



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2165 OF 1996
IN THE MATTER OF THE ESTATE OF KIMANI WANYORO (DECEASED)
SUSAN WAMAITHA.....APPLICANT/BENEFICIARY
VERSUS
NAOMI NJOKI KIMANI.....1ST RESPONDENT
MARY NJERI KIMANI.....2ND RESPONDENT
WARIARA KIMANI.....3RD RESPONDENT
AHMED NOORDIN.....4TH RESPONDENT/APPLICANT

RULING

1. The deceased Kimani Wanyoro died intestate on 7th December 1992. He was survived by three houses. His estate comprised of the following assets:

- a) LR No. Lari/Kireita/T.105;
- b) LR No. Lari/Kireita/T.106;
- c) LR No. Lari/Kireita/T.107;
- d) LR No. Lari/Kireita/T.110;
- e) LR No. Lari/Kireita/T.81;
- f) LR No. Lari/Kireita/219;
- g) LR No. Lari/Kambaa/83;
- h) LR No. Lari/Kambaa/264;
- i) LR No. Lari/Kambaa/83;
- j) LR No. Lari/Kirenga/T.105;
- k) LR No. 36/11/222 Eastleigh-Nairobi;
- l) Kshs. 588,264 held by the Public Trustee; and

m) Shares with Barclays Bank of Kenya Ltd

2. A grant of letters of administration was issued to Mary Njeri Kimani (2nd respondent), Wariara Kimani (3rd respondent) and Naomi Njoki Kimani (1st respondent) (deceased) on 7th December 1999. The certificate of confirmation of grant intestate was issued on 8th May 2008 based on the order made in judgment dated 15th April 2008. The certificate divided the estate amongst the three houses. Susan Wamaitha was substituted to represent her deceased mother Naomi Njoki Kimani (1st respondent) in an order issued on 30th November 2015.

3. The estate of the deceased has since been distributed among his three houses, except for LR No. 36/11/222 Eastleigh. On 23rd February 2009 Lady Justice Rawal (as she then was) made an order to the effect that LR No. 36/11/222 Eastleigh be sold and the proceeds therefrom be distributed among the three widows of the deceased. Pursuant to the order of 23rd February 2009, the 2nd and 3rd respondents sold the suit property to the 4th respondent. Subsequent to the sale of the property, the 1st respondent filed an application to the Court of Appeal (**Civil Application No. NAI 5 OF 2011**) seeking stay of execution of the ruling of 23rd February 2009. The application is still pending before the Court of Appeal.

The applicant Susan Wamaitha filed an application dated 13th September 2013 seeking to amend the application she had filed on 9th February 2011 to put in focus the real issues in controversy which relates to the circumstances under which the suit property was sold and whether the sale should be nullified by the court. The 2nd and 3rd respondents supported the application. The 4th respondent opposed the application on the ground that he was the duly registered owner of the suit property, and that the applicant did not have *locus standi* to bring the application. Through the ruling made on 13th February 2014, the court held that it was in the interest of justice that the applicant be allowed to amend her application for the issues touching on the legality of the sale of the suit property to be determined. The court therefore allowed the application for leave to amend the application dated 9th February 2011.

4. The 4th respondent Ahmed Noordin filed summons dated 5th February 2018 seeking the setting aside of the order made by this court on 13th February 2014 and the striking out of the amended summons dated and filed on 26th February 2014 with costs to the 4th respondent. The application was based on the grounds that:

a) the order of 13th February 2014 in which the beneficiary/applicant Susan Wamaitha was granted leave to amend her summons dated and filed on 9th February and 10th February 2011, respectively, was a nullity and void in law in that the said summons had long been heard and determined vide a ruling delivered on 3rd March 2011 by the Hon. Mr. Justice Kimaru;

b) the beneficiary/applicant and the 1st respondent Naomi Njoki Kimani were guilty of concealing and/or failing to disclose to the court the fact that the summons which they were seeking to amend had long been heard and determined and thus not available for any amendment;

c) the beneficiary/applicant's amended summons dated and filed in court on 26th February 2014 pursuant to the said order of 13th February 2014 was thus not only *res-judicata* but also a nullity and of no legal effect as it was founded on the said summons which had long been spent and not capable of being amended; and

d) the court had no jurisdiction to entertain and/or hear the beneficiary/applicant's amended summons aforesaid as the same amounted to an appeal against the order of 23rd February 2009 of Lady Justice Rawal (as she then was) which order has not been stayed to date.

5. The application was supported by the affidavit of the 4th respondent also dated 5th February 2018. He stated that he was enjoined in the proceedings after he bought a property known as L.R. No. 36/11/222, 6th Street Eastleigh, Nairobi (which was part of the estate of the deceased) from the 2nd respondent and the 3rd respondent Wariara Kimani (now deceased); that the sale of the property to him was pursuant to a ruling of this court by Lady Justice Rawal (as she then was) delivered on 23rd February 2009; that subsequent to the sale and after he had taken possession of the property, the beneficiary/applicant vide an application dated 9th February applied for an order of stay of execution of the order of 23rd February 2009; that pursuant to a ruling delivered on 3rd March 2011, the court granted only an order restraining the 2nd respondent Mary Njeri Kimani and the 3rd respondent from evicting the beneficiary and the 1st respondent from the property but no order for stay of the ruling was granted; that on 2nd June 2010 the 1st respondent filed a notice of appeal against the Lady Justice Rawal (as she then was) delivered on 23rd February 2009 after which she filed an application in the Court of Appeal (**Civil Application No. NAI 5 OF 2011**) seeking stay of execution of the ruling of 23rd February 2009, which application is still pending determination by the Court of Appeal; that on 26th February 2014 the beneficiary/applicant filed an amended summons which is pending before this court which application was fatally defective, bad in law and *res-judicata* because the summons was spent by the ruling of 3rd March 2011 by Justice Kimaru, that the prayers amounted to an appeal of the ruling of 23rd February 2009 whereas the matter was still pending before the Court of Appeal; and that the order for leave to amend the amended summons filed on 26th February 2014 was obtained through misrepresentation and concealment of material facts that the summons which was sought to be amended was already determined by Justice Kimaru on 3rd March 2011.

6. The application was opposed by the 2nd respondent through her replying affidavit filed on 11th April 2018. It was her case that the present application was aimed at creating a diversion from the scrutiny of the illegal sale of the suit property which was done in three illegal and different agreements; that the 3rd and 4th respondent conspired to exclude her and the 1st respondent from a supplementary agreement for sale of the suit property in order for them to misappropriate funds through their secretive and illegal deal signed exclusively by them both; that neither herself nor the 1st respondent participated in the negotiations of the supplementary agreement; that the 4th respondent's title was acquired through fraudulent, corrupt and illegal process which were exposed hence the need to cure the same through the amended summons; that neither herself nor the 3rd respondent received the full amount from the sale and there was no evidence attesting to the fact; that the court

upon discovering that the property was sold without the participation of the applicant and the 1st respondent allowed the amended summons; that the 4th respondent was allowed to reply to the motion for the amended summons and a hearing was conducted; and that the court allowed the amended summons to scrutinize the manner the property purportedly changed hands and it is in the interest of justice that the scrutiny be allowed to establish the legality of the sale of the property.

7. Parties filed their written submissions which I have considered.

8. I note there have been several orders issued in this matter regarding the distribution of the suit property among the deceased's beneficiaries. Pursuant to the order made by Lady Justice Rawal (as she then was) delivered on 23rd February 2009, the property was to be sold and the proceeds of the sale distributed among the beneficiaries of the deceased. There, however, emerged concerns that the property was sold without the participation of the 1st respondent's house. The 4th respondent was accused of colluding with some of the administrators to deny other beneficiaries their rightful share from the proceeds of the sale of the suit property. It was in the interest of justice that this issue be conclusively determined so as to protect the rights of all the beneficiaries of the estate. To this extent, I find no problem with the ruling of this court dated 13th February 2014 which allowed for the amendment and conclusive determination of summons dated 9th February 2011 and filed on 10th February 2011 on the issue revolving around the validity of the sale of the suit property. I therefore dismiss the present application and order that the application dated 9th February 2011 and amended on 26th February 2014 proceeds for hearing for the determination of the main issue.

9. This order is made pursuant to **rule 73** of the **Probate and Administration Rules** made under the **Law of Succession Act (Cap.160)** and **Article 159(2)(d)** of the **Constitution**.

10. So that progress is made towards the finalization of this long outstanding matter, I direct that the Deputy Registrar does give the earliest date for the hearing of the application dated 9th February 2011 and amended on 26th February 2014.

11. Each party shall bear own costs on this application.

DATED and DELIVERED at NAIROBI this 2ND day of OCTOBER 2018.

A.O. MUCHELULE

JUDGE