



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 250 OF 2007

(IN THE MATTER OF THE ESTATE OF MAAKA MUHUHI MUGWERU (DECEASED))

LOISE WAIRIMU MUGWERU1ST APPLICANT

RUTH WANJIRU MUGWERU.....2ND APPLICANT

WINNIE WANGU MUGWERU.....3RD APPLICANT

VERSUS

JULIUS GICHUKI GICHUHI.....1ST PROTESTOR

ELLEN NYAETU MUGWERU.....2ND PROTESTOR

GRACE WANJUGU MWAL.....3RD PROTESTOR

JOSEPH WANDETO MUTIRITHIA.....4TH PROTESTOR

GODWIN WACHIRA GICHUHI.....5TH PROTESTOR

WOLLESTON KAMAU NGUMO.....6TH PROTESTOR

HENRY NDEGWA NJURAITA.....7TH PROTESTOR

MARGARET WAMBUI NGUGI.....8TH PROTESTOR

OWEN THUKU KOIBITA.....9TH PROTESTOR

GRACE GATHONI GAKUU.....10TH PROTESTOR

FRANCIS MURAGURI MIANO.....11TH PROTESTOR

JOSEPH MWANGI GAKUL.....12TH PROTESTOR

BENARD MACHIRA MAINA.....13TH PROTESTOR

ELIZABETH WANJIKU KANYI.....14TH PROTESTOR

JOHN KINYUA GACHIHI.....15TH PROTESTOR

DEDAN MUCHOKI KIBETHI.....16TH PROTESTOR

GRACE WANJA NJOGU.....17TH PROTESTOR

RULING

The applicants are administratrixes of the estate of Maaka Mukuhi Mugweru who died intestate on 24th January, 2007. On 25th of July 2017, they filed a summons for confirmation of grant and in support thereof they filed an affidavit in which they set out a scheme for distribution of the deceased's estate amongst his survivors.

The protesters have objected to the confirmation of grant and in particular, most of them are not at home with the scheme proposed for distribution of the property known as LR No. 13041/2 (herein 'the Kasarani property') which I understand is a prime property located at Kasarani in Nairobi. To this end they have sworn affidavits of protest filed on diverse dates between the 31st August, 2017 and the 19th March, 2018.

The reasons given for objection to the confirmation are as varied as the number of protesters themselves. The 1st protestor, for instance, has a claim of Kshs. 1,977,919 against the estate which, in his view, must be taken into account in the distribution of the estate. The 2nd and 3rd protesters' major contention is that the estate was not distributed equally amongst all the beneficiaries. The 4th protestor's concern is that some of the assets listed as comprising the deceased's estate do not belong to the deceased. The 5th, 6th, 7th, 8th and 9th protesters' claims revolve around the Kasarani property. Others whose interest is in this particular property, for various reasons, are the 11th, 12th, 13th, 14th, 15th and 16th protesters. The 10th protestor wants the share due to one of the children of the deceased to devolve upon his children in equal shares while the 17th protestor's position is that the share of the estate allocated to her is registered somebody else's name.

On 14th November, 2017, the applicants filed a notice of preliminary objection to the hearing of the protests on the primary ground that they are frivolous, scandalous, vexatious and an abuse of the court process. Their major argument, as I understood it, is that the deceased's estate or any part of it could not have been disposed of or alienated in any manner whatsoever until such time that the grant has been confirmed and therefore the protesters' claims have no basis in law as long as they are based on what the applicants have argued to be illegal transactions.

Now, according to rule 2 of the Probate and Administration Rules a "protester" is defined as "a person who has filed a protest under rule 40 (6) against the confirmation of a grant".

Rule 40(6) referred to is of the same Probate and Administration Rules and it says thus:

Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

According to rule 40(8), where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing to the confirmation of grant, an appropriate order is made for the matter to be set down, at the earliest opportunity possible, for directions once the applicant, the protester and such other person or persons the court considers fit have been notified.

Of importance to note is that the rules do not prescribe the matters that may be covered in an affidavit of protest; equally important to note, is that any person is eligible to object to the confirmation as long as he has grounds to do so. In the ultimate, it is the court to decide, once the applicant and the protester have been heard, whether the protester's protest has any merit and therefore refuse to confirm the grant or defer its confirmation or reject the protest altogether and confirm the grant.

In my humble view, there is nothing intrinsically inappropriate with the 17 affidavits of protests. To be precise, I find them consistent with rule 40(6) of the Probate and Administration Rules and, as far as I can gather, the applicants have not suggested that they are not; their only concern is that the protests are founded on what in their view, are illegal transactions on the deceased's estate. In particular, the applicants are saying that the protesters could not possibly have purchased any part of the deceased estate or acquired any interest in it by whatever means until such a time that the grant has been confirmed.

The applicants may be right to some extent; however, my concern with their position on this point is that I have to interrogate the evidence on record for me to come to any informed decision on the legal status of any transaction involving the deceased's estate and eventually the status of any claims by the protesters on the estate. I also note that not all the protesters are claiming purchaser's interest and even some of those who have laid their claim on this basis are saying they either transacted with the deceased before his demise or they acquired their rights from cestuis que trust. Whether these claims are legitimate or not or whether they bear any merit is not something that can be determined at the preliminary stage. In a nutshell, it is improbable that these are matters that can be disposed of in limine; they can only be determined, and conclusively so, once the protesters have been cross-examined on their affidavits.

The law on what constitutes a preliminary objection is all too clear; that it consists of purely a point of law that has either been pleaded or is implied and if argued it may dispose of a suit. A preliminary objection loses that identity when it becomes necessary for the court to examine the evidence and ascertain the facts (per Sir Charles Newbold in *Mukisa Biscuit Manufacturing Company Limited versus West End Distributors Ltd* (1969) E.A at page 701).

It follows that I cannot lock out the protesters at this stage; they must have their day in court. Accordingly, I overrule the applicants' preliminary objection dated 13th November, 2018. Costs will be in the cause.

Meanwhile, in order to avoid any further delay in the disposal of this cause, I direct that the summons for confirmation of grant dated 24th July, 2017, the protests on record and the summons for revocation of grant dated 28th August, 2017 be heard together by way of oral evidence.

It is so ordered.

Dated, signed and delivered in open court at Nyeri this 12th day of October, 2018

Ngaah Jairus

JUDGE