



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 590 OF 1985

IN THE MATTER OF THE ESTATE OF ELIUD MUIGAI MACHARIA (DECEASED)

AMBER WAMBUI MUIGAI.....APPLICANT

~VERSUS~

CLAIRE NJERI MUIGAIRESPONDENT

TERRY WACHEKE MUIGAI.....INTERESTED PARTY

RULING

1. This is the Notice of Preliminary Objection dated 25.9.2018 filed in court on 26.9.2018 raised against the Applicant's Summons dated 13th August 2018 on the following grounds.

(i) THAT the Orders sought by the Applicant are Res judicata. The Applicant's cause of action arises from the Estate of ELIUD MUIGAI (deceased) which was fully determined by the Honourable Court and property distributed as per the confirmed grant issued on 5th October, 2015.

(ii) THAT the Applicant has no locus standi to bring this application for the reasons that, the grant was confirmed on 5th October, 2015, no protest was filed by the Applicant in regards to the mode of distribution and the Estate of the deceased has already been distributed.

(iii) THAT property LR No. NAIROBI/BLOCK/60/381 NGEI is the registered property of TERRY WACHEKE MUIGAI.

(iv) THAT this Honourable Court is rendered functus officio upon issuance of confirmation of grant and distribution of the Estate of ELIUD MUIGAI (deceased)

(v) THAT the Applicant's Application is therefore frivolous and an abuse of the Court process.

2. Mr. Ojienda submitted that there is a misjoinder of parties as Terry Wacheke Muigai is not an administrator of the Estate but only a beneficiary just like the Applicant. He submitted in writing that no application was filed by the Applicant to enjoin Terry Wacheke Muigai. Further that Section 35 (1) of the Succession Act Cap 160 Laws of Kenya provides that the interested party has a life interest in the Estate of the deceased.

3. It was also submitted in writing that the Application is res-judicata as the Estate has already been distributed and that the Applicant would have applied for revocation of grant if she was not comfortable with the mode of distribution.

4. The Learned Counsel for the Respondent and Interested Party also submitted in writing that the letters of administration for the Estate of Eliud Muigai Macharia who died on 5th May 1984 were issued to Catherine Njeri Muigai, Grace Waithera, Claire Njeri Muigai and Charlene Njeri Muigai and the Certificate of Grant was issued on 5th October, 2015 and the Estate was divided as per the Confirmed Grant and the Court became functus officio upon the performance of its duty.

5. Opposing the Preliminary Objection Counsel for the Applicant submitted that the Notice of Preliminary Objection does not specify which provisions of the law under which it is raised and that a misjoinder should not have pleadings struck off and further that the issue of misjoinder can be rectified.

6. I have considered the submissions by both parties in the Preliminary Objection, I find that it is not in dispute that Terry Wacheke Muigai is the widow of the deceased Eliud Muigai Macharia who died on 5th May 1984.

Grant of representation to the said estate was issued to Catherine Njeri Muigai, Grace Waithera, Claire Njeri Muigai and Charlene Njeri Muigai.

7. The Certificate of Confirmation of grant was issued on 5th October 2015 and the Estate was subdivided as per the confirmed grant. It is not in dispute that LR. NAIROBI/BLOCK 160/381 NGEI was transferred to Terry Wacheke Muigai (the interested party).

8. Sections 35 of the Law of Succession provides as follows;

Succession provides as follows:

“35 (1) Subject to the provisions of Section 40, where an intestate has left one surviving spouse and child or children, the surviving spouse shall be entitled to:

(a) The personal and household effects of the deceased absolutely, and (b) a life interest in the whole residue of the net intestate estate;

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

35 (2) A surviving spouse shall during the continuation of the life interest provided by Section (1) have power of appointment of all or any part of the capital of the net intestate estate by way of a gift taking immediate effect among the surviving child or children but the power shall not be exercised by will nor in such manner as to take effect at any future date.

9. I find that the estate of the deceased having been distributed, the interested party has already acquired a life interest in the net intestate Estate. The property was transferred to her by the administrators of the Estate and the Applicant did not raise any protest to the mode of distribution. The distribution in this falls under section 40.

10. I find that the interested party is wrongfully enjoined to the Application and further, the applicant did not even seek leave of the court to enjoin her as an interested party to the suit.

11. Under Section 35 (1) of the law of Succession Act, the children of the deceased are not entitled to access the net intestate estate so long as the interested party is surviving. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or upon her remarriage.

12. I agree with the sentiments expressed in Bob Njoroge Ngarara Vs Mary Wanjiru Ngarara & Another [2014] eKLR that;

“The Court will not Countenance the eviction of the widow so as to satisfy the wish of any beneficiary for a share. A life interest remains with the Petitioner/Respondent and it is only after her demise and/or re-marriage the said plot will be distributed to the other four beneficiaries.”

13. I allow the Preliminary objection dated 25.9.2018 and strike out the Application dated 13th August 2018 with no orders as to costs.

14. The Applicant is directed to stop intermeddling with the Estate forthwith.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 10TH DAY OF DECEMBER, 2018

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI

IN THE PRESENCE OF:

Mr. Ojienda for the interested party.

N/A by the Applicant.