



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.716 OF 2011

In the Matter of the Estate of Isaac Kaburu Marete (Deceased)

DANIEL GITUMA MARETE.....PETITIONER

Versus

FRANKLINE MUTWIRI.....OBJECTOR

JUDGMENT

Acquisition of land before confirmation is unlawful and does not enjoy property rights under the Constitution

[1] By the Summons for Confirmation of Grant dated 27th August 2012, the Petitioner sought for confirmation of grant of letters of administration intestate made to the Petitioner on 11th April 2011 to be confirmed. But, a Protest to Confirmation of Grant was filed on 29th April 2013 by FranklineMutwiri in his capacity as a purchaser of 1/8 pf an acre from the estate property. He claimed that on 22nd September 2010, he entered into a sale of land agreement with the family members to purchase 1/8 of an acre from the estate property. He annexed an agreement dated 22/9/2010 to support his claim.

Directions

[2] On 9th June 2014, the court gave the following directions:

- (a) Leave granted to Protestor to file further affidavit;
- (b) The Protest be determined by way of submissions;
- (c) Date be taken at the Registry; and
- (d) Mention on 29th September 2014.

[3] On 29th September 2014 the Protestor had not filed any affidavit as order. He sought for more time to do so; and tThe court allowed him 7 days to file the affidavit. On 3rd December 2014 again the Protestor had neither filed any affidavit nor submissions. His legal counsel Otieno C undertook to file submissions. He was given 21 days to do so. On 13th July 2016, Otieno C was absent but of importance, he had not filed any affidavit or submissions on behalf of his client. Consequently, the court allowed the Petitioner to file submissions within 7 days. On 22nd November 2016, the Protestor and his counsel were absent. The court observed that the Protestor's legal counsel was absent and no explanation that had been given on the

failure to file submissions. Thus, the court ordered that it will decide this case on the basis of material filed in court. I shall so proceed.

Protest by purchaser

[4] During confirmation of grant, the court is supposed to determine any or all protests filed. I will, therefore, determine the protest herein first. The protestor claims to have entered into a sale of agreement on 22nd September 2010 with the family of the deceased wherein they agreed to sell and he agreed to purchase 1/8 of an acre from the estate property. He stated that he had started to cultivate and has planted seasonal foods on the said parcel of land but the beneficiaries herein now are bent at evicting him so that they can sell the property to another purchaser.

Petitioner's side of the story

[5] The Petitioner in his affidavit sworn on 12th July 2013 deposed that only some of the beneficiaries signed the agreement. He also averred that as the beneficiaries are people of no tangible economic means but the protestor is a man of means, he was to take care of all expense on this cause but he has done nothing except the Kshs. 4,000 he paid upon the signing of the said agreement. He stated that the protestor is now demanding a sum of Kshs. 240,000 from the estate. To the Petitioner, the protestor breached his own agreement but importantly he is not entitled to any land in the estate.

DETERMINATION

Acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under the Constitution

[6] Upon meticulous consideration of the protest, all arguments filed and the law, I am of the following persuasion. I will restate once again what I stated in the case of **the Matter of the Estate of M' Ajogi M'Ikiugu alias Ikiugu Ajogi (Deceased)** on sale of estate property before confirmation of grant as follows:-

Sale of estate property before confirmation

Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the Law of Succession Act. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.

[7] But for completeness of the foregoing discourse, I wish to go two steps up. First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than Lord Denning M.R in the case of **MACFOY V UNITED AFRICA CO. LTD [1961] 3 All ER 1169 at pg. 1172** that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no

need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

Second, any acquisition of land in violation of the Law of Succession Act is unlawful and a finding to that effect by a competent court brings the acquisition within the claw-back provisions of article 40(6) of the Constitution which declares that:-

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

This provision should be understood within the broader sense of the law of ensuring that a person's holdings are just and lawfully acquired having been acquired through original just acquisition, or lawful transfer, or through rectification of injustices or through inheritance. Accordingly, acquisition of land before confirmation of grant is null and void; and does not enjoy property rights in article 40 of the Constitution of Kenya, 2010.

Agreement null and void

[8] On the basis of the law set out above, the agreement entered into between the protestor and the beneficiaries on 22nd September 2010 is vitiated in law and, is, therefore, null and void for all purposes and intents. I so declare that agreement; it is of no legal effect whatsoever. In any event, the agreement is a manifestation and a product of intermeddling with the estate for which the parties may be cited in a criminal charge under section 45 of the Law of Succession Act. Therefore, the protest is based on an illegality and the protestor cannot legally found a claim whatsoever against the estate. It bears repeating that, all those who signed the agreement herein could be cited for intermeddling- and I think, in appropriate cases, courts should begin to tread that path in order to preserve the estate properties and to vindicate the law by punishing the offending parties. Accordingly, the protest dated 15th April 2013 is dismissed. I will not, however, award costs to the Petitioner because he too is at guilt. I will now decide on the distribution.

Distribution and Confirmation of grant

[9] The protest is now out of the way. I note that the affidavit in support had included some purchasers but in the submissions by the Petitioner, they have been omitted. I have considered the proposal by the Petitioner and I note it has provided for all children of the deceased except Margaret Nkoroi Muraa- but I note that Form 37B dated 27th August 2010, for Consent to the Mode of Distribution of Estate bearing a sign against her name was filed on 4th September 2010. I have not seen any protest from her. There is also no any objection from any of the beneficiaries to the proposed mode of distribution by the Petitioner. Accordingly, I order that distribution of the estate property namely, L.R NO NYAKI/KITHOKA/771, shall be distributed as follows:-

- (a) David Kiogora Muraa.....0.30 acres**
- (b) Stephen Mubichi.....0.25 acres**
- (c) Daniel Gituma.....0.30 acres**
- (d) Alice Kananu Muraa.....0.30 acres**
- (e) Jeremiah Mwiti Marete.....0.30 acres**
- (f) Henry Kimathi.....0.30 acres**

(g) Samson Mwenda.....0.30 acres

[10] The upshot is that I confirm the grant herein. Distribution of the estate shall be as per the above terms. It is so ordered.

Dated, signed and delivered in open court at Meru this

20th day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Kaimenyi advocate for Mokuu advocate for Petitioner

Nyenyire advocate for Otieno C advocate for protestor

F. GIKONYO

JUDGE