



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**P & A NO 1 OF 2017**

**(FORMERLY HC NAKURU SUCC 202 /1998)**

**IN THE MATTER OF THE ESTATE OF JOHANA WAITETE MACHARIA -DECEASED**

**GRACE WANJIKU WAITETE.....1<sup>ST</sup> APPLICANT**

**VERSUS**

**NAOMI WANJA WAITETE.....1<sup>ST</sup> RESPONDENT**

**RULING**

This matter relates to the estate of **Johana Waitete Macharia, (the deceased)** who died intestate on 13/8/1988. At the time of his death, he had three wives and 22 children who survived him. His wives were Rodah Wanjiku Waitete, 1<sup>st</sup> wife; Grace Wanjiku Waitete 2<sup>nd</sup> wife (the applicant) and Naomi Wanja Waitete, 3<sup>rd</sup> wife (the respondent).

The 1<sup>st</sup> wife Rodah applied to this court for letters of administration dated on 8/1/1990. A grant of representation was issued to Rodah and the same was confirmed on 19/9/1990. The estate was distributed to the three houses as per the schedule of distribution contained in the confirmed grant.

On 11/7/2016, Grace Wanjiku Waitete filed a summons against the 3<sup>rd</sup> wife, Naomi seeking *inter alia* that a stock agent by name Custody and Registrars Services give an account of the deceased's shares in Kenya Breweries Ltd. ICDC and KGGCU. Similar orders were sought against Kenya Commercial Bank, Nyahururu and Co-operative Bank, Olkalou. The third prayer was directed at Naomi, to explain to the court how parcel no **Nyandarua/Olkalou South/53** was subdivided, title closed and transferred to 3<sup>rd</sup> parties and that an order be directed at the land Registrar Nyahururu to supply the court with documents on subdivision of the subject land.

A court order was issued directing the Land Registrar to issue a report on the same which he did, on 24/11/2016.

Thereafter, Grace the applicant, filed the summons dated 30/1/2017 now under consideration, seeking the following orders:

- (1) That all the subdivision of the parcel land Nyandarua/Olkalou South/53 and the transfers done contrary to the grant of letters of administration be set aside and nullified;**
- (2) that the sale/transfer of Kenya Breweries Ltd, ICDC and KGGCU shares done contrary to the grant of letters of administration be nullified and set aside**
- (3) That the beneficiaries of the estate of the deceased and/or 3<sup>rd</sup> parties who have acquired interest from the unlawful sale be at liberty to join in these proceedings and take part.**

Grace Wanjiku swore an affidavit in support of the application in which she deposed that Naomi is one of the deceased's widows; that the grant herein was issued to Rodah (now deceased) and was confirmed in 1990 setting out the mode of distribution of the deceased's estate; that the said property had already been bequeathed save that the transfers had not been done; that Naomi took advantage of the death of the administrator, Rodah, and distributed the property contrary to the confirmed grant; that Naomi transferred the land to her children and third parties as evidenced by the Land Registrar's letter dated 24/11/2016 (GMM2); that on being summoned to court, the respondent admitted to having filed a parallel application for grant of letters of administration and used it to sell the shares that formed part of the deceased's estate. The applicant urges the court to nullify the transfer of the deceased's property by Naomi.

Naomi filed grounds of objection in response to the application as follows:-

- (1) That the application is vexatious, frivolous and an abuse of the court process;
- (2) That the court lacks jurisdiction to hear and determine matters touching on the use, title and occupation of land;
- (3) That the orders sought are not available in law;
- (4) That the particulars of fraud against the respondent are not particularized;
- (5) That other title holders have not been joined to this application;
- (6) That the application is therefore incompetent and should be dismissed.

Mr. Chege, counsel for the respondent further submitted that the applicant is not an administrator of the estate and this application therefore violates the provisions of **Section 72 of the Laws of Succession Act** and the appellant has no standing in the matter.

He also urged that this court lacks jurisdiction to entertain the matter as it has no jurisdiction to cancel a title but the jurisdiction is vested in the ELC Court and lastly that as per Naomi's affidavit of 30/6/2016, she was not aware of these succession proceedings and that the applicant has not demonstrated that the transfer of the properties were adverse to these succession proceedings.

In a rejoinder, Ms Yalwala submitted that the applicant being a beneficiary of the estate, has the locus to bring the application and that under **Section 93 of the Laws of Succession Act** where the estate has been wasted this court has jurisdiction to cancel title.

I have now considered the pleadings and the rival submissions of counsel. It is not in dispute that a confirmation of grant in respect of the deceased's estate was issued to Rodah Wanjiku Waitete way back on 19/9/1990. The same has not been revoked.

The applicant contends that the said Rodah is now deceased. However, there is no evidence of her death and the court has no idea when she died. It would have been expected that the applicant attaches a copy of the death certificate.

From the pleadings, it seems that despite the confirmation of grant having been issued in 1990, this estate has not been wound up. Upon the death of Rodah, if indeed she is dead, the beneficiaries should have agreed on another administrator or administrators or the administrators be appointed by the court or one of them should have moved the court to be granted the said orders. The applicant came to court seeking prayers herein but never sought to be appointed as an administrator. As it is, there is no administrator for the deceased's estate.

In her reply, Naomi claimed to have filed a succession cause which gave her authority to distribute the deceased's estate as she did. However, so far, Naomi has not tendered any evidence to prove the fact that she was also an administrator of the deceased's estate in another cause. So far, it is a mystery how she managed to distribute the deceased's estate without involving other beneficiaries.

If indeed the administrator died, then the estate has not yet been wound up. There is a dispute and allegations of wasting of the estate. It seems the court which dealt with this case earlier did overlook the fact that there was no administrator in this cause. Both Grace and Naomi are widows of the deceased and it is only proper that both be appointed as administrators so they can continue with the process of administration of the deceased's estate.

As for the orders sought in this application, this court cannot grant them because it is not clear how Naomi came to transfer the said properties. Some of the properties are held by third parties who are not parties to this cause and an order of cancelation of title would adversely affect them yet they have not been heard. If indeed the titles have been illegally obtained then those affected have recourse to the ELC Court.

In the end, I find that the orders sought cannot be granted. Since the deceased's estate has not been wound up and the administrator, Rodah, is said to be deceased, under this court's inherent powers, I hereby appoint both surviving widows of the deceased, Grace Wanjiku and Naomi Wanja as administrators of the estate. The two administrators do take an account of what is left of the deceased's estate, file a report on it and present to the court for purposes of distribution.

It is so ordered.

**Dated, Signed and Delivered at Nyahururu this 11<sup>th</sup> day of July, 2018.**

.....

**R.V.P Wendoh**

**JUDGE**

**Present:**

Mr. Mathea holding brief for Mr. Githiru - Counsel for applicant

Soi - Court Assistant

N/A - the respondent/s