



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO.459 OF 2011

THE MATTER OF THE ESTATE OF KARUA MUKUA alias M'KARARU M'MUKUA (DECEASED)

STELLA KAGWIRIA MUTUMA.....PETITIONER

-VS-

MONICA MBUTHU KITHINJI.....1st APPLICANT/OBJECTOR

KULETA KOVICO FRANCIS.....2nd APPLICANT/ OBJECTOR

ROSE KANJA KARARU.....3rd APPLICANT/ OBJECTOR

ANN MUKIRI MARETE.....4th APPLICANT/ OBJECTOR

LUCY KAIRUTHI KARARU.....5th APPLICANT/OBJECTOR

FLORENCE KAGWIRIA KARAR.....6th APPLICANT/OBJECTOR

JUDGMENT

[1] This decision relates to distribution of the state of Kararu Mukua, the deceased herein. The task of the court is to: (a) identify the rightful beneficiaries of the estate; (b) ascertain the estate property; and (c) distribute the estate in accordance with the law.

Beneficiaries

[2] The deceased was survived by the following children:

1. Monica Mbuthu Kithinji- daughter
2. Kuleta Kavico Francis-daughter
3. Rose Kanja Kararu-daughter
4. Ann Mukiri Marete-daughter
5. Lucy Kairuthi Kararu-daughter
6. Florence Kagwiria Kararu-daughter
7. Genesio Mutuma M'Kararu (deceased)-son

[3] The foregoing are therefore the rightful beneficiaries of the estate of the deceased.

Estate property

[4] The protestors who are daughters of the deceased stated in their affidavit sworn on 9th August 2018 that the deceased left the following

two properties:-

a. LR. NO. NYAKI/NKABUNE/560 (0.20 Ha)

b. LR. NO. NYAKI/GIAKI/259(20.30 acres)

[5] The protestors stated that they are aware of alleged sale of No. 560 to Fredrick Thunguma and transfer was done by the petitioner herein. They do not recognize the alleged sale and state that the said property is part of the estate of the deceased.

[6] The purchaser Fredrick Thunguma filed two affidavits sworn on 16th April 2018 and 30th October 2018. In the alter affidavit he corrected paragraph 3 of the former affidavit and now claimed that he did not buy LR. NO. 560 from the deceased Kararu Mukua as he had claimed but from Genesisio. Except, he added that he bought the said land from Genesisio after he had filed the succession cause and grant confirmed. He also claimed to have bought 1 acre from LR. NO. 259 from the same Genesisio.

[7] I have perused the agreements provided by the purchaser herein and it is easily discernible that the agreement for sale of LR. No. 560 is dated 8th August 2011 and the parties are Genesisio and the purchaser. The acknowledgement of receipt provided is in respect of sale of LR. No. 560 and is dated 19th April 2011. The parties are Genesisio and the purchaser.

[8] Two pertinent matters emerge from the facts of the case. First, these proceedings were filed on 25th August 2011. Therefore, it is not true that the said LR. No. 560 was bought by the purchaser after the cause had been filed and grant confirmed. The truth of the matter is that the sale was before the filing of this cause and in law such acquisition of estate property before confirmation of grant is unlawful, and therefore, null and void. I find the sale of the estate property herein to Fredrick is unlawful acquisition which does not enjoy any protection of the law or property rights. See article 40(6) of the Constitution that: -

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

[9] Such acquisition is not even protected under section 93 of the Law of Succession Act. In fact, in the circumstances of this case, section 93 of the Law of Succession Act has been inappropriately invoked. The purchaser is not therefore a person beneficially interested in the estate. In his submissions he has called himself an innocent purchaser for value. His own agreements show that he was aware that the property belonged to a deceased person but he bought even before succession proceedings were filed- may be it was albeit mistakenly in the hope that it will be lawfully transferred to him after succession proceedings are filed. Would such person claim invoke the noble defence of innocent purchaser without notice? Obviously not. This defence has been misused by many. But it be known that it cannot be used to defeat the express claw-back provision of the Constitution in article 40(6) which declares that any acquisition of land which is found to be unlawful acquisition does not enjoy property rights.

[10] Accordingly, LR. NO. 560 forms part of the estate of the deceased. Therefore, the estate property is: -

a. LR. NO. NYAKI/NKABUNE/560 (0.20 Ha)

b. LR. NO. NYAKI/GIAKI/259(20.30 acres)

Distribution

[11] The Petitioner proposed in her affidavit sworn on 14th December 2017 at paragraph 4 as well as in her submissions that the estate of the deceased be distributed as follows:

(a) L.R No. Nyaki Nkabune/560 – Stella Kagwiria Mutuma

(b) L.R No. Nyaki/Giaki/259

1. Rose Kanya Kararu - 3 acres
2. Kuleta Kabico Francis - 2 acres
3. Florence Kagwiria Kararu
4. Ann Mukiri Marete
5. Lucy Kairuthi Kararu
6. Monica Mbuthu Kithinji - 2 acres
7. Stella Kagwiria Mutuma - 13.30 acres

[12] She stated that the clan resolved on 5.5.2005 that the estate be distributed as she has proposed which was in accordance with the wishes of the deceased's Meru will. She annexed minutes of the meeting.

[13] I have considered the submissions of all parties. There is absolutely no basis in law of giving the deceased son of the deceased such larger share as proposed by his widow. It seems she has based her proposal on Meru tradition which discriminated women in inheritance; the tradition has been declared to be inconsistent with the Constitution. She also alluded to the clan having distributed the land; I say little; the clan has no such powers over the estate property. The proposal by the petitioner therefore offends the law and I reject it. As the protestors are daughters of the deceased they are entitled to the estate as the son in equal shares. See section 38 of the Law of Succession Act. Nonetheless, they have decided to allocate the widow of their late brother a bigger share; which is quite in order as long as it is given voluntarily. The daughters are quite magnanimous. I therefore, order that the estate shall be shared as per paragraph 10 of the protestors affidavit of 9th August 2018.

(a) L.R NO Nyaki/Nkabune/560 which measures 0.20 Ha shall be shared equally among all the beneficiaries. Stella Kagwiria shall take the share of her late husband Genesisio Mutuma

(b) L.R NO. Nyaki/Giaki 259 which measures 20.30 acres shall be shared as follows-;

i. Monica Mbuthu Kithinji -2 acres

ii. Kuleta Kavico Francis - 2.30 acres

iii. Rose Kanja Kararu - 3 acres

iv. Ann Mukiri Kararu - 2 acres

v. Lucy Kairuthi Kararu -2 acres

vi. Florence Kagwiria Kararu - 2 acres

vii. Stella Kagwiria Mutuma shall take the balance i.e. 7 acres being share of late Genesisio Mutuma.

[14] The estate properties above shall revert into the name of the deceased in their original numbers stated above. Any transfer or subdivision of any of the estate properties above are cancelled in order to give effect to the foregoing order. As the earlier grant was revoked and parties herein seem not to be moving in the same bus, I appoint the petitioner and Monica Mbuthu Kithinji as the joint administrators of the estate herein. The said grant is confirmed in the foregoing terms. As this is a family dispute, I order each party to bear own costs. It is so ordered.

Dated signed and delivered in open court this 18th November, 2019

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F. GIKONYO

JUDGE

In presence of

Kiogora for objectors

Ashiba for Muriuki for purchaser

J.Gitonga for Gichunge for petitioner

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F. GIKONYO

JUDGE