



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 272B OF 2009

IN THE MATTER OF THE ESTATE OF NGACHU MWIREBUA DECEASED)

JUDGMENT

This ruling relates to the **estate of Ngachu Mwirebua** who died intestate on 27/4/1995. The grant was confirmed on 11/5/2011 in the presence of all the beneficiaries except the applicant herein, **Jane Nkatha** and one **Felishian Gichuru**. On 16/6/2014 Jane Nkatha filed this application seeking orders that;

- 1. The letters of probate made on 11/5/2011 be revoked and cancelled;**
- 2. That the court order that Title No. Nkuene/Taita/3028, 303, 3029 be cancelled and the parcels be consolidated and divided equally among Cesarina Rigiri Ngachu, Cecilia Regeria Ngachu, Rosemary Kinanu Mbijiwe, Jane Nkatha Ngachu and Jane Wanja.**
- 3. Costs of the summons be borne by Mbaabu Mbijiwe.**

The grounds upon which the application is brought are that the grant was confirmed to Mbaabu Mbijiwe who excised a portion of the land fraudulently and gave or sold it to David Kithinji Mungatia who is unknown to the applicant and is not named in the confirmed grant; that the excision from the land has affected the size of the land the applicant is supposed to get and its locality. The application was supported by the supporting and further affidavits dated 10/6/2014 and 3/7/2014 and the applicant further deponed that she had seen some agreements purporting to have sold the land in 2010, yet the grant had not been issued and she was not a signatory to it; that despite the fact that her names appear in the titles that were issued, she is disadvantaged because of the locality of where she is supposed to construct her house. She added that the Petitioner/Respondent conspired with the other beneficiaries in the sale agreement. On 25/6/2014 Makau J. directed that the application dated 16/6/2012 be heard by way of *viva voce* evidence.

Jane Nkatha, testified as PW1. She told the court that she was not aware when her brother Mbaabu Mbijiwe DW2, filed this cause but came to be aware of it after the grant was issued when he called her home, where he informed her of the subdivision. She was shown the certificate of grant whereby she had been given a portion with her sisters Rosemary Kinanu, Cesarina Rigiri, Janet Wanja and Cecilia Regeria; that the petitioner was not able to show her her portion. Her other brother Adrian Kithinji attempted to show her her portion but he claimed it could be anywhere and she left and engaged a lawyer who after investigations showed her two sale agreements; one dated 15/12/2010 whereby parties in the said agreement were Cesarina Rigiri, Rosemary Kinanu and Janet Wanja and buyer was David Kithinji; that witnesses were Mbaabu, Adrian and Kirimi Mbijiwe; that the 2nd agreement was dated 5.1.2011 and parties were Cesarine Rigiri, Rosemary Kananu and Janet Wanja and purchaser was David Kithinji and witnesses were the two brothers again namely Adrian Kithinji and Kiumi Mbijiwe. She denied having

received any of the proceeds from the sale of the land and did not know where KShs.500,000/= that was paid for the land went to.

In cross examination, PW1 admitted that all the daughters of deceased were supposed to share one acre and she signed the consent to enable them get her share and that each daughter of deceased was entitled to 1/5 of the acre. She said that amongst her 13 siblings, she is the only one complaining because she never consented to the sale of land with her sisters. She said that she has no objection to the sisters getting 4/5 of the acre but that 1/5 acre is not available because it is what was sold. She said that in the one acre, she had a specific portion which had been shown to her by her father because she used to come from Nairobi to take him to Hospital while the others never did. She reiterated that she did not want the whole grant revoked but only as respects the one acre given to the girls.

Mbaabu Ngachu (DW1) confirmed that he is the petitioner in this cause after all the 12 of his siblings gave him the blessing to go ahead with the cause. He stated that Jane was aware of all the steps he took as respects the deceased's estate; that it was agreed that the deceased's 5 daughters were entitled to an acre which they were to share equally and that her portion is available; that David Githinji bought land from the 4 sisters with the knowledge of Jane and that Jane still has her portion; that the remaining portions are registered in the joint names of the five sisters and she has not been prevented from getting her 1/5 of an acre. DW1 denied that Jane was entitled to any particular portion of the land and that she can excise her portion from any of the portions. He denied knowing of any sale agreements before confirmation and that transfers of titles were done after confirmation of grant.

DW2 Adrian Kithinji, a brother to Jane also testified that they all agreed that the 5 daughters of the deceased should get an acre of land which they would share equally; that after distribution and demarcation, the 5 sisters sat down and sold land to David Kithinji (DW3); that Jane was involved in the sale and whenever money was paid, they would call her from Nairobi to receive it; that first time Jane was given KShs.75,000/= in his presence and later, KShs.50,000/= in his presence; that the sisters sold land because they had urgent needs – illness; that the 5 sisters related well and were surprised at the sudden change in Jane. He was of the view that if Jane wants, she can be given her remaining portion because the purchaser (DW3) is already using the portion that was sold to him and it cannot be returned to the applicant.

David Kithinji (DW3), told the court that it is Kithinji, the brother of the applicant who approached him that his sister wanted to sell an acre of land. They negotiated and he did a search and he paid the first two installments and when he wanted to pay the third, Jane said that she wanted her land. The total sale price was KShs.900,000/=. That he paid KShs.300,000/=:, then KShs.200,000/= and that last installment of KShs.400,000/= he paid to the 4 sisters. He was issued with the title, has fenced it and now uses it. DW4 said that Jane knew very well and used to call her over the land transaction and that she did not object to the sale till she changed her mind later. He confirmed that the sale agreement was on 15/12/2010, that he did a search before the sale and that the land was in the ladies names. He admitted that Jane never signed the agreement but she told them to go ahead with the sale. He admitted that he never saw her receive the money.

In the summons for confirmation dated 10/12/2010, at paragraph 4 thereof the mode of distribution of the deceased's estate was set out. The objector Jane Nkatha was listed as one of the beneficiaries and it is clear that the 5 daughters of the deceased were to share equally 0.40 Ha., which was said to be equivalent to an acre. There was a consent signed by all beneficiaries and at the confirmation, Jane did not attend. The Counsel appearing for the estate confirmed to the court that Jane Nkatha and Felishian Gichuru were at work and would not attend. As a result, the grant was confirmed. Jane has no objection to the distribution. In any event, in cross examination, she admitted to having signed the consent to confirmation. Her issue is the subsequent sale of part of the 0.4 Ha. that the deceased's daughters were entitled to DW3.

There are two sale agreements. The first one dated 15/12/2010 for sale of ¼ acre of land out of LR Nkuene/Taita/244 which measured 20.74 Acres and the price was KShs.600,000/=. The vendors are named as *Cesarina Rigiri Ngachu, Rosemary Kinanu Mbijiwe and Janet Wanja*; sisters of Jane. The

purchaser was DW3. The second agreement was dated 5/1/2011, made between *Cesaina Rigiri, Rosemary Kinanu and Janet Wanja*. Again Jane was not party to the agreement. By this time the grant had not been confirmed and the land was still in the names of the deceased. DW3 was therefore, not truthful when he told the court that he did a search and found that the land was in the names of the vendors. By then, the said vendors did not have any rights to the land and could not purport to pass any rights to a 3rd party. I am guided by the decision of *Simiyu v Watambamela (1985) KLR 852* where the court held that the mere anticipation that land would devolve to a person did not confer on that person any rights over that land; for an individual to inherit any parcel of land, he/she has to be declared the heir.

Jane has denied having been made aware of the sale of the land or receiving any proceeds from the sale. DW3 the purchaser, denied giving any money to Jane. It is only DW1 and 2, Jane's brothers who claim that she was party to the sale agreements and received money. Whereas DW1 said that Jane received KShs.75,000/=, then Kshs.90,000/=, DW2 said Jane received KShs.75.000/=, then KShs.50,000/=. There is no record anywhere on how the money was paid if at all. Curiously, Jane's sisters who are the vendors of the land did not testify as regards the sale or what Jane received. No reason was given as to why none of them testified. DW3 having told the court untruth on how he established from the search that the land belonged to deceased's daughters before the sale, I find it doubtful that Jane was made aware of the sale or that she received any consideration from the sale of the said land. DW1 was the petitioner and was party to the sale agreement which was made contrary to **Section 55 of the Law of Succession Act** which provides:

“No grant or representation, whether or not limited in its terms shall confer power to distribute any capital assets, or to make any division of property unless and until the grant has been confirmed as provided in Section 71.”

The sale also went contrary to Section 45 of the Law of Succession Act which provides:

“(1) except so far as expressly as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

The above, notwithstanding, it is a fact that the three sisters who sold the land did not sell their whole share or entitlement. After the confirmation, 3 titles were issued in respect of the 5 sisters' shares: Nkuene/Taita/3028 in the names of Janet Wanja, Jane Nkatha Ngachu, Rosemary Kinanu, Cesarina Rigiri and Cecilia Rageria. It measures 0.032 Ha. No. 3030 is also in the names of the 5 sisters. It measures 0.21 Ha. The 3rd title is Nkuene/Taita/3029. It is in the name of David Kithinji (DW3) and it measures 0.14 Ha. It means that what is left of the sisters' entitlement is 0.242 Ha. $(0.4 - (0.21 + 0.032))$. From the evidence, the deceased's daughters were entitled to one acre which was translated to 0.4 Ha.

In her testimony, PW1 told the court she wants the court to revoke the titles issued to DW3 so that they can share the land equally. She also alleged that her father had shown her a specific locality out of the one acre which she was supposed to get. However, there is no evidence that she was entitled to any specific location in the one acre. PW1 admitted that she has not done any development on the land. If the deceased had wanted to give PW1 a specific portion of the one acre, there is no reason why it had not been carved out. What is clear is that the 5 sisters were supposed to share the one acre equally.

DW1 told the court that Jane's sisters are willing to transfer to her, her share at any time being 20% of the acre. Having found that there is really no evidence that PW1 was party to the sale agreement or that she received any part of the consideration from the sale of land, it is only proper that she gets her full share of 20% or 1/5 of the acre.

Whether the court should order cancellation of DW3's title and do the subdivision of the one acre afresh, I am of the view that there is no evidence that Jane was supposed to get any specific portion of the one acre allocated to the daughters of deceased. Though it was unfair for the 4 sisters to dispose of the land without involving all the sisters to agree on how to share the land, it would be unfair to cancel the title at this stage. DW3 has taken possession of the land NKUENE/TAITA/3029 and he is protected by **Section**

93 (1) of the Law of Succession Act. The Section reads:

“93. (1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

In this case, though the sale agreements were made on 15/12/2010 and 5/1/2011, which was before confirmation of the grant, the transfers were not effected till the grant was confirmed. The transfers were made in 2013 when titles were issued to the beneficiaries. For that reason, I decline to grant PW1's request to cancel titles in respect of Nkuene/Taita/3028, 3029 and 3030. I decline to revoke the grant because it will subject to the parties incurring costs and it is not necessary since only one of the plots is the subject of the application.

In the end, I make the following orders:

- 1. The court declines to revoke the grant;**
- 2. The court declines to revoke the title Nkuene/Taita/3029 sold to DW3;**
- 3. That Jane is entitled to 20% (1/5) of an acre as her inheritance;**
- 4. That Jane be given her entitlement of 20% of an acre from Nkuene/Taita/3028 or 3030 as will be agreed; in default titles be cancelled and either party be at liberty to apply;**
- 5. The parties will share cost of the transfer equally;**
- 6. Costs of application be borne by the petitioner.**

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF NOVEMBER, 2015.

R. P. V. WENDO

JUDGE

9/11/2015

In the Presence of:

In person for Appellant

Mr. Gikunda for Respondent

Ibrahim/Peninah, Court Assistants