



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1839 OF 2010

IN THE MATTER OF THE ESTATE OF ASHTON GACHUNJI KANYARATI – (DECEASED)

NICHOLAS MUHINDI KANYARATI.....APPLICANT

VERSUS

DR CHARLES M.O. WANYOIKE.....1ST RESPONDENT

WILLIAM GACHIENGO.....2ND RESPONDENT

KEN WAITHAKA PROPERTIES LTD.....3RD RESPONDENT

RYAN PROPERTIES LTD.....4TH RESPONDENT

RULING

1. The deceased died testate on 8th February 2010 having left a written will dated 2nd February 1995 in which he appointed the 1st and 2nd respondents as executors. The court upon the petition by the respondents issued a grant of probate with written will on 6th October 2015.
2. The applicant is a son of the deceased. He filed this motion dated 31st July 2015 under certificate of urgency seeking orders for the preservation of the assets of the estate of the deceased and restraint of further transfers or changes pending the provision of a full inventory and account by the respondents. He further sought injunctive orders stopping or restraining the respondents and beneficiaries of the estate from selling disposing, interfering with and/or alienating the whole or part of L.R. No. 12767/3 Karen and LR No. 4953/1084 Thika. He asked that the court do issue an order directing the respondents to provide an account of all assets of the estate as contained in his last will. He, lastly, asked that the court ascertain his interest as provided for in the will of the deceased.
3. His application was premised on grounds that some of the beneficiaries of the estate had caused

the transfer of property LR No. 4953/1084 Thika and LR No. 12767/3 Karen to his detriment as a son and a beneficiary of the estate of the deceased. He claimed that the transfers were clearly designed to circumvent, frustrate and entirely emasculate the terms of the will of the deceased and further perpetuate a fraud. Lastly, he claimed that unless the orders sought were granted, he was bound to suffer great prejudice and irreparable loss. In the affidavit sworn in support of the summons, the applicant averred that the deceased bequeathed him LR NO. 4953/1084 Thika as per Clause 15 of the will. He further averred the LR No. 12767/3 Karen, being the family home, was willed conditionally. It was his case that despite the express intentions of the deceased as contained in his will, one of the beneficiaries Grace Wanja Kanyarati had purported to transfer LR No. 12767/3 Karen and LR No. 4953/1084 Thika fraudulently to the 3rd and 4th respondents respectively.

4. The 1st respondent filed a replying affidavit in response to the summons in which he stated that the deceased himself effected the transfer of the two properties subject of this application during his lifetime to one Grace Wanja Kanyarati. He deponed that LR No. 12767/3 Karen was transferred on 1st February 1996 while LR No. 4953/1084 Thika was transferred on 2nd February 1996. The properties having been transferred by the deceased 14 years prior to his demise, he contended, the same do not form part of his estate and as such the orders sought in the summons could not be granted as it would be an exercise in futility.
5. The 3rd and 4th respondents were enjoined in the case on 8th December 2015 by the consent of the parties. The respondents were the registered owners of the two properties subject of this application. Kenneth Kanyarati, a director of the 3rd and 4th respondent, swore a replying affidavit dated 15th December 2015 in opposition to the applicant's summons. He averred that LR No. 12767/3 was transferred by the deceased to Grace Wanja Kanyarati and the transfer registered on 1st February 1996. Grace Wanja Kanyarati later transferred the property to the 4th respondent on 21st July 2010 at the time when no family member was aware of the contents of the will. As concerns LR No. 4953/1084, he stated that the same was gifted by the deceased during his life to Grace Wanja Kanyarati and the transfer registered on 2nd February 1996. The said Grace Wanja Kanyarati in turn transferred the same to the 3rd respondent through a transfer registered on 21st July 2010. He further stated that the two properties did not form part of the estate of the deceased and as such the application herein was misguided. Lastly, he averred that the applicant's summons should be dismissed for being an abuse of the court process as there is a pending suit being ELC Civil Suit No. 1563 of 2014 (OS) over ownership of LR No. 12767/3 as well as Notice of Motion in which the applicant herein seeks to amend his pleadings to include the determination of ownership of LR No. 4953/1084.
6. The parties made oral submissions in support of their cases. The applicant was represented by Mr Ochola, the 1st and 2nd respondents by Mr Gathumbi and the 3rd and 4th respondents by Mr Wawire. Mr Ochola submitted that the transfer of property LR No. 4953/1084 to one of the beneficiaries, who is a widow of the deceased, was fraudulent as the deceased had bequeathed the same to the applicant. He further submitted that should the court find that the two properties subject of this application do not form part of the estate of the deceased then it means that the applicant as a beneficiary was not provided for in the will. He thus asked that the applicant's benefit be determined. The 1st and 2nd respondents opposed the application on the basis that the two properties do not form part of the estate as the deceased had disposed of them. Mr. Wawire for the 3rd and 4th respondents took the same position. He submitted that the intentions of the deceased changed when he transferred the properties before his death.
7. I have looked at the annexures 'CMOW 1' and 'CMOW 2' annexed to the 1st respondent's replying affidavit dated 13th November 2015. I note that LR No. 12767/3 was transferred to one Grace Wanja Kanyarati on 1st February 1996. By this time the deceased was still alive. The deceased in his written will dated 2nd February 1995 had earlier on willed this property to the said

Grace Wanja as per Clause 19.

8. Concerning LR No. 4953/1084 situated in Thika Municipality, I note that the deceased in his will bequeathed the same to the applicant. The documents, however, show that he subsequently transferred it to Grace Wanja Kanyarati on 2nd February 1996 as a gift when he was still alive. The said Grace Wanja Kanyarati in turn transferred the property to the 3rd respondent.
9. *Prima facie*, the properties subjects of this application were transferred by the deceased himself in his lifetime. At this stage of the case the applicant has not shown that he has a case that may likely succeed. The orders sought cannot therefore be granted. The motion is dismissed with costs.

DATED and DELIVERED at NAIROBI this 12TH day of APRIL, 2016.

A.O. MUCHELULE

JUDGE