



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 839 OF 2007
IN THE MATTER OF THE ESTATE OF P N N (DECEASED)

JUDGMENT

1. The deceased herein died on 12th September 1999. According to a letter dated 12th November 1999 from the Chief of Nkaimurunya Location, Kajiado County, the deceased was survived by a widow, daughters and sons. The letter identified the survivors as R W N, G W, E N, S W, J N and K R. Representation to his estate was sought by R W N in her alleged capacity as widow of the deceased, in a petition filed herein on 2nd April 2007. He was expressed to have been survived by the individuals named in the Chief's letter of 12th November 1999. He allegedly died possessed of Ngong/Ngong/[particulars withheld]. A grant was accordingly made to the widow on 18th July 2008.

2. On 31st March 2008, the administrator lodged a summons for confirmation of her grant, of even date. She proposed that the sole asset be registered in her name to hold in trust for herself and her children in equal shares.

3. Several affidavits were lodged at the registry in response to the application. The first was by M M N. He swore it on 2nd April 2008. He is s brother of the deceased. He alleges that Ngong/Ngong/[particulars withheld]. had been acquired by their father, J N N from a Paul Karanja Muiruri. He claims that the property was registered in the deceased's name as their father was away in Nyeri. He charges that their mother, E N N, caused the property to be registered in the deceased's name to hold in trust for the rest of the family. The next affidavit was sworn by M W C on 14th October 2008. She is sister of the deceased. She alleges that Ngong/Ngong/[particulars withheld]. is family property held in trust by the deceased. She alleges that it was their mother who caused the property to be so registered s that the deceased could hold t in trust for the family. She also alleges that their mother handed the documents of title over to the deceased's wife, the administrator herein.

4. To these affidavits the administrator swore an affidavit on 28th November 28th November 2008. She asserts that the property had been bought by her husband and not the deceased. She states that there is a sale agreement signed by the deceased and eth seller, Patrick Karanja before an Assistant Chief. She alleges the allegations are an afterthought, and M M was even a minor at the time. She has attached a copy of the alleged sale agreement between the deceased and Paul Karanja.

5. The alleged seller, Paul Karanja Mwiruri, swore an affidavit on 9th February 2009. He asserts that he sold the land in question to the father of the deceased. The deceased involvement was that he had been sent by his father to remit the first installment, otherwise the rest were remitted by the father himself. He was also involved at the transfer stage when consent of the relevant land control board was required, and since his father was away, the board accepted to have the deceased step in for him. The other affidavit was sworn by the former assistant Chief for Olkeri, S T K, on 11th February 2009. He alleges that he was

in office at that time. He claims to be aware that the Paul Karanja had sold property to the deceased's father. At the time of obtaining the consent of the Land Control Board, the father was not available, and the deceased signed the relevant documents on his behalf. He states that he had been made aware of the transaction by parties, the seller and the buyer.

6. Directions were given on 28th November 2011 that the said application be disposed of by oral evidence.

7. The hearing commenced on 23rd September 2013. The protestor, M W C, testified first. She testified that the property had been bought by her father, but at the consent stage the father was late and it was agreed between the Chief and the deceased that the property be registered in his name so that they do not miss the land control board meeting. She testified that the deceased was a drunkard who predeceased their father. Their father allegedly tried to resolve the matter with the administrator, but she stayed away. He allegedly died before the matter could be resolved. Their mother handed over the documents related to the property to the deceased's wife for safekeeping. She would like the Ngong property shared equally between the deceased and his brother, M M N. She asserted that she saw the agreement between her father and the seller. She alleged that the same was in a book.

8. The next witness was M M N. He stated that he was a brother of the deceased. He alleged that their father bought the land and shared it equally in 1990 between him and the deceased. He alleged that the documents relating to the property were handed over by their mother to the administrator as her husband, the deceased, was a drunkard and of unsound mind. The said documents related to the subdivision of the property. He conceded that he had seen the title to the property; it was in the name of the deceased.

9. He was followed to the stand by S T, the Assistant Chief. He was the area assistant Chief at the time of the alleged sale. He claimed that it was the father of the deceased who was buying the property. He claimed that there was a sale agreement. He did not appear to have had seen it for he said he was told about it by the buyer. When shown the sale agreement he confirmed that it appeared to have been a sale between the deceased and the seller. At the payment of the first installment, he claimed the deceased came and claimed that he had been sent by his father. The witness allegedly witnessed as the deceased paid the first installment. He was not present at the payment of the second installment. At the land control board the deceased also allegedly came and alleged to have been sent by the deceased. The witness then signed the papers as evidence that he knew the parties. He explained that at the board, the understanding was that the sale was to the deceased's father.

10. The alleged seller, Paul Karanja Muiruri, came next. He stated that he sold a piece of land to the father of the deceased. He could not recall the land reference number of the land he sold. He said that the sale agreement was signed between him and the deceased. He alleged that he had a sale agreement that he had signed with the father of the deceased, who was the buyer. He conceded that the document annexed to the affidavit of the administrator was the agreement that he signed with the deceased. He said there an agreement between him and the deceased, but he was selling to the father and that the father trusted the son. He said the agreement with the deceased said that the witness had sold the land to the deceased. He insisted that he did not sell the land to him. The first instalment was paid by the deceased. At the land control board meeting, it was the deceased who attended as the buyer was said to be away. The Chief allowed him to transact with the deceased instead of his father to avoid pushing the matter to the next meeting of the board. He stated that when the buyer eventually surfaced, they went together to the Kajiado land office, where they were advised that the property in question came out in the name of the person who attended the board meeting.

11. The administrator testified on 30th March 2016. She alleged that the deceased bought the disputed property from Paul Karanja in 1990. She relied on the agreement attached to her affidavit. She stated that her sister and brother in law live on the said land. She asserted that the protestors had not produced any documents to establish that the property did not belong to the deceased. She said it was the deceased who left her with the title deed before he died that is how he came to be in possession of it. She stated that at some point the provincial administrators came to the land and sought to subdivide it by force, into two portions.

12. It is not disputed that the deceased was survived by the administrator and her children. The only question for determination is whether the deceased was registered as proprietor of the disputed property in trust for the extended family. In short whether the property in question was bought by the deceased or by his father. It is common ground that the property was acquired from a Paul Karanja. The seller testified in his papers and orally that he did not sell the property to the deceased but to his father. He did not produce the agreement he signed with the father of the deceased but identified the one the administrator was relying on as the one that he signed. He confirmed that that agreement says that he was selling the land to the deceased. Secondly, when consent for transfer was sought before the land board, it was the deceased who was in the picture, not his father. The Assistant Chief who was supposed to have witnessed the payment of the first installment allegedly signed, not an acknowledgement of the sale price, but a sale agreement between the seller and the deceased.

13. I note that there are several parties claiming that Ngong/Ngong/[particulars withheld]. was trust property held by the deceased for the benefit of others. It is a matter of determining ownership of property as between the estate of the deceased and that of his father. That would call upon me to make a determination as to ownership thereof. I am invited to determine whether the registered owner thereof was not the real or actual owner thereof, and to find that the property had in fact been bought by another person and that the deceased was but a mere agent of that other.

14. According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri.

15. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.

16. The final orders that I shall make in the circumstances are as follows:-

(a) That I postpone determination of the application dated 31st March 2008, to the extent that it applies to Ngong/Ngong/[particulars withheld]. to await determination of the issues identified hereabove in terms of the orders herebelow;

(b) That I set aside Ngong/Ngong/[particulars withheld]. from the schedule of the assets for distribution in the estate of the deceased to await determination of the ownership thereof between the estate of the deceased and all those other claimants, including the estate of his deceased father, J N N;

(c) That M M N, M W C and the administrator of the estate of J N N are hereby granted 366 days to file and prosecute a suit at the ELC to resolve the questions the subject of (b) above;

(d) That the administrator of the estate shall be at liberty thereafter, should the respondents be unsuccessful at the ELC, to move this court for determination of the application dated 31st March 2008;

(e) That the property in question is situated within Kajiado County, consequently I hereby direct that the cause be transferred to the High Court of Kenya at Kajiado for final disposal;

and

(f) That there shall be no order as to costs.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE