



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 5 OF 2015

In the Matter of the Estate of M' Thurania M' Mwereria (Deceased)

VIRGINIA MWARI THURANIRA.....APPLICANT

-VS-

PURITY NKIROTE THURANIRA.....RESPONDENT

RULING

[1] Before me is a Summons dated 14th November, 2016 which is expressed to be brought under Section 45, 47 and 82 (b) of the Law of Succession Act CAP 160 of the Laws of Kenya. The significant orders sought are:

- (a)An injunction to restrain Elias Mugambi Mwongera and Boniface Mworua Mugambi from intermeddling with the deceased's estate;**
- (b)Any other order to preserve the estate; and**
- (c)Cost of the application.**

The said application is premised on the following grounds:

- 1. That the deceased's estate, L.R NO. Nkuene/Mitunguu/Kithino/565 is still registered in the deceased's name.**
- 2. That named persons to wit Elias Mugambi Mwongera and Boniface Mworua Mugambi are intermeddling with the deceased's estate.**
- 3. That the said persons are not children or beneficiaries of the deceased.**
- 4. That unless the orders sought is granted the deceased's estate is at risk of being wasted.**

[2] The Applicant stated that, on 7th June 2016, the court appointed the Respondent (her step daughter) and her as the Joint Administrators of the estate of the deceased comprising of the suit land namely L.R NO. NKUENE/MITUNGUU/KITHINO/565 and which is registered in the deceased's name. She stated that one Boniface Mworua Mugambi in his witness statement stated that he is a purchaser of 1 acre of the suit land. Similarly, Elias Mugambi invaded part of the deceased estate and is farming about 2 ½ acres

ostensibly for having bought the said land from the Respondent herein. Consequently, she contended that the presence of the two strangers was preventing him from accessing and utilizing her husband's land.

[3] The Applicant submitted in support of and reiterated the above grounds but emphasized that the agreement entered between Elias Mugambi and Julia Thurania on 20th July 2011, was null and void as it contravened Sections 45 and 82 of the Law of Succession Act. And as such, Elias Mugambi should be evicted from the estate. She also stressed that the allegation by the Respondent that Boniface Mworira purchased 1 acre directly from the deceased was not backed by any supporting evidence by way of a sale agreement.

[4] The application was, however, opposed via Replying Affidavit sworn by the Respondent on 7th December 2016, where she deposed that before their late father passed away, he had sold 1 acre to Boniface Mworira Mugambi and that Elias Mugambi had bought 1 ½ acres from their late mother Julia Thurania and that the purchasers lived on and utilized the said land. She further contended that their late mother passed away before she could file succession to the estate of their father. She denied that these purchasers were intermeddlers, for they were purchasers for value and had the right to live and utilize the suit land.

[5] The Respondent also reiterated the above grounds and submitted that purchaser bought the portion of land from and during the lifetime of the deceased. Therefore, his claim was not prohibited by Section 82 and 45 of the Law of Succession Act. Consequently the Respondent contended the application for injunction was malicious and should not be allowed.

DETERMINATION

[6] I have carefully considered this application, the rival submissions by the parties and the authority relied upon by the Applicant. The allegation herein is that Elias Mugambi Mwongera and Boniface Mworira Mugambi are intermeddling with the deceased's estate. Boniface Mworira and Elias Mugambi filled witness statements claiming to have bought 1 acre and 1 ½ acre from the deceased and the deceased's wife respectively. The Respondent supported and attempted to justify the said sales of the estate property to the two. However, no evidence was tendered by the Respondent to the effect that indeed her father had sold 1 acre of land to Boniface Mworira Mugambi. With regard to Elias Mugambi Mwongera, the Respondent produced a land sale agreement dated 20th July 2011 between her mother Julia Thurania and the said Elias Mugambi Mwongera selling to him 1 ½ acres. Fitting these facts to the law, what does the law commend?

[7] This Application is brought pursuant to section 45 and 82 (b) of the Law of Succession Act CAP 160 of the Laws of Kenya. Section 45 provides as follows:

Protection

(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.

Section 82(ii) of the Law of Succession Act provides that:

(ii) no immovable property shall be sold before confirmation of the grant;

[8] The above two sections are pointedly relevant to the circumstances of this case. What does case law say about these two sections? Enough judicial decisions have been made on this subject and I do not wish to multiply them. Except, however, I should be properly grounded. I am content to cite some; for instance, in the case of **Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J** held:-

" A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act...For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immoveable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"(ii) no immovable property shall be sold before confirmation of the grant." (Underlining mine).

Similarly Mutungi J in **Joseph Oginga Onyoni & 2 others v Attorney General & 2 others [2016] eKLR** citing with approval the case of **Troustik Union International & Another –vs- Mbeyu & Another [1993] eKLR** held that the estate of a deceased person is vested in legal representative and it is only the legal representative who has capacity to represent the estate. In the case of **Omari Kaburi –vs- ICDC [2007] eKLR** Lady Justice Wanjiru Karanja (as she then was) held that:-

"The law is that the grant is what clothes a person with locus standi to standi in and sue on behalf of the estate of the deceased..."

[9] A work of the court in the Matter of the Estate of Isaac Kaburu Marete (Deceased) **DANIEL GITUMA MARETE vs. FRANKLINE MUTWIRI [2017] KLR** is also quite apt. The court stated as follows:-

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

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 **Re 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.

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.

[10] Applying the law on the facts of the case, I observed earlier that no evidence was tendered to proof that indeed the deceased sold 1 acre of land to Boniface Mworira Mugambi. In fact, no property was transferred to him. Therefore, the portion he claims to have bought from the deceased is part of and is the estate property. As for the assertion that the Respondents mother sold 1 ½ acres of land to Elias Mugambi Mwongera, I have this to say. The said sale agreement is null and void for violating Section 82 (b) (ii) of the Law of Succession Act, as the said Julia Thurania had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under Section 80 (2) **Law of Succession Act**, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity. In the end result and having come to the above conclusion, I find the application dated 14th November, 2016 to be meritorious and I accordingly allow it in the following specific terms:-

(1) Elias Mugambi Mwongera and Boniface Mworira Mugambi are hereby restrained from intermeddling with the deceased’s estate property herein and more specifically L.R NO KUENE/MITUNGUU/KITHINO/565;

(2) If the said Elias Mugambi Mwongera and Boniface Mworira Mugambi are on the estate property they shall be evicted from L.R NO NKUENE/MITUNGUU/KITHINO/565 forthwith; and

(3) This being a succession matter there will be no orders as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 16th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutera advocate for the respondent

Respondent – present

Karuku for Mwingi advocate for applicant

Applicant present

F. GIKONYO

JUDGE