



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1745 OF 2000

IN THE MATTER OF THE ESTATE OF JANE WANJIRU MUTHEE (DECEASED)

JUDGMENT

1. The proceedings to whose these proceedings relates to the estate of Jane Wanjiru Muthee who died intestate on 18th May 1998. A grant of letters of administration was given to Anthony Kinyenje Muthee and Gladwell Wanjiru Nyoike on the 25th of April 2014. The administrator petitioned for confirmation of grant on 5th July 2014.

2. In his affidavit in support of the said application Anthony avers that the deceased was survived by 3 dependants JNM, Caroline Wanjiku Muthee and Anthony Kinyenje Muthee. That Caroline Muthee is deceased and is survived by PN a minor who he alleges is under his care and protection and that JN lacks capacity by virtue of his mental status. That the deceased who was the proprietor registered plot no. **Ruiru East Block 1/43** which was subdivided into 8 plots namely **1858, 1859, 1860, 1861, 1862, 1864 and 1865**. That the deceased had before her demise sold plot no. 1859 to Grace Wachinga Muchai, plots 1860 and 1862 to Kiga Self Help Project and plot 1863 to Paul Mungai Wambugu and 1865 had been bequeathed to Henry Munyori in Succession cause no. 422/95. He proposes the remaining parcels of land to be shared as follows;

i. L.R. No.1859 Anthony Kinyenje Muthee- absolutely

ii. L.R. 1861 Anthony Kinyenje Muthee-to hold in trust for James Njoroge and Paul Njenga Wanjiku

iii. L.R. No. 1864 Anthony Kinyenje Muthee- absolutely

The proposed summary of distribution as follows;

L.R. NO.1858 A 0.15 ACRE PIECE OF LAND - ANTHONY KINYENJE MUTHEE ABSOLUTELY

L.R. NO.1859 A 0.15 ACRE PIECE OF LAND - GRACE WACHIGA MUCHAI ABSOLUTELY

L.R. NO.1860 A 0.15 ACRE PIECE OF LAND - KIGA SELF HELP GROUP PROJECT ABSOLUTELY

L.R. NO.1861 A 0.15 ACRE PIECE OF LAND - ANTHONY KINYENJE MUTHEE TO HOLD IN TRUST FOR JNM AND PNW

L.R. NO.1862 A 0.15 ACRE PIECE OF LAND - KIGA SELF HELP PROJECT ABSOLUTELY

L.R. NO.1863 A 0.15 ACRE PIECE OF LAND - PAUL MUNGAI WAMBUGU ABSOLUTELY

L.R. NO.1864 A 0.15 ACRE PIECE OF LAND - ANTHONY KINYENJE ABSOLUTELY

L.R. NO.1865 A 0.15 ACRE PIECE OF LAND - HENRY MUNYORI ABSOLUTELY

3. Gladwell Wanjiku Nyoike filed her affidavit of protest on 11/08/2014 opposing the said application for confirmation of grant. She avers that PN is under the care of his grandmother Wanjiku Wanjenga and not Antony's. That the sale of the parcels of land to the said purchasers was done fraudulently and she seeks to have the same declared as an illegality on the face of the law as the same were carried out through duress and undue influence and pressure on the deceased by her brother Henry Munyori. She avers the same was done through collusion and misrepresentation by the said Henry Munyori. She added that Henry was not entitled to get any parcel of land from the deceased's estate as he is not the deceased's beneficiary. That it was wrong for Jane to purport to sell of the parcel of land without consideration of other beneficiaries. She urges the court to determine the legality of the said sales before considering the mode of distribution. Further that the proposed mode of distribution is unfair as Anthony Kinyenje has allocated himself two plots of land leaving J and P to share one portion of land. She proposes that Anthony, J and P to each get one plot of land. Adding that from the foregoing Anthony has demonstrated unfairness and lack of consideration and doubts that he is best suited to hold the parcel of land in trust for both J and P who are incapacitated proposing she holds the same in trust for the two incapacitated beneficiaries.

4. The matter proceeded via viva voce and affidavit evidence.

5. **Gladwell Wanjiku Nyoike** in her testimony stated that Fredrick Muthee was her first-born son and was married to Jane Wanjiru Muthee. However, they died in 1994 and 1998 respectively. She stated that they had a farm in **Ruiru/Ruiru Estate Block 143**. After their demise Jane went to Kiambu and obtained a grant under Succession Cause no.422/95. Upon obtaining the same she gave Henry Munyori a portion of the said land as he was a beneficiary and both began selling the shamba after dividing it into 8 portions. That when she went to Thika she found someone had built on the said shamba. She went to the Registrar of lands and placed a caution at the time they had already sold 5 portions and only 3 portions remained. She then moved to court and accused her of selling the shamba yet she had children but she died before the matter had been concluded. She denied knowing the purchaser adding that the said shamba had been sold to him by Henry Munyori. She testified that Fredrick and Jane had 3 children namely JN, Caroline Wanjiku Muthee and Antony. However, Caroline Wanjiku died leaving behind PN. She stated that Munyori forged a title deed adding that Henry had interfered with her house a lot and had even denied N from boarding the vehicle ferrying his mother's remains. She testified that the family should have been informed when the shamba was sold adding that each of the children should get one plot each that is Anthony, Njoroge and J. She testified that she brought Anthony up as he was a street boy.

6. **Anthony Kinyenje Muthee** a son to Fredrick Muthee and Jane Wanjiru both deceased in his testimony stated that they were 8 plots but what is remaining are 3 plots plot 1859 measuring 0.15 acres is to be inherited by Grace Wachinga as she had bought the said plot, while plot L.R. No. 1860 measuring 0.15 acres goes to Kiga Self Help Project together with L.R. No.1862. L.R. No. 1865 measuring 0.15 acres to go to Henry Munyori because his mother had decided to give him an 1/8 of the said parcel of land and the same had been effected through succession cause 422/95. He testified that the beneficiaries as per his mother's estate are as follows; JNM, Caroline Wanjiku Muthee (died in 2013) and Anthony Muthee. He stated that JM was mentally unstable but is in hospital. That Caroline Wanjiku is survived by PN who is 12 years old who was taken up by her late mother's mother in law where she was married. He testified that he had given himself plots 1864 and 1858 and given J and P 1861. He justifies that he can use one of the plots to develop the other and support P N. That plot 1858 had 2 rooms while 5 rooms had not been developed. Adding that it was the objector who collected rent in the amount of Kshs. 20,000 from the said houses since 2013. He adds that plot no. 1864 is a quarry and has nothing while plot no. 1861 is where his father and mother are buried. He added that the mother inherited the plot 1864 from her maternal side. He lived with his grandmother from 2000 to 2008 and left when they disagreed. That the grand mother has 4 other children she had families and also had her own property and did not depend on his mother. He urged the court to adopt the proposed mode of distribution. That they have tried to engage the grandmother in talks but to no avail.

7. **Henry Munyori Kimenje** in his affidavit dated 4th February 2015 and evidence states that all transactions were procedurally done and he has never been convicted of any crime and terms the objector's allegation as defamatory. Adding that the deceased Jane Wanjiru Muthee had bequeathed him the said plot measuring 0.15 acres excised from L.R 1/43 Ruiru East block through Succession Cause no. 422/95 and the objector never at any time raised an objection adding that the parcel in contention belonged to Anthony Kinyenje Muthee who was his father who in turn gave his Jane Wanjiru Muthee adding that the matter can only be best resolved by the maternal family. He admits that Jane was sick but adds that she was incapacitated as not to be able to make rational decisions. Adding the Kshs. 10,000 received from Kiga Self Help Group and the same was part payment of the purchase price and that he further received more money when the objector applied for revocation of the grant in Succession Cause no. 422/95 which orders were not granted. He added that during Jane's burial there were fracas caused by the objector which resulted into him being arrested and charged in Criminal Case no. 1265 of 2014 at Thika law Courts but was acquitted on 21st October 2013.

8. **Paul Mungai Wambugu** relied on his affidavit dated 26/1/15 he avers that on 3rd May 1996 he entered into a sale agreement with of a portion of **L.R. Ruiru East Block 1/43** at a consideration of Kshs. 135,000. Plot was proposed no 1863. The sale was on basis of willing seller willing buyer basis devoid of any undue influence and or duress and was in current occupation of the said parcel of land.

9. **Francis Mburu Gachukia** in his affidavit dated 27th January 2015 stated that on 5th August 2014 Kiga Self Help Group entered into a sale agreement with Jane Wanjiru Muthee in which they purchased a portion of **L.R. Ruiru East Block 1/43(1860)** at a consideration of Kshs. 140,000 and further on 26th July 1996 entered into another sale agreement for the sale of **L.R. Ruiru East Block 1/43(1861)** at a consideration of Kshs. 140,000. That the said sales were a willing seller and willing buyer basis devoid of any undue influence or duress and is in current occupation of the said parcel of land.

10. **GRACE WACHINGA MUCHAI** in her affidavit dated 26th January 2015 avers that she entered into a sale agreement with Margaret Wangui Maina who had bought a parcel of land **L.R. No. Ruiru East Block 1/43 (1/1859)** from Jane Wanjiru Muthee at a consideration of Kshs. 195,000/- the same was on a willing seller and willing buyer basis devoid of any undue influence.

11. Parties filed written submissions. The protestor in her submissions raised 4 issues for determination namely;

- i. Whether Henry Munyori was bequeathed property by the late Jane Wanjiru
- ii. What is the legality of sales of parcels of land to purchasers
- iii. Whether the distribution as set out in paragraph 10 and 11 of the summons for confirmation of grant
- iv. What and who is the interest of the protestor

12. **Whether Henry Munyori was bequeathed property by the late Jane Wanjiru?** The protestor submits that it was illogical for Jane Wanjiru to bequeath Henry a portion of the land without leaving a will. Adding that he could only have gotten the same through duress and undue influence and fraud by causing the same to be transferred in his name. The protestor challenges the sale of portions of land to Kiga Self Help group as no evidence was adduced to prove the same is registered or evidence tendered to show that Francis Mburu is the Chairman of the said group. Adding that the said Chairman would not have occupied the whole portion of land alone yet it belonged to the group. She further submitted that the sale agreement shows that the said portion was to be sold at Kshs 140,000 and the deceased only received Kshs.100,000 and no evidence has been adduced that the outstanding balance was ever paid. That as per the sale agreement dated 26th July 1996 a balance of Kshs 90,000 remains unpaid adding that in the case of Paul Mungai a balance of Kshs. 35,000 remains and that no transfer documents have been attached. In regards to Grace Wachiga Muchai she alleges that the purchaser appears to have two different handwritings which do not require a handwriting expert to discern the same. She added that

Henry Munyori applied pressure and undue influence on the deceased Jane Wanjiru to get a portion of the said parcel of land as he used to bring her purchasers for her parcels of land adding that it cannot be purported that the deceased entered into the sale agreements freely and as such the sale should be declared null and void. She relied on the case of **Julius Wainaina Mwathi vs Beth Mbene Mwathi Civil Appeal No. 123 of 1992**. The deceased at the time of writing the will was quite ill and the court invalidated the will.

13. **Whether the distribution as set out in paragraph 10 and 11 of the summons for confirmation of grant.** She points out that the distribution does not reflect fair and equal distribution of the deceased's estate in that Anthony has given himself 2 undivided plots being 1864 and 1861 leaving JN and PN to share plot no. 1864. He points out that PN is a minor while J is mentally incapacitated and caution should be taken due to their vulnerable state.

14. **What and who is the interest of the protestor?** The protestor is the mother of Fredrick Muthee and mother in law to Jane Wanjiru and had administered the estate until Anthony reached age of majority. She submitted that she is the one living with JN who is mentally incapacitated and PN who is a minor and she advocates for fair distribution of the deceased's estate. Adding that she took steps to nullify illegal transactions that Henry Munyori had undertaken. She submits that she is the best suited to hold the plot in trust of JN and PN. She submits that her interest is for the genuine beneficiaries to benefit from the deceased's estate. She urges to invoke its discretion in ensuring fair distribution of the deceased's estate and allowing her to hold the shares of JN and PN in trust.

15. The respondent raised 2 questions for determination.

- i. The legality of transactions entered into by Jane Wanjiru
- ii. What position Gladwell Wanjiku Nyoike in administration of the estate of Jane Wanjiru Muthee in light of the children of Jane Wanjiku attaining majority age?

It was submitted that Jane Wanjiru was the administrator of the estate of Fredrick Muthee in Succession Cause 422/95 and as a personal representative is empowered to enter into transactions disposing interest in immovable property after confirmation of the grant on 22nd February 1996. It was submitted that all transactions entered into by Jane Wanjiru were done after confirmation of the said grant and as such she passed a good title to the purchasers who purchased the said parcel of land. He relied on the case of **Simiyu v Watambala [1985]** where it was held that, *"I agree that the appeal should be dismissed on any view of the transaction put forward. If the sellers were intending to sell their present right in land, to which they considered themselves after the death of their father intestate in 1970 then that agreement was void because they could not sell what they did not have they had to be declared heirs to their father under the process permitted by section 120 of the registered Land act Cap 300."*

16. Adding that Jane Wanjiru had capacity to transfer the estate property to willing purchasers. The deceased had subdivide the land into portions and had sold 5 plots at the time of her demise leaving behind 3 plots to be shared amongst her 3 children surviving her.

17. On the issue of true beneficiaries it was submitted that Jane Wanjiru had three children dependants by virtue of section 29 adding that Gladwell had just been appointed as a trustee as per section 41 and upon the children of Jane Wanjiru attaining the age of majority Gladwell has no right or basis to exercise the role of co-administrator adding that none of the beneficiaries she claims to be fighting for has challenged the decisions made by their late mother in her capacity as administrator of their late father's estate. It was submitted that the purchasers willingly entered into a sale agreement with Jane Wanjiru and that Henry Munyori had been bequeathed a portion of the said parcel of land in Succession Cause 422/95 at Kiambu and efforts by Gladwell to revoke the said grant was insufficient to warrant revocation.

18. It was further submitted that section 66 of cap 160 gives a guide that court' use in exercising their discretion Jane is survived by three children it follows subject to section 41 the estate should wholly vest on the said 3 children on this she relied on the case of **Eunita Anyango Geko & Another v Philip**

Obunyu Orinda [2013] eKLR where it was held that, “33. Further, the provision of section 66 of cap 160 place the applicants and their respective children ahead of any other claimant to the estate of the deceased....34. Taking all circumstances, the law and evidence herein into account, no other beneficiary stands above locus standi as regards the estate of their woman-husband, Gladis Odinga Orinda not even the respondent who was a step-son to Gladis. In the circumstance I find and hold that the respondent lacked locus standi to petition for letters of administration intestate of the estate of Gladis in the face of the applicants herein who rank first in priority for the grant of letter of administration.” He urges the court to find the protestor’s affidavit lack merit and confirm the grant as per the mode of distribution proposed on 4th July 2014.

DETERMINATION

19. Paul Mungai Wambugu, Francis Mburu Gachukia and Grace Wachinga Muchai claim that they are purchasers for value without notice having purchased the said parcels of land from the late Jane Wanjiru Muthee. To support the same they have adduced sale agreements supposedly signed by the deceased. Though Gladwell alleges that the said sales were fraudulent she has not adduced evidence to prove the same. Section 109 of the Evidence Act Cap 80 provides, “*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*” I find that the protestor has not adduced any evidence to prove that the said sales were fraudulent and as such I find that Paul Mungai Wambugu, Francis Mburu Gachukia and Grace Wachinga Muchai are purchaser’s for value without notice. Therefore, Plot 1859 measuring 0.15 acres is to go to Grace Wachinga as she had bought the said plot. While plot L.R. No. 1860 measuring 0.15 together with L.R. No.1862 acres goes to Kiga Self Help Project. L.R. No. 1865 measuring 0.15 acres had been gifted to Henry Munyori by the deceased before her demise and the same had been effected through Succession Cause 422/95 the same was not challenged in the said succession cause.

20. Section 38 of the Succession Act provides that, “*Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*” The deceased died intestate leaving behind 3 children namely JNM, Caroline Wanjiku Muthee and Anthony Muthee. Caroline Wanjiru Muthee died in 2013 and was survived by PN who was and still is a minor at the time of hearing this matter. It follows that the J, Anthony and P are the only true beneficiaries that are entitled to inherit from the deceased’s estate this is not opposed by either of the parties. There are 3 plots of lands remaining from the initial 8 portions carved from **L.R. No. Ruiru East Block 1/43 (1/1859)**. The three remaining plots of land are 3 and all measure 0.15 acres and the beneficiaries are 3 as such each of the beneficiaries should get one plot.

21. Section 41 of the Act provides that, “*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.*”

PN at the time of these proceedings was about 10 years old and hence still a minor. JN is said to be mentally handicapped and as such is not capable of taking care of himself of making decisions independently. The protestor avers that she is the one who stays with and looks after both PN and JN. I find that due to the said incapacities the two JN and PN are not capable of holding property and as such the same should be held in trust on their behalf. The two are in custody and control of the protestor and as such I find she is best suited to hold their apportioned share of the said plot of land forming the deceased’s estate. I find that the remaining parcels of land should be distributed as follows;

L.R. NO.1858 A 0.15 ACRE PIECE OF LAND - GLADWELL WANJIKU NYOIKE TO HOLD IN TRUST FOR PNW ABSOLUTELY

L.R. NO.1859 A 0.15 ACRE PIECE OF LAND - GRACE WACHIGA MUCHAI ABSOLUTELY

L.R. NO.1860 A 0.15 ACRE PIECE OF LAND - KIGA SELF HELP GROUP PROJECT ABSOLUTELY

L.R. NO.1861 A 0.15 ACRE PIECE OF LAND - ANTHONY KINYENJE MUTHEE ABSOLUTELY

L.R. NO.1862 A 0.15 ACRE PIECE OF LAND - KIGA SELF HELP PROJECT ABSOLUTELY

L.R. NO.1863 A 0.15 ACRE PIECE OF LAND - PAUL MUNGAI WAMBUGU ABSOLUTELY

L.R. NO.1864 A 0.15 ACRE PIECE OF LAND - GLADWELL WANJIKU NYOIKE TO HOLD IN TRUST FOR JNM ABSOLUTELY

L.R. NO.1865 A 0.15 ACRE PIECE OF LAND - HENRY MUNYORI ABSOLUTELY

No order as to costs each party to bear their own costs . It is so ordered.

Dated, signed and delivered this **8th** day of **June** 2017.

R. E. OUGO

JUDGE

In the presence of;

Mr. Mwariri

For the Protestor/Applicant

Antony Muthee

Respondent in person

Paul Wambugu, Francis Mburu, Grace Wachinga and Henry Munyori Interested parties

MS. Charity

Court Clerk