



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 706 OF 2012
IN THE MATTER OF THE ESTATE OF KIBE KIMANI (DECEASED)

RULING

1. The deceased herein died on 6th July 1975. Representation to his estate was sought in a petition lodged in Kiambu SPMSC No. 89 of 2010 by Hannah Gathuya Kibe and Benson Mwangi Kibe, in their respective purported capacities as widow and son of the deceased, respectively. He was expressed to have been survived by the widow and twelve (12) children. He was said to have been possessed of only one asset, Dagoretti/Ruthimitu/233. A grant of letters of administration intestate was accordingly made on 11th August 2010. The said grant was confirmed on 24th March 2011; vide an application for confirmation thereof dated 27th January 2011. A certificate of confirmation of grant of even date was duly issued; the property of the estate was to devolve jointly upon the two administrators.
2. The application for determination is the summons dated 4th April 2012 seeking revocation of the grant made on 11th August 2010 in Kiambu CMSC No. 89 of 2010. It is brought at the instance of Anne Wanjiku Kimani. The grounds and factual background to the application is that Dagoretti/Ruthimitu/233 had been sold to one Kimani Thuo by the deceased in 1965 and the family of the said Kimani Thuo resided on the subject property. It is pleaded that there arose a resulting trust in favour of the said Kimani Thuo. The applicant argues that the non-disclosure of the Kimani Thuo family was amounted to a fraudulent concealment of matter from the court. The applicant is a widow of the said Kimani Thuo, who avers that the family of the administrators does not live on the land and their interest thereon is disposal thereof by way of sale. She has attached several documents to support the alleged sale, dating back to 1977, 1978, 1979 and 1981. The transactions are apparently between Kimani Thuo and Kimani Kibe.
3. The applicant filed a further affidavit on 19th March 2014, sworn on 17th March 2013. She attaches documents to her affidavit to support her allegation that the deceased had entered into an agreement in 1966 with her husband for disposal of the said property. There is a document dated 16th January 1966 purportedly signed by the deceased disposing of one acre of parcel number 233 to Kimani Thuo.
4. I have carefully gone through the record and I have not come across any response by the administrators to the revocation application. As it is the revocation application is unopposed.
5. I directed on 18th September 2013 that the application dated 4th April 2012 shall be disposed of by way of written submissions. The applicant did comply with the directions and file written submissions but the respondent did not.
6. The applicant's application is founded on the allegation that her husband had bought the sole property

of the estate from the deceased back in 1965. She has attached documents dated 1966 to support that contention.

7. I am cognizant of the fact that the Constitution of Kenya 2010 has taken away the jurisdiction of the High Court to determine matters touching on ownership of land. The same Constitution has established a special court of equal status with the High Court and conferred upon it jurisdiction to make determinations on matters of that nature. I have in mind Articles 162 and 165 of the Constitution, which states as follows:-

‘162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) ... ; and

(b) the environment and the use and occupation of, and title to, land.’

‘165(5) The High Court shall not have jurisdiction in respect of matters –

(a) ... ; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).’

8. The applicant in her application has not attached any court decree holding that her late husband had bought Dagoretti/Ruthimitu/233 from the deceased. The application as crafted invites me to determine whether the applicant’s late husband had bought the subject property so as to find that the applicant was entitled to a share of the estate of the deceased to the extent of Dagoretti/Ruthimitu/233. Determining whether the late husband of the applicant had bought the subject property would bring the matter within the purview of Article 162(2) of the Constitution of Kenya. That being the case, the High Court would have no jurisdiction over the matter.

9. I wish to point out that the fact that a property belongs to or is registered in the name of a dead person does not mean that all questions touching on it must be placed before the probate court. The mandate of a probate court is to distribute the property of a dead person amongst the persons who survive him, who are invariably his relatives. Claims by non-relatives are not for determination within the cause, but elsewhere in separate proceedings. Rule 41(3) of the Probate and Administration Rules requires that property claimed by a third party should be removed from the schedule of assets for distribution to await determination of its ownership in separate proceedings. Under the current legal dispensation such determination has to be by the court envisaged by Article 162(2)(b) of the Constitution, the Environment and Land Court.

10. It is the Environment and Land Court that ought to determine where the applicant’s husband acquired Dagoretti/Ruthimitu/233 from the deceased. Once a determination in that behalf is made in favour of the applicant she then comes back to the cause Kiambu SPMSC No. 89 of 2010 to have the property devolved to her. In the meantime the said property should be set aside to await the determination of ownership by the Environment and Land Court.

11. I feel inclined to make in the circumstances are –

(a) that the The orders that **implementation of the certificate of confirmation of grant issued on 11th August 2011 in Kiambu CMSC No. 89 of 2010 is hereby stayed to await determination by the Environment and Land Court, in a suit to be filed by the applicant, of the question as to whether the applicant’s husband had bought Dagoretti/Ruthimitu/233 from the deceased;**

(b) that the said stay shall be for a period of 366 days, subject to extension from time to time by the Kiambu court on application;

(c) that the court file in Kiambu SPM CSC No. 89 of 2010 shall be returned to that court for disposal, while the instant file shall be closed; and

(d) that there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE