



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 1972 OF 2014

IN THE MATTER OF THE ESTATE OF ELIUD KIARIE MUTEMBEI (DECEASED)

MARION WANYI NGARURA.....APPLICANT

VERSUS

JANE NUNGARI.....1ST PETITIONER

PAERMINUS NGUGI KIARIE.....2ND PETITIONER

RULING

1. The deceased to whose estate these proceedings relate is Eliud Kiarie Mutembei who died on 26th January, 2014. Marion Wanyi Ngarura hereinafter the applicant filed a Notice of Motion Application under Section 66(d) (1) and Rule 16(1) of the Probate and Administration Rules. She brought the application in her capacity as the Administrator of the Estate of Gerrisson Ngarura Ngugi. In her application she prayed

- i. To be granted leave and be admitted as the Protector in these proceedings(involving the estate of Eliud Kiarie Mutembei)
- ii. That the annexed protest be deemed to be duly filed and served upon the respondent.
- iii. Costs of the application.

2. She swore an affidavit of protest in support of her application dated 21st June, 2016 where she averred that she was a wife to Gerisson Ngarura Ngugi who had since died on 9th January, 1999. She stated that she had petitioned for letters of administration of his estate vide P & A succession cause no. 315 of 1999 and was the administrator thereof. She claimed that her late husband had purchased two parcels of land measuring 3/8 of an acre and 1/8 of an acre totaling half ½ an acre excised from KIAMBAA/KIHARA/1906 from Eliud Kiarie Mutembei the deceased herein. She attached two sale agreements dated 10th November, 1995 and 4th June, 1996 respectively.

3. Further, she averred that together with her late husband they took possession of their land upon purchase and have been in occupation to date. Although a title deed was not issued to her husband by the time of his demise, the survey process had already began. It was her concern that the petitioners in the estate of the deceased herein had become uncooperative and were intending to deny her the parcel of land which rightly belonged to her deceased husband.

4. In response to the application, Stephen Gitau Kiarie filed a replying affidavit dated 20th December, 2016. He averred that the applicant was an intermeddler with no rights over the estate of the deceased. He stated that the applicant's claims should be addressed under a different regime of law as joining her in these proceedings would cause delay, prejudice the administration of the estate and cannot be conveniently tried and determined at this stage.

5. He asserted that the alleged interest has not been proved and can only be enforced after being proven. Further, that neither was the alleged sale sanctioned by the Land Control Board nor was there proof that the deceased had received any money as to the alleged sale. He also questioned this court's powers to adjudicate over the applicant's interest in his opposition to the Application.

6. The 2nd Petitioner Parmenas Ngugi Kiarie also swore a replying affidavit dated 29th September, 2017. He deponed that the application was bad in law, the prayers sought were incapable of being granted and that the applicant did not qualify as a protector. He echoed the sentiments of Stephen Gitau Kiarie that the applicant's claim can only be enforced by way of a different suit. He alluded to civil suit No. 2026 of 1996 and HCCC No. 147 of 1998 suits between the deceased and the applicant's husband which were never prosecuted. He asserted that the application was intended to frustrate the conclusion of the matter herein.

7. The parties filed written submissions in support of their respective claims. In her submission, the applicant reiterated the contents of her affidavit of protest. She further submitted that Section 28(a) and (b) of the Land Registered Land Act 2012 envisaged trust land and provided that all registered land shall be subject to various overriding interests without their being noted in the register. She also raised the issue of occupation with reference to the case of Antony Kaniaru v Joseph Aichungu & another ELC No. 111 of 2016, where it was held that it was fundamental for the court to interrogate how an occupier of land entered thereon before making any findings on contested ownership. She urged the court to allow the application.

8. In their submission, the Petitioners reiterated the contents of the affidavits filed in opposition to the application. They further submitted that the legal provision under which the application was made being 66(d) (1) of the Probate and Administration Rules, did not exist. They contended that the applicant did not explain why it took such a long time to bring the claim from 1996 to 2014 when the deceased passed on and asserted that the issues raised by the applicant can only be determined in a separate suit and not the succession proceedings herein.

9. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is whether it is proper to join the Applicant as a party in these proceedings. Joinder of parties in a succession cause is a matter of the inherent jurisdiction of the court for purposes of ensuring the ends of justice are met and is ordinarily done under section 47 and rule 73 of the Law of Succession Act and Probate and Administration Rules respectively. In the case of re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR Musyoka J dealt with joinder and elaborately stated as follows:

“Joinder of parties to a suit is a concept in the ordinary civil process, where suits in the proper sense of the word are between two rival or contending sides. Other persons or entities not named as parties in the dispute may be joined, on application, to the suit if they meet certain conditions. ... Usually a person or entity will be joined where they have complementary claims with the parties arising from the same facts. The probate process can be said to be a civil process only to the extent of it not being a criminal process. It is, in most respects, a process completely distinct from that governed by the Civil Procedure Act, Cap 21, Laws of Kenya, and the Civil Procedure Rules. It is regulated instead by the Law of Succession Act and the Probate and Administration Rules, which prescribes processes that are clearly removed from those intended for the ordinary civil process. In other words, the probate process is a special jurisdiction with its own processes and procedures. Such special jurisdiction and procedures are saved by section 3 of the Civil Procedure Act.

The legislation that regulates the probate process has, however, imported into its practice certain provisions of the Civil Procedure Rules. That it has done through Rule 63 of the Probate and Administration Rules. However, the provisions of the civil process relating to joinder of parties are not among the provisions so imported under Rule 63.

The rationale for the omission to import the said rules has something to do with the design of the probate process. Succession causes are not ordinary suits in the sense where there are two rival claimants, asserting certain rights. Rather, it is a cause designed for the sole purpose of facilitating succession to the estate of a dead person. The ultimate goal being distribution of the estate amongst the persons, if they are more than. ...With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.

Joinder of parties is not envisioned in the probate process and should be avoided at all costs. It is not provided for under the relevant legislation, and it can only be allowed by the court in exercise of its inherent discretion. It is however my view that making an order to join an interested party in probate causes, even though I have on occasion done so, amounts to exercise of inherent discretion outside of its bounds.

This begs the hypothetical question that were this court to be of the persuasion that it had discretion to join third or interested parties to a probate cause, does the applicant qualify for exercise of that discretion in its favour? In the civil process, the persons who are joined to a suit as parties (whether as substantive parties or third or interested parties) must have an interest in or claim to whether directly or indirectly, to the subject matter of the suit.”

10. The foregoing is the correct position. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation

11. The Applicant seeks to be joined as an interested party in this cause so that she can protect the parcels of land which she claims that her late husband purchased from the deceased herein. She has attached a sale agreement and payment receipt to the deceased. Although, challenges to the said agreement and objection to the jurisdiction of this court to try such claims have been raised, one thing is clear that the Applicant is in possession of the suit property.

12. No explanation has been given by either deponents in their replying affidavits as to why the Applicant is in occupation of the parcel of land in question, although several arguments were raised to demonstrate that the alleged sale agreement is invalid. The main argument is that the relevant consent was not obtained from the Land Control Board. Evidently, the Applicant's husband was never registered as the proprietor of the disputed parcel and seemingly, beyond the sale agreement and various payments no further step was taken between the vendor and the purchaser to complete the transaction.

13. Possession of land is an equitable right. From the foregoing, I find that on prima facie basis, the applicant appears to have an identifiable stake, or legal interest in this estate although she is not a party in these proceedings. However, she need not be directly involved in these proceedings as a party. The law has devised ways of protecting the interests of such parties. Under rule 41 of the Probate and Administration Rules, the court may where such claims are made as in this case, appropriate or set aside the particular share in question or dispute, to abide the determination of the question in proceedings commenced under order 36 of the Civil Procedure Rules, or in any other appropriate proceedings.

14. In this case, as the petitioners rightly submitted, and in exercise of my powers under the law of Succession Act and specifically under rule 41(3) of the Probate and Administration Rules, it is my finding that the dispute on the ownership in respect of half (½) an acre excised from KIAMBAA/KIHARA/1906 cannot be conveniently determined in these proceedings.

15. I accordingly, subject to the provisions of section 82 of the Law of Succession Act, by order appropriate and set aside half (½) an acre excised from KIAMBAA/KIHARA/1906 to abide the determination of the question in proceedings under Order 37 rule 1 of the Civil Procedure Rules. Subject to the provision of Section 71 (2) of the Succession Act and consent of the beneficiaries herein, the parties may proceed with the distribution of rest of the estate. In light thereof, there is no need for the applicant to file protest. I, therefore decline to join the applicant in this cause.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF MAY 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant

In the presence of.....Advocate for the Petitioners