



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 6 OF 1992

IN THE MATTER OF THE ESTATE OF THE LATE NZIOKA WAMBUA (DECEASED)

PAUL ITOTIA DAVID.....1ST ADMINISTRATOR/APPLICANT

VERSUS

MUTHIO NZIOKA.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. By a Summons dated 22nd March, 2019, the applicant herein seeks the orders to the effect that the Court be pleased to annul or otherwise cancel the titles of **Muthio Nzioka** – the 2nd administrator herein – to LR No. Mavoko Town/Block 2/104 and LR No. Mavoko Town/Block 2/3 and to order the County Land Registrar Machakos to register the said parcels in the joint names of the Administrators herein, **Paul Itotia David** and **Muthio Nzioka**.

2. The applicant's case in summary is that he is a grandson of the deceased herein and the 1st Administrator of the deceased's estate having become an administrator following the death of his grandmother, **Mbatha Nzinga Nzioka**, who was a widow to the deceased and one of the joint administrators of the deceased's estate. The 2nd Administrator who is the Respondent in the application, it was averred is the deceased's surviving widow.

3. According to the Applicant, the deceased died on 27th March, 1988 leaving, inter alia, the following assets as part of his estate:

i. Mavoko Town/Block 2/03

ii. Mavoko Town/Block 2/104

iii. Mavoko Town/Block 1/2272

iv. Mavoko Town/Block 1/2088

v. Mavoko Town/Block 1/2316

vi. Mavoko Town/Block 1/2392

vii. Mitaboni/Ngelani/2916

viii. Mitaboni/Mitaboni/3038

ix. Mitaboni/Mitaboni/401

4. It was deposed that following the death of the deceased, on 3rd June, 1985, his family convened a meeting to determine his properties and their mode of distribution to his survivors. At the said family meeting, the assets of the deceased and their mode of distribution was agreed.

5. It was averred that on 9th January, 1992 the Respondent filed Succession Cause No 5 of 1992 in which she listed the following properties as the assets of the deceased:

- i. Mitaboni/Ngelani/2916
- ii. Mitaboni/Mitaboni/3038
- iii. Mitaboni/Mitaboni/401
- iv. Mitaboni Katani Company Ltd (Shares No. 002012 and 001003 held by the deceased).

6. On 13th January, 1992 the original 1st Administrator, **Mbatha Nzinga Nzioka**, also filed Succession Cause No. 6 of 1992 and listed the following properties as the deceased's assets:

- i. *Mavoko Town/Block 2/03*
- ii. *Mavoko Town/Block 2/104*
- iii. *Mavoko Town/Block 1/2272*
- iv. *Mavoko Town/Block 1/2088*
- v. *Mavoko Town/Block 1/2316*
- vi. *Mavoko Town/Block 1/2392*

7. The said two succession causes were subsequently consolidated by the Court under the instant file.

8. It was averred that the issue whether **Muthio Nzioka** was the wife of the deceased was settled vide a ruling delivered by **Mwera, J** (as he then was) on 19th May, 1999 in which ruling the learned Judge observed that following the demise of the deceased herein, the 2nd Administrator/Respondent (**Muthio Nzioka**) presented herself to Mitaboni Katani Co. Ltd In 1991 and 1992 as the deceased's sole wife, pursuant to which two parcels of land namely LR No. Mavoko Toen/Block 2/104 and LR No. Mavoko Town/Block 2/3 were registered in her name instead of the estate and title issued in her name on 20th October, 1991 which was a public holiday. As a result, the then 1st Administrator, **Mbatha Nzioka**, upon being aware of the same, caused a restriction to be registered against the two titles. It was averred by the applicant that the presentation book for Machakos District Land Registry shows that on 19th, 20th and 21st October, 1991 no transfer of titles was effected in favour of any person given that none of those days was a working day. It was further averred that the Respondent's contention that she was issued with a Title Deed on 19th February, 1992 for LR No. Mavoko Town/Block 2/3 is equally false because whereas on the said date Mitaboni Katani Co. Ltd transferred numerous title documents none of those related to the Respondent. It was the applicant's position that the list of plot owners for Machakos Town Block 2 clearly shows that the deceased had four plots allocated to him which was on account of his ownership of land parcels No. Mavoko Town Block 2/104 and Mavoko Town/Block 2/3.

9. The Applicant therefore asserted that the Respondent has fraudulently registered the properties of the deceased as hers purporting to be a member of Mitaboni Katani Co. Ltd and was issued with share Certificate No. 49 while the truth is that the Respondent was not a member of the said company and the said Certificate is a forgery and her name does not appear in the list of the Company's members registered as at 1st May, 1979. It was averred that besides the said forged certificate, the Respondent has no documentary evidence of any dealings with Mitaboni Katani Co. Ltd and that on the contrary the available records show that even after his demise the deceased was represented by his son **Nzioki Mboya** during the AGM of members only held on 22nd October, 1994.

10. It was further disclosed that the Respondent's ownership of the aforementioned properties was subjected to criminal investigations by the Land Fraud Unit of the DCI that culminated in her being charged at the Machakos CM's Criminal Case No. 265 of 2018 – **Republic vs. Muthio Nzioka**.

11. Based on the foregoing the Applicant believed that the contested properties belonged to the deceased and ought to revert to the estate to enable all the beneficiaries to receive their fair share of the deceased's assets.

12. The contentions of the Applicant as regards the manner in which the respondent registered herself as the owner of the said parcels was confirmed by an affidavit sworn by one **Joseph Mutua Muinde**, a former Chairman of Mitaboni Katani Company Limited.

13. In response to the application, the Respondent averred that she became a member and shareholder of Mitaboni/Katani Company Limited on 17th June, 1979 and paid Kshs 5,000/- and was issued with Share Certificate No. 49 in respect of 300 shares which was Certificate was signed by the then Directors of the Company. It was her position that she used to send the deceased to represent her in the Company meetings who used to collect her dues that members were to get. She explained that following the change in the Board of Directors the old Board members declined to hand over the Register of the members to the new members and following the restructuring of the membership list she was registered as owner of plot no. 3. According to her the list relied on by the applicant as the members list was a list of members who were getting transport allowance back home. According to her the later **Wambua Nzioka** was not a member and to her, she was the only member of the company hence the shares of the company belong to her and not to her deceased husband.

14. According to the Respondent, the Applicant has no basis to inherit the property of the deceased since their mother only had a life interest in the Estate of the Deceased and following her death the grandchildren cannot claim the property of the deceased since they are not dependants of the deceased.

15. The Respondent therefore refuted the allegations made against her and contended that the said criminal charges levelled against her cannot be the basis for depriving her of her property since the same are yet to be determined.

16. In support of his case the Applicant relied on the case of **Munyasya Mulili & 3 others vs. Sammy Muteti Mulili [2017] eKLR** where the court relied on the decision in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** and section 80 (1) of the ***Land Registration Act***.

17. In this regard, the Applicant contended that they had demonstrated that the Respondent herein through fraud deliberately intermeddled with the property of the deceased by portraying herself as the sole wife of the deceased with the aim of causing the six parcels of land aforementioned to be registered in her name, effectively disinheriting the Applicant herein and the beneficiaries of the 1st house. As a result of the Respondent's underhand tactics the Title Deed for L.R. No. Mavoko Town/Block 2/104 was issued on 20th October, 1991 which was a public holiday when the land's office was certainly not working.

18. In view of the foregoing, it was submitted that the Title Deed for L.R. No. Mavoko Town/Block 2/3 supposedly issued on 19th February, 1992 is equally surrounded by a series of fraudulent actions by the Respondent and as a result ought to be cancelled and registered in the joint names of the Administrators herein.

19. Considering that the signatures of the land registrar on the Title Deeds for L.R. No. Mavoko Town/Block 2/3 and L.R. No. Mavoko Town/Block 2/3 were found by a certified document examiner to be forged it was contended that it is in the best interest of the deceased's estate that the aforementioned titles be cancelled and the same be registered in the joint names of the Applicant and Respondent being the Administrators of the deceased's estate or in the alternative the same be registered in the name of the deceased's estate. The Applicant cited the case of in **Re Estate of Mutugi Mbutii (Deceased) [2018] eKLR**.

20. In this regard it was submitted that the balance of convenience tilts in favour of this Honourable Court exercising its inherent jurisdiction to preserve the deceased's property by granting a temporary injunction to restrain the Application as prayed by the Applicant bearing in mind that the Respondent has already fraudulently transferred L.R. No. Mavoko Town/Block 2/3 and L.R. No. Mavoko Town/Block 2/3 to her name during the pendency of these proceedings and if the Respondent, her agents and/or successors in title would dispose of the same, the unfortunate consequential effect would be to deny the Applicant and the 1st house their rightful inheritance. The Applicant therefore prayed that this Court grants the orders sought in the Summons dated 22nd March, 2019.

21. On behalf of the Respondent, it was submitted that I the prayers sought by the 1st administrator for annulment or otherwise cancellation of the Title Deeds L.R 104 and Block 2/3 and the two Titles to be registered in the joint names of the Administrators and Adminstratix have no merits and should be dismissed with costs. According to the Respondent, evidence has been presented to the Court to show that the two parcels were created between 1991 and 1992. There is nothing to show before the late **Wambua Nzioka** died in 1998 the two parcels of land stated by the 1st Administrator were in place. There is nothing to show the properties cited by the 1st Administrator were in place as the time of death of the Deceased. There are no certificates of Titles that have been shown to the Court to this effect. Further the Ruling of **Justice Mwera** did not state that the above-named parcels of land were in the names of **Wambua Nzioka** since the parcels of land had been created on the ground.

22. It was further submitted that the 2nd Administrator has clearly shown her share certificate of Mitaboni Katani Co. Ltd and by virtue of the membership she was entitled to parcels of land that were given to her. In addition, the Respondent submitted that there is evidence to show that the Chairman of the said Company Mitaboni Katani Co. Ltd wrote two contradiction letters which were certified by **Francis Mulwa Advocate** to be correct and another letter was written by the same Chairman to say the parcels of land belonged to her husband the late **Wambua Nzioka**. This issue is not proved by the 1st Administrator. As regards when the parcels registered and Title Deed issued and when it was issued it was contended that it cannot be called fraudulent if the Title Deed were shown to have been prepared on 20/10/1991 on the part of the 2nd Adminstratix who does not know how to read and write. The Respondent submitted that she does not keep or never kept Governments records what is alleged to be fraud cannot be attributed to her since she does not know how to read and write.

23. As regards the opinion of the document examiner her position was that the Court must still make its own conclusion and Courts should not abdicate its duty for decision making to experts. Therefore, the Court should take the view that expert opinion is only opinion and it cannot take the place of substantive evidence. The Court has to decide the issue upon such assistance as the expert may offer but it should not abdicate its role of opinion making to the expert called before it. It must form its own opinion on the subject matter at hand. According to her, the allegation of fraud or forgery has not been proved against her and the expert has not given evidence and has not been cross-examination on the documents.

24. The Court was therefore urged to dismiss the Application with costs to the 2nd Administrator/Respondent.

Determination

25. I have considered the foregoing. It is clear that the instant application is based on the allegation that the Respondent forged the documents that were used by her in facilitating her registration as the proprietor of the subject parcels of land. In **Rosemary Wanjiku Murithi vs. George Maina Ndinwa (2014) eKLR**, the Court held that proof of fraud involves questions of fact. I agree with the holding **In the Matter of the Estate of P. W. M – Deceased [2013] eKLR** that:

“It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently; consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud.”

26. In this case the Applicant’s case is that the Respondent fraudulently caused herself to be registered as the proprietor of the parcels of lands which belonged to the estate of the deceased. The Respondent on the other hand argues that the said parcels of lands were hers and she was the one who acquired them from the company. I agree with the holding in the case of Munyasya Mulili & 3 Others vs. Sammy Muteti Mulili [2017] eKLR, that:

“...no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased’s properties before confirmation of grant whether by way registration of title, or sale is thus liable to revocation pursuant to the powers granted to this Court by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.”

27. However, in this case, this court has to determine the time when the Respondent acquired title to the subject parcels. That is not an issue that can be determined by way of affidavits but in light of the disputed factual averments requires viva voce evidence subjected to cross-examination.

28. I also agree in principle with the holding in In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR that, that:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

29. However, section 3 of the *Law of Succession Act*, “estate” means “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated. For this Court to nullify the titles in question it must therefore as a condition precedent find that the said titles were the free property of the deceased and therefore formed part of his estate. I am however unable to do so based on the pleadings before me.

30. In my view, the issues regarding the manner in which the Respondent acquired the said properties ought to properly be dealt with by the Environment and Land Court. In determining what order to make I am guided by the position adopted in In re estate of P N N (Deceased) [2017] eKLR, where it was held that:

“According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”

31. Consequently, while I disallow the application herein I direct that the status quo regarding the said parcels shall be maintained for a period of 45 days to give the Applicant herein a window to ventilate his interest before the Environment and Land Court.

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

33. It is so ordered.

Read, signed and delivered in open Court at Machakos this 28th 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 Josephine