



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC.SUCCESSION CAUSE NO. 44 OF 2016

(FORMERLY CHUKA SUCC. CAUSE NO. 191 OF 2014)

**IN THE MATTER OF THE ESTATE OF THE LATE ALBERT MURERA NGARUMI
(DECEASED)**

AND

ELIZAPHAN NTHIIRI RERI.....INTERESTED PARTY/APPLICANT

VERSUS

BORNFACE GITARI KIRIMO.....INTERESTED PARTY/RESPONDENT

VERSUS

DYNAH KANGAI ALBERT.....PETITIONER /RESPONDENT

FELIX KIRIMI MUCHEKE.....INTERESTED PARTY/RESPONDENT

JOSELINE CIAMUTEGI MUCHEKE.....INTERESTED PARTY/RESPONDENT

R U L I N G

1. **ELIZAPHAN NTHIIRI & BORNFACE KIRIMO** the applicants have taken out summons for revocation of grant dated 27th September 2016 praying inter alia that a grant issued to **DYNAH KANGAI ROBERT** on 19th November, 2014 be revoked or annulled on grounds inter alia that the procedure followed by the appellant was fraudulent and unprocedural. The other major ground for the application is that the grant issued has had the effect of completely disinheriting the applicants who asserts that they are creditors to the estate a fact they claim was concealed from court by the Petitioner/Respondent who was appointed the administrator of the estate of the late Albert Murera Ngarumi (deceased) who died on 18th December, 2013.

2. The respondent has filed a Preliminary Objection to the said Summons for Revocation of grant on the following grounds namely:-

1) That the application dated 27th September 2016 is fatally and incurably defective and bad in law on the grounds that:-

a. The same is a violation of Section 4 (1) a & 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya.)

b. That the contracts if any upon which the applicants' claim is premised is unenforceable and invalid by virtue of Section 6 of the Land Control Act.

c. That the applicants lack the capacity to move the court under Section 76 of the Law of Succession Act.

d. That this court lacks jurisdiction to entertain the applicants claim by virtue of Article 165(5) (b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act.

2) That the application raises no reasonable cause of action.

3. In her written submissions done through her learned counsel Ms Gitonga, Murithi & Associates, the Respondent has contended that the applicant's claim is based on two sale agreements dated 3rd February, 1993 and 17th December, 1996 and that based on that the applicants claims are time barred by virtue of **Sections 4 & 7 of the Limitations of Actions Act**. The Respondent has contended that because the Applicant's claim on the estate is based on contract, the law required them to have launched their claim before the expiry of six years and cited the case of *MAHMOUD SHEE BWANA -vs- PUBLIC TRUSTEE [2014] eKLR* to support that contention.

4. The Respondent has also submitted that the subject matter of the transactions referred to by the applicants are agricultural land and therefore in her view the same transactions are void by a dint of **Section 6 (1) of Land Control Act**, because no consent from Land Control Board has been exhibited by the Applicants. The case of *Re- Estate of John Gakunga Njoroge (deceased) [2015] eKLR* has been cited to support this view in addition to the case of *JACKSON KITUKU MUSIKALI & 8 OTHERS -VS- PENINA MUENI KAIPON & ANOTHER [2016] eKLR*.

5. The Respondent has further contended that the Applicants' claim is based on land and as such, the claim is beyond the purview of a probate court and that the proper forum to ventilate the issue should be the Environment and Land Court as established under **Article 162 (2)** of the Constitution. It is further contended that this court cannot entertain matters that fall within the jurisdiction of Environment and Land Court. In this regard, the Respondent has cited the following decisions to buttress her point:-

1. **John Ogola Mukenya -vs- Ernest Mangala Ayuga [2016 eKLR]**

2. **Nancy Waithira Mburu -vs- Catherine Kathonu Marete & Another [2014] eKLR.**

3. **Morris Muriithi Josiah -vs- Benson Njoroge & Anor [2015] eKLR.**

6. The Respondent has submitted that the applicant's claim is predicated upon the cited fundamental deficiencies that render it unenforceable and no reasonable cause of action can be found upon such claims.

7. The applicants have opposed the Preliminary Objection raised by the Respondent and have made their written submissions through Ms IC Mugo & Co. Advocates. It is the contention of the applicants that they are creditors of the deceased and therefore interested parties in the estate herein. The applicants have contended that the term "*interested parties*" as provided under **Section 76 of Law of Succession Act** is wide enough to include creditors and to support this view they have cited the authority in the case of *MUSA NYARIBARI GEKONE & 2 OTHERS -VS- PETER MIYIENDA & ANOR [2015] eKLR*. The applicants have contended that it is only after hearing of the parties that the court can determine whether the application raises a reasonable cause of action.

8. The Applicants have also contested that their claims are time barred by virtue of the **Section 4 (1) and**

7 of the **Limitation of Action Act** contending that the time when the "*cause of action arose*" should be interrogated and that it was wrong to assume that the same was synonymous with when the transactions took place. The applicants have contended that the agreements entered showed that it was premised on a future event in the sense that the balance of the purchase price was to be done after the transfer documents had been executed. It has further been submitted that the suit land had a charge over it which could not have made it possible for a consent to be obtained from Land Control Board and that the land was discharged two years after the demise of the deceased herein and the computation of time should therefore only run after 16th August, 2016.

9. The Applicants have cited a case that was pending in *Milimani Commercial Court in Civil Case No.336 of 2014* contending that the agreement entered between them and the deceased was predicated upon the conclusion of that case which in their view was in 2015. It is submitted that time could only run for the purposes of **Section 4(1)** of the **Limitation of Actions Act** after the case had ended.

10. The Applicants have argued that the Respondent as an administrator in the estate should as well bear the burden of liability and not just enjoy taking over the assets in the estate. They have contended that **Section 66(d)** of the **Law of Succession Act** recognizes the interests of creditors and that as creditors they were interested parties in the estate and therefore justified under **Section 76** of the **Law of Succession Act** to move this court to have the grant revoked.

11. The Applicants in a twist of directions, have however conceded that this court lacks jurisdiction to here and determine their application in view of the clear constitutional provisions of **Article 165(5)** and **Section 13(1)** of the **Environment and Land Court**. The Applicants have nonetheless contended that this court has jurisdiction to protect the estate in order to preserve it as the applicants move to a court of competent jurisdiction. They have on that basis prayed for an order of status quo in the estate contending that this court can invoke its powers under **Article 159** of the Constitution and issue such orders that promote justice rather than place weight decision on a technicality. They have cited a unreported decision of **Hon. Justice Mabeya** in this court in the case of *JACKSON KAMAU NTHIGA -vs- HUMPREY KIRIMI MBUBA & MARY MUTHONI* to persuade this court to order for a status quo in the estate.

12. The above concession by the Applicants regarding the jurisdiction of this court to entertain their claim within this cause has really determined the Preliminary Objection raised by the Respondent in this cause. I do believe that it is only fair and in the interest of justice that I do not make any pronouncements on the other grounds raised by the Respondent as the same should be entertained by a court competent to entertain and determine them. I will therefore restrict myself only to the question of jurisdiction though the respondent has raised salient issues of law that would have required determination in order to bring this matter to an end.

13. I have considered the authorities cited by the Respondents and particularly those that touch on the question of jurisdiction of this court in probate matters. The scope of this court as a probate court is clearly defined by the preamble of the Law of Succession Act (Cap 160) which clearly reveals the intention of parliament in enacting the statute. The purpose was to;

"amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto."

The application of this Act is made clearer under **Section 2(1)** thereof where it provides as follows;-

"Except as otherwise expressly provided in this Act or any other written law, the provision of this Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons" "

The Law of Succession Act (Cap160) as framed therefore only addresses issues to do with administration of estates of deceased persons, dependants as defined therein, the distribution of the estates of deceased

persons and such other related matters. The architectural design of the Law of Succession Act (Cap 160) was not meant to address disputes related to ownership of land whether the land in question forms part of the estate or not. In my view such disputes or ownership claims over the estate should be canvassed in the right and correct forum which is provided by both the Constitution of Kenya 2010 and the enabling statute **Environment and Land Court Act** (Cap 12A Laws of Kenya). That forum needless to say is the Environment and Land Court.

14. The applicants herein may have a cause of action against the estate herein or a chose in action but whatever the case, as correctly observed by the applicants counsel, the appointed administrator under **Section 82 of Law of Succession Act** has the right and obligation to not only enforce causes of action accruing from the estate but defend them as well. The section provides as follows:-

"Personal representatives shall have..... the following powers-

(a) To enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate....."

The property of a deceased person by law vests in the personal representative, so when another third party other than a dependant as defined under **Section 29 of the Act (Law of Succession Act)** has any action either for recovery of land, specific performance or any other right, the law provides that the person to be sued is the personal representative or the administrator duly appointed. When those rights are outside intestate or testamentary succession claims then obviously the same are outside the statutory limits of the **Law of Succession Act Cap 160** and that is why the other written laws come into play in order to address such concerns or dispute.

15. The Applicants have raised an important aspect in their claim which I consider important to address in the context of Law of Succession Act and that is the claim that they are creditors to the deceased or the estate. It is true that **Section 66 of the Law of Succession Act** addresses the question of creditors but it is only when it comes to preference of certain persons to administer the estate where a deceased person dies intestate. It is clear that creditors are in the tail end of those to be given preference to administer the estate and would rarely get that chance especially in the African setting. More importantly however is that a creditor in the strict sense of the word as per Concise Oxford English Dictionary means;

"a person or company to whom money owing."

The Blacks Law Dictionary defines "**creditors**" as

1. *"One to whom a debt is owed. One who gives credit for money or goods also termed "debtee"."*

2. *" A person or entity with a definite claim against another especially a claim capable of adjustment and liquidation."*

The term creditor though Law of Succession Act does not define it is used to describe any person who the estate owes some money by virtue of the deceased person having received some credit or money from a person (creditor). The claim in my view is monetary and cannot be equated to land. When the claim relates to land then it becomes either a chose in action or a cause of action against the estate and in that event, the claim should be taken to the right forum which as observed is the Environment and Land Court because this court cannot act outside/beyond its mandate and statutory limits.

16. The Applicants have while conceding that this court lacks jurisdiction to entertain their application have urged me to invoke the provisions of **Article 159** of the Constitution and give such orders as may be necessary to preserve the estate for the interest of justice. I am however not persuaded to do so for simply for two reasons:-

1. Once a court notes on its own motion or upon application by any party that the court lacks

jurisdiction to entertain a matter, it has to simply down its tools and cannot issue any order or directive for want of jurisdiction.

2. There is absolutely nothing that prevents the applicants from going to the right court properly seized with the necessary jurisdiction and move it to issue such orders as may be considered necessary for the interest of justice.

17. In the upshot, this court for the above reasons finds merit in ground (d) of the Preliminary Objection raised by the Respondent. The same is sustained and the summons for revocation of grant dated 27th September, 2016 is hereby struck out with costs to the Respondent.

Dated, Delivered at Chuka this 13th day of July, 2017.

R.K. LIMO

JUDGE

13/7/2017

Ruling dated, signed and delivered in the open court in the presence of Mugo for the Applicant and Murithi for Respondent.

R.K. LIMO

JUDGE

13/7/2017