



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 971 OF 2011**

**IN THE MATTER OF THE ESTATE OF SAYIA MULUPI (DECEASED)**

**RULING**

1. The application before me is dated 24<sup>th</sup> September 2020. It is brought at the instance of Brown Indai Mwanzi, Emanuel Ekirapa and Samuel Lukongo, who I shall refer hereto as the applicants; against persons identified in the application as the respondents, being John Saidi Sayia, James Lusese Wamalika and Meshack Wakoli Wamalika. The application essentially seeks restraining orders, with regard to North Kabras/Malava/3456, pending hearing and disposal of unidentified objection proceedings.

2. The grounds on the face of the application are: that the applicants separately purchased portions of North Kabras /Malava/3456, paid full consideration and were given vacant possession; that they had filed objection proceedings claiming their respective portions and the matter had undergone mediation; that the respondents, with a view to defeat the applicants claims, it is alleged, are leasing or trespassing on or interfering with their respective portions, which could render the objection proceedings null and void, and occasion on the applicants loss and damage; the ruling of 29<sup>th</sup> May 2020 was erroneous; to the extent that the court was and that justice favoured that the respondents be barred from interfering with the three portions claimed by the applicants pending hearing and determination of the objection proceedings.

3. The affidavit in support of the application was sworn by the 1<sup>st</sup> applicant. He avers that the deceased had died on 14<sup>th</sup> July 2008, and his estate comprised of North Kabras/Malava/447, which had since been subdivided into North Kabras/Malava/3456 and 3457. He deposes that before the deceased died, he had sold a portion of North Kabras/Malava/447, now designated as North Kabras/Malava/3456, to one Eliud Wamalika Muluri, a brother of the administrator, and the father of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The portion demised was subsequently surveyed and boundaries fixed, and the 1<sup>st</sup> applicant moved into possession, and developed the property. On the death of the deceased, he was made to understand that his portion would be curved out at confirmation and conveyed to him, but that did not happen, hence he filed the objection proceedings. He avers that the respondents were threatening to invade the land to interfere with his possession, and lease it out to other individuals. He avers that the 3<sup>rd</sup> respondent accosted and assaulted his wife on 9<sup>th</sup> March 2020, and chased her out of the land where she was working. Criminal proceedings were initiated in Butali PMCCRCs Nos. 148 and 213 of 2020 with respect to the same. He fears that he could be dispossessed and disinherited. He would like the respondents stopped from interfering with the property pending the hearing and disposal of the objection proceedings. He has attached to his affidavit a variety of documents to support his case. There are two affidavits by the other two applicants, also averring to have had acquired portions of North Kabras/Malava/3456, from the deceased, in 2005 and 2006.

4. Upon being served, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a notice of preliminary objections, dated 5<sup>th</sup> October 2020, alleging, principally, that the court did not have jurisdiction to entertain the application, and that the same violated section 13 of the Environment and Land Court Act, No. 19 of 2011 (revised 2012)

5. Directions were given on 27<sup>th</sup> October 2020, for disposal of the preliminary objection by way of written submissions. Parties have complied. The written submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are dated 4<sup>th</sup> January 2021, and were ruled herein on 22<sup>nd</sup> January 2021. The applicants filed their submissions on 22<sup>nd</sup> January 2021, dated 21<sup>st</sup> January 2021. The administrator did not file any.

6. In their written submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents address only one issue, whether the High Court has jurisdiction over the matter. It is submitted that the applicants were not dependants of the deceased. It is also argued that the applicants bought the land in question from one Eliud Wamalika Muluri, the father of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and from the deceased himself. It is submitted that the land in question was agricultural, and, therefore, subject to the Land Control Act, Cap 302, Laws of Kenya, which required that consents from the local land control board be obtained to sanction the sales, yet no such consents were obtained, thereby making the sales null and void. It is submitted that the court is being invited to superintend over a dispute on land ownership, yet the High Court had no jurisdiction to venture into such matters. The Environment and Land Court Act is cited to support the argument that jurisdiction over such matters rests with the court established under that Act and not with the High Court. The decision of the Court of Appeal, in *Owners of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime and Kwach JJA), is cited for the contention that a court without jurisdiction stops on its tracks, and takes no further step. The decision in *Peter Kungu Waithatu & another vs. Ruth Wanjiru Kungu & another* [2020] eKLR, is cited for the point that a probate court ought not transform itself into an ordinary civil court, to deal with otherwise purely civil disputes which are not anchored anywhere in the Law of Succession Act. *Monica Wangari Njiri & 4 others vs. Eunice Wanjiru Igamba & another*

[2016] eKLR (Ndung'u J) (Onyiego J) is relied on, for the proposition that the mandate of a probate court was limited, and did not extend to determination of questions related to ownership of property. It is suggested that the applicants ought to have moved the court under Order 37 of the Civil Procedure Rules, for determination of the issue of ownership. It is concluded that the claim of the ownership of the subject lands by the applicants was before the wrong forum.

7. On their part, the applicants argue that the Law of Succession Act is concerned with administration of estates of deceased persons, and the High Court is vested with power to determine any dispute under the Act. It is submitted that the argument that the dispute before the court was a land matter was misplaced and unfounded, as the land in question constituted the estate of the deceased. It is submitted that the applicants bought the subject lands from a son of the deceased, with the tacit approval or consent or knowledge of the deceased, which then made the applicants creditors of the estate, and the applicants were, therefore, properly before the court. Sections 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules are cited to support the contention that the High Court has inherent power to make orders to meet the ends of justice. The decision in *Floris Piezzo & another vs. Giancarlo Falasconi* [2014] eKLR, which turned on section 47 and Rule 73, is cited to buttress the point. It is argued that the orders sought are for the purpose of preserving the estate.

8. This matter relates to the estate of Saya Mulupi, who died on 14<sup>th</sup> July 2008. Representation was sought and obtained by Selina Khatsenzia Sayia and John Saidi Sayia, widow and son, respectively, of the deceased. Letters of administration intestate were made to them on 5<sup>th</sup> March 2012, and a grant was subsequently issued, dated 13<sup>th</sup> March 2012.

9. On 27<sup>th</sup> August 2013, the 1<sup>st</sup> applicant herein lodged a summons for revocation of the grant made on 5<sup>th</sup> March 2013, dated 22<sup>nd</sup> August 2013, on grounds that the administrators had not disclosed that the 1<sup>st</sup> applicant was a liability of the estate, having bought a portion of the land of the estate on 30<sup>th</sup> January 2005 from Eliud Wamalika Mulupi. He complained that he was not listed in the petition as a liability, yet he was entitled to the share of the portion that he had bought. He stated that the deceased had knowledge of the alleged sale before he died. He complained that the administrators had sought representation in the estate, without informing him or obtaining his consent. Another summons for revocation of grant, dated 12<sup>th</sup> February 2014, was lodged at the registry herein on 13<sup>th</sup> February 2014, by the three applicants, on the basis that they had obtained an interest in the lands of the estate through sales by Eliud Wamalika Mulupi. They claimed that the deceased was aware of the transaction, before he died, and that, when representation was sought in the estate, they were not notified, and their consents were not obtained.

10. On 23<sup>rd</sup> June 2015, one of the administrators, John Saidi Sayia, lodged a summons herein, dated 15<sup>th</sup> June 2015, seeking confirmation of the grant made on 5<sup>th</sup> March 2013. Distribution was proposed amongst the persons listed in the said summons. To the said summons for confirmation of grant, the applicants raised protests, arguing that they had acquired interests in estate lands, and that they were entitled to be apportioned shares in the lands at confirmation of the grant.

11. The court gave directions on the disposal of the three applications. When the application, dated 12<sup>th</sup> February 2014, was placed before the Judge on 3<sup>rd</sup> April 2014, directions were given that the same be disposed of by way of oral evidence. The administrators were also directed to file for confirmation of their grant, with the ostensible intent that the two applications be disposed of simultaneously. After the summons for confirmation of grant was filed, directions were given on 23<sup>rd</sup> May 2016, that the summons for revocation of grant be deemed to be the plaint and the summons for confirmation of grant be deemed to be the defence, which meant that the two applications were to be disposed of simultaneously, by way of oral evidence.

12. The parties, that is to say the administrator and the applicants, sought to have the matter subjected to mediation, and an order was made on 22<sup>nd</sup> November 2019, referring the matter to mediation. The parties reached a partial settlement, which was adopted as an order of the court on 4<sup>th</sup> December 2019. The purport of that settlement was that the estate of the deceased was distributed amongst his sons, as follows:

- (a) Eliud Amalika Sayia - 6 acres;
- (b) Joseph Ooko Mulupi – 2.8 acres;
- (c) John Saidi Sayia – 5.5 acres;
- (d) Sayia Wangatia – 6.7 acres;
- (e) Michael Sayia Mulupi – 3.5 acres;
- (f) David Sayia – 3.2 acres;
- (g) Luka Sayia – 3.0 acres;
- (h) Emmanuel Sayia – 3.3 acres;
- (i) Peter Sayia – 3.6 acres;
- (j) Maurice Avomba - 4.4 acres; and
- (k) Mulupi Sayia and Daniel Koikoi – 15 acres.

13. Regarding the claims by the applicants, the settlement was that they were to get the share of what they had bought from Eliud Amalika

Sayia from the 6 acres allocated to the said Eliud Amalika Sayia. It was recommended that the subdivision of the shares of the applicants, from the 6 acres due to Eliud Amalika Sayia, be determined by the court. There is also mention of a subdivision of 15 acres between Mulupi Sayia and Daniel Koikoi, which is supposed to be handled “ by the government.”

14. My understanding of the mediation settlement is that it resolved the pending applications for confirmation of grant and revocation of the grant. The effect, therefore, of the adoption of the mediation settlement agreement was that the grant made on 5<sup>th</sup> March 2013 was confirmed and the estate of the deceased was to be distributed in the terms of the mediation settlement agreement. The Deputy Registrar ought, after the mediation settlement agreement was adopted by the court on 4<sup>th</sup> December 2019, to have processed and issued a certificate of confirmation of grant, in those terms, to the administrators, to facilitate transmission of the estate. The only interest the applicants have in the estate is recovery of the land sold to them by Eliud Amalika Sayia, and once, the issue was resolved through mediation, there would be no basis, thereafter, for the prosecution of the revocation applications.

15. Since the pending applications for confirmation and revocation of grant were determined through or resolved by the mediation settlement agreement, which became an order of the court through its adoption, the said applications ceased to pend after 4<sup>th</sup> December 2019, as the order of that day resolved them, and ,therefore, there was no basis for the applicants to mount the application dated 24<sup>th</sup> September 2020, purporting that they sought orders pegged on the pendency of the so called “objection proceedings.” For one, objection proceedings are governed by sections 67 and 68 of the Law of Succession Act cap 160, laws of Kenya, and no proceedings grounded on those provisions were ever filed, and none pend. Secondly, if the applicants, by “objections proceedings,” meant the two revocation applications, the same also do not pend, for they were resolved in the manner that I have explained above. The application dated 24<sup>th</sup> September 2020, therefore, has no foundation, and ought not to have been filed. It is academic. The parties ought to be pursuing transmission of the property as per the mediation settlement agreement, instead of wasting time on these needless proceedings. Since the Motion, dated 24<sup>th</sup> September 2020, has no legs to stand on, the preliminary objection founded on it, is equally academic.

16. The final orders that I shall make in the matter are as follows:

- (a) That as “the objection proceedings”, that the Motion dated 24<sup>th</sup> September 2020 is founded on, are no longer pending, the said Motion ought not to have been filed, and it is hereby dismissed;**
- (b) That the notice of preliminary objection, dated 5<sup>th</sup> October 2020, is pegged on the Motion, dated 24<sup>th</sup> September 2020, which has been dismissed under (a) above, and, therefore, the said preliminary objection also stands dismissed;**
- (c) That the Deputy Registrar shall process a certificate of confirmation of grant founded on the terms of the mediation settlement agreement, that the court adopted, and made an order of the court, on 4<sup>th</sup> December 2019;**
- (d) That the Deputy Registrar shall also process a court order extracted from the mediation settlement agreement, as adopted by the court;**
- (e) That the parties shall thereafter proceed to have the estate distributed as per the terms of the certificate of confirmation of grant, to be processed and issued, through transmission;**
- (f) That any disputes, arising from the transmission process, shall be resolved through the Environment and Land Court, as transmission is a process regulated and governed by the relevant land legislation and not the Law of Succession Act;**
- (g) That each party shall bear their own costs; and**
- (h) That any party aggrieved by the orders made herein is hereby given leave, of twenty-eight (28) days, to move the Court of Appeal, appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF MAY 2021**

**W. MUSYOKA**

**JUDGE**