



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE 4 OF 2013**

**IN THE MATTER OF THE ESTATE OF ESTHER KABARE ... DCD**

**AND**

**JOHN KABEGENJOGU.....PETITIONER/APPLICANT**

**VERSUS**

**CICILYWANJIKUKABARE.....1<sup>ST</sup> RESPONDENT**

**ANN MUTHONI KABARE.....2<sup>ND</sup> RESPONDENT**

**LUCY WANGITHI KABARE.....3<sup>RD</sup> RESPONDENT**

**JOSEPH NJUNUKABARE.....4<sup>TH</sup> RESPONDENT**

**SAMUEL WACHIRAKABARE.....5<sup>TH</sup> RESPONDENT**

**VERONICA MICERE GITHAKA.....6<sup>TH</sup> RESPONDENT**

**GALDYS MUTHONU GITHAKA.....7<sup>TH</sup> RESPONDENT**

**DANIEL KABUI KATHIGO.....8<sup>TH</sup> RESPONDENT**

**RULING**

The objector/applicant Mary WakariroGathua filed an application dated 6.6.2017 seeking orders that a prohibition order be issued to bar any dealings by the respondents with the suit property L.R No.Mutira/Kanyei/46 pending the hearing and final determination of the application. She further seeks an order that the grant be rectified specifically to exclude <sup>1/8</sup>from L.R No. Mutira/Kanyei/46 which was erroneously included in the list of properties and yet it was sold 19.2.1999 to the late Sammy Alias Samuel Kariuki Gathua.

She further seeks orders that the respondents be ordered to execute a transfer of 1/8from the said parcel of land to her. That if the transfer is not executed within 30 days he court to order the Deputy Registrar of the High Court of Kenya to execute the necessary documents or the Land Registrar be ordered to cancel the title deed.

The application is based on the grounds that the late Sammy KarimiGathua purchased a parcel of land known as LRMutira/Kanyei/46 from Reuben GitahaKabare, Samuel WachiraKabare and Joseph NjumuKabare. The late Sammy Karimi died on 18.4.2011 before the land was transferred to his name. That the land was included in the estate of the deceased when the grant was confirmed.

The respondents did not file any papers to oppose the application though some of them were not served.

I have considered the application. This application is based on a wrong assumption that the grant has been confirmed. The record shows that when the matter came before my brother Justice Limo on 10.10.2016 for an application for confirmation of grant, he noted that the parties had noted that the parties had not agreed and gave parties time to move in one way or the other. That is to say they file a protest or iron out their differences. There is no record showing that the grant was confirmed on 6.7.2016.

The record shows that the grant was issued toCicilyWanjikuKabare and Joseph NjumuKabare on 7.7.15 and they proceeded to file an application for confirmation of grant and listed the estate as Land Parcel No. Mutira/Kanyei/46 measuring 3.7 acres to be distributed among

the eight dependants. The certificate of official search dated 15.6.2016 shows that the Land Parcel is registered in the name of the deceased, Esther Kabare. The application for confirmation of grant is yet to be heard and determined. There is a protest on record which has also not been heard determined.

In her affidavit the applicant says the late Sammy Karimipurchased land from Reuben GitahaKabare, Samuel WachiraKabare and Joseph NjumuKabare. These sellers (vendors) were not the registered owners as the certificate of official search dated 15.6.16 shows that Esther Kabare was the registered owner. The sale of plot by the three amounts to intermeddling of the estate of a deceased person as they were not administrators. The **Law of Succession Act** makes it an offence for any person to intermeddle with the estate of deceased person. **Section 45 of the Act** provides:-

**No intermeddling with property of deceased person**

*“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this*

*section shall-*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”*

The said sellers could not legally sell the estate of the deceased or a part thereof from the estate of the deceased. The deceased remains the registered owner. The appellants has not made out a prima facie case with a chance of success and has not made out a case for the grant of prohibition order against the registered owner.

In an application of this nature the applicant has to satisfy the court that it should grant the injunction. An injunction is a discretionary remedy which is granted on the basis of evidence and sound legal principles.

In the case of **Giella - vs – Cassman Brown Ltd 1973 E A 358** the principle for the grant of an injunction were stated. These are:-

- *The applicant must establish a prima facie case with chances of success.*
- *That he is likely to suffer irreparable harm which cannot be compensated by an award of damages*
- *If the court is in doubt it will decide on a balance of convenience.*

These principles have been applied in various cases in **Kenleb Cons Ltd -v- New Gatitu Service Station** it was stated that a party must show he has a right, legal or equitable which requires protection by injunction. The applicant has not demonstrated that she has a prima facie case. The land was bought from people who were intermeddling with the estate and could not pass good title. The land had not been transferred to her deceased husband. The various legal processes to be followed in the transfer of agricultural land had not been followed. The remedy of specific performance is not available.

The applicant has not come to court in clean hands. The certificate of confirmation of grant is Succession Cause No. 935 /2011 in the Estate of Sammy Alias Samuel KarimiGuthua which was issued to her on 3.7.12 shows that she included land Parcel

No. Mutira/Kanyei/46 which does not belong to the Estate of her deceased husband. The agreement MWG-3 shows that her husband had bought a portion of 3 300 square feet which is part of Mutira/Kanyei/46. It was stated that it was to await survey as the land was under succession. The applicant went ahead and included the entire parcel of land in the Estate of her deceased husband. The applicant has not made out a prima facie case. It is indeed the grant which she is the administratixwhich should exclude or expunge the estate of the deceased in this case.

On the issue of irreparable loss, I find that the applicant is not likely to suffer irreparable loss. The loss can be quantified and be compensated by an award of damages.

The balance of convenience does not tilt in her favour. I find that the applicant has not made out a case for a prohibition order as prayed in prayer No. -2.

The second issue is rectification of grant:

**Section 74 of the Law of Succession Act** provides:

*Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court-----*

**Rule 43(1) of the Probate and Administration Rules** provides:

***“Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased, or in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons.”***

The section is clear that rectification is for correction of errors. This refers to mistakes made and is applied to correct a name, a description or time and place of deceased's death or the purpose of a limited grant. An application to exclude the property of deceased from a grant is a substantive issue which is not what is envisaged in an application for rectification of grant. To do so through rectification is extending the meaning of recertification too far.

Rectification may only be applied to correct errors which are no more than mistakes which are rectified without charging the substance of the grant.

The application has been brought under various provisions. Some which have no relevance to the application. The application is not properly before this court as the grant has not been confirmed and there is a pending protest.

**Section 72 Law of Succession Act** provides:

***“(1) Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:***

***Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.”***

It is also provided under **Section 82 (ii) of the Act** no immovable property shall be sold before confirmation of grant. The property is not in any danger of being disposed off by the respondent as the grant has not been confirmed.

I find that this application is premature and is without merits. I dismiss it with costs to the respondents.

**Dated at Kerugoya this 8<sup>th</sup> day of November 2018.**

**L.W. GITARI**

**JUDGE**