



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 288 OF 1999

IN THE MATTER OF THE ESTATE OF KIMILU NZAU KIVATI (DECEASED)

DAVID MUMO NDAMBUKI.....ADMINISTRATOR

VERSUS

HENRY MUTISYA KATULA.....RESPONDENT

JOSEPH MUSYOKA MWAMISI &

MARY WANGUI MUSYOKA.....APPLICANTS/INTENDED INTERESTED PARTIES

RULING

1. By a Notice of Motion dated 30th August, 2016, the Respondent/Applicant herein seeks substantially an order of this court to interpret the ruling delivered herein on 23rd May, 2014 and that the Court orders a survey and proper demarcation of the boundaries of LR No. Machakos/Kiandani/3682 including the adjacent roads thereto.
2. According to the Applicants they are spouses and co-owners of a portion of the suit property. They stated that they are beneficiaries of the estate of the deceased and **Joseph Musyoka Mwamisi** is listed as such in the Confirmed Grant hence they have a legitimate interest in the matter. The applicant averred that they are lawful purchasers for value of a portion of the suit property having purchased the same from the beneficiaries with the consent of the Administrator. However, they are yet to obtain the title thereto as the process of Administration was stalled by the Respondent's application of placing a restriction on the suit property. They were however allowed possession of the suit property by the estate of the deceased after payment but prior to the said restrictions being placed.
3. The applicants disclosed that they have farmed the property numerous over various seasons and have even planted trees thereon both fruits and aesthetic some of which have matured. Despite the foregoing on 15th August, 2016 the Respondent unlawfully, forcefully and without any colour of right trespassed onto the said property accompanied by various persons among them the surveyor and took measurements of the same without the applicants' consent, approval or knowledge. As a result, the said action was reported to the police and is under investigations. The applicant averred that based on their information the Respondent had commenced the process of having the said property illegally surveyed and transferred to himself and upon inquiring from the Respondent, the Respondent stated that he was merely enforcing the decision of the court made on 23rd May, 2014. The Applicants however contended that the court cannot by its decision perpetuate an illegality.
4. According to the Applicants in the affidavit sworn by the Respondent which led to the said ruling, the Respondent disclosed that there were vacant parcels of land in the suit property hence the applicants were unable to understand the reason why the Respondent seeks to excise the applicant's property. The applicants averred that based on information sought and received by the Respondent from the Ministry of Lands the suit property measures 1.69 ha after hiving off what has been sold to the applicants and the order extracted from the said ruling purports that the respondent should excise a portion measuring 0.5 ha less what he had sold to one **Harrison Mulela**.
5. The Applicants were however quick to clarify that they were not opposed to the order or were challenging it but were only seeking its interpretation regarding the exact size of the said **Mulela's** property to be included in the Respondent's 0.5 ha, where exactly the portion was to be excised and whether the order permitted the Respondent to trespass onto the Applicants' property.
6. To the applicants since they were not party to the consent decision, they were unaware of it till the said trespass was committed.

7. In response to the application, the Respondent averred that he exchanged a portion of his land 2.4 acres at Katelembo with the late **Kimuli Kivati** for 2 acres of his land Machakos/Kiandani/3682 in an agreement that is not disputed and thereafter sold 2 quarter acre plots to the applicants. When the family of the deceased herein applied for letters of administration both himself and the applicants were included as beneficiaries since they were purchasers for value and the applicants were issued with the portion they bought from the Respondent but before the grant could be confirmed and distribution effected the applicants started buying the remaining portion from other beneficiaries even though by then no one had the authority to dispose of the estate without the consent of the other beneficiaries. As a result, the Respondent did not get his portion of land compelling him to move the court for appropriate orders and an order was issued that he gets his portion from part of the deceased's land.

8. It was therefore the Respondent's position that the Applicants can only benefit to the extent of the portion which he sold to them and cannot force the Administrator to give him portion which was purportedly sold to him by other beneficiaries before the subdivision and distribution of the estate. In his view, the Applicants' only remedy is for damages against the seller and not against the administrator since at the time of the alleged sale by the beneficiaries, none of them had titles which they could sell to the applicants hence the applicants have no cause of action either against the Respondent or the Administrator of the estate.

9. The Respondent insisted that since he had an agreement with the deceased, the deceased's liability to him had to be taken care of and be met first.

10. In his response, the Administrator stated that both the Respondent and the Applicants were included as beneficiaries of the estate of the deceased being purchasers for value. According to him, the Respondent's claim is based on an exchange of land between him and the deceased while the applicants' claim is based on purchase of the Respondent's portion. However, the Applicants went ahead and purchased additional portions from other beneficiaries before the distribution and before the Respondent could be given his portion. As a result, the Respondent sensing that he could not get his portion moved to court seeking an order that his portion be given to him before any other transaction on the land could be permitted.

11. According to the Administrator he did not sanction the further purchases by the Applicants from the beneficiaries hence the applicants' cause of action is against the seller. It was therefore his position that the applicants could only benefit to the extent of the portion he bought from the Respondent and cannot compel the Administrator to give him a portion which was purportedly sold to him by a beneficiary before the distribution of the estate. The administrator stated that the applicants' claim is not part of what was given to them as per the certificate of confirmation hence the application ought to be dismissed with costs.

12. There was also an affidavit sworn by one **Ndolo Musyoka** who averred that he was a grandson of the deceased hence was a beneficiary to the estate. He confirmed that having procured the consent of the administrator, he together with his father and other siblings sold a portion of the suit property to the applicants for which payment was paid in full after which they allowed the applicants to take possession thereof. According to him, the court ordered the 0.5 ha of the suit property be transferred to the Respondent less what he had sold to one **Harrison Muhoka Mulela**. It was therefore his position that it would be prudent for the court in interpreting its said order to also advise as to whether the portions including that sold to **Harrison Mulela**, and that which the Respondent currently resides on. He urged the court to determine the sizes of the said portions and whether the said portions sold by the Respondent are hived from the 0.5 ha.

Determination

13. I have considered the issues raised in this application.

14. The current application is the subject of the ruling delivered on 23rd May, 2014. By that ruling the applicant therein, **Mutisya Katula**, the Respondent herein was seeking orders that the court directs the Machakos District Surveyor to excise from Land Parcel No. Machakos/Kiandani/3682 a portion measuring 0.5 hectares in compliance with the consent order entered by the parties herein and recorded on 29th September, 2008. It was also sought that the respondent therein, the Administrator, be directed to sign all the documents required to effect the transfer of the excised portion and to obtain the Land Control Board consents for the said purpose and in default the Deputy Registrar to execute the said documents. After considering the application, the court issued the said orders.

15. What provoked the said application was a consent order recorded before **Lenaola, J** (as he then was) on 29th September, 2008, in which he expressed himself as hereunder:

“The application dated 24th November 2004 be allowed in the following terms:

- a. The petitioner herein do transfer to the applicant 0.5 hectares out of Machakos/Kiandani/3682;**
- b. The said 0.5 hectares includes that portion that had already been sold by the applicant to one Harrison Muthoka Mulela,**
- c. The restriction registered against the said properties be and are hereby lifted on condition that order 1 above is effected,**
- d. Each party to bear its own costs.”**

16. It is important to emphasise that in this application the applicants are seeking that this court to interpret the ruling delivered herein on 23rd May, 2014 and that the Court orders a survey and proper demarcation of the boundaries of LR No. Machakos/Kiandani/3682 including the adjacent roads thereto. In other words, the consent order issued by **Lenaola, J** is not the subject of this ruling. The ruling of 23rd May, 2014 was delivered by **Mutende, J** and as indicated above she in effect issue an order that the Machakos District Surveyor to excise from

Land Parcel No. Machakos/Kiandani/3682 the portion measuring 0.5 ha in accordance with the said consent order. That was substantially what was being sought. The other order was simply effectuating the same. As stated above the consent order was directing the Administrator herein to transfer to the applicant, the Respondent herein, hectares out of Machakos/Kiandani/3682 and so doing to ensure that the said 0.5 hectares includes the portion that the applicant sold to one **Harrison Muthoka Mulela**. In other words, the 0.5 hectares that the Respondent herein was entitled to pursuant to the said consent was inclusive of **Harrison Muthoka Mulela's** portion sold to him by the Respondent.

17. The Certificate of Confirmation issued herein sets out the mode of distribution of the Estate of the deceased. As long as the estate is being distributed in accordance therewith no one ought to complain unless that confirmation is set aside. It is however desirable that in carrying out the process of demarcation, persons who are in occupation of the suit property should retain the portion they occupy as long as what they occupy is not more than what is indicated in the certificate of confirmation. Where a person has purported to purchase a portion thereof other than in accordance with the law, that person can only lay his claim against the person from whom he purported to purchase the same either by laying a claim in damages or by seeking a transfer of that other person's entitlement to the estate once the distribution is completed.

18. Save for the foregoing, it is my view that the ruling of 23rd May, 2014 was very clear in its terms and does not brook of any ambiguity hence does not require any interpretation.

19. Save for the foregoing the instant application is dismissed but with no order as to costs.

20. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey