



IN THE HIGH COURT OF KENYA

AT MERU

IN THE MATTER OF THE ESTATE OF MARETE MAKINU- DECEASED

SUCCESSION CAUSE NO. 305 OF 2013

NANCY WAITHIRA MBURU.....APPLICANT

VERSUS

CATHERINE KATHONI MARETE.....1ST RESPONDENT

GERALD MBAABU M'IKUNYUA.....2ND RESPONDENT

R U L I N G

1. The applicant through summons dated 27th May, 2013 brought pursuant to Section 47 and 76 of the Law of Succession Act and Rule 44 and 73 of the Probate and Administration Rules sought that the grant of letters of administration in the estate of MARETE MAKINU(DECESED) issued to CATHERINE KATHONI MARETE dated 27th November, 2012 and confirmed on 29th November, 2012 in the Senior Principal Magistrate's court at Chuka Succession Cause No. 39 of 2012 be revoked. That the Deputy Registrar Meru Law Courts call for Chuka Principal Magistrate's court Succession Cause No. 39 of 2012 to this court and further court do issue orders of inhibition inhibiting all dealings in relation to the estate of the deceased known as L.R. NO. Ankere/Makandune/451 pending hearing and determination of the application.
2. The court granted orders of inhibition and directed the Deputy Registrar of this court to call for the Chuka SPMCC Succession Cause No. 39/2012 to this court and ordered its order be served upon the Deputy Registrar of this court for compliance.
3. That before the lower court file could be brought to the High court the respondents through the firm of M/s Mwirigi Kaburu & CO. Advocates filed a preliminary objection raising 5 points, which the court shall deal with in this ruling, later seeking to have the applicant's summons struck out with costs. This court gave directions that the preliminary objection be determined by way of written submissions. The respondents filed their submissions dated 26th November, 2013 through the firm of M/S Mwirigi Kaburu & Co. Advocates whereas submissions on behalf of the applicant were filed on 2nd December, 2013 by the firm of M/S Kevin Nyenyire & Co. Advocates. This court has very carefully considered the summons, the preliminary objection, submissions as well as authorities by both counsel and the counsel opposing positions and proposes to deal with the preliminary objection point by point.
4. The respondents combined grounds numbers 1 and 2 of the preliminary objection and submitted

that NANCY WAITHIRA MBURU lacks locus standi to file the instant application dated 27th May, 2012 for the reasons that the applicant has not obtained any letters of administration over the estate of RAPHAEL WAMBURU GITIKA, deceased, who is alleged to have purchased LR. NO. NANKERE/MAKANDUNE/451 on 2nd August, 1976. The respondents urged as such the applicant lacks capacity to represent the estate of the late RAPHAEL WAMBURU GITIKA and enforce the alleged sale agreement dated 2nd August, 1976. The respondents urged the applicant without grant of letters of administration to the purchaser's estate she is a stranger to the proceedings and the summons dated 27th May, 1976 and the application thereto ought to be struck out. The respondent urged further there is no privity of contract between the applicant and MARETE MAKINDU(deceased) and as such the applicant cannot purport to file the present application when she had never entered into any contract with the deceased.

5. The applicant countered the respondents grounds No. 1 and 2 of the preliminary objection by urging that the applicant has locus in filing the instant application dated 27th May, 2013 and that she has met the requirements/criteria for revocation of grant as provided for under Section 76 of the Law of Succession Act. The said section clearly states:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-“

6. The applicant contended that she has an interest in the estate of the deceased by virtue of being a personal representative of RAPHAEL WAMBURU GITHIKA(Deceased) who had bought land in the estate of the deceased and annexed a copy of a limited grant of letters of administration marked “NMWI”. The annexure is a limited grant of letters of administration *ad Litem* over the estate of RAPHAEL WAMBURU GITHIKA issued on 16th July, 2013 to the applicant in Meru HC.MISC. No. 33 of 2013.
7. The applicant avers that she is a beneficiary of the estate of MARETE MAKINU by virtue of the fact that her late husband had bought the suit land from the deceased and one of her sons has been in occupation of the suit land.
8. Having considered the arguments and having noted that the applicant has been issued with a limited grant to the deceased estate on 16th July, 2013 almost two months after filing the instant application I find that at the time of filing the instant application she lacked capacity to do so consequently she was not an interested party or a representative of her husband's estate hence she lacked capacity to bring the instant application. She therefore lacked locus standi in the instant application.
9. The respondents under paragraph 3, 4, and 5 of the preliminary objection has averred that the applicant's claim is unknown in law of Succession Act as the claim is civil in nature and cannot be enforced in a succession cause. That the agreement alluded to by the applicant dated 2nd August, 1976 being over an agricultural land and this being a controlled transaction, is void for lack of Land Control Board consent and cannot form a basis for a claim over land which is statute barred. The respondents urged that the application dated 27th May, 2013 is thus incompetent and an abuse of the court process and should be struck out. The respondent relied on Section 4(1) and (7) of the Limitation of Actions Act which limits the period on claim founded on contract to be brought to court within six years from the date of the cause of action and bars any claim to recover land after expiry of 12 years.
10. The applicant countered the respondents above mentioned grounds by urging that the applicant's son has been in occupation of the suit land and that the Succession Cause was filed secretly before a court that lacked jurisdiction in determining the matter as the value of the estate was above court's jurisdiction and that the application raises weighty issues of both law and fact which can only be dealt with after hearing both parties. The applicant further urged that the respondents are

trying to introduce mere technicalities in a succession cause which may cause injustice to the parties and referred to the case of **LUCY WANJIKU KIBABA & ANOTHER V LUCY WANJIRU MUCHENE(2003) eKLR.**

11. The applicant is seeking to have the grant issued to the respondents revoked so as to recover parcel No. NANKERE/MAKANDUNE/456 sold to her late husband on 2nd August, 1976 by the deceased MARETE MAKINU who died before effecting transfer. Clause 3 of the said sale agreement indicates that consent of the land control board was to be applied for by the vendor and the purchaser was to have exclusive possession of the whole land without any interference. The applicants claim to be entitled to the deceased estate by virtue of being a beneficiary to the deceased estate. The applicant in the instant case is not a dependant of the deceased estate by virtue of the provisions of Section 29 of the Law of Succession Act and cannot as well be termed as a beneficiary to the deceased estate. If the court understands the applicant, she is claiming ownership of the suit land by virtue of adverse possession for all the years since the contract between her late husband and the deceased Marete Makinu became null and void for want of consent of the relevant Land Control Board, which prayers are not tenable in the Succession Cause but in a civil court and to be more specific in the Environmental and Land Court by virtue of Article 162 of the Constitution of Kenya, 2010.
12. I agree with the respondent's counsel that the applicant's claim for recovery of land after expiry of the statutory period for seeking consent of the Land Control Board has lapsed cannot be enforced in a Succession Cause as the claim is civil in nature. The applicant claim can only be entertained by the Environment and Land Court but not in a Succession cause.
13. This court has no sufficient evidence to find out whether consent of the Land Control Board was obtained or not nor is it going to be drawn to make a finding as to whether the claim is time barred or not or whether the applicant has acquired title to the land through adverse possession, this being a claim which can only be handled by the Environmental Land Court. In view of the foregoing I find merit in the respondents preliminary objection under grounds No. 3, 4 and 5 and the same are allowed.
14. In view of the conclusion I have come to the preliminary objection succeeds, the applicant's application dated 27th May, 2013 is struck out. The applicant is at liberty to file his claim in Environment and Land Court for hearing and determination on merits. In view of the nature of the applicant's claim I will order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF JULY, 2014

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. Nyenyire for the applicant
2. Mr. Mwirigi for the respondent.

J. A. MAKAU

JUDGE