



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K. Kemei – J)

SUCCESSION CAUSE NO. 973 OF 2013

IN THE MATTER OF THE ESTATE OF MWALUKO SILA (DECEASED)

MUTILE MWALUKO.....1ST PETITIONER

ESTHER MUTUNGE MWALUKO.....2ND PETITIONER

CHARLES ILELI MWALUKO.....3RD PETITIONER

VERSUS

EVANSON NZIVO MWALUKO.....OBJECTOR

RULING

1. The deceased herein **Mwaluko Sila** died intestate on the 12/04/2009.
2. A grant was issued to **Mutile Mwaluko, Esther Mutunge Mwaluko** and **Charles Ileli Mwaluko** on the 24/02/2014 as the petitioners in the estate.
3. Summons for confirmation of grant dated 14/08/2014 were filed by the petitioners wherein only three beneficiaries were disclosed namely **Evalyne Mwendu Mwaluko alias Mutile Mwaluko, Esther Mutunge Mwaluko** and **Charles Ileli Mwaluko**.
4. On the 6/10/2015 the petitioners were directed to file written consent of all the beneficiaries to the proposed distribution and all beneficiaries to be present during the hearing of the summons for confirmation.
5. Before the hearing of the summons for confirmation of grant, the protestor herein filed an affidavit of protest dated 11/12/2019 in which he opposed the petitioners' application to have the grant issued to them confirmed on the ground that he had earlier purchased ten (10) acres from the deceased. According to the protestor, he had bought the said acres comprised in land reference **Masii/Mbaani/379** and that the petitioners should have considered his interest thereon in the proposed schedule of distribution of the estate of the deceased. The protestor further averred that during the **Citation No. 291 of 2019** in which he had cited the petitioner herein, the 3rd petitioner confirmed that the protestor is entitled to 9.35 acres which would be transferred to him upon payment of balance of purchase price of Kshs. 52,000/= as well as survey fees. The protestor undertook to clear the balance of the said purchase price. He annexed copies of the sale agreement both written in Kikamba language and their translation into English thereof.
6. The Third Petitioner filed a replying affidavit (undated) and filed on 10/01/2020 wherein he raised several issues *inter alia* :that the petitioners are not refusing to allocate the protestor a portion of land measuring 9.35 acres and are ready to give him the same upon the payment of outstanding balance; that should the protestor be not satisfied with the proposed piece of land then the petitioners be allowed to dispose it and then refund the purchase price to him; that the family of the deceased seeks for compensation of Kshs. 100,000/= being damages caused to them by the protestor when he had them incarcerated in police cells for three days in an attempt to coerce them to complete the sale transaction.
7. Parties agreed to canvass the protest by way of written submissions. It is only the protestor's counsel's submissions dated 28/01/2010 that are on record.
8. Mr. Kamolo, learned counsel for the protestor submitted that when the protestor cited the petitioners vide **Citation No. 291 of 2019 at Machakos** they admitted that the protestor was entitled to 9.35 acres of land but however left him out during the filing of summons for confirmation of grant. It was submitted that the protestor should be allocated the 9.35 acres and that the protestor should pay up the outstanding balance of Kshs. 14,500/=. It was finally submitted that the alleged survey expenses should be shouldered by the estate.

9. I have considered the rival affidavits and the submissions filed. It is not in dispute that the deceased herein had sold a piece of land to the family of the protestor and that there is still some outstanding balance due to the estate of the deceased. It is also not in dispute that the protestor herein had earlier cited the petitioners vide **Machakos Chief Magistrate's Court No. 219 of 2019** in which the petitioners agreed to allocate the protestor's family 9.35 acres in land parcel **Masii/Mbaani/379** upon the protestor clearing a balance of Kshs. 52,000/= being in respect of outstanding purchase price and survey costs. The issue for determination is whether the protest is merited.

10. The affidavits of the petitioners both in this cause and **Citation No.219 of 2019** leaves no doubt that they are in principle not opposed to allocating the protestor's family 9.35 acres out of land parcel **Masii/Mbaani/379** upon the protestor paying some outstanding balance as well as survey fees incurred. The petitioners are also not happy with the way the protestor has taken them to the police cells over the said land and now seek for some compensation of some sort. I have carefully considered the affidavits of the petitioners and find that they do not intend to put road blocks on the way of the protestor over the sale transactions. Ordinarily, the said land transaction involving the deceased and protestor's family ought to have been subjected to the provisions of sections 6 and 7 of the Land Control Act Cap 302 of the Laws of Kenya which provided that the transaction over agricultural land ought to go through the Land Control Board for consent and that in the event of lack of such consent then the transaction becomes voidable and that the and that the purchaser was expected to seek for refund of the purchase price as a debt from the seller. This could have been the ideal situation. However, as the petitioners appear not to have any problem accommodating the protestor's family on condition that the balance of the purchase price and survey fees are paid, and since the protestor is agreeable to the same, I find that the protest herein is meritorious. If the conduct of the parties suggests a peaceful settlement of the dispute, then this court must allow them to do so. I have noted that the protestor is only aware of a balance of a between **Kshs. 11,188/= to 14,601/=** and that his counsel seeks that the survey fees be borne by the estate of the deceased. I am not persuaded by the protestor's suggestion since the petitioners are entitled to be compensated for the survey fees and that the sums proposed is **Kshs. 52,000/=** which should be paid by the protestor. There is no prejudice suffered by the protestor if he pays the said sum as he has agreed to settle the same. The finalization of the matter will benefit both parties herein. I have seen the affidavit in support of the summons for confirmation of grant wherein the 3rd petitioner has proposed to set aside 9.35 acres to be kept by him in trust for the protestor herein. If that is the true state of affairs, I find that the protestor should clear the sum of Kshs. 52,000/= forthwith so that the petitioners can proceed to include him as a creditor to the estate and his share factored in the proposed schedule of distribution.

11. In the result, I find merit in the protest and allow the same in the following terms:

(a) The protestor to pay to the petitioners the sum of Kshs. 52,000/= within the next fourteen (14) days from the date hereof so as to enable the petitioners to list him as a creditor to the estate and to be allocated 9.35 acres out of parcel No. MASII/MBAANI/379 failing which the petitioners shall proceed with the hearing of summons for confirmation of grant.

(b) That upon the payment of the aforesaid sum by the protestor, the petitioners are granted leave to file and amend schedule of distribution of the estate factoring the interest of the protestor.

(c) Matter to be mentioned on the 8.03.2021 for further orders.

(d) Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 11th day of February, 2021.

D. K. Kemei

Judge