



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 621 OF 2015

(FORMERLY SPM CHUKA SUCCESSION CAUSE NO. 46 OF 2015)

IN THE MATTER OF THE ESTATE OF THE LATE RICHARD KANAMPIU NANCHU (DECEASED)

JULIA MUTHONI KITHAE.....PETITIONER

VERSUS

HUMPHREY NGAI WAKITHAE.....1ST INTERESTED PARTY

MERCY KARIMI NYAGAH.....2ND INTERESTED PARTY

JAMES MURIUNGU KITHAE.....3RD INTERESTED PARTY

R U L I N G

1. This cause relates to the late **RICHARD KANAMPIU NANCHU** (deceased) who died on 13th August 2010 domiciled at Chogoria. According to the introductory letter from the Area Chief dated 2nd February 2015, and the petition (P&A 5) the deceased died and left the following dependant namely:-

i Kithae, the petitioner herein listed the following properties as comprising the estate namely:-

i. Julia Muthoni Kithae - widow

ii. Joyce Kangai Bore children

iii. Humphrey Ngai Wakithae

iv. Andiel Njagi Kithae

v. Mercy Karimi Miriti

vi. Graham Mugendi Kithae children

vii. Kimathi Kithae

viii. Eilshipha Waithera Ngang'a - Daughter in law

ix. Martin Mutuma Kithae

x. Nickson Murithi Kithae

xi. Joanes Mwangi Kithae Grandchildren

xii. Michel Ciru Kithae

xiii. James Muriungi Kithae

2. Julia Muthona) Mwimbi/Chogoria/2534

b) Mwimbi/Chogoria/2530

c) Mwimbi/Chogoria/3893

d) Mwimbi/Chogoria/2535

e) Mwimbi/Chogoria/3899

f) Mwimbi/Chogoria/3895

3. The proceedings show that the petitioner was appointed the administratrix of the estate of the deceased on 20th April 2015 and issued with letters of administration on 17th June 2015.

4. Humphrey Ngai Wakithae, Mercy Karimi Nyagah and James Muriungi Kithae, the applicants herein have vide Summons for Revocation of Grant dated 19th March 2018 have applied for the following orders namely:-

i. Spent

ii. That the Honourable court be pleased to order inhibition orders against Parcels Nos. Mwimbi/Chogoria/2530, 2534, 2535, 6628, 6629, 6630, 6631, 6635, 6436, 6437, 2626, 6695, 6696, 3891, 3895, 3899, and 1885 pending the hearing of this application and until further orders.

iii. That this Honourable court be pleased to order District Land Registrar Meru South to cancel the following titles namely: Mwimbi/Chogoria/6628, 6629, 6630, 6631, 6635, 6436, 6437, 2626, 6695 and 6696 and revert them to the name of the deceased herein.

iv. That this honourable court be pleased to revoke the grant issued to Julia Muthoni Kithae on 17th June 2015.

The grounds upon which the above reliefs have been sought are as follows:-

a) That the Petitioner/Respondent has dealt with the estate without a confirmed grant of representation wherefore intermeddling with the same.

b) That the proceedings to obtain the grant herein were defective in substance.

c) That the grant was obtained fraudulently by the Petitioner.

4. This application is supported by affidavit of Humphrey Ngai Wakithae (the first Applicant) sworn on 19th March 2018. The deponent has deposed that the petitioner is the widow to the deceased and his step mother. He accuses her for keeping the Applicants in the dark in regard to the administration of the estate of the deceased and that he was taken by surprise when he noticed strangers subdividing the estate herein.

5. The deponent further states that the consent that was filed by the petitioner indicating that all beneficiaries had consented to the administration of the estate is a forgery.

6. He further avers that the Petitioner/Respondent intermeddled with the estate by transferring Mwimbi/Chogoria/3893 to Martin Mutuma Mwangi and Nickson Murithi without confirmation of grant. He also depones that the following assets similarly changed hands;

a) Mwimbi/Chogoria 6628 to Elias Kaburu Rithaa

b) Mwimbi/Chogoria/6630 to Martin Mutuma Mwangi

c) Mwimbi/Chogoria/6631 to Nickson Murithi

d) Mwimbi/Chogoria/6435 to Nickson Murithi

e) Mwimbi/Chogoria/6436 to Nicholas Mwenda Kimathi

f) Mwimbi/Chogoria/6437 to Kimathi Kithae

g) Mwimbi/Chogoria/2626 to Peter Murithi Kubai and Linet Nkirote Kimathi

h) Mwimbi/Chogoria/6695 to Julius Mutwiri M'Mwamba

i) Mwimbi/Chogoria/6696 to Nickson Murithi

7. The Applicants have expressed fears that the remaining properties comprising the estate may face the same fate. He adds that a number of dependants were not revealed by the Petitioner/Respondent and have listed the following dependants as having been excluded:-

a) Prudence Gatune Kanampiu and

b) Hidith Mukwaiti Richard Kanampiu

8. James Muriungi and Mercy Karimi Nyaga have also sworn affidavit in support of the Summons for Revocation of Grant. They both claim that they were not involved despite being dependants. Mercy Karimi has deponed that Graham Mugendi's signature was also forged as he was in the UK at the time.

9. In their written submissions the Applicants have pointed out the evidence tendered by the District surveyor who explained the circumstances under which the transfer was done in 4th July 2017 when the deceased died on 18th August 2010. They submit that they were not informed of this cause in order to give consent or renounce their rights and that in their view meant that the proceeding were defective and/or obtained fraudulently. They have as such asked this court to revoke the grant.

10. The Petitioner/Respondent in a Replying Affidavit sworn on 24th May 2018 has opposed this application. She has averred that Prudence Gatune passed away while Hidith Mukwaiti left the deceased in 1950s and got married to the brother of the deceased known as Nabea.

11. The Respondent has deposed that she left the succession papers at the Chief's office where the applicants and other beneficiaries went and signed. She however concedes that Graham Mugendi never signed but allegedly gave her permission to sign on his behalf and that he has not raised any issue.

12. The Petitioner/Respondent further alleges that Martin Mutuma Mwangi and Nickson Murithi had transfers in their favour which were executed by deceased prior to his death.

13. The Respondent concedes that Kimani Kithae got registered in parcel No.3895 (later divided into 6435- 6437) and that she did not know that the property (3895) formed part of the estate and believed that Kimani Kithae also had an executed transfer from the deceased.

14. The Respondent admits selling parcel No.2626 to Peter Murithi Kubai and Linet Nkirote Kimathi before the grant was confirmed. She denies that parcel No.3894 (later subdivided into parcel No.6695 to 6696) forms the estate as she believes that she was a joint owner with deceased and therefore acquired it as right of survivorship. She concedes that exercising that right she transferred parcel No.6695 and 6696 to Julius Mutwiri and Nicholas Murithi respectively.

15. In her written submissions the Petitioner/Respondent has contended that the Applicants have not met the threshold under **Section 76** of the **Law of Succession Act**. She submits that the Applicants have not demonstrated the defect in the proceedings herein. It is her contention that the Applicants have not tendered expert evidence to show or prove that their signatures were forged.

16. The Petitioner/Respondent contends that she had no role in the transfer of parcels No.6629, 6631, and 3895. She however concedes that she wrongly dealt with parcels No.2626 and the title should be revoked.

17. This court has considered this Application and the response made. This court did summon on its own motion the Land Registrar Tharaka Nithi County when it noted the serious allegation made by the Applicants. The Registrar came and testified that parcels No. Mwimbi/Chogoria/2530, 2532 and 2535 are all registered in the name of deceased.

18. The Registrar also testified that her records showed that parcels No.3893 and 3895 were transferred to other parties with parcel No.3893 being transferred to Martin Mutuma and Nickson Murithi who then subdivided it into parcels No.6629, 6630 and 6631. She testified that the registration was late but justified the same stating that Land Control Board consent supported the transfer. She was not aware that the owner had passed on when the transfer was effected stating that they deal with documents presented to them. She had no records for parcels Nos. 3894, 6628, 6635 and 6636.

19. This court has considered the evidence by the Registrar and it is my considered view that in regard to parcels of land which were apparently transferred by the deceased through execution of transfer documents and obtaining Land Control Board Consent, this court sitting as probate court is not seized with the requisite jurisdiction to interrogate and determine the validity of the said transfers. This court can only exercise its jurisdiction over estate of deceased persons as provided under **Section 2** of the **Law of Succession Act**. The Applicants can only have legitimate basis to challenge the validity of those transfer if they can show that the properties at the time the deceased died formed part of his estate and were free property in terms of **Section (3(1))** of **Law of Succession Act**.

20. This court finds that the following properties does not form part of the estate:-

(i) Parcels Numbers 6695, 6696, 6697 and 6628.

21. I have considered the response made by the Respondent particularly in regard to the fact that she concedes that she unlawfully signed on behalf of a beneficiary known as Graham Mugendi. That is an admission of forgery which renders her appointment as the administratrix herein defective and fraudulent. **Rule 26 (2) of Probate and Administration Rules** required the Applicant to obtain consent from all the beneficiaries in **Form 38** of the **Act** but she did not. Her reasons that she left the succession papers to some unnamed Chief for the other dependants to come and append their signatures in my view appear suspect. The unnamed Chief has not sworn an affidavit affirming the beneficiaries who went to his office and appended their signatures. I find that on a balance of probabilities, the Applicants

have established sufficient basis under **Section 76 of Law of Succession Act**

for this court to move and revoke the grant. The beneficiary known as Graham Mugendi was required to swear an affidavit renouncing his rights to benefit from the estate if he was not interested or alternatively agree to the Petitioner/Respondent being appointed the administrator.

22. The Petitioner/Respondent has also conceded that she irregularly dealt with the parcel No.2626 which forms part of the estate contrary to **Section 55 and 82 of Law of Succession Act** and that admission in my considered view on its own is sufficient to invoke the provisions of **Section 76 of Law of Succession Act** and revoke the grant issued to her and revert the parcel back to the deceased's name which I hereby do.

23. I have considered the evidence given by the Land Registrar in respect to parcel No. Mwimbi/Chogoria/3894. She told this court that the parcel was in the name of both the deceased and the Petitioner and because she was the wife, the Registrar assumed that the two were joint owners and deleted the name of the deceased leaving the Petitioner's name when she was presented with Death Certificate.

Section 118 of Registration of Land Act Cap 300 Laws of Kenya (now repealed) provided as follows:-

" If one of two or more joint proprietor of any land, lease or charge dies, the Registrar on proof to his satisfaction of the death, shall delete the name of the deceased from the Register. "

Under the new law i.e Land Registration Act, similar provisions is provided under **Section 91**. It is on the basis of the above that the Respondents right of survivorship means that she is the legitimate owner of that parcel of land. I am not persuaded therefore that parcel No. Mwimbi/Chogoria/3894 now forms part of the estate because it is not though the ownership of the two was not expressly indicated as joint. This court's position is in line with the following decisions:-

i. Re Estate Dirica Lumire Mapesa (deceased) [2018] eKLR and

ii. Isabel Chelangat -vs- Samuel Tiro Rotich and 5 Others [2012] eKLR.

In the latter case the court held inter alia:

" The register in respect of East/Wanga/Lubinu/66 did not indicate whether the proprietorship was joint or in common. However going by what is stated in "Cheshire and Burn's Moder Law of real Property, joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares. I would hold that the deceased Silas Okumu Simeyo held East Wanga/Lubino/66 as joint proprietors. That is to say that a presumption would arise that the tenancy is intended to be joint..... it follows then that following her demise on 6th February 1994, the principle of "Jus Accrescendi"(right of survivorship) applied and her interest in the said property merged or united with that of the surviving joint tenant or joint proprietor, Silas Okumu Simeyo. The effect of this then would be that the said property ceased to form part of the estate of the deceased and was not available for distribution in her estate."

24. In regard to parcels No.6629 to 6831 the resultant subdivision of parcel No. Mwimbi/Chogoria/3895, I have noted that the properties were in the name of the deceased as of 2015 when this cause was filed. The said parcels changed hands after the Succession Cause was filed. The contention by the Petitioner/Respondent that she knew little about the subdivision and transfer appears suspicious because the persons in whose favour the parcels were registered also appear as the dependants (Grandchildren to the deceased) herein. The Petitioner obviously knew of the transactions and the fact that the two beneficiaries have not turned up in court to justify the transfer of the parcels from the deceased to them 7 years after the demise of the deceased shows those transactions are suspicious and irregular. I at the same find that the transfer of the parcel No.3895 (subdivided into 6435 to 6437) in the name of Kimani Kithae another beneficiary suspect as it happened after the succession cause had been filed and before the confirmation of grant. Those transaction violated the provisions of **Section 55 and 82 of Law of Succession Act** are to that extent null and void. In the end this court finds that Summons for Revocation of Grant date 19th March 2018 is merited. The grant issued to the Petitioner/Respondent on 17th June 2015 is hereby revoked. This court finds that in view of her admitted wrong doing and in particular forgoing a signature of one of the beneficiaries and facilitating of irregular transfers of some of properties forming the estate to her preferred grandchildren, she is not fit to be appointed as administratrix. This court hereby appoints Humphrey Ngai Wakithae and Mercy Karimi Nyagah as administrator and administratrix respectively of the estate of the late Richard Kanampiu Nanchu (deceased). The two are at liberty to move this court for confirmation of grant before the expiry of 6 months statutory period in view of the age of this cause. I also grant prayer 2 save that parcels No. 3891, 3895, 3899 and 1885 are excluded. I also grant prayer 3 of the application save that parcels No.6695, 6696, 2662 and 6628 are excluded for the reasons aforesaid above.

Dated, signed and delivered at Chuka this 14th day of November, 2019.

R.K. LIMO

JUDGE

14/11/2019

Ruling signed, dated and delivered in the open court in presence of Murithi holding brief for Kimathi for Respondent and in presence of Applicant in person.

R.K. LIMO

JUDGE

14/11/2019