



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 660 OF 2015

(FORMERLY MERU SUCC. CAUSE NO. 258 OF 2008)

IN MATTER OF THE ESTATE OF ZAKARIA NTHIGA MATUMODECEASED

JACKSON KAMAU NTHIGA.....PETITIONER

VERSUS

HUMPREY KIRIMI MBUBA.....OBJECTOR

MARY MUTHONI.....INTERESTED PARTY

RULING

1. On 7th February, 2007, Jackson Kamau Nthiga (“ the Petitioner ”) petitioned for the Succession of the estate of the late Zacharia Nthiga Matumo who died on 2nd July, 2004. In his Petition, he named his mother and six (6) brothers as the beneficiaries. According to the Petitioner, there was only one asset belonging to the estate, LR No. Magumoni/Itugururu/282 and there were no liabilities attaching on the estate. That property was said to measure approximately 3.3. ha. Although the deceased died at Mbogoni Meru South, the Petitioner lodged the Petition at the Nairobi Central Registry, at the Family Division of the High Court. A grant was duly issued on 18th June, 2007.
2. On 17th December, 2007, Humprey Kirimi Mbuba, “**the Objector**” filed an application for the revocation of the grant on the ground that there was concealment of material facts, that he was a purchaser and therefore beneficiary of the estate. On 21st May, 2008, the file was transferred to Meru High Court. On 8th March, 2012, Mary Muthoni, “**the Interested Party**” filed an Affidavit of Protest claiming that she was entitled to one (1) acre from the estate. Finally on 17th September, 2015 this file was transferred to this court from Meru High Court. The application for revocation was finally heard on 2nd November, 2015 and 2nd February, 2016, respectively.
3. The positions of the respective parties as contained in their various Affidavits and testimonies of witnesses is as following. In his Affidavits and testimony, the Objector (O1W1) stated that he had a valid Sale Agreement in respect of LR Magumoni/Itugururu/282 for purchase of one (1) acre therefrom, that a consent had been obtained from the local land control board; that the Petitioner had intended to defraud him of his right and that is why he commenced the Succession proceedings at Nairobi away from the location of the property and the residence of the deceased. At the trial, he testified and called one more witness. He told the court that the Sale Agreement was entered on 27/6/1995 for the purchase of 1 acre at Kshs.26,000/-; that the consent for the transfer of Magumoni/Itugururu/1131 was given to the deceased on 28/8/96; that the objector later

- on lodged a Caveat against the property; that when the deceased declined to effect the transfer in 2003, the Objector filed Chuka PMCC No. 16 of 2004 which is still pending. He produced a Mutation form dated 15/6/1996 (O₁Exh 1), Sale Agreement dated 27/6/96 (O₁Exh 2), undated transfer (O₁Exh 4), Order dated 9/9/2003 (O₁Exh 3) a Green Card certified on 14/6/2004 (O₁Exh 5), Letter of Consent dated 29/1/87 (O₁Exh 7) amongst other exhibits in support of his case.
4. In cross-examination, the Objector admitted that the deceased's thumb print in the Sale Agreement was not witnessed; that the money he gave the deceased for the purchase of the property was to be used for the deceased's medical expenses (eye sight); that none of the deceased's family members signed the Sale Agreement. He further testified that in 2002, he had testified in a case filed at the IgambaNg'ombe Land Disputes Tribunal on behalf of one Francis Miano, claiming part of the same land. He admitted that there was no order in existence directing that he be registered as owner of the one (1) acre he was claiming nor was he related to the deceased. He also admitted that he was neither a dependent or beneficiary of the estate. He indicated, however, that the case he had filed before the Chuka Court claiming the property was ordered to be stayed to await the outcome for the Succession Cause.
 5. James Rwanda Njoka (O₁ W₂) told the court that he knew both the objector and the deceased. He recalled at one time having been called to the Chief's office where he found the assistant chief, the Objector, the deceased with his wife and two (2) sons; that at the meeting, he witnessed the signature of the Objector in the Agreement (O₁Exh 1). He admitted that the deceased could not see well at the time.
 6. On her part Mercy Muthoni the interested Party (O₂ W₃) told the court that she was the wife of Francis Njeru who went missing since 2002. That she and her husband purchased from the deceased one (1) acre out of the suit property for Kshs.19,000/- and that she and her children have been in occupation thereof since 1994. That her husband had sued the deceased in the IgambaNg'ombe Land Dispute Tribunal Case No. 1/3/2002 whereby the award was in her husband's favour. She produced the proceedings as O₂ Exh1. That the tribunal had ordered that she pays the balance of Kshs.4,900/- to clear the purchase price; that the deceased had however refused and insisted that she buys the portion through a fresh agreement. That she later tried severally to pay the wife of the deceased after his demise but the widow always insisted that the Interested Party should settle with the deceased's children. The Interested Party only managed to pay Kshs.900/- a receipt for which she produced as O₂Exh 2. On cross-examination, she admitted that it is her missing husband who had purchased the property; that she had no documents to show that she was representing him in these proceedings.
 7. Ephantus Macharia Mbothu (O₂ W₁) testified in favour of the Interested Party. He told the court that he had known the interested party since 2002. He confirmed that in 2002, he was the Chairman of the IgambaNg'ombe Land Disputes Tribunal that decided the dispute between the deceased and the Interested Party on a claim of one acre in favour of the interested party. In cross-examination, he denied having any relationship with the deceased. O₂ W₂, Patrick Njeru Kathimbu, a pastor with IgambaNg'ombe AIC recalled that in 2002, he was one of the three (3) members of the Land Disputes Tribunal that decided the dispute in favour of the Interested Party; that the deceased had admitted having received the purchase price; that the only problem was a balance of Kshs.4,900/- which the Tribunal ordered be paid by the Interested Party.
 8. The Petitioner testified and did not call any other witness. He denied knowing either the Objector or the Interested Party. He told the court that the deceased was survived by seven (7) sons and a widow; that none in the family was involved in the alleged agreement between the Objector and the deceased. That all his brothers were in court at the time of his testimony except his mother, one Asphord Mbaka and Peterson Micheni. He further testified that the interested party was only allowed to come to the land by the deceased and had not purchased the same. He admitted however, in cross-examination that in 1992 he was very young to have known the dealings his late father had with the Interested Party.
 9. I have considered the testimonies of the parties and their witnesses. I have also considered the submissions filed by the parties. In my view, the issues that fall for determination are:-
 - a. Does the Objector and the Interested Party have a claim against the estate.
 - b. Is the claim by the Objector and Interested Party sufficient to have the grant revoked.
 - c. What orders are necessary in the circumstances of this case.

10. The Objector's case is that he entered into an agreement for sale of one (1) acre in the suit property with the deceased in 1996. He produced the Sale Agreement as O₁Exh 2. He also produced documents that showed that there was some transaction in the offing touching on the land between the two parties. From the trail of documentation produced by the Objector, this court was left with the impression that his claim that he had entered into some transaction with the deceased before his demise cannot be dismissed peremptorily. There was evidence of a case that is pending in the Magistrate's Court amongst others. The allegations of the Objector cannot be said to be without a basis.
11. As regards the Interested Party she produced the proceedings in IgambaNg'ombe Land Disputes Tribunal Case No. 1/3/02 which clearly showed that the deceased had entered into a sale of one (1) acre with the husband of the Interested Party. That out of the purchase price of Kshs.19,000/- there was a balance of Kshs.4900/- that remained to be paid. That tribunal ruled in favour of the husband of the Interested Party. The Kshs. 4,900/- was however not paid. Only a sum of Kshs.900/- was paid by the Interested Party. In those proceedings, the deceased admitted having allowed the Interested Party to enter and occupy the portion of the suit property. She has to date remained in occupation thereof. She was in such occupation for over 12 years during the lifetime of the deceased and he never evicted her therefrom. She continues to be in occupation to date.
12. I did note the testimony of the Petitioner. He dismissed both the claims of the Objector and Interested Party. Although there was evidence that the document named Letter of Family Acceptance (O₁Exh 1) signed by one of the surviving family members, that member was in court but did not testify to deny the contents thereof. There was at least prima facie evidence that the Objector had a dealing with the deceased before his demise. That dealing touched the suit property. As regards the Interested Party, the Petitioner and her Advocates sought to show that she was a licensee. Was she a licensee at will who could be evicted at will or a licensee coupled with an interest? I doubt that she was a licensee. The evidence on record points towards a purchaser in possession. However, I will refrain from making firm findings at this stage for what I am going to state hereinafter.
13. In view of the foregoing, there are several questions that arise that must be resolved before a final finding can be made. These are as follows: Is the agreement dated 27/6/96 binding? Is it enforceable? In view of the trail of documentation produced by the Objector, was there an intention on the part of the deceased to sell one (1) acre to the Objector? If there was money paid by the Objector pursuant to the representations by the deceased, is the Objector without a remedy? Since there is a law suit pending in the lower court in relation to the alleged transaction, is the Objector's interest to be shut out without him having ventilated his claim in that suit? The court was told that the said suit was stayed pending the determination of this Succession Cause. If the Objector finally establishes his interest, where will that leave him if these proceedings are concluded before then? As regards the Interested Party, the Land Disputes Tribunal Case No.1/03/02 declared some rights in favour of the husband of the Interested Party, did those rights dissipate with the demise of the deceased? I agree with Ms Rimita, Learned Counsel for the Petitioner that the Interested Party has no locus standi to sue on behalf of her husband who has been missing for over 15 years. He has neither been declared dead nor has the Interested Party been appointed a personal representative of his estate. However, having been in exclusive possession of a portion of the suit property for now over 20 years, might she not have a claim for adverse possession? In what circumstances did she enter and remain to date in possession of the portion of the suit property? To my mind, since the alleged issues arose during the lifetime of the deceased, and for the reason that the said claims were directed against the subject property, they cannot be dismissed peremptorily. They burden the estate. They need to be resolved before the estate is distributed. The question is, can this court resolve them as the Objector and Interested Party invited it to?
14. Ms Rimita referred this court to various decisions on the point. These include **Francis Musyoki Kilonzo & Anor -v. Vincent Mutua Mutiso [2013] eKLR, Nancy Waithira Marete v. Catherine Kathoni Marete & Anor [2014] eKLR and Muriuki Musa Hassan v. Rose Kanyua Musa & 4 others [2014] eKLR.** The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such a court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a

claim such as the one before this court. In the case before this court, there are serious issues that need to be established and or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate. In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings.

15. In view of the foregoing, since the claims of the Objector and Interested Party have not been formally been determined, they cannot lead to the revocation of the grant made in favour of the Petitioner. However, having established that they probably have a claim which is yet to crystalize, i.e a suit by the Objector which is still pending and a claim either of ownership vide Land Dispute Tribunal Case No.01/03/02 or adverse possession by the Interested Party, this court being a court of both law and equity cannot allow the said claims to be defeated on a technicality. It should be remembered that both claims were lodged against the deceased before he died. The claims were as against the very same property that is sought to be distributed and which happens to be the only asset of the estate.
16. In order to do justice to the parties in this case and guided by the pronouncement by **Muriithi J** in **Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR**, wherein he granted time to a purchaser to establish his right to an estate. I will make the follow orders:-
 - a. The application for revocation of the grant hereby fails and is dismissed.
 - b. The grant to the Petitioner stands but the confirmation thereof is hereby suspended for twenty four (24) months.
 - c. Pursuant to (b) above, the Objector and Interested Party are granted time to pursue and establish their claims in the lower court or the court with jurisdiction to determine their claims which they should do within twenty four (24) months from the date of this judgment.
 - d. After the expiry of the 24 months, the Petitioner shall be at liberty to list the application for the confirmation of the grant and distribute the estate in accordance with the law.
 - e. In view of the circumstances of this case, I will order each party to bear own costs.
 - f. Liberty to apply.
 - g. The exhibits produced in these proceedings be released to the Parties for purposes of complying with these orders.

Dated and Delivered at Chuka this 7th day of April, 2016.

A.MABEYA

JUDGE

Court

Judgment read and delivered in open court in the presence of the parties.

A.MABEYA – JUDGE

7.4.2016