



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO.305 OF 2012

In the Matter of the Estate of M’Ajogi M’ikiugu alias Ikiugu Ajogi (Deceased)

PATRICK KOOME M;IKIUGU.....PETITIONER

-VS-

PHOLENCERKAISON GIM’IKIUGU.....1ST RESPONDENT

JOSPHAT KATHURE MUKARIA.....INTERESTED PARTY/APPLICANT

RULING

Inhibition and addition of Applicant as beneficiary

[1] The Summons dated 2nd September 2014 seeks inter alia

(a) That inhibition be issued to restrain the Land Registrar for entertaining any dealings in NYAKI/NKABUNE/119; and

(b) That grant issued on 21st January, 2014 be nullified and or rectified to include the applicant as a beneficiary of the estate.

[2] The application is based on the affidavit by the Applicant as well as other grounds discussed in the submissions filed by the Applicant. The major reason for applying is that, by an agreement in writing dated 27th February, 2012, it was agreed that the Petitioner and the 1st Respondent will sell and the Applicant will buy ½ acre of land from at a consideration of Kshs. 700,000. He paid a sum of Kshs. 100,000 to facilitate the succession cause. The balance of Kshs. 600,000 was to be paid on transfer of the land to him. But, when the cause was applied for the Petitioner failed to include the Applicant as a person entitled to ½ acre from NYAKI/NKABUNE/119. The agreement also provided a penalty of liquidated damages equal to twice the purchase price in the event of default by any party. According to him, he will suffer irreparable damage and prejudice unless that state of affairs is changed.

[3] The Petitioner and the 1st Respondent did not file any affidavit. But, they filed submissions on 1st September 2016 in which they argued that the sellers did not have authority to sell the estate property at the time of the agreement. They cited section 82 of the Law of Succession Act and the decision by Muchelule J in the case of Re Estate of Juma Kariuki [2015] eKLR. Accordingly, they urged that the Applicant cannot found a claim against the estate on the agreement herein. They also argued that the Applicant even breached the agreement by not paying a further sum of Kshs. 300,000. They, therefore, asked the court to dismiss his application.

DETERMINATION

Sale of estate property before confirmation

[4] 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.

Applying the test

[5] Now, applying this test, the agreement herein was entered into on 22nd February 2012 by the Petitioners and the interested party. The property subject of sale is ½ acre to be excised from **NYAKI/NKABUNE/119**. This is the estate property. The said agreement suggested that transfer will be made after conclusion of intended succession cause. Clearly, the sale was done by the two petitioners even before they had applied for letters of administration. That is purely an act of intermeddling with the estate of the deceased and is a criminal offence under section 45 of the Law of Succession Act which provides as follows:-

Protection

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of 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.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

Accordingly, the sale agreement is vitiated having been procured by persons without legal capacity or lawful authority to sell the estate property. As such, the sale was in total breach of law and is, therefore, null and void for all purposes and intents. I so declare it. The upshot of my finding is that the application dated 2nd September 2014 is dismissed. I will not condemn the Applicant to pay costs because the actions by the two petitioners in selling the estate property before confirmation of grant is most foul. I, therefore, order that each party shall bear own costs of the application.

Dated, signed and delivered in open court at Meru this 14th day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Mrs. Ntarangwi advocate holding brief for Mr. Otieno C for Petitioner

Mr. Mulunga advocate holding brief for Mr. B.G. Kariuki advocate for
interested party.

F. GIKONYO

JUDGE