



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 52 of 2001

IN THE MATTER OF THE ESTATE OF M'IRERA M'NGARUTHI (DECEASED)

**STEPHEN MWITHIA M'RUUTI
APPLICANT**

VERSUS

JOSHUA MUTHUKU1ST ADMINISTRATOR

ISABELLA NKINA M'IRERA 2ND ADMINISTRATOR

AND

LAWRENCE KIRIINYA IBURI INTERESTED PARTY

JUDGMENT

Joshua Muthuku petitioned for grant of letters of administration intestate. After the temporary grant was issued, the same was confirmed on 3rd December 2001. The effect of that confirmation was that the only property of the deceased was given to Lawrence Kiriinya Ibuuri a purchaser. Lawrence was registered as the owner of that parcel of land on 18th February 2002 and a title was issued to him on 29th April 2002. On 14th June 2002 summons dated 13th 2002 was filed by Stephen Mwithia M'Ruuti. By that summons brought under section 76 of the Law of Succession Act, Stephen seeks that the grant issued to Joshua be revoked. Some of the grounds he seeks revocation are that he, Stephen is a beneficial owner of parcel No. Nyaki/Thuura/2465. He argued that he is in possession of that land. Further, he seeks revocation on ground that the grant was obtained fraudulently by making false statements or by concealing some materials to the court. In his grounds he stated that the land had been sold to him and that the petitioner had failed to review that he was living on the land. He stated, without showing how, that the gazette notice was defective. The summons was heard by way of *viva voce*. Stephen evidence was to the effect that the deceased sold to him parcel No. 2465. He produced an agreement dated 30th August 1976. That agreement stated that he was buying from the deceased some acres, which was not specified, from parcel No. 1735. The agreement also provided that if the deceased failed to transfer the land in the statement, he would refund money paid. Stephen produced before court receipts of payment he made towards the purchase price. All I need to say in respect of those receipts is that some of those payments bare a date

prior to the agreement and it is not therefore clear if they related to that alleged transaction. In oral evidence, he repeated that although he was in occupation of the land, this cause had been filed secretly without being informed. He said he had cultivated the land since 1976. In that year he planted coffee on the land. On being cross examined, he accepted that the transaction between him and the deceased had not obtained the consent of the Land Control Board. In defence, Isabella Nkina, the wife of the deceased, Joshua Nthuku the son and the petitioner, David Kirima the son of the deceased and Josphat Kathukumi also the son of the deceased all gave similar evidence to the effect that the deceased sold to Stephen two acres of land which the deceased transferred to Stephen before his death. They denied that the deceased had sold parcel No. 2465 to Stephen. It is clear from the evidence adduced that the transaction which Stephen seeks to enforce by his action did not get the consent of the Land Control Board as required by section 8(1) of the Land Control Act. That section is in the following terms:-

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within 6 months of the making of the agreement for the controlled transaction by any party thereto:”

Section 22 in actual fact outlaws any enforcement of a transaction which has not received consent as per section 8(1). Section 22 provides as follows:-

“22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person-

- (a) pays or receives any money; or***
- (b) enters into or remains in possession of any land,***

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

The only remedy available to a party whose transaction did not receive consent is to seek refund of the money paid under that transaction. I find that the agreement between Stephen and the deceased is not enforceable as against the deceased estate. Further I am of the view that Stephen summons for revocation is misconceived. I say so because the land in question, parcel no. 2465 is not in the name of the deceased. It is now registered in the name of a third party. Indeed it is registered in the name of Lawrence Kiriinya. Any claim against the said purchaser can only be entertained under a civil suit and not under the succession cause. This is because a succession Act is an Act of parliament setting the law relating to *“intestate and testamentary succession and administration of estates of deceased persons: and for purpose connected therewith and incidental thereto.”* That is a quote from the title of the Act. Stephen therefore cannot under the succession cause seek to have his right to parcel No. 2465 determined when that parcel is in the name of a third party who is not the deceased. Those very sentiments were expressed in this very cause by retired Hon. Mr. Justice Kasanga Mulwa in his ruling of interlocutory application where he stated:-

“The scope of succession causes is mainly the property of a deceased person. It is not in dispute that Joshua Muthuku and Isabella Nkina M’Ileri are the administrators of the deceased estate having been confirmed as such on 10.12.2001. The applicant seeks an injunction to restrain on Lawrence Kiriinya from interfering with the land in question. It is not in dispute that the said

Lawrence Kiriinya has title to the land is therefore the registered owner. The applicant on the other hand claims he paid the deceased for the piece of land and is in possession of the same. What this boils down to is the issue of ownership of the land. Clearly this cannot be said to fall in the realm of succession cause. This is not the correct platform to deal with this matter. The applicant should be well advised by his advocate of the correct avenues to seek justice or enforce his rights.

Further, the “interested party” needs also to be heard and defend himself and obviously this cause does not provide that opportunity. The parties are however reminded that enforcement of any rights will have to be done legally and not by a party taking the law into its hands.”

The Judge made this comments when ruling on an application for injunction filed by Stephen against Lawrence, the purchaser, who was named in that application as an interested party. The application for injunction was dismissed with costs. In the end, for the reasons given above, I find that the summons dated 30th June 2006 is incompetent and is dismissed with costs being awarded to the petitioner to be paid by Stephen Mwithia M’Ruuti. I find that there was no fraud committed or proved against the petitioner. Further, I hereby vacate the injunction granted on 20th August 2002 in this matter and I order that the caution registered against Nyaki/thuura/2465 by Stephen Mwithia M’Ruuti on 15th May 2002 be removed.

Dated and delivered at Meru this 5th day of November 2009.

MARY KASANGO

JUDGE