



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE 917 OF 2008

**IN THE MATTER OF THE ESTATE OF HUMPHREY RUBIA NGANGA ALIAS NGANGA
RUBIA (DECEASED)**

ALLAN RUBIA NGANGA.....APPLICANT

VERSUS

DAVID MUKII MEREKA T/A

MEREKA ADVOCATES.....RESPONDENT

RULING

INTRODUCTION

The deceased died on 19th September, 2003.

The beneficiaries of the deceased's estate are;

- 1) Nancy Wamoro Nganga
- 2) Agnes Muthoni Nganga
- 3) Allan Rubia Nganga
- 4) Sammy Mwirigi Nganga
- 5) Cathrine Wanjiru Nganga

The grant was issued on 21st June 2010 to the 4 beneficiaries as administrators of the deceased's estate and the Applicant Allan Rubia Nganga was the one left as beneficiary only. The grant was confirmed on 4th April 2011 and rectified on 20th March 2013.

APPLICANT'S CASE

The Applicant filed the application on 25th September 2015 brought under **Section 47 of Law of Succession Act Cap 160; Rule 49 & 73 of the Probate and Administration Rules.**

The Applicant sought orders that David Mukii Mereka T/A Mereka & Company Advocates be ordered forthwith release to Mbugua Nganga & Co Advocates on behalf of the Applicant the original grant/certificate of Title with respect to L.R. No 1159/41 Karen Nairobi and any document necessary to give effect to and/vest to the Applicant his share of the estate.

In the annexed supporting affidavit, the Applicant deposed that on 4th April 2011, the grant was confirmed and he was bequeathed 2.49 acres of the suit property L.R. no 1159/41. He attached a copy of confirmed grant marked **ARN1**.

The subdivision was conducted and a deed plan was issued annexed and marked **ARN2**.

The Applicant sold his portion to a purchaser and spent part of the sale proceeds to fund the subdivision of the suit property as evidenced by the document annexed and marked **ARN3**.

The other beneficiaries were aware of his undertaking of subdivision and payment for the said process as shown by correspondence marked **ARN5 & ARN6**.

On 6th February 2014, through Counsel, the Applicant wrote to the administrators through their Counsel, the Respondent herein and sought release of the original grant/title/certificate of the suit property L.R.1159/41 as per letter marked **ARN7**.

The Administrators replied and confirmed custody of the title documents for the suit property in their letter marked **ARN8**.

The Applicant informed this Court that several attempts have been made to resolve this issue amicably and sort out outstanding issues and these efforts have been futile.

Meanwhile, the Purchaser's Counsel wrote to the Applicant on 11th June 2015 and demanded transfer of title over the Applicant's portion of the suit property vide the letter marked **ARN1**.

Consequently, the Applicant wrote letters to the Respondent on the same issue; attached are numerous correspondences marked **ARN 11, 12 & 13** and the issue remains unresolved.

Therefore, the Applicant applied to court to compel release of the title documents to facilitate transfer of the proprietary interest in his portion of the suit property to the Purchaser. As such, the Applicant remains exposed to legal action as he cannot complete the sale without the said document.

RESPONDENT'S CASE

The Respondent, David Mukii Mereka filed Replying Affidavit on 1st December 2015 and confirmed acting for Agnes Muthoni Nganga, Sammy Mwirigi Nganga and Cathrine Wanjiru Nganga and Wamae & Allen Advocates acting for Nancy Wamoro Nganga.

The Respondent stated that he was informed by Counsel in his firm who had conduct of the matter, that in the proposed subdivision; the Administrators had been allocated smaller portions of the suit property than was agreed in the confirmed grant.

The Nairobi County approved the deed plan on condition a road access would be put up on the suit property. The Administrators are of the view that they will not pay for the road as they will not use it. They demand that the land cannot be subdivided until the road access is in place and paid for.

The Respondent wrote to the Applicant and widow through their respective Counsel, a letter dated 28th February 2014 annexed and marked **DMM3** and intimated that the sub division fees of Ksh.2,142,500 was not agreed on by all beneficiaries. The Applicant proceeded with subdivision without consultation and agreement of other beneficiaries. The Respondent's clients were entitled to 1,727 hectares and by the

subdivision they got 1,749 hectares thus reducing their portion by 0.0621 hectares.

The Respondent deposed that the Applicant entered into Agreement for Sale with the Purchaser for 2.49 hectares and this was on 14th August 2013 before the subdivision as shown by Agreement annexed and marked **DMM4**.

Further by a letter dated 26th March 2014, marked **DMM5**, the Applicant through his advocate intimated that the road access was 12m instead of 9m and without consultation of the other beneficiaries, proceeded to hive off their allotment. Yet in the Agreement for Sale of the Applicant's portion to the 3rd Party Purchaser, the Applicant's portion in the suit property sold is still 2.49 acres and therefore there was no adjustment in hiving off from the said portion land for the access road.

The Respondent informed the Court that he has always been available to resolve the matter, however, the Applicant through Counsel insists that the Respondent himself should attend the meeting and refused his appointment of Counsel from his office to represent him in the meeting.

The Respondent was of the view these are contested issues that remain unresolved and therefore impede the release the original title to facilitate completion of sale of the portion owned by the Applicant to the 3rd party.

The Respondent's clients; administrators and beneficiaries of the deceased's estate; namely Agnes Muthoni Nganga, Cathrine Wanjiru Nganga and Sammy Mwirigi Nganga filed their affidavits on 4th December 2015 and 19th August 2016 respectively and stated that they instructed their advocate Mr. David Mukii Mereka not to release the original title/certificate/grant of the suit property. The basis for refusal is based on the fact that the Applicant is not an administrator and therefore not competent to execute any documents relating to the subject title. Secondly, they alleged that they were not involved in the subdivision process, they took issue with the subdivision, the erection of the access road and payment of survey fees and the cost of putting up the road on the suit property.

HEARING

On 17th February 2015 when the matter was heard in this Court for the first time, there were 2 applications, the instant application and the one dated 22nd October 2013 by the Circuit Valuers seeking settlement of the survey costs as ordered by Hon. Justice Kimaru on 11th March 2013.

The Court granted orders to have the DR Family Division write to CDSC to investigate and inquire into sale of shares by DYER & BLAIR and report on progress and status in 90 days. The Court noted with concern no progress had been made in the said direction.

With regard to the instant application, the Court granted orders to have the Respondent appear in Court to shed light on the issues in dispute. To his credit, the Respondent appeared in Court on 24th February 2016 and informed this Court that he filed an affidavit that laid out all the issues and the Applicant was to file a reply and the Court determine the issue.

On 15th June 2016, this Court implored the parties to hold a meeting with their lawyers and discuss the matter with a view to settling the matter out of court and the Court to record consent within 30 days.

On 21st September 2016, the parties confirmed that efforts to hold a meeting were futile and thus the instant application was set down for hearing. The interested party, Purchaser of the Applicant's portion of the suit property sought to be joined as party to the present proceedings. The Court granted leave for the party to be joined as party to these proceedings.

On 15th November 2016 the parties through Counsel on the matter and each reiterated the facts as contained in their clients' respective affidavits.

Mr. Nganga for the Applicant stated that the grant was confirmed in 2011 and rectified in 2013. The subdivision was undertaken and each beneficiary obtained share of the portion of the suit property L.R. 1159/41 Karen as per the confirmed grant.

At the time, the Respondent confirmed he had original title of the suit property.

The Respondent on behalf of the administrators beneficiaries took issue with subdivision as they were not consulted, and did not consent and their respective portions were reduced to accommodate a road access which they do not agree with or accept and finally who is to pay for the construction of the road.

The Applicant resides in UK and has incurred cost in paying for survey awaiting refund from the estate, he sold his portion to 3rd party and cannot transfer the same due to stalled distribution of the estate.

The Applicant's Counsel informed Court he is willing to give a professional undertaking on the title/certificate.

The Applicant relied on **Section 83 of Law of Succession Act Cap160** that stipulates duties of administrators.

Mr. Dola for the purchaser supported the application for release of the title as the sale between the Applicant and the Purchaser was undertaken in 2013 and awaits completion. The issue of the Applicant's portion being less due to the access road is not a problem on their part; it is only the administrators who seem to have a problem.

Mr. Chege for the widow of the deceased stated that he concurred with the Applicant's application to have the title released and facilitate distribution of the estate. His client received several offers to sell her portion of the suit property and all have not materialized and she has not been able to move out of the matrimonial home (as she was the 2nd wife and stepmother to the deceased's children).

Mr. Muriuki for the Respondent; stated that in reliance on the affidavits filed by the Respondent and the administrators, he informed Court that the Applicant is not an administrator and the Respondent holds the Title of the suit property on instruction of the Administrators and he came to Court and explained the circumstances as is confirmed from the Court record. The Applicant wants to sell his portion and leave the other beneficiaries with the new owner before issue of the access road is resolved. He referred to **Section 79-86 of Law of Succession Act Cap 160** which outlines the administrator's duties.

Counsel further contended that the Respondent is under instruction not to release the title deed and until the road is constructed subdivision cannot take place. The 3rd party who is not a beneficiary according to the confirmed grant and cannot be involved in this process.

ISSUE

The issue for determination is whether the Respondent should release the title deed, certificate or grant of the suit property or not.

DETERMINATION

From the evidence on record, it is apparent that the beneficiaries of the deceased's estate have unresolved issues with regard to the distribution of the deceased's estate amongst themselves.

The beneficiaries appointed the administrators under **Rule 26 of the Probate and Administration Rules**. The Applicant being entitled in a degree equal to the other beneficiaries, he renounced his right to be appointed administrator and gave written consent to the other family members to be appointed administrators of the deceased's estate. The grant was issued on 21st June 2010 to the following as administrators;

- 1) Nancy Wamoro Nganga
- 2) Sammy Mwirigi Nganga
- 3) Agnes Muthoni Nganga
- 4) Catherine Wanjiru Nganga

The grant was confirmed on 4th April 2011, rectified on 20th March 2013.

At this point the administrator's obligation to all beneficiaries was to distribute the estate as illustrated by the following provisions;

Section 55 of law of Succession Act Cap160:

No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.

In the process of distribution of the estate, among other duties, under **Section 82 (c) of Law of Succession Act** the administrators **shall subject only to any limitation imposed by their grant, have the following powers;**

to assent, at any time after confirmation of the grant, to the vesting of a specific legacy to the legatee thereof.

Section 83(f) & (g) of Law of Succession Act Cap 160 provides;

Subject to Section 55, to distribute or retain on trust (as the Case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and income there from, according to the respective beneficial interest therein under the Will or on intestacy; as the case maybe.

within six months from the date of confirmation of the grant, or such longer period as the Court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts and to produce to the Court a full and accurate account of the completed administration.

From the Court record, the process of distribution of the estate has been protracted by litigation among the beneficiaries. There are on record minutes of family meeting held on 5th July 2011 that facilitated the onset of the distribution of the estate process.

On 25th February 2013; Hon Justice L. Kimaru asked parties to propose Valuers to value assets that comprised of the deceased's estate. On 11th March 2013, the same Court recorded consent from all parties through Counsel that Circuit Valuers and Management Consultants to carry out valuation of L.R.209/6898 Kileleshwa and L.R.1159/41 Karen at an inclusive value of Ksh.800,000/-. The said amount would be paid from sale of shares due to the estate. This Court order and Consent of parties have never been set aside, reviewed or appealed against and remains valid and legal order of the Court.

On 25th February 2014, the Court ordered that shares from Barclays Bank, East African Breweries and NIC Bank be sold and not be distributed pending further orders of the Court. Meanwhile the 1st administrator Nancy Wamoro was to execute the conveyance documents to transfer and distribute properties to beneficiaries and purchaser.

On 8th October 2014, it was agreed by Consent that the Respondent advocate for administrators would

release title documents to the Applicant through his advocate for L.R. Ngong/Ngong/59481, 59482, 59483, 59491, 59492, 59495.

I have outlined the content of the relevant court orders and consents by parties herein that relate to the distribution of the estate to illustrate that the administrators and beneficiaries have in the past resolved disputes related to distribution either by consent or court order.

In the instant case, the administrators and beneficiaries have legitimate concerns about subdivision, the road access and payments to be made. These are issues that can be discussed and resolved to facilitate distribution as was done in other instances highlighted above. Despite this Court pleading with parties to meet and discuss, they have declined and no challenges were advanced in Court on why it was not possible to do so now as they had done before.

The Administrators ought to spearhead this process so as to ensure distribution of the estate as per the provisions cited above. The Administrators ought to have approached the surveyors and Applicant and sought to be present during the subdivision and or raise their objection.

Similarly they would also have sought audience with Nairobi County on the controversial issue of road access, the land required, where it would pass through on the suit property, cost and resolve how to share the cost.

In the absence of a meeting, each beneficiary is entitled to approach the Court on the disputed subdivision, road access and expenses.

This Court is concerned that beneficiaries have resolved similar disputes before and facilitated distribution of the assets that comprise the deceased's estate, but in the instant case there is a stalemate. The Administrators seem to have abdicated their statutory mandate and instead have instructed Counsel contrary to the specific provisions cited to withhold the Title to the suit property. No attempts have been made to resolve the impasse. The act of withholding the title, and not taking any steps to hold or attend meeting, consider the Applicant's Counsel professional undertaking, seek audience with Nairobi County and verify the road access requirement and how to share the cost or seek redress in Court can only infer deliberate and calculated delay in distribution of the deceased's estate.

The Respondent Counsel for the administrators, despite his clients request ought not to withhold the title document of the suit property ad infinitum and deprive beneficiaries their rightful share of the said property. The withholding of the title document would be justified if there have been and are in place deliberate efforts to resolve the issues that aggrieve beneficiaries and impede distribution of the estate. There is no legal requirement that entitles title documents to be withheld pending construction of access road and lights so as to facilitate distribution of the estate.

The Applicant seems from the pleadings and submissions by Counsel to have pursued the subdivision of the suit property L.R.1159/41 Karen. This is evidenced by annexure **ARN5** a letter, where the widow through Counsel approved of surveyor and agreed that the administrators be compelled to release the original title to enable surveyor complete his work.

Annexure **ARN6** is by the Respondent confirming that they received the Applicant's Counsel's letter informing them that subdivision was conducted on 20th September 2013. This means that the administrators were not consulted and did not consent and they were not present during the subdivision. This is a legitimate issue; the Administrators ought to have facilitated the subdivision with consent and presence of all beneficiaries. The proposed subdivision would be relied on in transfer of specific portions to the beneficiaries if all agree to the proposed subdivision or in the event there is any objection; the proposed subdivision and objection are presented to Court to determine. This is an issue that requires attention and subdivision proposal and attendant cost are revisited to accommodate all parties and they agree to the proposal before subdivision takes place.

Apart from this issue, the Court finds the matter regarding distribution of the deceased's estate is urgent in

light of the proprietary interest of the Purchaser of the Applicant's portion who wishes to complete the sale that has been pending since 2013. The Applicant attached letters of demand by the Purchaser through his Counsel and from the Court record, the Purchaser is joined to these proceedings. It is not in dispute the Applicant is one of the beneficiaries of the deceased's estate. He has beneficial interest in portion of the suit property which after the grant was confirmed he is entitled to the portion and may choose how to deal with it. The administrators and co beneficiaries have not facilitated transfer. The interested party is a bona fide purchaser for value with no notice of defective title to the Applicant's portion of L.R. 1159/41 Westwood Park -Karen. Therefore the distribution of the suit property ought to be expedited to avail the Purchaser proprietary rights on the Applicant's portion.

The totality of the evidence on record is that the Respondent ought to have advised his clients, the administrators to pursue resolution of the unresolved issues either through family meeting or pursuing the matter in Court instead of withholding the title document for the suit property and holding the Applicant ransom. The Applicant seems to have taken the law into his hands and proceeded solo with subdivision without informing and involving other beneficiaries. This can be rectified by meeting to agree and proceed with subdivision, or correct amend the contested portions and resolve the issue of the road access. In a nutshell there is no legal basis for withholding the title document.

The Administrators are in a fiduciary relationship with beneficiaries and ought to carry out their statutory duty. In default the Applicant has a remedy that he can apply to revoke the grant.

In IN RE ESTATE OF DAVID KYULI KAINDI (DECEASED), SUCCESSION CAUSE NO. 3403 OF 2005, it was pointed out that:

“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.”

[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”

DISPOSITION

The court orders that the instant application is allowed on the following terms;

- 1. The administrators shall hold meeting within 30 days from date of Ruling with all beneficiaries and /or representatives or Counsel with a view to;**
 - a) Resolve the issue of subdivision of L.R. 1159/41 Karen; whether to appoint another surveyor at own cost to carry out survey in the presence of all beneficiaries or recall same surveyor to consider objections and adjust accordingly the deed plan.**
 - b) Approach Nairobi County to discuss and determine the issue of road access on the suit property.**
 - c) Consider all beneficiaries contribution for land for road access, undertaking or**

payment for surveyor's services and road construction costs.

d) The administrators shall hold in trust the Applicant's portion of the suit property L.R.1159/41 until the title document is released for transfer of the said portion.

2. In default of the meeting; the Respondent shall forthwith release the title documents of L.R.1159/41 to Deputy Registrar Family Division for onward transmission to the Applicant through Counsel.

3. The Applicant has the option to apply for revocation of grant if the administrators do not comply with statutory mandate.

4. Each party to bear own costs.

DELIVERED SIGNED DATED IN OPEN COURT ON 18TH JANUARY 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

.....

.....

.....