



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.89 OF 1993

IN THE MATTER OF THE ESTATE OF M'AMAITIMA M'ITHIRI (DECEASED)

JENNIFER WANGUI M'MAITIMAPETITIONER

-VERSUS-

GEORGE MUTWIRI M'TWAMWRI

SAMUEL KAAI M'NDEGWA OJECTORS

JUDGEMENT

1. The petitioner herein JENNIFER WANGUI M'MAITIMA petitioned for grant of letters of Administration intestate in respect of the deceased estate herein. The Petitioner was issued with a temporary grant and letters of administration intestate on 23rd March 1995.
2. That the protestors George Mutwiri M'twamwari and Samuel Kaai M'ndegwa filed an affidavit of protest against confirmation of this grant under **Rule 40 (6) of the Probate and Administration Rules** made to petitioner Jennifer Wangui M'Maitima on 13th March, 1995. The protestors contended that the affidavit of the petitioner sworn on 14th April 1992 and filed in this court on 18th May 1993 was false in that it concealed material particulars in respect of the deceased estate, particularly in including L.R. Nyaki/Giaki/523 and by failing to disclose the deceased had long sold the said property to the protestors before his death and that the protestors had settled on the same for many years before the deceased's death.
3. That subsequently and before the orders of this court dated 26th October 2010 the petitioner fraudulently obtained a confirmed grant by which she transferred the land to her son; Muthiora Maitima without disclosing the protestors standing interest over the said parcel which amounted to defrauding the protestors of their parcel of land herein.
4. The protestors therefore prays that the petitioner as the legal representative of the deceased be ordered to transfer the title of the parcel L.R. Nyaka/Giaki/523 to protestors absolutely and to pay the protestors costs of this suit.
5. The court record review that by court's ruling dated 18th December, 2000 and in its ruling dated 26th October 2000 it did not revoke or annul the grant issued to the petitioner Jennifer Wangui M'Maitima

but cancelled the purported distribution of the deceased's estate awaiting the identification of all the beneficiaries and determination of the respective shares. The court ordered that the applicants, petitioner and all other interested parties be heard and their entitlement to the deceased's estate be determined. The court ordered evidence be heard in respect of L.R. Nyaki/Giaki/523 to enable administrative distribute the aforesaid land.

6. The protestors called four (4) witnesses and closed their case where as the petitioner gave evidence and called no witness.

7. The protestors case through PW1 Saina George Mutwiri is that her husband bought L.R.Nyaki/Giaki/523 in 1982 and she has been living in it; that the land was bought by her husband and Samuel KaaiM'Ndegwa and that they were handed the original title exhibit 1; that the deceased made an application to Land Control Board and attended board as per exhibit 2; that consent was given as per exhibit 3; however there was a boundary dispute that took long to settle as per letter from the Registrar exhibit 4. She testified that the owner of the land died before the transfer but that PW1 had been in possession since 1982. PW1 testified that both she and the petitioner know each other. On cross-examination PW1 testified the sale was to two (2) people and they paid the consideration; however she did not have receipt but the sale was conclusive as shown in the consent. She testified transfer forms were not signed but there was consent. She testified money was paid in presence of a witness.

8. PW2 SAMUEL KAAI M'NDEGWA testified that he bought the deceased land comprising of 4.77 hacters in presence of the witness in 1982 and the seller gave him the original title deeds that the witness took possession of the land and cultivates the land and has built houses; that he lives there. He testified that he knows the petitioner and who has never been to the land. He termed her letter stating that she doesnot know him as false and prayed that she be ordered to transfer the land to him. On cross-examination he testified that he doesnot have the agreement of sale but he paid the purchase price in full. He testified that consent was issued in 1981 before the sale of 1982. PW2 confirmed the deceased signed the transfer of land forms. He further stated hepaid Kshs. 6000/- per acre but he does not have any receipt but there were witnesses.

9. PW3 SAMUEL ITIRITHIA testified that he knew the deceased as well as the protestors and that he witnessed a transaction between the three, when the deceased sold 12 acres of land at Nyaki/523 at Kshs. 6000/- per acre totaling 72,000/-; that Kaai bought 4 acres and Mutwiri 8 acres; Kaai paid Ksh. 24000/- and Mutwiri Kshs. 48000/-. That the three attended the Land Control Board in the presence of their witness, that PW3 and Stanley Mbogiri. That PW2 was given the original Title Deed; that the deceased died before he could effect transfer. During cross-examination PW3 testified that he did not see any document being written. He said the transaction was in 1982. He testified the letter of consent is dated 23rd July 1981 in respect of land parcelNyaki/Giaki/ 523 and that it was sold even before the agreement was made. He testified the application was for subdivision and was signed by a different person.

12. PW4 GEORGE MUTWIRI M'MWARI testified that in the year 1982 he bought Nyaki/Giaki/523 of about 12 acres; that he bought 8 acres and 4 went to Samuel KaaiM'Ndegwa; that he paid the consideration when they were four in cash at the shop of Samuel, but he did not get a receipt as they were great friends and he took them to his friend Samuel Itirithia (PW3) and Stanley Kanga (deceased) that they had already obtained consent of the Land Control Board; that upon payment of the consideration sum the deceased gave the protestors title deed; that the deceased showed the protestors the land and put them into possession. PW4 built on the land and cultivates the land, however the process of transfer was delayed due to boundary dispute with a neighbour till the death of the deceased; that the dispute still persists. PW4 testified that he knew the petitioner and she proceeded with the succession cause without inviting PW4. During cross-examination he testified that his wife was not present when he bought the land. PW4 testified he bought the land in 1982 but does not know when the deceased died. He was out of the country in 1987 but he was informed he died in 1990.; that the transfer was frustrated by boundary dispute and that PW4 has been living on the land since 1982; that the consent is dated 23rd July 1981 in respect of the transaction between the deceased and protestor.

12. PW5 STEVEN GITHINJI M'IBURI testified that he lives on Plot No. 579. He testified that he

knows the petitioner by the name Wangui. He testified that petitioner has never erected any building on Plot No. 523 but had planted sugar cane there before 1980 but now do not plant sugar there; that the people who live there after they were brought there by M'Maitima M'tai are Sameul Kaai M'ndegwa and George Mutwiri, they live in their houses and have been settled with their family since 1981; that when the deceased tried to allocate, the land PW5 with his father Samson, his brother Joel raised a boundary complaint and the land people and M'Maitima M'Ital, went away and as such they got a sketch plan which was marked MFI from objectors; that the boundary dispute has not been settled to date and land has not been transferred to the protestors but they are still residing on the land; that it is long time since petitioner stopped cultivating sugarcane and that she no longer cultivates alongside the protestors since they moved into the land; that after death of M'Maitima; PW5 testified that he has never seen the petitioner go to the suit land. During cross-examination PW5 testified the issue was in 1981 when he was on plot no. 579 but now lives at Murathankari. He testified that George Mutwiri has been living at the suit land since 1981.

13. On 22nd September 2014 by consent of both advocates the maker of MFI-5 was not called but by consent the sketch map of Giaki Sub-location Settlement Scheme was produced as objectors exhibit 5 and the protestors closed their case.

14. The petitioner gave evidence as RW1 and called no witnesses. She testified that she is widow to the deceased herein who died on 5th November 1990. She testified that the deceased had 5 children namely: Godfrey Muthiora; Rael Anjira; Kajuju Doris; Karimi Penina and Mwendwa; that the deceased assets included L.R. Nyaki/Thuura/328,929 and Nyaki/Giaki/523 and a Plot no. 1A at Ruanyange Market. PW1 testified that she moved to Nyaki/Giaki/523 and started cultivating and that they put a structure for workers. That no people came to the land when they were using it however after the death of her husband people came to the land; and started cultivating on the land; that Kaai went to the land that at one time Kaai went to her home and told her not to lock him out during distribution as he is her son; that he wanted to be given a share of the land as one of her sons but he did not tell her he had purchased part of plot no. 523 and he had been cultivating the land since 1990. DW1 testified that she did not know both protestors before the death of her husband. PW1 testified that her husband never informed her of the sale of part of Nyaki/Giaki/523. She denied that the first protestor has taken part of Nyaki/Giaki/523 and stated that no one has or cultivates plot no. 523 but she quickly reiterated her evidence and admitted that the 2nd protestor was in occupation of the land. She testified that due to her poor health she does not go to the suit land and added Kaai forced her not to use the land as he was grazing his livestock on her vegetables in a year she could not recall. On cross-examination PW1 testified that when her husband died he did not leave her with the title deed to the suit land. She testified that she thought her husband had given the title deed to the protestors. She testified she did not accompany her husband to the Land Control Board and no consent was given to transfer the land. She denied obtaining title fraudulently from the Land Office, Meru but admitted giving a portion of land to Lucy Kiende who was assisting her with subdivision of the land. She testified that she found a house on the land and did not investigate whether there were many more houses on the suit land. She denied seeing plantations of fruits trees on the land. RW1 denied knowing PW3 and denied seeing him in this court on 11th February 2004 but she changed her mind and stated she knew him. She denied that the protestors were taken to the land by the deceased and testified she has no witness to show that protestor's house was not built in 1982. She testified that she is not aware of boundary dispute. She testified she has been trying to evict the protestors but they have refused.

14. I have very carefully considered the pleadings, the evidence by both the protestors and their witnesses and evidence by the petitioner. I have also considered the submission on behalf of the protestors and the petitioner. The issue for consideration in this matter is whether the protestors are entitled to a share of the deceased estate in respect L.R. Nyaki/Giaki/523 by virtue of being creditors?

15. The protestors called evidence from three witnesses. PW1 did not witness the transaction as per evidence of the first protestor but PW3 witnessed the sale agreement between the deceased and the protestors and payment of the consideration sum, but there is no dispute that the transaction between the deceased and the protestor was not reduced down in writing. RW1 denied there having been any sale agreement between the protestors and her late husband. RW1 admitted she was not at the place where the

agreement was made. The protestors and their witness have confirmed RW1 was not at the place where the agreement was made. I have considered the evidence of both sides and I have no doubt that deceased entered into oral agreement with the protestors and was paid the consideration sum and proceeded to put the protestors into occupation of the suit land.

16. The protestors and PW3 testified that the deceased proceeded to give the protestors the original title deed to the suit land; Which protestors produced as Exhibit 1. PW3 saw the deceased give the title to PW2. PW4 confirmed that the title was given to them after the sale of the land. RW1 did not deny the protestors were having the title deed but SHE was not sure how they came to be in its possession. Having considered the evidence and the fact that the protestors stated that in exchange of Ksh. 72,000/- the deceased surrendered the title deed to them to carry out the transfer and which transaction PW3 witnessed. I am satisfied that the deceased having sold his land voluntarily to the protestors, he surrendered the title deed to the protestors.

17. The protestors and their witness PW3 testified that they proceeded to the Land Control Board for consent to transfer the land to the protestors. Exhibit P2 is an application for consent of the Land Control Board L.CR. 657 addressed to the Chairman of North Imenti . The applicants M'MAITIMA M'ITHIRI (ID/2482181/65) in respect of the proposed purchaser, transferee, mortgagee Samuel Kaai Ndegwa and George Mutwiri M'twamwari for subdivision into two portions of 4 acres and 7.25 acres then transfer 4 acres to Samuel KaaiNdegwa;7.25 acres to George Mutwiri M'twamwari.The application is duly signed by both the protestors and the deceased. It is dated 7th July 1981; that is exhibit 3. A letter of consent dated 23rd July 1981 show that the application for subdivision and transfer was duly approved and issued to parties in respect of L.R. Nyaki/Giaki 523.

18. The protestors and their witness PW2 and PW5 testified how the deceased put the protestors into possession of the suit land. The protestors, PW1 and PW4, their witnesses PW2 and PW5 testified that the protestors have been in occupation of the suit land and have houses and/or buildings in the land since 1981 to date. That RW1 has not been in occupation of the suit land for a long time. The evidence of the protestors and their witnesses on the occupation of the suit Land has not been controverted by the RW1 either on cross-examination or by calling independent witnesses. PW5 a neighbour confirmed that the deceased took the protestors to the suit land but as he was trying to allocate the land PW5's family raised a boundary dispute, which is still pending and as such transfer could not be effected. Exhibit 5 confirms that PW5's family land Nyaki/Araki 579 borders Nyaki/Giaki/523. I therefore do not doubt evidence of PW5 as regards the objection they raised when the deceased was putting the protestors into possession of the suit land who have since then been in occupation.

19. The petitioner's counsel submitted that the protestors claim cannot be enforced as there was no contract for sale of land in writing. The petitioner relied on **section 3 (3) of the Law of Contract Act (Cap. 23)** which provides:-

“3. (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such a party.”

20. The protestors counsel referred to the case of **Alibhai & others v Karia & Another (1995-98) 2 EA 9** where it was held:-

“Upon the signing of a contract of sale of interest in land, the vendor becomes a trustee holding property for the purchaser who becomes the beneficial owner thereof.”

21. The protestors further relied on case of **Stephen & 6 Others –vs-Stephens & Another (1978) KLR 125** where it was held:-

“1. A personal representative of a deceased is under a duty to pay all debts of the intestate and thereafter distribute the rest of the estate to his beneficiaries.

2. A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires; or if he does what as trustee he is not entitled to do. In this instance the respondent as trustee in transferring the trust property to himself was guilty of breach of trust.”

22. The protestors and their witnesses admitted that the transaction was not reduced down in writing nor was thereafter a receipt acknowledging payment, however that evidence should not be taken in isolation to construe existence of a contract between the protestors and the deceased. This suit in addition to the oral agreement between the parties as I understand it is founded on the application for consent if the Land Control Board which clearly points out existence of a sale agreement between the parties, with a consideration and a duly signed consent application by the deceased and the protestors and the protestors having taken possession.

23. The deceased surrendered the title deed to the protestors put them into possession of the suit land, allowed them to use the land without raising any complaint from 1982 upto 1990 when he died. My view is that upon the deceased surrendering the title deed to the protestors, putting them into possession of the land, processing the application for consent to the Land Control Board and watching/allowing protestors from 1982 to the time he died in 1990 without interfering with their sole use and occupation meant that though the deceased was registered proprietor of the suit land and though he had not transferred the land pending resolution of the boundary dispute with PW5's family, which dispute is still pending to date, the moment he did so, he became a trustee to the protestors and was holding the land upto the time of his death as trustee for the protestors who had by virtue of the aforesaid acts become beneficial owners thereof and the said property ceased to be a free property which could be administered and transferred to any other deceased beneficiary.

24. The petitioner in this case as a personal representative of the deceased herein is under a duty to pay all debts of the intestate before she undertakes distribution of the deceased estate to the beneficiaries, however as the court in its ruling dated 26th October 2000 declined to revoke the whole grant but directed registration of Geoffrey Muthiora M'Maitima 24/1/1996 in respect of L.R. Nyaki/Giaki/523 be cancelled and the same removed from the list of the properties of the deceased in the certificate of confirmation of grant dated 15th January 1996 and the transmission in that confirmed grant be cancelled and directed the issue of entitlement be determined by oral evidence which this court took, I see no point of ordering that the petitioner to pay all debts of the deceased before distribution of the deceased estate as distribution have already taken effect save for L.R. Nyaki/Giaki/523.

24. In view of the foregoing I am satisfied that the protestors herein have proved that they are entitled to Nyaki/Giaki/523 by virtue of the deceased having been holding the said land in trust for them. I find that the protest is merited and I proceed to grant the following orders:-

(a) The petitioner herein as personal representative of the deceased herein is under duty and obligation to transfer 4 acres and 7.5 acres to Samuel Kaai Ndegwa and George Mutwiri M'twamwari respectively out of L.R. Nyaki/Giaki/523.

(b) Each party bears its own costs.

DATED at Meru this 8th day of October, 2015.

J.A. MAKAU

JUDGE

8.10.2015

Delivered in open court in the presence of:-

Mr. Kioga for the objectors

Mr. Akwalu for the petitioner

Court clerks – Faith/Ibrahim

F. GIKONYO

JUDGE

8.10.2015