



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 488 OF 2012**

**IN THE MATTER OF THE ESTATE OF SOLOMN MWANGI WAWERU (DECEASED)**

**ELIZABETH MUCHIRI MWANGI.....APPLICANT**

**VERSUS**

**FRANCIS MUCHIRI MWANGI**

**EPHANTUS KIMORI MWANGI**

**TIMOTHY MUGAMBI MWANGI.....RESPONDENTS**

**NGOTHO COMMERCIAL AGENCIES LIMITED.....OBJECTOR**

**RULING**

1. The Objector filed an objection dated 4th December, 2015 under **Section 68(1)** of the **Law of Succession Act** and **Orders 12, Order 15 Rules 1 and 4** of the **Civil Procedure Rules**. It is alleged the Objector is the rightful owner of the properties known as Kiambogo/Kiambogo Block 2/17214 and Kiambogo/Kiambogo Block 2/17215. It's case was that before his demise the deceased transferred these properties to the Objector to offset the deceased's debt of Kshs. 398,000/=. However, he died before the transfer was registered. Therefore, although they were still registered in his name at the time of his death the said properties were not a part of the estate of the deceased. The Objector is the legal owner with the full proprietary rights over these two properties. Hence, the two parcels of land should be excluded from these proceedings.

2. It was the Objector's submission that the two properties are not the free property of the deceased within the meaning of Section 3 of the Law of Succession Act as the deceased already sold these properties. He submitted that he has a right to intervene when the court proceedings touch on his property and his interests over the same are at risk. He relied on the decision in **Re Estate of Pepela Wekesa Nabukunda (Deceased) [2011] eKLR** where the Court upheld the objection of a purchaser of the land and proceeded to order the removal of the same from the probate proceedings.

3. In response to this application, the Respondents filed the grounds of opposition dated 11th March, 2016 and the Notice of Preliminary Objection dated 28th September, 2016 on the grounds that the Objector does not have locus to file any proceedings in this succession cause and that this Court does not have jurisdiction to entertain the claim which concerns a land dispute.

4. The 1st Respondent swore the affidavit filed on 14th March, 2016. It is urged that a search at the land registry shows that the properties are registered in the name of the deceased. He challenged the authenticity of the sale agreements in that the signature thereon is not the deceased's, that the objector's claim was only for Kshs. 265,000/= as per the letter dated 21st June, 2012 and 23rd January, 2013. The deceased used a different address and not the one cited in the sale agreement. The agreement is also signed on a Sunday but the deceased always attended church and therefore could not have signed this agreement. It is also unclear why the Objector waited until 2012 before taking possession of the land.

5 Elizabeth Wangari Mwangi who is acting in person filed an affidavit on 30th June, 2016 and the Notice of Preliminary Objection dated 17th March, 2017. She alleged that there was no evidence of when this money was borrowed. She relied on **Section 11(1)** of the **Money Lenders Act, Cap 528** which provides that no contract for repayment by borrower of money shall be enforceable unless a note or memorandum in writing of the contract has been made and signed personally by the borrower.

6. She also urged that the agreement is not authentic and alleged that the deceased's signature had been forged. She alleged that the only transaction between the deceased and Thomas Ngoto, the director of the Objector, was between the years 2006 and 2007 when the deceased

contracted the said Ngotho to subdivide and sell property No. Kiambogo/Kiambogo block 2/74. The total cost for this work was Kshs. 193,600/= which the deceased paid in full and an additional 122,900/= which Thomas Ngotho did not account for. However after the death of the deceased, the Objector wrote to the deceased's wife, demanding Kshs. 265,000/= being the balance outstanding from Kshs. 398,000/= cost of subdividing and selling the property. The Applicant's case was that the Objector is a vexatious litigant without a genuine claim to the estate.

7. In his supplementary affidavit in response to the above allegations, the Objector maintained that the Kshs. 398,000/= is the professional fees that is owed to it and includes the fees for subdividing the property and obtaining a discharge from Standard Chartered bank and the Objector had demanded payment from the deceased before his death.

8. She submitted that the Applicant cannot participate in the succession proceedings as it is not a beneficiary of the estate of the deceased. Its claim is a land dispute which should be litigated in the Environment and Land Court.

### **ANALYSIS**

9. I have considered the pleadings and the submissions of the parties. The first issue for determination which emanates from the Preliminary Objections and Grounds of Opposition by the Respondents is that the Objector does not have locus to bring these proceedings as he is neither a beneficiary of the estate nor a dependant of the deceased. Objections for the making of a grant are provided for under **Sections 67, 68, 69 and 70 of the Law of Succession Act**. These sections do not limit who is entitled to bring an objection. My understanding of the law is that any person with an interest in the estate of the deceased may bring objection proceedings.

10. Further, the Act does recognise the interests of third parties especially those of creditors and at **Section 66** gives powers of the probate court to grant letters of administration to creditors at its discretion where issuing such a grant would be in the best interests of all the persons concerned. From the evidence that has been presented before this Court, it is clear that the Objector has an interest to protect the estate as it alleges that the properties stated above were sold and transferred to it by the deceased and therefore are not available for distribution to the beneficiaries. The issue arising is whether the Applicant has chosen the right forum to articulate his interest.

11. The second objection was against the jurisdiction of this Court. It was common ground among the Respondents and Elizabeth that the claim herein ought to be litigated before the Environment and Land Court which is vested by **Article 162 of the Constitution** and **Section 13 of the Environment and Land Court Act** the jurisdiction to determine disputes touching on use and occupation of and title to land.

12. The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See **Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 Others**). In **Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR** the Court held that;

**“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”**

13. Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court.

14. It is my opinion that the fact that the Applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of that property stayed by the succession cause. The Applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land Court. The law provides an avenue for the Objector to access conservatory orders at the Environment and Land Court. The Succession Court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of such a suit.

15. The Applicant herein is not registered as the owner of the properties and has submitted his claim as purchaser. It was the objector's assertion that the land was transferred to him to pay outstanding professional fees of Kshs. 398,000/= for work overseeing the subdivision of the deceased's property KIAMBOGO/KIAMBOGO/BLOCK 2/74. It attached a letter dated 19th January, 2007 wherein it raised the fees of Kshs. 398,000/= together with an undertaking by the deceased vide the letter dated 5th February, 2007 that he would settle the quoted fees by transferring land to him.

16. That claim is denied by the Respondents. The rightful heirs/ beneficiaries entitled to a grant of letters of administration in this matter exist and are known and indeed they have applied for the same. The Objector's claim is limited to securing its rights over plot numbers Kiambogo/Kiambogo Block 2/17214 and Kiambogo/Kiambogo Block 2/17215. This cannot be a basis to oppose issuance of a grant to the persons most entitled.

17. **Musyoka J** in the **Re the Estate of Dorcas Wanjiku** had this to say in respect of creditors to an estate;

**“Creditors, as mentioned earlier, are neither heirs nor survivors nor beneficiaries or dependants. They ought not to be listed in the petition as survivors, except in the column of liabilities. Ideally creditors should wait for the heirs, beneficiaries, survivors and dependants to apply for grant, failing which they, the creditors, would then become entitled to have citations issued. Where grant is not sought after they have issued citations, they should then ask the court to allow them to petition for a grant to be made to them. Where the heirs, dependants, survivors and beneficiaries obtain the grant, the creditors should, after the appointment of the administrators, prove their claim to the administrators, and if the administrators fail to**

honour their claims then move the court appropriately. Where the claim is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action filed in the civil court.”

18. This Court *M.K. Ibrahim J* (as he then was) in a decision cited with approval by this Court **In the matter of the Estate Peter Igamba Njoroge**, Nakuru Succession Cause Number 432 of 2009 had this to say on the issue of a probate court's jurisdiction to resolve a claim based on land held in trust (and in our case purchase or transfer of land);

“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim or trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction of the court. This will only go to the question of costs.”

19. To reaffirm the above position, the decision in **High Court Succession Cause Number 864 of 1996 [2015] eKLR** by *Musyoka J* is apt. In that case the Judge stated;

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

20. The Applicant has failed to convince this Court to issue the orders sought. That is not to say, however, that he cannot file his claim Environment and Land Court. The findings of this Court are not in regard to whether he is the rightful owner or not and the Applicant retains the right to pursue his claim before the relevant Court. However at this point it is the finding of this Court that he has not laid sufficient basis to satisfy this Court that the property did not constitute the net estate of the deceased, which should accordingly, be excluded from this proceedings until the question of title is ascertained.

21. The upshot of the above is that the objection dated 4th December 2015 is hereby dismissed with costs.

Dated and Signed at Nakuru this 12th day of June, 2018.

**A. K. NDUNG’U**

**JUDGE**