



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NUMBER 504 OF 2014
IN THE MATTER OF THE ESTATE OF THERESIAH MUMBI MBUTHIA
MIRRIAM WACHUKA MBUTHIAAPPLICANT
VERSUS
MARGARET WAMBUI KANYEKI 1ST RESPONDENT
ALLAN KABAHI 2ND RESPONDENT
LAND REGISTRAR – NAIVASHA3RD RESPONDENT
HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before court is the application dated 10/3/2017. Vide this application Miriam Wachuka Mbuthia (applicant) seeks orders;

1. Spent.

2. THAT this Honourable court be pleased to issue a mandatory injunction compelling the 1st and 2nd respondents to forthwith surrender the original title for land parcel number GILGIL/KARUNG BLOCK 8/25 (KENYA KAIRI) to the applicant forthwith.

3. THAT this Honourable court be pleased to order the 3rd respondent to forthwith remove the caution lodged against GILGIL/KARUNGA BLOCK 8/25 (KENYA KAIRI) by the 1st respondent.

4. THAT costs hereof be borne by the respondents in any event.

2. The application is grounded on the annexed affidavit of the applicant and on grounds;

a) **THAT** the Applicant is the administrator of the estate of THERESIA MUMBI MBUTHIA (deceased).

b) **THAT** one of the properties of the estate is land parcel number GILGIL/KARUNGA BLOCK

8/25 (KENYA KAIRI).

c) **THAT** the original title for land parcel number GILGIL/KARUNGA BLOCK 8/25 (KENYA KAIRI) is now illegally held by the 2nd respondent .

d) **THAT** the 1st respondent has lodged a caution against the said title apparently working in cahoots with the 2nd respondent.

e) **THAT** the deceased herein passed on when her children were very young as a result which the 1st and 2nd respondents took advantage of them by illegally holding their mother's title.

f) **THAT** the 1st and 2nd respondent acts of impunity should not be allowed to continue as the same are illegal and amount to intermeddling with the estate of the deceased.

g) **THAT** it is only proper that appropriate orders be issued.

3. The gist of the application, the affidavit and the grounds in support is that the applicant is the administrator of the estate of Theresia Mumbi Mbutia (deceased).

4. Among the properties comprising the estate is parcel number Gilgil/Karunga Block 8/25 (Kenya Kairi).

5. It is averred that the original title for the land is now allegedly held by the 2nd respondent. The deceased passed on when the applicant and siblings were very young as a result of which the 1st and 2nd respondent took advantage of them by illegally holding the deceased's title.

6. The application is opposed. The Attorney General acting for the 3rd respondent has raised 4 grounds in opposition, namely;

1. The application does not disclose any sufficient and/or reasonable cause to warrant the orders sought.

2. The application does not disclose adequate particulars in support of the alleged intermeddling, to enable the court to grant the reliefs sought.

3. The instant application is pre-mature, misconceived and bad in law.

4. The reliefs sought cannot issue.

7. The 1st respondent and with authority of the 2nd respondent has sworn a replying affidavit. She depones that the deceased herein Theresia Mumbi Mbutia was known to her and her (1st respondent's) husband one Joseph Kimemia.

8. Joseph Kimemia had lent money to Mary Wanjiru, a sister to the deceased on the 31/8/2001 to the tune of Kshs. 15,000/=. An agreement is exhibited. This money was lent for and on behalf of the deceased.

9. The deceased herein passed on and later Mary Wanjiru passed on before the monies were repaid.

10. Loise Wambui Mbutia, the administrator of the estate of the deceased herein agreed with Kimemia on how the monies would be paid. It was agreed that the debt would be paid through the sale of land parcel number Gilgil/Karunga/Block 8/25 (Kenya Kairi) to Kimemia. An agreement is exhibited showing a sale price of Kshs. 130,000/=.

11. Since the estate owed Kimemia Kshs. 55,000/=:, the amount payable pursuant to the sale was Kshs.

75,000/=.

12. On 12/5/2004 Loice Wambui Mbutia was paid Kshs. 5,000/=. The balance owing was thus Kshs. 70,000/=.

13. Kimemia paid Kshs. 70,000/= on 6/12/2004 to Loise (administrator) and the administrator passed the original title for Gilgil/Karunga/Block 8/25 to him. Loise died before the succession proceedings in respect of deceased herein were done. Kimemia subsequently died.

14. I have had regard to the application and the opposition thereto. Of determination is whether the respondents should be compelled to release title to land parcel Gilgil/Karunga Block 8/25 (Kenya Kairi) and secondly, whether the 3rd respondent should remove the caution lodged against the said title.

15. As at the time the deceased died, land parcel number Gilgil/Karunga/Block 8/25 was registered in her names. Titles had not passed to any other person.

16. To that extent it formed part of the free property of the deceased which she was legally competent freely to dispose during her lifetime and her interest had not been terminated by her death.

17. Any individual or body laying a claim to the estate, be it a debt owed or property held would upon the death of the deceased have to lodge such a claim with the administrator.

18. By her own admission, the 1st respondent engaged in a litany of illegalities between herself, her husband one Joseph Kimemia and one Loise Wambui Mbutia (a purported administrator) relating to the settlement of an unproved debt against the estate of Theresia Mumbi Mbutia, a process which culminated to in a purported sale of parcel number Gilgil/Karunga Block 8/25, a capital asset supposedly to clear indebtedness of the estate of Theresia Mumbi Mbutia.

19. There is no evidence that the said Loise Wambui Mbutia had obtained letters of administration in respect of the estate and even if that were so, any sale of such property would have had to be sanctioned by the court.

20. The annexures filed by 1st respondent in her replying affidavit are self defeatist. She annexes an agreement for lending of money between Joseph Kimemia and Mary Wanjiru. Theresia Mumbi Mbutia is not a party to that agreement. She is not even a witness.

21. The alleged claim against the estate of Theresia Mumbi Mbutia over this debt is not only misplaced but outrightly illegal.

22. All further agreements between Joseph Kimemia and Loise Wambui Mbutia on the basis of the lending agreement must of necessity fall flat on the face.

23. The acts of Loise Wambui Mbutia and Joseph Kimemia after the death of Theresia Mumbi Mbutia related to dealings with parcel title number Gilgil/Karunga/8/25 whose title was in the name of Theresia Mumbi Mbutia was intermeddling with the estate of the deceased.

24. The case of **GITAU AND 2 OTHERS VS WANDAI AND 5 OTHERS (1989) KLR 231** falls on all fours with our instant case. Entering into agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.

25. The pertinent question is whether or not the parties herein could legally deal with the property Gilgil Karunga Block 8/25 by way of sale before the grant was issued. The ready answer is found in **Section 45** of the **Law of Succession Act**. The Section provides;

“Section 45.

(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.”

26. As held in the case of **SAMUEL KAMIN CRISPOH VS. JOHN NJERU KAHIHU (2015) eKLR**, the validity of the purported sale is questionable. The court stated;

“No immovable property shall be sold before confirmation of Grant

The applicant herein is armed with a sale agreement which has been disputed. Even if this court was to accept that indeed he purchased the said portion from the Respondent, the Applicant faces yet another challenge, namely, that the transaction was entered into before the Grant was issued and confirmed. Thus, the transaction offends both Section 45(1) and Section 82(b) (ii) cited above. These are points of law which go to the root of the validity or otherwise of the said agreement.”

27. Section 82(b) of the Law of Succession Act alluded to by the court in this passage provides;

“S. 82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;”

28. Indeed such dealing with the property of the deceased gives rise to a cognizable offence. I agree with *Musyoka J* in the **ESTATE OF VERONICA NJOKI WAKAGOTO (DECEASED)** where he stated;

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

29. For reasons above stated, the respondents have no basis in law upon which to hold the title to parcel number Gilgil/Karungu/Block 8/25. The caution lodged on the basis of this claim is not sustainable.

30. With the result that the summons dated 10th March 2017 is allowed, I make the following orders;

1. A mandatory injunction compelling the 1st and 2nd respondents to surrender the original

title for land parcel number GILGIL/KARUNGA BLOCK 8/25 (KENYA KAIRI) to the applicant to issue forthwith.

2. THAT the 3rd respondent to remove the caution lodged against GILGIL/KARUNGA BLOCK 8/25 (KENYA KAIRI) by the 1st respondent forthwith.

3. THAT costs be borne by the 1st and 2nd respondents.

Dated and Delivered at Nakuru this 13th day of December, 2018.

A. K. NDUNG'U

JUDGEa