



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

SUCCESSION CAUSE NO. 84 OF 2015

IN THE MATTER OF THE ESTATE OF MARY WANJIRU (DECEASED)

(Original Succession Cause No. 115 of 2014 of the Chief Magistrate's Court at Naivasha)

WANGARI KIHKA.....APPLICANT

-VERSUS-

GEORGE KIBE MBAKI.....OBJECTOR

R U L I N G

1. In response to the Petition for a grant of letters of administration and Notice of Motion seeking temporary orders of injunction filed by the Petitioner, **Wangari Kihika**, on the 8th and 9th October, 2014 respectively, the Objector **George Kibe Mbaki** filed an objection in person on 13/4/2015. To counter the said objection the Petitioner swore an affidavit filed on 5/5/2015. Subsequently the Objector instructed counsel through whom he filed a Preliminary Objection and an affidavit, seemingly, in part to support the Preliminary Objection and also in opposition to the Notice of Motion by the Petitioner.
2. On receipt of these pleadings the Petitioner filed grounds in opposition and a further affidavit in opposition to the Objection and the Preliminary Objection. The Objector, not to be left out put in a Further Affidavit to the Petitioner's last affidavit annexing proceedings in Land Dispute Tribunal Case Number 40 of 2005, a copy of the Confirmed Grant in Nyahururu Succession Cause number 85 of 1992 in the matter of the estate of **Njohi Kimani**, issued on 10th April, 2002. No answer or cross petition as anticipated in Rule 17 of the Probate and Administration Rules were filed.
3. Both Mr. Gichuki for the Petitioner and Mr. Mwangi for the Objector addressed the court on the Objection and the Petitioner's Notice of Motion. They placed reliance on the affidavits sworn by the respective parties. Mr. Mwangi's main argument is that the present proceedings are unnecessary as Nyahururu PM's Court Succession Cause Number 85 of 1992 is complete and that the interest obtained therein by the Petitioner's mother **Mary Wanjiru Wanjohi** as widow to the deceased therein had already been sold off to the Objector and other purchasers by the said widow before her death.
4. Hence the sole estate asset, land parcel **NYANDARUA/GITHIORO/1610** (widow's portion) no longer exists. That the question was settled in Land Dispute Tribunal Case number 15 of 2006 pitting the said buyers, including the Objector, against the present Petitioner and other

beneficiaries. That the said decision was adopted by the Nyahururu Principal Magistrate's Court in Case Number 40 of 2005 and efforts to quash it subsequently were unfruitful. That further proceedings in respect of the subject matter and the present Petition constitute an abuse of the court process and may lead to orders incapable of being effected. Mr. Mwangi stated there were other purchasers who should be heard, preferably in the original succession cause and urged that the present one be struck out.

5. For his part, Mr. Gichuki relied on a ruling in a citation brought vide Nakuru Succession Cause 445 of 2009 by one **David Njomo**, a son of the present Petitioner, claiming to have purchased 2 acres from the deceased **Mary Wanjiru Njohi**, before the grant was confirmed. His position as stated by Ouko J. (as he then was) is that the widow **Mary Wanjiru Njohi** had no title to pass to any purchaser, prior to the confirmation of the grant in Succession Cause 85 of 1992.
6. Secondly, that the present Petitioner was not party, nor were other beneficiaries to the estate of **Mary Wanjiku Njohi** parties to the case before the Land Dispute Tribunal. Moreover, that the alleged purchasers were not parties in Succession Cause 85 of 1992. That even excluding the portion claimed by the purchasers, there is a remaining portion that is due to the Petitioner and other beneficiaries. Conceding that all claimants should be heard, Mr. Gichuki urged the court not to dismiss the Application on a technicality saying that her action was prompted by the alleged purchasers' attempts to unlawfully subdivide parcel number 1610.
7. There is a plethora of affidavits filed in this matter together with annexures. I think the history of this dispute as at February of 2011 was succinctly captured by Ouko J. in the citation case at Nakuru (Succession Cause 445 of 2009) brought by a son of the present Petitioner against her. I can do no better than quote the Honourable Judge in the said matter:-

“It is not clear from the record when the late Njohi Kimani died. It is however not disputed that he was survived by two widows, Leah Wacuka Njohi and Mary Wanjiru Njohi. It is also common ground that the former took out grant of letters of administration in respect of the estate of the late Njohi Kimani, which was confirmed on 10th April, 2002.

According to the Certificate of Confirmation of a Grant, parcel of land No. NYANDARUA/GITHIORO/275 was to be shared by all the dependants of the late Njohi Kimani. Leah Wacuka was to get 14.615 acres for herself and in trust for her children while Mary Wanjiru Njohi was to get 7.615 for herself and her children in trust. But even before the grant was issued and confirmed, the Applicant in the present application, David Njomo Kihika, grandson to Mary Wanjiru Njohi, claims to have purchased, on 28th December, 1992, by a written agreement, from Mary Wanjiru Njohi 2 acres out of her share in NYANDARUA/GITHIORO/275. It is alleged that Mary Wanjiru Njohi's share in this property was subsequently excised and given number NYANDURUA/GITHIORO/1610. There is evidence that Mary Wanjiru Njohi died on 12th August, 2002.

It is the said agreement for sale of 2 acres that has been the subject of a protracted litigation involving the Applicant and Mary Wanjiru Njohi's children, the Respondents, Kimani Njohi and Josephine Wanjiru Kihika. Incidentally Josephine Wanjiru Kihika is the Applicant's mother and Kimani Njohi is therefore his uncle. The Applicant's contention in the instant application dated 18th August, 2009, is that the Respondents being children of the late Mary Wanjiru Njohi rank first in priority and ought to take out letter of administration; that although they have not taken out letters of administration in respect of Mary Wanjiru Njohi's estate, they have colluded with some strangers to deny the Applicant his rightful share of the two acres of the suit land by the said strangers filing Land Dispute Tribunal No. 40 of 2005 in which an award was issued in their favour as the lawful purchasers of the suit land.

The Applicant did not participate in the Tribunal Case No. 40 of 2005 but instead filed Tribunal Case No. 43 of 2005. Subsequently, he filed a Judicial Review Application No. 317 of 2007 to challenge the award in Tribunal Case No. 40 of 2005.

Both actions by the Applicant were unsuccessful. He has now brought this application and a citation. This ruling relates to the application in which he seeks restraining orders against the Respondents to stop them from disposing of or in any way intermeddling with parcel No. NYANDARUA/GITHIORO/1610 pending the determination of the citation proceedings.”

8. The Learned Judge concluded:-

“The Applicant claims that in 1992, he purchased 2 acres of Mary Wanjiru Njohi’s allocation.

Note that that claim predates the confirmation of the grant. Section 55 (1) of the Law of Succession Act provides that:

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

If the grant was confirmed on 10th April, 2002, it follows, in terms of Section 55 (1) aforesaid, that any transaction or dealings in respect of the deceased person’s land whether NYANDARUA/GITHIORO/275 or NYANDARUA/GITHIORO 1610 before the 10th April, 2002 is a nullity and of no consequence. Mary Wanjiru Njohi had no property to pass to either the Applicant or the other purported purchasers. The entire estate was in the hands of the deceased person’s personal representative, Leah Wacuka Njohi. It is apparent that Mary Wanjiru Njohi died on 12th August, 2002 only four months after the grant was confirmed.”

9. The confirmed grant in Succession Cause 85 of 1992 speaks for itself. As far as the widow **Mary Wanjiru Njohi** was concerned, 7.615 acres subsequently excised from Land Parcel **NYANDARUA/GITHIORO/275** (being parcel number 1610, the subject matter herein) was to “be registered in trust for herself and her children.”

10. If I understood the position taken by the Objector, it is that he and others in Land Dispute Tribunal Suit No. 15 of 2006 purchased parcels of land from the said widow a long time ago. That after the Petitioner’s mother passed on, her co-wife **Leah Wachuka Njohi** facilitated the transfer of the parcels to the buyers and nothing remains of the estate of **Mary Wanjiru Njohi**.

11. A search conducted by the Petitioner on 31st July 2014 whose result is attached to her Notice of Motion indicates that land parcel number **NYANDARUA/GITHIORO/1610** was still registered in the name of the widow **Mary Wanjiru Njohi**. On his part the Objector claims that he has applied for his portion out of the same title to be registered as land parcel number **NYANDARUA/GITHIORO/3915**. That was on 12/2/2015. It does not appear that a title document has been issued to him as none was attached to his affidavits.

12. From all the depositions and material placed before me several things are not in dispute:

- a. There has been no Succession Cause filed before the present petition in respect of the estate of **Mary Wanjiru Njohi**.
- b. There has existed a long dispute involving claims by persons who claim to have purchased parts of land parcel **NYANDARUA/GITHIORO/1610** from the deceased before the conclusion of the succession proceedings, relating to the estate of her late husband **Kimani Njohi** (Succession Cause No. 85 of 1992).
- c. The Petitioner herein is the daughter of the deceased **Mary Wanjiru Njohi** and **Kimani Njohi**, the latter being the deceased in Succession Cause 85 of 1992.

d. Parcel No. 1610 is currently registered in the names of **Mary Wanjiru Njohi**.

13. Several questions have been raised by the parties as to whether the present petition is necessary, whether the alleged purchasers, including the Objector acquired any legal interest from the sale transactions alleged between them and the deceased widow **Mary Wanjiru Njohi** and finally, the extent and/or net estate if any, of the said widow and the rightful beneficiaries. The Petitioner, the objector and other alleged purchasers must be heard, in order for these matters to be determined.

14. It will be a pyrrhic victory for any party if it turns out at the end of the matter that the estate or what remains of it has dissipated. In my considered view, the fact that the Notice of Motion has been brought in the wrong format is a technicality which ought not to defeat substance (See Article 159 of the Constitution).

15. A *prima facie* case was defined in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated:-

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....”

So what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

16. In my view the Petitioner has made out a *prima facie* case. The estate of the deceased widow and by extension the interest of beneficiaries will suffer irreparably if the ongoing process of subdivisions and registration of new titles is allowed to continue. I am persuaded, while rejecting the Preliminary Objection, to allow the Petitioner’s application in terms of prayer (c) therein.

17. In order to facilitate the resolution of this long standing dispute and give every relevant party a chance to be heard, I will make the following directions, in the interest of justice:

- 1. For purposes of publicising this petition as widely as possible, the Deputy Registrar of this court, upon satisfying herself that all the necessary procedures have been met, will cause it to be published in the normal way in terms of Rule 7 (4) of the Probate and Administration Rules.**
- 2. The present Petitioner will extract and serve a copy of her petition upon all the parties in Land Dispute Tribunal Cause Number 40 of 2005 and her living sibling (s).**
- 3. As usual, all interested parties including the present objector who desire to object may do so by filing objections pursuant to Rule 17 of the Probate and Administration Rules within the period set out in the gazette notice.**
- 4. Upon all due preliminaries being complied with by the said objectors, the Deputy Registrar will set the matter down for mention in accordance with the provisions of Rule 17 (b) of the Rules.**

Costs will abide the outcome of the Petition (s).

Delivered and signed at Naivasha this 5th day of **November, 2015**

In the presence of:-

For the Petitioner : Mr. Gichuki. D. K.

For the Objectors : Mr. Mburu F. I. holding brief for Mr. Mwangi

Court Clerk : Stephen

C. W. MEOLI

JUDGE

Clerk : Stephen

C. W. MEOLI

JUDGE