



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 311 OF 2015

(FORMERLY SUCC. CAUSE NO. 49 OF 2015)

IN THE MATTER OF THE ESTATE OF MURITHI MBURIA ALIAS M'MURITHI MPURIA (DECEASED)

AND

JOHN KINYURU M'MURITHI.....PETITIONER/ADMINISTRATOR

VERSUS

EDITH MUTHONI MURITHI.....1ST PROTESTOR

J U D G E M E N T

1. This cause relates to the estate of **M'MURITHI M'MPURIA ALIAS MURITHI MBURIA** (deceased) who died on 8th September 2009 resident at a place called Nkumari. According to the petition for letters of administration herein, the deceased died intestate living the following dependants surviving him;

- i. John Kinyuru M'Murithi (Petitioner)
- ii. Mariam Nkirote
- iii. Jotham Kithinji M'Murithi
- iv. Julia Nkatha
- v. MM
- vi. Rose Mpinda
- vii. Stephen Kaburia M'Murithi
- viii. Samuel Nkunja

2. The only asset listed as comprising the net estate is that property known as Nkuene/Nkumari/304 measuring approximately 1.6 ha or 4 acres.

3. John Kinyuru M'Murithi, the Petitioner herein was issued with letters of administration on 2nd November 2015 and therefore appointed as an administrator of the estate of the deceased herein. On 30th November 2017 he lodged Summons for Confirmation of Grant dated 29th November, 2017 and indicated that the surviving beneficiaries were now seven after the demise of Samuel Nkunja. He therefore proposed to have the estate distributed as follows:-

Land Parcel No. Nkuene/Nkumari/304

- i. John Kinyuru M'Murithi - 1 acre
- ii. Stephen Kaburia Murithi - 1 acre

iii. Jotham Kithinji M'Murithi - 1 acre

iv. Julia Nkatha Andrew - 0.952 acre

4. The proposed mode of distribution elicited protests by eight different parties who claimed respective purchasers interests. The eight parties filed protests and are among the 11 persons who had filed a caveat dated 22nd November 2018.

5. Mary Wanjiku Kinuthia, (DW8) in her affidavit of protest sworn on 6th February, 2018, stated that her deceased husband one Peter Duati Mugo who died on 3rd September 2017 had prior to his demise had purchased 0.03 acre from Stephen Kaburia Murithi. She exhibited an agreement dated 8th February, 2010 indicating that the said Peter Duati Mugo (deceased) had paid Kshs.130,000/- as consideration. During the *viva voce* hearing she however indicated that her late husband bought 80 ft by 100ft at Kshs.1000,000/- from Stephen Kaburia.

6. Ellyjoy Kanini (DW1) another protestor filed her affidavit of protest sworn on 6th February, 2018. She deposed that she purchased a quarter acre from Jotham Kithinji M'Murithi vide an agreement dated 29th January 2010. She has further deposed that the seller undertook the process transfer of the quarter acre to her and effected payment of the entire consideration of Kshs.150,000/- to the said seller.

7. Domisiano Kiambi Kithinji (DW2) another Protestor/Caveator told this court that he had purchased a portion of land measuring 20X80ft from Samuel Nkunja in 2009. He however could not produce any document to back up his claims only indicating that the late Samuel Nkunja simply pointed out the portion he was selling to him.

8. Edith Muthoni Murithi (DW3) in her affidavit of protest sworn on 25th May 2018 stated that she bought a portion from the deceased in this cause during his lifetime and though she did not indicate when and what size she purchased in her affidavit of protest, at the hearing of protests herein, she clarified that she bought a quarter of an acre from the deceased in 2008. She further indicated that she went to the Land Control Board with the deceased for consent to transfer. She tendered an agreement dated 14th March 2008 indicating that she bought 0.25 acre at Kshs.120,000/- from the deceased. She called a witness Mugambi Muthamia (DW4) who supported her claims. He told this court that he accompanied the deceased and Edith Muthoni to the firm of Kiogora Advocate who drew an agreement and that two of the sons of the deceased including Kinyuru were present. He however indicated that by the time the agreement was drawn the deceased had passed on while the wife to the deceased was ailing.

9. Rosemary Kinanu Mathiu (DW3) in her affidavit of protest sworn on 6th February 2018 stated that she purchased 20ft by 100 ft from John Kinyuru and another 20ft by 100ft from Stephen Kaburia at a total consideration of Kshs.100,000/- . He exhibited an agreement dated 19th April 2009 witnessed by deceased to back up her claims.

10. Anselimo Gichunge Riungu (DW4) another protestor, in he affidavit of protest sworn on 6th February 2018 deposed that he purchased 1/2 an acre from the late Samuel Nkunja on 18th September 2014. He also deposed that Samuel Nkunja undertook to take him to Land Control Board to formalize the transfer but failed to do so. He further stated that he paid Kshs.100,000/- out of the total consideration. He was supported by Lawrence Njuku Riungu who filed an affidavit to that effect but failed to come to court to testify.

11. Emmanuel Kinyua Francis (DW7) another protestor on his part filed an affidavit of protest sworn on 12th February 2018 deposing that he also purchased 40ft by 80 ft from Samuel Nkunja (deceased) in 2010.

12. Edward Mutegi Sabari (DW9) in his affidavit of protest sworn on 6th February 2018 deposed that he purchased 0.03 ha of the estate from Jotham Kithinji on 22nd March 2011 and that he has been waiting for the said seller to transfer the portion purchased to him. He has exhibited an agreement dated 22nd March 2011 to back up his claims.

13. Luke Magute Ruiga (DW10) in his affidavit of protest sworn on 6th February 2018 deposed that he also bought 50ft by 100ft from Jotham Kithinji on 10th April 2013 and exhibited an agreement to that effect. He also exhibited a letter from the Area Chief confirms that he was purchaser.

14. The Petitioner, John Kinyuru (PW1) on his part denied the claims made by the purchasers. He stated that those who claimed to have purchased portions from his late father ought to have finalized the deals with the deceased. He further testified that none of the purchasers had complained before the demise of the deceased.

He however conceded that he sold 40 X100 ft to Rosemary Kinanu in 2002. He further added that one of the dependants, Josphat Murungi is mentally challenged and proposed to have 1 half acre given to him.

15. Julia Nkatha (PW2) one of the dependants to the deceased denied knowledge of claims by the protestors. According to her, her late father the deceased herein left 4 acres of land as a family they have agreed on how the estate should be distributed. She added that she takes care of her mentally challenged brother and was ready to hold his share in trust for him.

16. Jotham Kithinji (DW11) another dependant testified that the estate belongs to the deceased and that those who purchased any share from any of the dependants should await the distribution and make their claims on whoever sold them a portion. He added that he knew Edith Muthoni as a purchaser who purchased a portion from the deceased herein and has no problem with that.

17. Edith Muthoni Murithi, one of the protestors herein in her written submissions has contended that she purchased 0.25 acre from the deceased on 14th March 2008 and in her view the same is not disputed. She has urged this court to hold that the deceased held that portion in

trust for her despite the fact that no consent from Land Control Board was obtained prior to the demise of the deceased. She has cited 2 legal authorities to wit;

a) *Jerusha Wangari Mwangi -vs- Beatrice Muthoni Karanja [2018] eKLR* and

b) *Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri [2014]eKLR* to support her claim.

In the two authorities the courts held that agreement for sale of land are enforceable despite lack of consent from Land Control Board particularly where a seller had created an implied constructive trust in favour of a purchaser.

The same position was held to be applicable in probate matters in the case of *Re Estate of Konini Ole Kimantiru [2019]eKLR*. In that cause, the deceased died before executing the transfer documents. The court found that the applicant was entitled to specific performance by the personal representative based on a constructive trust.

18. This court has considered the protests filed by protestors in this cause. The protests are hinged on purchaser's interest. This court has noted from the affidavits of protests filed, that all save for Edith Muthoni Murithi purchased their respective interests after the demise of the deceased. It is clear from the agreements tendered that the same were entered as follows:

i. Anselimo Gichunge Riungu - 18th September 2014

ii. Ellyjoy Kanini and Jotham Kithinji M'Murithi- 29th Jan. 2010

iii. Emmanuel Kinyua Francis and Samuel Nkunja - 20th Nov. 2010 and 13th July 2011.

iv. Rosemary Kinanu Mathiu, John Kinyuru M'Murithi and Stephen Kaburia Murithi - 19th April 2009.

v. Luke Magute Ruiga and Jotham Kithinji M'Murithi -16th Apr. 2013

vi. Edward Mugeti Shabari and Jotham Kithinji - 22nd March 2011

vii. Peter Nduati husband to Mary Wanjiku Kinuthia and Stephen Kaburia Murithi - 8th February 2010.

19. The legal position on any disposition of an estate or part of an estate of a deceased person after his demise is provided under **Section 55 (1)** and **Section 82(b)** of **Law of Succession Act**.

Section 55 (1) provides as follows:-

"No grant of representation, whether or not limited in its terms shall confer power to distribute any capital asset constituting a net estate or to make any division of property unless and until the grant has been confirmed as provided under Section 71."

The claims made by some of the purchasers that the administrator or any of the dependants purportedly asked for money to facilitate succession or subdivision of the estate is not anchored in law. It is a breach of the law and cannot be sustained.

20. Moreover under **Section 82 (b)** of the Act, the law states:-

"No immovable property shall be sold before the confirmation of grant."

The law clearly prohibits anyone from dealing with the estate of a deceased person in any other way other than as provided by the law and therefore by purporting to dispose any part of the estate to the cited purchasers in this cause, the concerned dependants were breaching the law and the purchases made by the protestors after the demise of the deceased are void *ab initio*. The transactions offended **Section 45, 55** and **82** of the Act and as I have observed, the transactions lacks protections of the law. As indicated by Jotham Kithinji one of the dependants who conceded to some of the purchases, the only remedy for the said purchasers is to wait until the grant is confirmed and distributed to the beneficiaries entitled in law to get a share, before following it up with whoever purported to sell to them any share. Obviously the dependants who sold any share to the purchasers and obtained full consideration cannot keep the money and the portions sold as that would not serve the interest of justice. The purchasers therefore have the liberty to negotiate with them or enforce their rights against the sellers in accordance with **Section 7 of Land Control Act**.

21. On the part of the claim by Edith Muthoni Murithi, her claim is somewhat different as she dealt with the deceased himself before his demise. She entered into a valid written agreement witnessed by an advocate on 14th March 2008. The deceased made an undertaking dated 7th April 2009 to transfer 0.25 acre to her and he acknowledged full payment in consideration. None of the dependants have challenged her claim and this court finds that though the deceased died before formalizing transfer of 0.25acre to her, the deceased held the portion in constructive trust in favor of the purchaser- Edith Muthoni Murithi. It is therefore clear that the claim by Edith Muthoni is considered a liability in the estate and has to be enforced.

In the end, the grant issued on 2nd November 2015 is hereby confirmed and the estate comprised in Nkuene/Nkumari/304 shall be distributed as follows:-

Edith Muthoni Murithi - 0.25 acre

The dependants have through a consent agreed that the net estate be divided into 4 with the daughters agreeing to share 1/4 of the estate and the 4 sons sharing equally the remaining portion. However because this court was told that MM is mentally challenged his share shall be held by Julia Nkatha Andrew as she stated that she has been caring for him. The net estate after giving 0.25 acre to Edith Muthoni is 3.75 acres which means that the same shall be distributed as follows:-

- i. John Kinyuru M'Murithi - 0.75 acre (Aprox)
- ii. Jotham Kithinji M'Murithi - 0.75 acre (Aprox)
- iii. Stephen Kaburia M'Murithi - 0.75 acre (Aprox) to be held in trust by Julia Nkatha Andrew
- iv. MM - 0.75 acres to be held in trust by Julia Nkatha Andrew
- v. Julia Nkatha Andrew
- vi. Rose Mpinda To share 0.75 acre jointly.

This being a family matter, I make no order as to costs.

Dated, signed and delivered at Chuka this 18th day of September 2019.

R. K. LIMO

JUDGE

18/9/2019

Judgment dated, signed and delivered in the presence of petitioner and the protestors in person.

R.K. LIMO

JUDGE

18/9/2019