



REPUBLIC OF KENYA



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**In re Estate of Mary Wanjiru Njohi (Deceased) (Succession Cause 84 of 2015) [2022] KEHC 16990 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
SUCCESSION CAUSE 84 OF 2015  
GWN MACHARIA, J  
DECEMBER 15, 2022  
ORIGINALLY  
NAIVASHA CM'S COURT SUCCESSION CAUSE NO. 115 OF  
2014  
IN THE MATTER OF THE ESTATE OF MARY WANJIRU NJOHI  
(DECEASED)**

**BETWEEN**

**WANGARI KHIKA ..... PETITIONER**

**AND**

**GEORGE KIBE MBAKI ..... OBJECTOR**

**RULING**

1. This cause relates to the estate of Mary Wanjiru Njohi who died intestate on August 13, 2002.
2. The matter originally begun in the Chief Magistrate's Court at Naivasha vide Succession Cause No 115 of 2014 where the petitioner, Josephine Wangari Kihika, petitioned for grant of letters of administration intestate in the respect of the deceased's estate vide a petition filed on October 8, 2014. This prompted an objection by George Kibe Mbaki filed on April 13, 2015. Thereafter, the matter was transferred to the High Court and pursuant to an order issued by Meoli, J on November 5, 2015, the petition was regazetted vide Gazette Notice No 6092 of June 23, 2017. The matter is for determination of the objection to the grant of letters of administration to the petitioner.

**The Objectors' Case**

3. Objector witness 1, George Kibe Mbaki testified that on May 15, 1993, he entered into an agreement with Mary Wanjiru Njohi (the deceased), for sale of one (1) acre of land which was to be excised from



- her share in her late husband's property known as Nyandarua/Githiora /275. The land was sold on condition that the vendor would facilitate transfer upon finalization of Nyahururu Succession Cause Number 85 of 1992 which had been filed in respect of the said Njohi Kimani's estate. He assumed possession while waiting the finalization of the succession cause. The grant in respect of the estate of the vendor's late husband was confirmed in the year 2002 whereupon an administrator to the estate was appointed and the vendor was conferred her share of the estate being Nyandarua/Githioro/1610. However, she died before effecting transfer and the beneficiaries of her estate refused to do so on her behalf.
4. As such, together with other purchasers, they filed a complaint at the South Kinangop Land Dispute Tribunal against the estate of Kimani Njohi and upon hearing, a decree was issued requiring that the land be transferred to them. The said decree was later adopted as a judgement of the Court at Nyahururu PMCC No 15 of 2006 and a decree dated August 22, 2006 was issued pursuant thereto. Thereafter, subdivision of Nyandarua/Githioro/1610 was done in the year 2014 pursuant to the court order issued in Nyahururu PMCC No 15 of 2006. An application for consent was then filed with the Land Control Board, South Kinangop on the authority of the decree and the Board issued him with the approved letter of consent to transfer the respective portions. They were thereafter issued with title deeds to wit Nyandarua/Githioro/3915, 3916, 3917, 3918 and 3920.
  5. In cross examination, he stated that he bought 1 acre of land from Mary Wanjiru Njohi for Kshs 45,000/-. He was informed by David Njomo Kihika to buy it from his grandmother. He paid Kshs 35,000/- cash and the balance in instalments. Although the agreement does not show the land parcel number, it shows he paid Kshs 30,000/= and had a balance of Kshs 15,000/= which he paid but had proof. He was aware that the land had not been transferred to Mary Njohi at the time he bought it. A surveyor, DN Kiama went into the land to place beacons but he was stopped from sub-dividing. He is not aware that court stopped transactions on plot 1610 vide an order of Meoli, J dated November 5, 2015. Further, he stated that he has filed a case in Engineer SRMCC No 171 of 2015 against the petitioner herein to prevent anyone from entering Nyandarua/Githioro/3915 which is his portion.
  6. Objector witness No 2, Wambui Waiyaki testified that on March 29, 1993, she entered into an agreement for sale of land with Mary Wanjiru Njohi (now deceased) in respect to one and a half (1.5) acres to be excised from her share of Nyandarua /Githioro /275 which was then registered in her late husband's name. She paid the balance of the purchase price on September 22, 1997. She reiterated the averments by George Kibe Mbaki regarding the conditions under which the sale took place and the events that followed up until she obtained her title deed in respect of Nyandarua/Githioro/3916 which resulted from a subdivision of the deceased's property known as Nyandarua/Githioro/1610. In her view therefore, she obtained the title deed in respect to her portion free from fraud and thus the same should be protected as per the provisions of the *Land Act*.
  7. On cross examination, she stated that she bought the land for Kshs 45,000/=. She paid part of the money in the advocate's office and some at the Chief's Office. The agreement was for 1 ½ acres but when clearing the balance, she paid for another ½ acre. When they started the transactions, the seller Mary Wanjiru had a title in the name of her husband, Kimani Njohi who had died. The chief told her to wait for the Succession case to end then Mary Njohi would give her the share she had bought.

### **The Petitioner's Case**

8. The petitioner's witness 1, David Njomo Kihika, a son of the petitioner herein, testified that he is one of the beneficiaries of the estate of the deceased herein who was her maternal grandmother. He stated that at the time when their grandmother is purported to have sold land to the objectors, she had not received her portion of their grandfather's property known as Nyandarua/Githioro/275. The



confirmation of grant of their late grandfather's estate was issued on April 10, 2002 and the purported sales took place around 1993. The purchasers came up with the claim of purchasing land after the deceased died and they have never entered the allegedly purchased portions to date. He stated that the petitioner and her three sons have settled on Nyandarua/Githioro/1610 which was purportedly sold to objectors and works the land. The subdivision of said land to Nyandarua/Githioro/3912 to 3917 was unprocedural, illegal and should be cancelled. He averred that he filed a citation in Nakuru over Nyandarua/Githioro/1610 in Succession Cause No 445 of 2009 and the court found that any dealings with the property that predated the confirmation of grant in respect of the estate of Njohi Kimani were a nullity since the land had not passed to Mary Wanjiru Njohi.

9. In cross examination, he denied participating in the sale of land to the four objectors. He admitted that his name and signature appear on the agreement for sale between Mary Wanjiru Njohi and George Kibe Mbaki (annexture GKM 1) and that he was present when the agreement (GKM 1) was being drawn since he knows George. However, he stated that the agreement relates to another parcel of land and not Nyandarua/Githioro/1610. His uncle was the one selling their land. He stated that he was not aware that there was a dispute filed at South Kinangop Land Control Board. He only became aware of the proceedings therein when this case came up. On re-examination, he stated that annexture GKM 1 does not show which land was in issue or the size thereof. He also averred that an injunction was obtained in respect to plot 1610 and thus they were shocked when new title deeds were issued.
10. Petitioner witness 2, Josephine Wangari Kihika testified that Mary Wanjiru Njohi was her mother. She had some land in Karati. When she died, no one was given the land since there was no will but her children were to be the heirs. She could not remember writing an affidavit. It was her testimony that the land belonging to her mother was never sold to anyone and she was not aware whether there are people claiming the land. She did not recall being sued by George Mbaki. Further, she testified that the deceased children as well as her own children live on that land to date.
11. Petitioner's witness 3, John Wanjohi Kihika was also a son to the petitioner. It was his testimony that he is also a beneficiary of the estate of his late maternal grandmother, Mary Wanjiru Njohi. He reiterated that at the time when their grandmother Mary Wanjiru Njohi is purported to have sold land to the objectors herein, there was no land that had been registered in her name that she could sell since Nyandarua/Githioro/275 was still in the name of their late maternal grandfather, Njohi Kimani.
12. In cross examination, he stated that the agreements for sale of land exhibited herein (GMK 1 and GMK 2) do not deal with plot 1610 which was given to his grandmother.

### **Submissions**

13. The petitioner submitted that she is the right person to petition the court for grant of letters of administration intestate of the estate of Mary Wanjiku Njohi, the deceased herein as she was her mother and she is a beneficiary of her estate. The objectors had purported to have purchased land from Mary Wanjiru Njohi long before she got any land. The petitioner faulted the objectors for proceeding with subdivision of Nyandarua/Githioro/ 1610 and registration of new titles despite there being an injunction issued by this court on November 5, 2015 restraining the same.
14. The petitioner maintained that by the time the objectors entered into the agreements for sale with Wanjiru Njohi, the said Wanjiru Njohi had no land to sell to them as no land had passed to her from the estate of her husband, Njohi Kimani. She contended that as such any transaction regarding the land of the deceased, Njohi Kimani by anyone who had not obtained the confirmation of a grant is null and void for all purposes and cannot be enforced by any means whatsoever as was stated in Nakuru HC Succession Cause No 445 of 2009 - *In the Estate of Mary Wanjiru Njohi (Deceased) between David*



*Njomo Kibika v Kimani Njohi & Josphine Wangari Kibika*. Further, it was submitted by the petitioner that the sales were conducted in contravention of the provisions of section 55 and section 82(b) (i) of the *Law of Succession Act*.

15. In support of her submissions, the petitioner cited the following cases: *Simon Mwangi Ngotho & another v Susannah Wanjiku Muchina* [2022] eKLR; *Re Estate of Barasa Kenenje Manya (Deceased)* Succession Cause No 263 of 2002 (2020) KEHC 1 (KLR); *Re Estate of Paul M'maria (Deceased)* *Margaret Naana Mbae & another v Silas Muthengi & another* [217] eKLR and *Mcfoy v United Africa Co Ltd* (1961) 3 All ER 1169.
16. On the other hand, the objectors submitted that the questions of whether or not the agreements held by them are valid and capable of enforcement and/or whether the deceased had land capable of being transferred to them cannot arise at this point because they were resolved by the South Kinangop Land Disputes Tribunal and the decision thereon has never been appealed against. They urged the court to uphold the decision of the Land Disputes Tribunal by excluding their portion namely Nyandarua/Githioro/3915 and 3916 from the estate of the deceased as well as these proceedings. Further, they urged the court to uphold the interests of the other objectors namely Patrick Karanja Waweru and Wanjiru Kimani who had not obtained title deeds over their respective portions measuring one (1) acre each as per the decree dated August 22, 2006 (GKM-4).

### **Analysis and Determination**

17. From the evidence on record, the following facts are not in dispute: The deceased herein, Mary Wanjiru Njohi, was one of the three wives of the late Njohi Kimani who died in 1991 and left a property known as Nyandarua/Githioro/275. Succession proceedings in respect of the estate of the said Njohi Kimani were commenced in 1992 vide Nyahururu Succession Cause Number 85 of 1992. The grant of letters of administration in respect of the estate of the late Njohi Kimani was confirmed on April 10, 2002. According to the certificate of confirmation of a grant, land parcel No Nyandarua/Githioro/275 was to be shared by all the dependants of the late Njohi Kimani. Mary Wanjiru Njohi, the deceased herein, got 7.615 which portion was excised and assigned parcel number Nyanduraa/Githioro/1610. Mary Wanjiru Njohi then died on August 12, 2002.
18. The objectors herein contend that they entered into various agreements for the sale of Mary Wanjiru's portion in land parcel number Nyandarua/Githioro/275 sometime in the year 1993 when the said property was still registered in the name of Njohi Kimani. It is common ground that by then, no grant of representation in respect of the estate of the deceased had been issued or confirmed.
19. Section 55 and 82 of the *Law of Succession Act* provide as follows regarding the distribution of the estate of a deceased:

“ 55. No distribution of capital before confirmation of grant

- (1) 1) 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.
- (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in



respect of a period wholly or partly before or after the date of death.

82. Powers of personal representatives

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;” [underlining mine]

20. *In re Estate of Paul M’Maria (Deceased)* [2017] eKLR, Gikonyo, J pronounced himself as follows:

“[10] The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:-40(6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”

21. The learned judge went on to state as follows when determining the validity of the sale of a property which was done prior to confirmation of a grant:

“Therefore, applying the law and the Constitution, the sale of Plot 18A Mitunguu Market on July 12, 2004 was in contravention of the Law of Succession Act and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute. Therefore, the argument that there was a suit by the 1st Respondent or a decree therefrom does not change this reality of the law or fetter the jurisdiction of a probate court to preserve estate property for purposes of succession. As long as the transaction is void, it is also futile to argue that subsequent transfer thereof was done by the 1<sup>st</sup> Respondent who was the administrator of the estate of the deceased.”



22. This court finds further persuasion in the case *In re Estate of Isaac Kaburu Marete (Deceased)* [2017] eKLR where Gikonyo, J had this to say in similar circumstances: -

“(6) Upon meticulous consideration of the protest, all arguments filed and the law, I am of the following persuasion. I will restate once again “what I stated in the case of the Matter of the Estate of M’Ajogi M’Ikiugu alias Ikiugu Ajogi (Deceased) on sale of estate property before confirmation of grant as follows:-

Sale of estate property before confirmation

Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the Law of Succession Act. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.”

23. Guided by the above authorities, among many others, this court agrees with the petitioner that the deceased had no capacity to enter into any binding agreement for the sale of any portion of her late husband’s property known as Nyandarua/Githioro/275 before April 10, 2002 when the grant issued in respect to his estate was confirmed. The deceased herein had no property in Nyandarua/Githioro/275 which she could legally sell to the objectors herein as at 1993 when the sales purportedly took place. The agreements were null and void *ab initio* and could not confer good titles on the objectors herein. At this point therefore, this court fully agrees with the pronouncement by Ouko, J (as he then was) in Nakuru HC Succession Cause No 445 of 2009 - *In the Estate of Mary Wanjiru Njohi (Deceased) between David Njomo Kibika v Kimani Njohi & Josphine Wangari Kibika* that any transaction or dealings in respect of the property of the deceased whether Nyandarua/Githioro/275 or Nyandarua/Githioro 1610 before the April 10, 2002 is a nullity and of no consequence. Suffice it to state, the decision by Ouko, J (as he then was) in the Nakuru case did not preclude this court from pronouncing itself on the same issue since this case is not *res judicata* to the Nakuru case.
24. Accordingly, this court declares the agreements entered into between the objectors and the deceased herein null, void and of no legal effect whatsoever.

## Conclusion

25. Consequently, the objection is dismissed with no order as to costs. A grant in respect of the estate of the late Mary Wanjiru Njohi (deceased) is hereby issued and confirmed to the petitioner herein, Josephine Wangari Kihika to administer the same in accordance with the law. It is so ordered.



**DATED AND DELIVERED AT NAIVASHA THIS 15<sup>TH</sup> DECEMBER, 2022.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Gichuki for the Petitioner/Applicant.

2. Mr. Wairegi for the Objector

