



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 267 OF 2000

IN THE MATTER OF THE ESTATE OF NGARUNYI MWINJA alia NGARUNI M'IKWIRIGA (DECEASED)

DOROTHY NAITO NGARUNI.....ADMINISTRATOR/APPLICANT

-VS-

JAMES MURITHI MUUNA.....1ST RESPONDENT

CYPRIANO MUTHURI2ND RESPONDENT

KIOGORA M'RIMBERIA.....3RD RESPONDENT

RULING

1. This ruling relates to the summons dated 3rd October, 2018 brought under **Section 45(1) and 2(b) of the Law of Succession Act**. The applicant seeks that the respondents do vacate the deceased's estate to enable the implementation of the judgment delivered on 7th June, 2018.
2. The grounds upon which the application is grounded are contained in the supporting affidavit of Dorothy Naito Ngaruni sworn on 3rd October 2018. She deponed that the estate was distributed pursuant to the judgment delivered on 7th June 2018. When she visited the estate for purposes of distribution, she found the respondents in occupation. James Murithi, Cypriano Muthuri and Kiogora M'Rimberia occupying approximately 2.5 , 0.5 and 0.5 acres respectively where they have cultivated food crops, coffee bushes and bananas. She peacefully requested them to vacate but they did not do so, hence they are intermeddling with the estate.
3. The application was opposed through the replying affidavits of James Murithi Silas, Festus Kiogora M'Rimberia and Julius Muthuri Sabari sworn on 23rd October 2013, 29th October and 29th October 2018, respectively.
4. James Murithi stated that in 2000, he was approached by some of the heirs of the estate and was asked to buy a portion out of land parcel **NO. NKUENE/MIKUMBUNE/600** (hereinafter "**the suit land**") measuring 7 acres so that they could raise money for this succession cause. On 13th December, 2000, he entered into an agreement with Muriungi M'Ngaruni for the purchase of one and a half acres for a sum of Kshs.300,000/-. After paying the initial deposit he was put into possession of his portion. After the court revoked the confirmed grant, he filed a suit in Meru ELC (O.S) No. 24 of 2018 and the same is still pending in the premises, the application was misadvised and aimed at interfering with his peaceful occupation thus it ought to be dismissed.
5. Festus Kiogora M'Rimberia averred that upon the first confirmation of grant on 22nd July 2002, Muriungi agreed to sell to him an acre out of the suit land at a consideration of Kshs.100,000/- through a sale agreement dated 8th November, 2002. He applied for the land control board consent and the vendor signed the transfer of land document but the same was not lodged for registration. That he has extensively developed the land and installed water supply.
6. Julius Muthuri deponed that after the first confirmation of the grant on 22nd July 2002, Muriungi agreed to sell to him a ½ (half) an acre out of the suit land at a consideration of Kshs.100,000/- through a sale agreement dated 6th August 2002. He has also extensively developed the land by growing bananas, trees and installed water supply.
7. He further deponed that, on 9th April 2010 Muriungi sold to him 60 points of an acre from **L.R. NO. NKUENE/UPPER-MIKUMBUNE/1510** being one of the resultant subdivisions from the suit land. He has even obtained consent from the land control board. He is only interested in what he has purchased as he is an innocent purchaser for value without prior notice.
8. This application was canvassed by way of written submissions. The 2nd and 3rd respondents submitted that they are innocent purchasers

for value without notice. They urged court to protect their interests pursuant to the provisions of **section 93(2) of the Law of Succession Act, CAP 160 of the Laws of Kenya, (the Act)**.

9. On his part, the 1st respondent contended that the family and the clan of the deceased prevailed over him to assist the family of the deceased in lodging the present Cause. He agreed by buying from the estate 1 ½ acre for a consideration. That he was put in possession thereof and has been in occupation for 16 (sic) years. He has since filed **Meru ELC (OS) 24 of 2018**. He prays that the orders be declined until that suit is determined. He relied on **Meru HC CR. Pet. No. 2 of 2017 Gilbert Mwirichia vs. DPP & Judson Mwenda Gitonga, In re Matter of the Estate of Mwarania M'Inoti (deceased) (2018) Eklr and In Re Estate of Elias Kiruja [2018] eKLR** for the proposition that, the execution of the Judgment of this court of 7th June, 2018 be stayed pending the ELC matter being finalized.

10. On the other part, the applicant was adamant that the court has already spoken through its judgment of 7th June, 2018. That the rights of the parties having been declared, the orders sought should be granted to allow the matter to be finalized.

11. I have carefully considered the affidavits on record and the submissions of learned Counsel. The issue for determination is **whether or not the court should allow its Judgment to be executed**.

12. **Section 45(1) of the Act** provides that: -

“(1) Except so far as expressly authorized by this 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.”

13. When one Muriungi Ngaruni, one of the children and administrators of the deceased, sold a portion of the suit land through the sale agreement dated 13th December, 2000 to the 1st respondent, he had not been issued with any letters of administration. He had no authority to sell to the 1st respondent, any part of the suit land. He and the 1st respondent were obviously intermeddlers.

14. The record shows that on 22nd July 2002, the parties recorded a consent that the estate be distributed as follows:-

- a) Ruguru Ngaruni - 1 acre
- b) Muriungi M'Ngaruni - 2 ½ acres
- c) Stephen Gagicha - 2 ½ acres
- d) James Silas Murithi - 1 acre

15. Pursuant thereto, a certificate of confirmation was issued to Muriungi M'Ngaruni. Based on this certificate, Muriungi once again sold from his share a ½ acre and 1 acre to the 2nd and 3rd respondent vide agreements executed on 6th August, 2002 and 8th November, 2002 respectively.

16. I am aware that **section 93 of CAP 160** seeks to protect and make valid transfers not affected by revocation of representation. It provides that:-

“(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

“(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

17. To my mind, this provision cannot be relied on to perpetuate or assist in fraudulent dealings by the so called “innocent purchasers” against innocent beneficiaries. A purchaser who walks with his eyes open to an estate whose succession is hotly contested in court, cannot connive with the administrator against the estate or the other beneficiaries and purport to seek cover under this provision. It was never the intention of the legislature that the statute be used as a conduit for fraud.

18. In **Lucy Wangui Kabaiko & another v Jane Wangari Kabaiko & 3 others[2014] eKLR** Kimondo J held that:-

“Section 93 does not clothe all such transactions with a veneer of legality. Certainly, the section would not condone an illegality, say where the purported holder of a grant had acquired it fraudulently or had no authority to transact. The law would not countenance intermeddling with the estate.”

19. In the present case, the Certificate of confirmation dated 22nd July, 2002 was suspended or stayed by the court on 1st August, 2002. It is doubtful whether the administrator, Muriungi Ngaruni had any right or power to enter into the agreements dated 6th August, 2002 and 8th November, 2002. If the 1st and 2nd respondent were aware of that order by any means, they cannot purport to seek refuge in **section 93 of the Act**.

20. As regards the agreement dated 9th April, 2010, this court entertains doubt if the same was bona fide. By that time, Julius Muthuuri Sabari must or should have known that Muriungi Ngaruni was no longer the sole administrator of the estate of the deceased and could not act alone. Even if he was the sole administrator, Julius Muthuuri Sabari should by then have known that the entire estate was still in dispute. He offered to 'help' Muriungi Ngaruni steal a match against the other beneficiaries. He, the 2nd respondent must be made to reap from what he sowed, fraud. He cannot benefit from his own wrong. That agreement is unlawful, illegal and of no effect. He should pursue Muriungi Ngaruni for his claim in respect thereof.

21. One thing is clear, it would seem that the respondents had at all times known of the existence and active prosecution of the objection in this Cause. They were attending court to follow on what was going on. They failed to join the proceedings to ventilate what they felt was their interest in the matter. While the 1st respondent has taken an active step to protect his interest by initiating proceedings before the ELC court, the 2nd and 3rd respondents have not. I have held that they cannot seek refuge under **section 93 of the Act** in respect of the agreements entered in August and November, 2002 for the reasons I have set out above. They can only claim adverse possession if they took possession then of the said portions of 1 ½ acre.

22. From the foregoing, this court has been persuaded that:-

a) on the authorities cited by Ms. Mwangi for the 1st respondent, the court should have suspended the confirmation of the grant in respect of the claim by the 1st respondent under **Rule 41 (3) of the Probate and Administration Rules** pending his establishing his claim in the relevant court;

b) that the 2nd and 3rd respondents may also have a claim under adverse possession on the portions they purported to have purchased from Muriungi Ngaruni in August and November, 2002, respectively; they should also be given limited time to prove their claims in the relevant Court, if at all;

c) that since Muriungi seems to have sold his interest to the 2nd and 3rd respondents;

d) the share that constitutes the free estate of the deceased should be distributed to the beneficiaries but having in mind (c) above without waiting for (a) and (b) above;

e) the total area which the respondents have laid claim is 3 acres, whose distribution should be suspended. The respondents to file and prosecute their claims for the said total acreage of 3 acres in the relevant courts which has jurisdiction to determine their claims within 24 months of the date hereof.

f) the total area available for distribution apart from the area claimed for adverse possession by the 1st respondent is 5.5. acres. Each of the beneficiaries is entitled to 0.7857 acres. However, after Murungi sold another 1.5 acres to the 2nd and 3rd respondents, the area available for distribution is 4 acres only. That would be distributed to the 6 innocent beneficiaries at 0.6666 acres each while Murungi has to await the claim by the 2nd and 3rd respondents.

23. Under **section 47 of the Act**, the Certificate of Confirmation dated 2nd July, 2018 is hereby rectified as follows: -

L. R. No. Nkuene/U-Mikumbune/600

a) Ntibuka Ngaruni - 0.6666 acres

b) Stephen Kagicha - 0.6666 acres

c) Naito Ngaruni - 0.6666 acres

d) Judith Kanyua - 0.6666 acres

e) Hellen Kanyua - 0.6666 acres

f) Catherine Nduru - 0.6666 acres

g) Muriungi Ngaruni - To await the claim by Festus Kiogora M'Rimberia and Julius Muthuri Jabari to be determined within 24 months.

h) The balance of 3 acres to await the determination in Meru ELC No. 24 of 2018 and any suit to be filed by Festus Kiogora M'Rimberia and Julius Muthuri Jabari.

24. Accordingly, the application is hereby marked as settled on the above terms. The applicant is allowed to demarcate and distribute the unoccupied area of the estate property to the extent aforesaid. There is liberty to apply.

SIGNED at Meru me:-

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 6th day of December, 2018.

F.K. GIKONYO

JUDGE