaries despite being beneficiaries due to the fact that our father bought land parcel number Nyandarua/Karari/143 from the late Fredrick Mwangi who is son of Kung'u Wamwere (deceased).

d) **THAT** the said land is registered in Kung'u Wamwere and the late Fredrick Mwangi had promised the late Joseph Kariuki Njenga, the applicants' father that the transfer would be effected once the succession case of his father is completed.

e) **THAT** no prejudice shall be occasioned to the respondents if this application is allowed.

3. It is supported by the sworn affidavit of Lucy Wanjiru Njenga with authority of the other applicants.

4. The applicants' case in a nutshell is that they are children of Joseph Njenga Kariuki (deceased). The applicants' herein are the administrators of the estate of Joseph Njenga Kariuki (deceased).

5. It is the applicants' case that Joseph Njenga Kariuki (deceased) bought six (6) acres of land out of parcel of land Nyandarua/Karati/143 from one Fredrick Mwangi (deceased). Fredrick Mwangi (deceased) was a son of Kung'u Wamwere, the deceased herein.

6. It is acknowledged that the said land is registered in Kung'u's name and Fredrick had promised Joseph that transfer would be effected once succession case of his father (Kung'u) was completed.

7. A sale agreement dated 23rd February 1984 is exhibited as evidence of the sale transaction between Mwangi Kung'u and Njenga Kariuki. Evidence of further payments to Mwangi Kung'u is annexed.

8. There is also an affidavit by the 5th applicant, Paul Kimani Kanyi who states he bought five (5) acres of land from Fredrick Mwangi Kung'u. The sale agreement annexed is dated 22nd September, 1983.

9. The 5th applicant annexes a judgment by the Senior Resident Magistrate Naivasha dated 29th March 1996 which decreed that Fredrick Mwangi Kung'u transfers four (4) acres of land to the 5th applicant.

10. The application is opposed and in a replying affidavit Joseph Njoroge Mburu, with authority of the co-administrators of the estate of Kung'u Wamwere avers that the estate herein is that of Kung'u Wamwere and not Fredrick Mwangi. The alleged sales in the absence of a succession cause are fraudulent and irregular.

11. All documents produced relate to a sale transaction between the claimants and Fredrick Mwangi Kung'u and not Kung'u Wamwere.

12. There is no claim at all that any of the claimants bought land from Kung'u Wamwere.

13. It is urged that "*mugundu wakwa*" in Kikuyu means "my land" and therefore when Fredrick used the words "*mugunda wakwa*" on the exhibit marked "LWN iii" he literally meant his land and not any part of the estate of the deceased herein.

14. Both parties filed written submissions.

15. I have considered the application, the supporting affidavit and grounds upon which the application is premised. I have had due regard to the replying affidavit and submissions on record.

16. Of determination is whether the applicants have achieved the legal threshold for the revocation of the grant herein.

17. **Section 76 of the Law of Succession Act** provides;

"S.76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any

material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

18. The application before court is predicated on grounds that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making of a false and misleading statement and by concealment from the court of something material to the case. The administrators are accused of failing to include the applicants as beneficiaries they being children of Joseph Kariuki Njenga who had bought land from Fredrick Mwangi.

19. To begin with the estate herein is the estate of Kung'u Wamwere. The grant of letters of administration was confirmed on 4th October, 2018.

20. Before the confirmation of the grant nobody, least of whom Fredrick Mwangi had any right to dispose of any part of the estate of Kung'u Wamwere.

21. It is readily admitted by the applicants that land parcel number Nyandarua/Karati/143 from which the applicants allege to have bought land is registered in the name of Kung'u Wamwere, the deceased herein.

22. The question that readily springs to mind is what capacity (if at all) did Fredrick Mwangi possess to sell land parcel number Nyandarua/Karati/143 or any part thereof before the grant in respect of the estate of Kung'u Wamwere was confirmed.

23. The obvious answer is that Fredrick Mwangi possessed no capacity at all to dispose any part of the deceased's property.

24. It is intriguing to see some consent from the Land Control Board sanctioning the alleged transactions. If these consents are not forgeries, then the official concerned in the issuance of the same must be totally ignorant of the law relating to title to land and he has no business being in office. It is easy to read mischief in the issuance of the alleged consents.

25. The applicants at no time transacted with Kung'u Wamwere during his lifetime and neither did they transact with the administrators of the estate of Kung'u Wamwere (deceased) after Kung'u's death.

26. They are clear in their minds whom they dealt with i.e. Fredrick Mwangi. Fredrick Mwangi, or his estate now that he is deceased, should make good the agreement reached with Fredrick Mwangi if at all.

27. An attempt has been made at submissions stage by counsel for the applicants to insinuate that Kung'u Wamwere had orally given the land to Fredrick Mwangi and what remained was transfer. No evidence of this was availed and even this belated manouvre cannot salvage the applicants' sinking boat.

28. The applicants are non suited in this matter and have no locus at all to lay claim on the estate of the deceased.

29. **Section 45 of the Law of Succession Act** provides as follows;

“S. 45. (1) Except 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.

(2) Any person who contravenes the provisions of this section shall -

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

30. Before 4th October, 2018 when the grant herein was confirmed no person had the authority to deal with the free property of the deceased by way of possession or disposal or otherwise intermeddle with the estate of the deceased.

31. Indeed, even for appointed administrators, there is a limit to their powers in so far as dealing with capital assets of an estate are concerned.

32. **Section 82 of the Law of Succession Act** provides;

“S.82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that –

(ii) no immovable property shall be sold before confirmation of the grant;”

33. This court (*Muriithi J*) in the case of JOHN GAKUNGA NJOROGE [2015] eKLR held;

“A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard the jurisdiction of the court to protect the estate of the deceased person is set out in Section 45 of the Law of Succession Act. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of letters of administration to them and before the confirmed grant, the contracts of sale are invalid for offending the provisions of Section 45 and 82 of the Law of Succession Act. Even if the sales were by the administrators, the dealings with immovable property of the estate is restricted by the provision on the powers and duties of personal representatives under Section 82(b) proviso (ii)....”

34. I need not belabor the point but I feel constrained to bring a little more clarity in the applicable law.

35. The acts of Fredrick Mwangi were void in law he having not had capacity to enter into any sale agreement in respect of the land belonging to Kung’u Wamwere.

36. *Lord Denning M.R* in the case of MACFOY vs UNITED AFRICA CO. [1961] 3 All ER 1169 at page 1172 had this to say;

“... if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

37. In the end, I must find and hold that the summons herein is anchored on a clear misapprehension of the law, is bad in law, misconceived and totally lacking in merit.

38. I proceed to dismiss the same with costs to the respondents.

Dated and Delivered at Nakuru this 18th day of July, 2019.

A. K. NDUNG’U

JUDGE