



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 17 OF 2013**

**IN THE MATTER OF THE ESTATE OF NJERU NGANGA (DECEASED)**

**NGARI NGANGA**

**MARGARET NJOKI MACHAKI.....PETITIONERS**

**VERSUS**

**TRYPOSA GATAVI KIRAITHE.....APPLICANT**

**RULING**

1. The applicant has brought this application by way of summons under Rules 49, 63, and 73 of the Probate and Administration Rules and under section 45 of the Law of succession Act (Cap 160) Laws of Kenya. The applicant seeks an order directing that the signature of petitioner Ngari Nganga be dispensed with in execution of the confirmed grant. An order is also sought that the co-petitioner (Margaret Njoki Machaki) be allowed to sign in place of Ngari Nganga (the co-administrator) in execution of the confirmed grant. The application also seeks an order to dispense with the consent of the land control board. Finally an order is also sought for the provision of costs.
2. The parties adduced oral evidence in support of their cases.
3. The applicant Tryposa Gatavi Kiraithe (P.W.1) gave evidence in support of her application. She called Margaret Njoki Machaki (P.W.2) in support of her case. P.W.1 testified that she purchased two acres of land from Margaret Njoki Machaki. The purchase price was Kshs.180,000/=. The money was required by P.W.2 to file the current succession cause in respect of her late father in law's estate, who is a brother to the Ngari Nganga. The money was also to be used to pay school fees and buy uniform for her children. PW 1 bought 2 acres of land in respect of land reference No. Nthawa/Gitiburi/319 leaving a balance of 1  $\frac{3}{4}$  acres for PW 2. The parties executed an agreement which was put in evidence as exhibit Pex 1. Ngari Nganga allowed the co-petitioner to take the Kshs.100,000/= with the final payment of Kshs.80,000/= to be paid later. This is clear from the applicants exhibit Pex 2.
4. It is also her evidence that Ngari Nganga did not have any share in the 2 acres which she sold to PW 1. It was her further evidence that Ngari Nganga has refused to sign the necessary documents in order to facilitate the execution of the confirmed grant. It is for these reasons that the applicant wants the court to issue orders authorizing her to sign in place of Ngari Nganga.
5. The evidence of P.W.1 is supported by that of Margaret Njoki Machaki (P.W.2). PW 2 testified that Ngari Nganga is not supposed to get a share out of the Kshs.180,000/- which was the purchase price in respect of the suit land. P.W.2 further testified that she told Ngari Nganga that the applicant had paid Kshs.80,000 for the survey and sub-division of the suit land.

6. The respondent, Ngari Nganga testified as D.W.1 in his own behalf in opposition to the evidence led by the applicant (PW 1) and Margaret Njoki Machaki (P.W.3). D.W.1 testified that he told Margaret Njoki Machaki to get a buyer in respect of the suit land so that they could get money to file a succession cause in respect of the estate of the deceased. P.W.2 complied and managed to get the applicant to purchase the land. In furtherance of that agreement P.W.2 received kshs.100,000/= with the approval of Ngari Nganga. When he learned that P.W.2 had received kshs.80,000/=, Ngari Nganga asked her as to why she had received the money, when she knew that that money was meant for survey and subdivision purposes. According to him, it is from that point in time that he refused to recognize the purchase agreement, because he was not involved in the Kshs.80,000/= changing hands between PW 1 and PW 2.

7. He further testified categorically that he will not facilitate the execution of the confirmed grant unless he is given the Kshs.80,000/= for surveying and transferring the land to the applicant. Finally it is his evidence that the suit land, part of which was bought by the applicant was his land and he only allowed P.W.2 to receive kshs.100,000/= to avoid scaring P.W.1 from continuing to finalise the purchase agreement.

8. In the light of the foregoing evidence, the following are the issues for determination. First, whether or not Ngari Nganga is entitled to be given the Shs 80,000/= before signing the necessary documents to facilitate the execution of the confirmed grant. Second, whether or not the applicant has made out a case for the grant of the orders sought, directing that the co-petitioner, Margaret Njoki Machaki to sign all the necessary document in place of Ngari Nganga. Third, whether or not the court should order that the consent of land control board be dispensed with. Finally, who should bear the costs of this application.

9. I have considered the evidence of the applicant and her witness and that of the respondent. I believe the evidence of the applicant (PW 1) and that of her witness P.W.2 that a sale agreement was executed between, them which was witnessed by Ngari Nganga. I also believe their evidence that Ngari Nganga (DW 1) had no share in the parcel of land that was sold to the applicant. Furthermore I also believe their evidence that Ngari Nganga has refused to sign the necessary document to facilitate the execution of the confirmed grant.

10. According to Ngari Nganga the suit land was his property, and for that reason the applicant should have given the money to him for survey and subdivision purposes.

11. I find from the evidence of the applicant (P.W.1) and her witness (P.W.2) and that of the co-petitioner Ngari Nganga that the latter has refused to sign the necessary document to facilitate the execution for confirmed grant. More importantly I also find that Ngari Nganga is not entitled to a share in the suit land, part of which was sold to the applicant. I find his evidence to be incredible, when he claims the suit land to be his own property. This cannot be true because the confirmed grant gave the co-petitioner, Margaret Njoki Machaki the whole of the suit Land parcel No. Nthawa/Gitiburi/319. Ngari Nganga has not challenged the confirmed grant that gave to Margaret Njoki Machaki the suit land as her rightful share. It is also to be remembered that Ngari Nganga authorized P.W.1 to receive the kshs.100,000/- in furtherance to the land purchase agreement to which he was a witness. He cannot therefore turn round to claim to be the owner of that suit land. I therefore reject his evidence.

12. In light of the foregoing evidence I find that the applicant has made out a case for the grant of prayers 1 and 2 of the summons. It therefore follows that the signature of the co-petitioner, Ngari Nganga is hereby dispensed with and his co-petitioner Margaret Njoki Machaki will sign in his place in order to facilitate the execution of the confirmed grant. I further authorize Margaret Njoki Machaki to apply for the consent of the land control board in furtherance of facilitating the execution of the confirmed grant.

13. There will be no order as to costs.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **14<sup>th</sup>** day of **SEPTEMBER 2016**

In the absence of both the applicant and her counsel, Mr. Mogusu and in the presence of the respondent

(Ngari Nganga).

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**14.09.16**