



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 62 OF 2012

IN THE MATTER OF THE ESTATE OF MUNYUA NGEREGERE(DECEASED)

MURIUKI MUSA HASSAN.....PETITIONER

VS

ROSE KANYUA MUSA1ST APPLICANT

SARAH GAUKU MUSA.....2ND APPLICANT

AND

NAOMI KAGURI THURANIRA.....1ST INTERESTED PARTY

CAROLINE KATHURE KIRIGIA2ND INTERESTED PARTY

JEREMIAH KIAMBATI MAJAU.....3RD INTERESTED PARTY

R U L I N G

The two objectors/applicants through an application dated 25th July, 2012 brought to this court pursuant to Section 47 and 76 of the Law of Succession Act(Cap.160) Laws of Kenya and Rules 44, 59 and 73 of the Probate and Administration Rules sought inter alia: That the grant of representation to the estate of Munyua Ngerere issued to Muriuki Hassan, the Petition herein be revoked and a fresh grant do issue to the applicants.

The application is opposed. The petitioner filed Replying Affidavit denying the 1st applicant is his sister and that the 2nd applicant had left the deceased's matrimonial home and got married to more than three(3) husbands. The petitioner even deponed that the 2ndapplicant had gotten 4 other children with other husbands. He deponed the applicant has no interest over the deceased estate. The 2nd interested party filed a Replying Affidavit on her part and that of her co-interested parties deponing that they are innocent purchasers and that the applicants are unknown to them. They further deponed that since the land is more than 4 acres and that they purchased 1 acre,in case the applicants are found to be genuine claimants the interested parties should be allowed to get their shares and if any one has to loose his share it should not be the interested parties but the petitioner.

On 17th December, 2012 the parties agreed by consent that the applicants' application be determined by way of oral evidence. The applicants gave evidence and called one witness. The petitioner did not on his part call any evidence nor produced any witness. The interested parties gave evidence and called no witness.

The applicants' case is that the 1st applicant/objector is sister to the petitioner and daughter to the 2nd applicant, who is mother to the 1st applicant and the petitioner. That the deceased, Musa Muriuki was husband to the 2nd applicant and father to 1st applicant and the petitioner. The 2nd applicant averred that she was chased away by the petitioner from the matrimonial home 21 years ago and has not been married to any other person nor does she have any other children contrary to what the petitioner had deponed. The 2nd applicant further averred that she knew Munyua Ngeregere deceased whose estate is subject of these proceedings and that he was uncle to her late husband.

That the said Munyua Ngeregere deceased was brother to the 2nd applicant's father in-law, the late Hassan. That Hassan died first and there was only one shamba NTIMA/NTAKIRA/769 in which they were all living. That when Munyua Ngeregere, deceased passed on, the 2nd applicant and her late husband were left in occupation of the land as the deceased had no family of his own. That after the death of the 2nd applicant's husband the petitioner chased away the 2nd applicant. That when the petitioner petitioned for the grant he did not consult the applicants nor did he seek their consent. The applicants became aware of this matter after grant had been issued.

The 2nd applicant confirmed that the 1st applicant and the petitioner are children of Musa Hassan. She further averred that herself and her daughter, 1st applicant, do not use any part of the suit land but it is occupied and used by the interested parties who are not their relatives. She confirmed that the interested parties are purchasers from the petitioner. She stated the heirs to the deceased estate is herself, the 1st applicant and the petitioner. She prayed for the grant to be revoked and further the sale of the land to the interested parties to be declared null and void as she had not been consulted on the sale. She further prayed she be appointed the sole administrator.

During cross-examination the 2nd applicant confirmed her only children were the 1st applicant and the petitioner and that she did not know the children alleged by the petitioner to be her children. She further testified that she was only married to the late Musa Hassan and that at no time was she chased by her husband from the matrimonial home.

The 1st applicant/objector Rose Kanyua corroborated the evidence of the 2nd objector/applicant and adopted her evidence wholly. During cross-examination she averred that she was born while her parents lived on the suit land and that she is married near the said land. Applicant's witness No.3, Japheth M'Kungang'a a neighbour to the deceased Munyua Ngeregere and who knows LR.NTIMA/NTAKIRA/769 testified that the deceased had no wife or children of his own. He further confirmed the applicant and the petitioner were children of the 2nd applicant with the late Musa Hassan. That during the lifetime of Musa Hassan the parties used to stay on NTIMA/NTAKIRA/769. He confirmed the 2nd applicant stays at a rented place at Ntakira after she was evicted from her matrimonial home by the petitioner.

He further confirmed none of the 3 parties lives on the land but the land is cultivated by the three purchasers who had purchased the land from Muriuki Musa Hassan, the petitioner. He testified that Sarah Gauku Musa, the 2nd applicant has not married any other person after the death of her husband. He said the 2nd applicant is survived by the 1st applicant and the petitioner as her only children. During cross-examination OW3 testified that the petitioner unlawfully sold the deceased land.

The 1st interested party testified that the land was sold to her by the petitioner. She also confirmed she knows the applicants as sister and mother to the petitioner. She concluded by stating that she is a purchaser and had no more to say. During cross-examination she admitted that when she bought the land

it belonged to Munyua Ngeregere the deceased; and that the applicants were not involved. The 2nd interested party testified that she bought the land from Muriuki Musa Hassan and that she came to know the objectors/applicants in court as sister and mother to the petitioner. She conceded that the objectors/applicants have the right to inherit the suit land. She claimed that she is innocent purchaser for value, however she concluded that the petitioner had told her his mother had been married to another person 25 years ago and that his sister had refused to co-operate in the administration of the estate and that chief wrote a letter stating that the 1st applicant had refused to cooperate. She prayed to be allowed to get the share of the land as she had purchased a ¼ of an acre. During cross-examination the 2nd interested party admitted when she bought the land she knew it belonged to Munyua Ngeregere.

The 3rd interested party testified that he purchased ¼ of an acre from Muriuki Musa Hassan, the petitioner in 2010. He conceded that the objectors are entitled to the deceased estate. He prayed from Muriuki's share he be given ¼ of an acre which he had bought.

That after close of the respective cases the parties agreed to put in written submissions. The applicants filed their submissions on 11th February, 2014, together with supportive authorities. The interested parties and the petitioner's submissions were filed on 10th February, 2014. I have carefully considered the respective pleadings by the parties in support and in opposition of the application, the respective opposing submissions by the parties and authorities as relied upon by the Counsel for the applicants/objectors.

Having considered the above issues for determination in these proceedings and can be summarized in my view as follows:-

- a. ***Whether the objectors/applicants have established a case to enable this court grant the application for the revocation of the grant of representation to the petitioner.***
- b. ***Whether a fresh grant of representation should be made to the objectors/applicants.***

In the instant application and from the evidence which I have taken pain to reproduce and which the petitioner did not bother to challenge at all, there is no dispute that the heirs to the estate of the late Munyua Ngeregere are the two applicants namely Rose Kanyua Musa and Sarah Gauku Musa and the petitioner Muriuki Musa Hassan being niece, sister-in-law and nephew respectively to the deceased, Munyua Ngeregere. Further from the uncontroverted evidence of the applicants and their witness there is no denial from the petitioner that he acted without knowledge and consent of the applicants. The petitioner sought grant of letters of administration of the deceased estate without notice to the applicants in contravention of Rule 26(1) (2) and (3) of the Administration and Probate Rules which provides:-

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded,

Administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

The petitioner did not only conceal the fact of the existence of the applicants but lied to the area chief that the 1st petitioner had refused to co-operate and his mother had been chased away by his father and was married to other 3 men with whom she had children. The petitioner obtained grant in this cause by means of untrue allegations of fact essential in point of law. He obtained this grant fraudulently by the making

of a false statement and/or by concealment from the court of something material to the case contrary to Section 76 of the Law of Succession Act(Cap.160).

On the sale of 1 acre to the interested parties, the purchasers are specific that the land was sold to them by Muriuki Musa, the petitioner, when the same was still in the name of the deceased Munyua Ngeregere. That the applicants were not involved and some of the purchasers alluded to the fact that they knew of the existence of the applicants. They even averred that the petitioner told them that the 1st applicant had refused to co-operate with him and that the 2nd applicant had been chased away. They claimed they are innocent purchasers for value. The purchasers testified that they purchased their respective portions in 2010, that is before the petitioner petitioned for the grant herein. The petition in this cause was gazetted on 13th April, 2012 and temporary grant of letters of administration are yet to be issued.

Section 82 (a),(b),(ii) of the Law of Succession Act provides:-

82. Personal representatives shall, subject only to any limitation

imposed by their grant, have the following powers(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death

for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary

or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;”

The purchasers who claim to have purchased portions of the land from the petitioner were aware the petitioner did not have any grant of letters of administration and even any capacity to deal with the deceased estate. They have admitted that they did not deal with the deceased Munyua Ngeregere who had died on 15th October, 1965 as they conceded they bought the land in 2010, 35 years after the death of the proprietor. There is no way they can claim or be considered as creditors to the deceased estate as envisaged by Section 66 of the **Law of Succession Act(see Bernard Kamau Kiragu & 80 Others V Nyarua Kirogo HCSC at Nakuru by Hon. Justice L. Kimaru)** and HCSC 1974 of 2008(Nbi) in the matter of the estate of **Veroniah Njoki Wakagote(deceased) Hon. Mr. Justice W.M.Musyoka and Joseph Kuna Waruru Vs John Njogu Waruru and Willy Kipkurui Cheruiyot HCSC 80”A” of 1999** by Mr. Justice F. Azangalala, as he then was). The interested party as it stands have no claim directly or otherwise against the estate of the deceased Munyua Ngeregere. They are not creditors nor do they have any interest known in law against the deceased estate. They are no more than total strangers to the deceased’s estate. Their claim if any can only be adjudicated upon in another forum and only against Muriuki Musa Hassan. The interested party have no cause of action against the deceased’s estate. The matter before this court is a succession cause and in such cases court deals with issues to determine who are the beneficiaries of the deceased estate, the properties that comprise the deceased’s estate, the mode of distribution to be adopted when distributing the properties that comprise the estate of the deceased to the dependants of the deceased.

The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them

if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.

Having stated the above I am satisfied that the applicants have established a case for revocation of the grant of representation made to the petitioner.

As regards who should administer the deceased estate, I have considered the fact that the petitioner is not in good terms with applicants and has intermeddled with deceased estate and as such he won't be able to faithfully administer the estate faithfully.

I am inclined to appoint the 2nd applicant/objector mother to both 1st applicant and the petitioner as the sole administrator as she shall consider the interest of all the children family, namely the petitioner and its applicant.

The upshot of the above reasons I allow the applicant's application dated 25th July, 2012 and order as follows:-

1. *That grant of representation made to the petitioner be and is hereby revoked.*
2. *Fresh grant of representation be made to the 2nd objector/applicant and the 2nd objector/applicant be at liberty to seek confirmation of the grant without undue delay.*
3. *The interested parties claim or dispute cannot be entertained in these succession proceedings but in a different forum and are at liberty to commence proceedings against the petitioner or await for outcome of the distribution hence act as they shall deem fit and just.*
4. *That though parties are sister and brother, and mother and son, I have considered the facts of the matter and though it is not in the best interest to award costs in matters related to family, in view of the special circumstances of this case, I order that the petitioner do pay to the applicants costs of this application to be taxed by Deputy Registrar of this court or be agreed.*

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. **Mr. Kariuki for the applicant – present**
2. **Mr. E. Ogoti for the petitioner – present**
3. **interested parties – present**

J. A. MAKAU

JUDGE