



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 230 OF 2014

IN THE MATTER OF THE ESTATE OF JOSEPH MUSAU NTHENGE (DECEASED)

PETER PAUL NTHENGE MUSAU.....1ST ADMINISTRATOR/APPLICANT

STELLA MUMBUA MANTHI.....2ND ADMINISTRATOR/APPLICANT

VERSUS

JOSEPH MUTUKU NDETO.....1ST RESPONDENT

JACOB MBOLE.....2ND RESPONDENT

RULING

1. This matter relates to the estate of **Joseph Musau Nthenge**, (deceased) who died intestate on 15/02/2012. A petition for letters of administration intestate was filed by **Peter Paul Nthenge Musau** and **Stella Mumbua Manthi** which was confirmed on 18/01/2017.
2. The applicants filed a Summons General under section 45, 47, and 74 of the Law of Succession Act and Rules 43, 49, 59 and 73 of the Probate and Administration Rules seeking principally orders that the grant herein be rectified to include **Plot No. 55A KIMUTWA MARKET** and **Parcel of land No. MUVUTI/KAAN/1437** and that orders of preservation, and protection be issued to the effect that the 1st and 2nd respondents, respectively, whether by themselves or through their servants, agents and/or employees or any other person whomsoever claiming under them or through them be restrained from selling, trespassing, intermeddling or interfering in any way with **Plot No. 55A KIMUTWA MARKET** and **Parcel of land No. MUVUTI/KAANI/1437** and any other assets of the deceased herein or from doing any other prejudicial act thereon pending the hearing and determination of this application.
3. The application is based on the grounds that **Plot No. 55A KIMUTWA MARKET** and **Parcel of land No. MUVUTI/KAANI/1437** were left out during the distribution of the deceased's estate, and that the respondents are currently intermeddling with the respective suit properties with the first respondent grabbing **Plot No. 55A KIMUTWA MARKET** by illegally causing the same to be registered in his name from that of the deceased and purporting to develop the same as his while the 2nd respondent has trespassed into and claimed that **parcel of land no. MUVUTI/KAANI/1437** is his without any colour of right and without their consent or knowledge or that of the other beneficiaries.
4. In opposing the application, the 2nd respondent Daniel Jacob Mbole filed a Replying Affidavit and deponed that the said land parcel **No. MUVUTI/KAANI/1437** was owned by his father and was part of a larger piece of suit property which his father had sold to the deceased at his own discretion on the condition that if the deceased wished to dispose of it then he would give first priority to Mbole's children and that was how he acquired it. He averred that he has since cleared the purchase price of Kshs 180,000/ to the deceased who subsequently died before transferring ownership to him although he had surrendered the title thereto to him. He sought that the administrators be compelled to effect transfer thereof to him. He annexed copies of sale agreements and payment notes.
5. A further replying affidavit was filed by Rose Nthiwa in support of the 2nd respondent wherein she deponed that on or about the year 2008, when she was the area head of Kyanzaus village where the deceased had his home, the deceased called her and informed her that he had sold the title number Muvuti/Kaani/1437 to the 2nd Respondent and wanted her to assist him in demanding for payment of some balance of the purchase price. She further deponed that she is aware that the subject parcel of land belongs to the 2nd respondent.
6. The application was canvassed by way of viva voce evidence.
7. The 1st petitioner herein testified and sought to adopt the contents of his witness statement dated 6/7/2017 and maintained that the two new

assets belonged to the deceased. He produced a copy of a demand letter from Municipal Council of Machakos seeking for outstanding rates on plot No. 55A as well as a certificate of search for LR NO. MUVUTI/KAANI/1437. On cross-examination, he admitted that he did not have an allotment letter from Machakos Municipal Council. He also confirmed that the search shown to him shows that the 1st respondent is the registered owner of plot No. 55A and added that he did not know how the plot ownership changed. He also confirmed that he has not done due diligence on the plots and that plot 55A has some structures. He also confirmed that the signatures on the sale agreement resembled those of the deceased but not the handwriting. The administrators closed their case.

8. The 1st respondent neither filed response nor tendered evidence. It is only the 2nd respondent who gave evidence. **Daniel Jacob Mbole (R. W1)** testified that land parcel **Muvuti/Kaani/1437** initially belonged to his father who sold it to the deceased herein and requested the deceased to sell to the seller's family in the event that he needs to sell it. He stated that the deceased approached him and informed him that he needed to sell the land to which he agreed to purchase at Kshs 180,000/ and began to pay by instalments which he cleared but that the deceased died before transferring it to him though he had surrendered the original title to him. He now wants the administrators to effect transfer thereof to him. On cross-examination, he confirmed that he has the original copy of the title in his possession and that the transaction was not witnessed by a third party and further that there are disparities in the amounts so far paid and that no consent from the land control board was obtained. On reexamination, he stated that the balance of Kshs 2000/ was due to a previous debt owed by the deceased.

9. **Boniface Iluve Nguta (RW2)** confirmed that the deceased had informed him that he had sold the land to a son of Mbole. He denied receiving a letter from the deceased to stop using the land that he had sold to Mbole's son.

10. **Rose Mueni Nthiwa (RW3)** sought to rely on her affidavit in support of the 2nd respondent. On cross-examination, she stated that she had been sent by the deceased to go demand on his behalf a sum of Kshs 9000/ being balance of purchase price remaining from the 2nd respondent.

11. Learned counsels filed and exchanged written submissions. The administrators'/Applicants submissions are dated 18/5/2021 while those of the 2nd Respondent are dated 9/7/2021.

2. Mr Kituku for the Applicants submitted that the above properties constitute the estate/free property of the deceased and the occupation of the respective deceased's properties despite the administrators warning is the epitome of intermeddling and impunity. He submitted that since the two properties belong to the deceased then the confirmed grant should be rectified so as to include the new assets for distribution among the heirs. Finally, it was submitted that the court should issue preservation orders on the properties so as to prevent wastage and intermeddling by the respondents and their agents or servants.

13. Mrs Mutunga for the 2nd Respondent submitted that the claims by the Applicants that the 2nd Respondent was in forceful and illegal occupation of the suit property is misplaced and tainted with malice. Counsel submitted that the evidence adduced by the 2nd Respondent is clear that there was an offer to sell land by the deceased and that the 2nd Respondent accepted the offer and the same was put down in writing and there was consideration of Kshs. 180,000/- that was paid to the deceased completing the agreement of sale.

14. Counsel submitted that the handing over of both the physical possession and possession of the title document for the suit property was a clear acknowledgement by the deceased that the 2nd Respondent had a right and interest over the suit property and this act of possession created an overriding interest in the suit property.

15. Counsel further submitted that the 2nd Respondent was not illegally and unlawfully occupying the suit property as he has purchased the suit property, has actual possession of the same as well as the original title deed.

16. Counsel finally submitted that the defect alluded by the Applicants to the said agreement on the ground that it was not witnessed and that a Land Board consent was not obtained is curable through the doctrine of equity where the doctrine of constructive trust and propriety estoppel so as to protect the 2nd respondent who would otherwise stand to lose in the absence of equitable reliefs. Lastly she submitted that the suit property is not free property of the deceased capable of being distributed among the heirs of the estate as the deceased was then not capable of further dealing in it in his lifetime as he had sold it to the 2nd respondent. Counsel sought for dismissal of the application.

17. I have considered the evidence on record as well as the submission by counsels for the administrators and 2nd respondent. It is not in dispute that the grant herein has since been confirmed and properties listed in the schedule of distribution distributed to the heirs. It is also not in dispute that the two properties namely **Plot No. 55A KIMUTWA MARKET** and Parcel of land **No. MUVUTI/KAANI/1437**, are still registered to the deceased herein. It is also not in dispute that since the year 2008, the 2nd Respondent herein has been in occupation of **Parcel of land No. MUVUTI/KAANI/1437** and has the original title pending transfer to his name. What is in contention however, is on the issue of how the 2nd Respondent came into possession of the suit land. Whereas the Applicants state on one hand that the 2nd Respondent is not legally in possession of the suit land and therefore the need for preservatory orders, the 2nd Respondent on the other hand maintains that he is legally in possession of the suit property and the original title of the same by virtue of having purchased it from the deceased and that he had fully paid the purchase consideration. It is also not in dispute that the new properties sought to be included in the grant had not been included in the schedule of distribution leading to the confirmation of the grant. I find the only issue for determination is whether the application has merit.

18. As the Applicants are seeking to introduce two new assets belonging to the estate of the deceased, the burden of proof lay upon them to discharge. Already, the respondents have raised opposition to the application on the ground that the properties belong to them and ought not to be included as part of the estate for distribution. As regards plot No 55A Kimutwa market, the applicants have presented a copy of a demand notice from the County Government of Machakos dated 10/2/2017 seeking for payment of plot land rates. However, the applicants have not availed documents of ownership such as an allotment letter or a register of plots/assets from the county government so as to leave no doubt that indeed the same belongs to the deceased. The applicants have claimed that the 1st respondent has staked a claim thereon but who has denied the same by claiming that he owns plot No.55B. The applicants have also not helped matters in that they admitted that they

did not do due diligence on the plots and further that they do not know how the deceased acquired plot No. 55A. In the absence of proof of documentary evidence on the said plot, iam satisfied that the said property cannot be treated as free property of the deceased. The applicants will have to pursue the same via the Environment and Land Court and if they succeed then the same will then be distributed by the succession court to the heirs.

19. As regards parcel number **Muvuti/Kaani/1437**, the 2nd Respondent has staked a claim thereon as he maintains that he had bought from the deceased. There are some documents which leave no doubt that the deceased had indeed sold the same to the 2nd respondent but however the transaction was not completed due to lack of a land control board consent. The 2nd Respondent's two witnesses confirmed that the deceased had indeed sold the land to the 2nd Respondent. The 2nd Respondent confirmed that the deceased did give him the original copy of the title deed which is still in his possession. The Applicants made a feeble attempt at impeaching the documents concerning the transaction and even threw another angle namely that the documents are forgeries. They have also claimed that no consent from the Land Control Board was obtained to sanction the transaction. The issue of ownership, claim, and trespass to land should now be ventilated before the Environment and Land Court which is the proper forum. The applicants who already have a grant of letters of administration have the locus to file suits before the said court and in the event of success then the properties found to belong to the deceased can be distributed to the heirs by the succession court. To that extent, I find that the applicants have failed to demonstrate that at this stage the new assets are free assets of the deceased available for distribution among the heirs. The ELC court is best placed to determine the rival claims as to ownership or otherwise of the two properties and hence this court will not delve into the same. The beneficiaries will not be prejudiced since the other assets that had been listed in the schedule of distribution have already been distributed to them upon the confirmation of grant.

20. In the result, it is my finding that the Applicants' application dated 6/7/2017 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE