



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

*Coram: D. K. Kemei - J*

**P&A CAUSE NO. 588 OF 2011**

**IN THE MATTER OF THE ESTATE OF KAMAU MWOSA THUMBU DECEASED)**

**PHYLLIS KAETI KABETE.....PETITIONER**

**AND**

- 1. JOSEPH NGUMBI NDAMBUKI**
- 2. WILFRED SAMSON MUTUA**
- 3. JOSEPHINE SYEKONYO JOSEPH**
- 4. PAULINA SYOMBUA JOSEPH**
- 5. SHADRACK MBITHI MUTISYA**
- 6. JACINTA NZILANI MBALUKU**
- 7. JULIUS KIJANA MBITHI**
- 8. BERNARD MUSYOKA MUUTU**
- 9. MICHAEL MUNYAO KASUVA.....INTERESTED PARTIES**
- 10. HELLEN MUIINDE**
- 11. KENNEDY KIVA KAMII**
- 12. JULIUS MWOSA KAMAU**
- 13. BONIFACE MUTIE KAVUVI**
- 14. PAUL KIOKO NGUTHI**
- 15. JOHN MUANGE MULWA**
- 16. KELVIN KILONZO MUSYOKA**
- 17. FIDELIS SILINGI MUSILA**

**RULING**

1. The deceased herein **Kamau Mwosa Thumbu** died on the 21/11/2002 intestate. A grant of letters of administration intestate was issued

to **Pius Kilonzi Kamau** and **John Kamau**.

2. The two administrators herein later died leaving the estate without an administrator. A new administrator **Phyllis Kaeti Kabete** was subsequently appointed.

3. The Petitioner filed an application dated 13/06/2019 seeking the following reliefs:-

**i. That the grant of letters of administration issued on 11/10/2011 to Pius Kilonzi Kamau (now deceased) and John Kamau Mwosa (also deceased) be rectified or changed and the Applicant be allowed to proceed as sole administrator and that a grant be issued in her names.**

**ii. That upon the grant being made the same be confirmed as per the schedule of distribution annexed to the supporting affidavit of the Applicant herein.**

**iii. That the costs of the application be in the cause.**

4. The application is supported by the affidavit of Phyllis Kaeti Kabete sworn on even date. The Applicant's case is that she is a daughter to the deceased. The Applicant's case is that the previous administrators have since died and hence the estate is without an administrator. She averred that the deceased was the registered proprietor of **Plot No. 10 Kitanga Settlement Scheme** and that the deceased together with some of his family members had sold portions of the said land to third parties. She annexed copies of the plot ownership, sale agreement and national identity cards and sought for the confirmation of grant in terms of the proposed schedule of distribution.

5. One of the purchasers **Shadrack Mbithi Mutisya** filed a replying affidavit dated 24/02/2020 where he averred that he is not opposed to the Applicant being made an administrator. However, he is opposed to the request for confirmation of grant according to the schedule of distribution because he had bought a portion of land measuring five and quarter (5¼) acres from the deceased herein at a price of Kshs.7,000/- in 1999 but that the deceased died without transferring ownership thereof to him. He further averred that the proposed share of 0.12 acres is erroneous. He annexed copies of the sale agreement in Kikamba and English translation.

6. The Administrator/Applicant filed a further affidavit sworn on 15/05/2020 in which she vehemently opposed the claim by Shadrack Mbithi Mutisya for 5¼ acres of land. She averred that the correct acreage is 0.05 Ha equivalent to 0.12 acres and that the said interested party had earlier been arraigned before **Machakos Chief Magistrate Court Criminal Case No.4073 of 1999** for an offence of altering a document without authority contrary to section 347 (b) and 349 of the Penal Code following a complaint lodged by the deceased against him for falsely altering the agreement to read five (5) acres instead of 0.05 Ha and that the court found him guilty and sentenced him to one (1) year imprisonment. It is the contention of the Applicant that the interested party herein is a blatant liar who should be charged with perjury.

7. Parties agreed by consent that the first prayer in the application be allowed and that the Applicant herein Phyllis Kaeti Kabete be issued with a grant of letters of administration. It was also agreed that the application be canvassed by way of written submissions.

8. Paul Kisongoa & Company Advocates for the Petitioner/Applicant filed submissions dated 4/12/2020 raised two issues for determination namely *whether the sale agreement dated 18/04/1999 is valid* and *whether the grant should be confirmed as proposed by the petitioner*. On the first issue, it was submitted that the purported sale agreement should be rejected as the same had been altered and which led to the interested party being charged in a court of law and jailed for one year as shown by the letter dated 17/03/2020 by the OCS Machakos police station (PKK1"). It was further submitted that the court records cannot be traced as the matter was concluded in 2000 and that this court should find the agreement to be invalid due to the alterations. Reliance was placed in the case of **Re Estate of Richard Moinkett Ole Meeli [2018] eKLR**. On the second issue, it was submitted that the confirmation of the grant should proceed as per the proposed schedule by the petitioner and that the 5<sup>th</sup> interested party's protest dated 24/02/2020 be dismissed with costs.

9. B. M. Mungata & Co. Advocates for the 5<sup>th</sup> interested party (protestor) filed submissions dated 20/11/2020 submitted that the court should give protestor the acreage as per the contents of the sale agreement (SMM1"). It was also submitted that in the absence of court proceedings and judgement over the alleged alteration of the sale agreement then the claims made by Petitioner should be treated as mere allegations. It was further submitted that the 5<sup>th</sup> interested party is a purchaser and hence the liability of 5¼ acres owed to the protestor should be settled before the estate is distributed.

10. I have given due consideration to the rival affidavits as well as the submissions of learned counsels. It is not in dispute that the deceased herein had sold several portions of his land on **Plot No. 10 Kitanga Settlement Scheme** to several purchasers before he died. It is also not in dispute that the new administrator has prepared a schedule of distribution of the estate wherein all the identities of those set to benefit have been listed. It is also not in dispute that the deceased had sold a portion of his land on **Plot No. 10 Kitanga Settlement Scheme** to the 5<sup>th</sup> interested party (protestor) herein. It is also not in dispute that the rest of the interested parties (purchasers) except the 5<sup>th</sup> interested party have opted not to file responses to the Petitioner's application thereby implying that they are in agreement with the proposed schedule of distribution. The issues for determination are as follows:-

**i. Whether the sale agreement entered on 18/04/1999 between the deceased and 5<sup>th</sup> interested party (protestor) is valid;**

**ii. Whether the grant should be confirmed as proposed by the petitioner;**

**iii. What orders may the court grant?**

11. As regards the first issue, the 5<sup>th</sup> interested party has maintained that he had entered into an agreement with the deceased herein where he purchased 5¼ acres of land on **Plot No.10 Kitanga Settlement scheme**. He annexed a copy thereof plus the English translation as “SMMI”. On the other hand, the petitioner maintains that her late father only sold to the 5<sup>th</sup> interested party a portion of land measuring 0.05 Ha and that is what she has proposed to give to the 5<sup>th</sup> interested party. The Petitioner has also thrown a spin on the size of the land so purchased by claiming that the 5<sup>th</sup> interested party altered the document by putting the size of land bought as 5¼ acres yet the real size bought was 0.12 acres (0.05 Ha). She added that the 5<sup>th</sup> interested party was subsequently charged in a court of law and jailed for one (1) year. She annexed a letter from the OCS Machakos Police Station dated 17/03/2020 (PKK1”) confirming her assertions and vehemently denies the claim raised by the said 5<sup>th</sup> interested party.

I have perused the copies of the agreements presented by both the Petitioner and 5<sup>th</sup> interested party. From the documents presented by the Petitioner there is no agreement indicating purchase of land measuring 0.05 Ha or 0.12 acres whereas the agreement presented by the 5<sup>th</sup> interested party shows the acreage sold as five acres at a total price of kshs.7,000/-. There is therefore a sharp contrast regarding the rival claims over the actual size of land sold by the deceased. The Petitioner on her part claims that the 5<sup>th</sup> interested party altered the acreage on the sale agreement to read five acres which earned him a jail term of one year vide **Machakos CM Cr. No.4073 of 1999** and she backed the same with a letter from the OCS Machakos Police Station. The Petitioner has been challenged to present the court proceedings and judgement but she has stated that the records cannot be traced. I find that the Petitioner should have gone a notch higher by securing a report from the relevant court regarding the existence of such a criminal case so as to back her claim that the 5<sup>th</sup> interested party had actually been imprisoned over alteration of the sale agreement. The police station is not the custodian of court documents and records and hence the letter by the OCS Machakos Police Station is not helpful at all to the petitioner’s case. I am satisfied that the 5<sup>th</sup> interested party had purchased 5 acres of land from the deceased comprised in land **Parcel Plot No. 10 Kitanga Settlement Scheme**. The claim for an extra ¼ acre by the 5<sup>th</sup> interested party has not been proved. He is only entitled to five (5) acres and no more. Hence the proper version of events appear to me to have been presented by the 5<sup>th</sup> interested party and not the Petitioner. The 5<sup>th</sup> interested party’s version seems convincing in view of the documents availed save only that the proper acreage bought is 5 acres. This then leads me to come to the conclusion that the sale agreement entered between the deceased and 5<sup>th</sup> interested party on 18/04/1999 is valid in all respects.

12. As regards the second issue, it is noted that the 5<sup>th</sup> interested party herein had bought land from the deceased prior to his death and hence he is a creditor to the estate whose interests must be taken into account as a liability to the estate which should be settled so as to leave the net estate for distribution by the beneficiaries. According to the sale agreement dated 18/04/1999 the deceased had sold 5 acres to the 5<sup>th</sup> interested party but that the deceased passed on before he could effect transfer of ownership to him. I have seen some documents relating to applications to the Masaku Land Control Board made by the deceased seeking for the requisite consent. The Petitioner has lined up a number of purchasers who had bought land from the deceased and now seeks to confirm the grant so that the beneficiaries and purchasers obtain their shares. As the other interested parties have not opposed the proposed schedule of distribution of the estate and since the 5<sup>th</sup> interested party has established that he is entitled to 5 acres of land and not 0.05 Ha, then I see no reason why the grant should not be confirmed with the 5<sup>th</sup> interested party’s share of 5 acres being factored.

13. In view of the foregoing observations, it is my view that the 5<sup>th</sup> interested party has proved that he is entitled to be allocated five (5) acres of land out of the deceased’s **Plot No.10 Kitanga Settlement Scheme**. Consequently the grant issued to the Petitioner on the 22/10/2020 is hereby confirmed in the following terms:-

- a. Five (5) acres out of Land Parcel No. 10 Kitanga Settlement Scheme shall be excised and registered in the name of the 5<sup>th</sup> interested party SHADRACK MBITHI MUTISYA.**
- b. The rest of the interested parties to be allocated their respective shares as proposed by the petitioner.**
- c. The remaining portion be registered in the name of the petitioner PHYLLIS KAETI KABETE for herself and in trust for all the beneficiaries of the estate of the deceased.**
- d. There will be no orders as to costs.**

Orders accordingly.

**Dated and delivered at Machakos this 11<sup>th</sup> day of February, 2021.**

**D. K. Kemei**

**Judge**