



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 342 OF 2001

IN THE MATTER OF THE ESTATE OF THE LATE ERNEST KILONZO KILUU-DECEASED

JOHN WAMBUA KILONZO.....PETITIONER (DECEASED)

VERSUS

1. ESTHER KAVINDU KISAU.....1ST OBJECTOR(DECEASED)

2. BEATRICE TABITHA KENZL.....ADMINISTRATOR/APPLICANT

AND

1. SAULO KILONZO

2. KIILU KILONZO

3. NYAMAI KILONZO

4. KYUMA KILONZO

5. DANIEL MUEMA KILONZO

6. BENARD KILONZO

7. MUSYOKA KILONZO

8. MWANZIA KILONZO

9. MUTUA KILONZO

10. MUMO KILONZO

11. AGNES NDULU

12. LUKENYA RANCHING

& FARMING CO-OP SOCIETY.....RESPONDENTS

AND

PASCOLIA MWENDE MUSEMBI.....PROTESTOR

RULING

1. The deceased, **Ernest Kilonzo Kiluu Ernest Kilonzo Kiluu**, passed away on 1st April, 1991. Subsequently, **John Wambua Kilonzo** petitioned for grant of letters of administration intestate which was issued to him on 14th June, 2002. Following the death of the said Petitioner, the said grant was revoked and a fresh one issued to **Beatrice Tabitha Kenzi**, the Respondent herein, who by Summons dated 9th

March, 2019 applied for confirmation of the said grant in which she sought orders that the deceased's properties be registered in her name to hold in trust for herself and the rest of the beneficiaries.

2. However, by an affidavit of protest sworn by **Pascolia Mwende Musembi**, the 1st Protestor herein, on 23rd October, 2020, the said Summons were objected to.

3. According to the 1st Protestor, apart from the properties set out by the Respondent as forming the estate of the deceased, the Deceased herein also owned Land Parcel No. Mavoko Town Block 3/901. According to the 1st Protestor, after the confirmation of the Grant on 7th November, 2011, on 2nd October, 2014 the then Administrators sold to her the whole Land Parcel No. Mavoko Town Block 3/901. However, one of the then Administrators, **John Wambua Kilonzo** passed away on 9th June, 2016.

4. The 1st Protestor therefore took issue with the proposed mode of distribution because her interest was neither protected nor was her name captured therein. She therefore prayed that the whole Land Parcel No. Mavoko Town Block 3/901 be registered in her name.

5. This particular protest was supported by the 5th Respondent and there was no opposition to it.

6. There was also a protest by **Daniel Muema Kilonzo**, the 5th respondent and the 2nd Protestor herein. According to him, the deceased herein was his father who had three (3) families as follows:-

LEAH SYOMBUNGI KILONZO-1ST WIFE (DECEASED)

- a. John Wambua Kilonzo- Son-deceased
- b. Esther Kavind Kisau - daughter -deceased
- c. Beatrice Tabitha Kenzi- daughter
- d. Benard Mutua Kilonzo-son –deceased

NDUKU KILONZO-2ND WIFE (DECEASED)

- a. John Nzioki Kilonzo-son-deceased
- b. Mary Ngii Mutua- daughter
- c. Benard Kiilu Kilonzo-son
- d. Serah Ongai- daughter
- e. Mueni Mutua- daughter

MUNYIVA KILONZO-3RD WIFE (DECEASED)

- a. Rosemary Muinde- daughter
- b. Saulo Kilonzo-son deceased
- c. James Nyamai Kilonzo-son
- d. Regina Mbithe- daughter-deceased
- e. Josephine Nzemi Musyoki- daughter- deceased
- f. Kyuma Kilonzo-son
- g. Daniel Muema Kilonzo-son
- h. Francis Musyoka Kilonzo-son
- i. Damaris Serah Kilonzo-daughter
- j. Mwanzia Kilonzo-son

k. Boniface Mutua Kilonzo-son

l. Mumo Kilonzo

7. According to the 2nd Protestor, neither himself nor his advocates were served with the summons for revocation of grant dated 8th March, 2018 despite the knowledge that he had an advocate on record hence the orders of 27th September, 2018 were obtained fraudulently and by way of misrepresentation. It was his view that the appointment of the Respondent as the sole administrator which is prejudicial to other families because she is pursuing her own different interests hence the need to have the administrators appointed from each family to protect their interests in the estate.

8. It was his averment that the deceased had shared his properties long before his death among his sons as between the three families and no one has a problem with that although his family was disadvantaged. He averred that the grant for the estate was issued and later confirmed on 7th November, 2011 and all the properties were to be held in trust for all the male beneficiaries representing the three families and that every house was given its share of the estate and there is no dispute at all about the distribution unless the applicant has.

9. The 2nd Protestor averred that what has been happening is that the applicant has been fighting with his brothers over the share due to the 1st family where she comes from. Since the dispute is between the applicant and her 1st family, all other beneficiaries should be discharged and the applicants to proceed with the case only against the share due to the 1st family.

10. According to the 2nd Protestor, the deceased left behind the following properties:-

a. Lukenya Ranching Cooperative society member no. 455

b. Mavoko Town block 3/2276

c. Land parcel no. 685-Lukenya

d. Land parcel no. 239-Lukenya

e. Mavoko Town block 3/901

f. Land parcel no. Mumbuni/Kasinga/ 1522

g. Land parcel no. Mumbuni/Kasinga/ 1573

h. Land parcel no. Mumbuni/Kasinga/ 2010

11. He averred that the estate was shared as follows:-

a. Mavoko Town block 3/2276- Lukenya which measures 40 acres was shared equally between the three families

b. Land parcel no. 685- the deceased had sold it during his life time.

c. Land parcel no. 239-Lukenya which measures 20 acres was shared equally between the three families

d. Mavoko Town block 3/901 which measures 50 feet by 100 feet was sold by the initial administrators after confirmation of grant to **Pascolia Mwende Musembi** on **2nd October, 2014** and he had no claim over it.

e. Land parcel no. Mumbuni/Kasinga/ 1522 the 1st and 3rd houses have settled and utilize it.

f. Land parcel no. Mumbuni/Kasinga/ 1573 the 1st and 3rd houses have settled and utilize it.

g. Land parcel no. Mumbuni/Kasinga/ 2010 the 2nd house has settled and utilize it.

12. It was his view that the mode of distribution proposed by the Respondent who comes from the 1st family will cause serious chaos in the family and would go against the wishes and the subdivisions done by the deceased. In his view, should the estate be shared amongst the children of the deceased, it is his 3rd house which will benefit because they are twelve (12) in number, the 1st house where the applicant comes from has only four (4) children while the 2nd family has five (5) children. However, his house is ready to take the les share on condition that the applicant respects the wishes of the deceased sharing the estate between the three houses. However, if the wishes of the deceased will be interfered with, then the estate be shared between all the children of the deceased.

13. He confirmed that after confirmation of grant the initial administrators sold Mavoko Town block 3/901 which measures 50 feet by 100 feet to **Pascolia Mwende Musembi** on 2nd October, 2014 and he has no claim over it.

14. It was his case that the application is thus brought in bad faith, meant to create disharmony between the three families, lacks merit and should be dismissed and the applicant to follow the share due to the 1st family where she comes from.

Determination

15. I have considered the issues raised in this protest. Section 93(1) and (2) of *The Law of Succession Act* provides that:

1. A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whose representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the Grant either before or after the commencement of this Act.

2. A Transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the Deceased have not been discharged nor provided for.

16. In this case the 1st Protestor has exhibited a copy of the agreement entered into between herself and the then Administrator, **John Wambua Kilonzo** by which the Administrator agreed to sell to the 1st Protestor Land Parcel No. Mavoko Town Block 3/901 in the sum of Kshs 500,000/-. According to the said agreement dated 2nd October, 2014, the 1st Protestor paid a sum of Kshs 350,000/- being deposit with the balance thereof being payable on 15th November, 2014. Dated 1st August, 2011 which shows that the said parcel was registered in the name of **Ernest Kilonzo Kiluu**.

17. It is clear that the 1st Protestor has interest in the said parcel of land. **Mabeya, J In Re Estate of Nchebere Gaua(Deceased) [2019] eKLR** expressed himself as follows:

“It was submitted for the Interested Party that he purchased the property three years after the Confirmation of the Grant on 12/8/2006. He is an innocent purchaser for value who should be protected under Section 93 of The Law of Succession Act...As regards the Interested Party, he contended that he bought the subject property 3 years after the Grant was confirmed. He produced a Sale Agreement dated 12/08/2016 for the purchase of the initial 5 Acres. He also produced a Sale Agreement for the subsequent purchase of 1 Acre on 21/3/2018. The total consideration was Kshs. 5,900,000/=. Accordingly, there was consideration in respect of the purchase of the total acreage of 6 Acres...The Grant was issued to the Petitioner on 2/5/2012 and was subsequently confirmed on 19/12/2013. It is clear that, the purchase of the subject property was not a hurried event as contended by the Applicant. There was a clear lapse of nearly 3 years from the date of Confirmation and the date of sale.”

18. In arriving at the said decision the Learned Judge cited the decision of the Court of Appeal in **Kaumbuthi Mathiu vs. John Mwirigi Mathiu & Another** in which it was held that:-

“During the hearing of this Appeal, it was submitted that the suit property had been transferred to the Interested Party. Section 93 of The Succession Act provides that a transfer of any interest in immovable or movable property made to a purchaser by a person whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the Grant. In the instant case, it is our considered view that the transfer of the suit property to the Interested Party is valid and protected by Section 93 of The Law of Succession Act and the Appellant has no remedy against the Interested Party and the suit property.”

19. Based on the evidence on record, I find that the 1st Protestor herein, **Pascolia Mwende Musembi**, has demonstrated that she acquired interest in the suit property. Accordingly, I allow the protest and direct that bought the suit property, **Land Parcel No. Mavoko Town Block 3/901**, be registered in the name of the Protestor upon proof of payment of the balance of the purchase price of Kshs 150,000/-.

20. As regards the Protest by the 2nd Protestor, the 5th Respondent, the same is similarly unopposed. The reason for seeking revocation of the earlier grant was the death of the then Administrator, **John Wambua Kilonzo**. Although some protests had been filed, those protests were never prosecuted. Since the 2nd protest has not been opposed, I find it merited and allow the same. Consequently, save for what I have stated as regards the 1st Protestor's interest, the Grant herein shall remain as confirmed on 7th January, 2011 with liberty to apply for the substitution of **John Wambua Kilonzo**.

21. There will be no order as to costs.

22. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 19TH DAY OF OCTOBER, 2021.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for the 5th Respondent

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