



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A. NO. 218 OF 2017

ESTATE OF KIOKO KITUVYA MAILU (DECEASED)

AGNES KAVINDU KISILU PETITIONER

-VERSUS-

STEPHEN KIVEVO 1ST PROTESTOR

COSMAS KIILU KIVEVO 2ND PROTESTOR

RULING

1. This matter is dealing with 3 objections/protests lodged by protestors dated 09/03/2017.
2. The respondents replied via affidavits sworn and filed on 08/08/2018.
3. Directions were given by court that the 3 files be consolidated and protests do proceed by way of viva voce evidence and parties were directed to file their respective witness statements.
4. After matter was heard via viva voce evidence, the parties agreed to file and exchange written submissions which they did.

PROTESTORS SUBMISSIONS

5. The protestors submit that, under section 3(1) of the Law of Succession Cap 160 Laws of Kenya an estate is defined as follows; **“the free property of a deceased person.”**
6. The question that then arises is, does the title No. Makueni/Kakusi/1091 form part of the deceased persons’ estate?
7. It is submitted that, It is an undisputed fact that the property title No. Makueni/Kikusi/1091 is registered in the name of Kivevo Kiilu and this is supported by a title deed bearing the name of Kivevo Kiilu as the registered proprietor with indefeasible rights. Under section 25 (1) of the Land Registration Act No. 3 the rights of a proprietor are indefeasible except as provided under the Act.
8. Section 25(1) provides:-

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever but subject to:-

a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and

b) To such liabilities, rights and interest as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

9. Under section 26 the certificate of title is prima facie evidence of ownership and cannot be challenged except on grounds of fraud or where it is shown the title has been acquired illegally, unprocedurally or through corruption.
10. Section 26(1) provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by a proprietor shall be taken all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easement, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

11. It is contended that, evidence by Gideon Kiilu, the brother to Kivevo Kiilu is to the effect that, the original property title No. Kiteta/Kakuswi/459 measuring 11.2 hectares was owned by his grandfather Ndei Kitonga who upon his death left the property to Kitonga Ilenge (an uncle) and Kiilu Mutua (his father) who passed away in 1970 and his share of the property was left to his children.
12. His brother Kivevo Kiilu who was the eldest son of Kiilu Mutua and Kitonga Ilenge supposedly sold this property to three brothers namely Kioko Katuvya, Musembi Katuvya and Munyao Katuvya (the deceased persons in these succession caused) for Twenty Six Thousand Kenya Shillings (Kshs. 26,000.00). The money was paid to Kitonga Ilenge but was never sheared with Kiilu Kivevo.
13. This led to the filing of a series of cases which went all the way to the Ministers Appeal and by his judgment dated 20th December, 1985 ordered that the property be divided into two equal parts with one half awarded to Kivevo Kiilu.
14. He produced a copy of this judgement setting out the final orders together with the certificate of title for the property title No. Makueni/Kakusi/1091 in the name of Kivevo Kiilu and an extract from the original title No. Kiteta/Kakuswi/459 which clearly indicated that “parcel No. 459 subdivided to create plot No. 1091 vide Minister’s Appeal.”
15. He further testified that no appeal had been preferred against the Minister’s orders and that followed up for many years amidst disputes with the Katuvya family before the registrar finally lifted the restriction on the property title No. Kiteta/Kakuswi/459 and issued a certificate of title for property title No. Makueni/Kakusi/1091 in the name of Kivevo Kiilu on 11th July, 2007.
16. It is contended that, the removal of the restriction and the issuance of the new title were carried out by the registrar and did not in any way have to involve Katuvya brothers since they were carried out pursuant to the Minister’s orders and not by consent. It is therefore immaterial that they were done after their death.
17. Further it is submitted that, in any event, if there’s any dispute as to the ownership of the property title No. Makueni/Kakusi/1091, this court lacks the proper jurisdiction to adjudicate that dispute. In **real Estate of Mbai Wainaina (Deceased)[2015] eKLR** Musyoka J. stated that;

“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

18. Gideon Kiilu testified that the Petitioners did file a suit against Kivevo Kiilu in Machakos Civil Suit No. 69 of 2004 but eventually withdrew the suit.

PETITIONERS SUBMISSIONS

19. The Petitioners submit that, it is not indispute that land title No. Kiteta/Kakuswi/1091 would only have been formed after being hived from land title No. Kiteta/Kakuswi/1091 which is currently registered in the name of Kivevo Kiilu (also deceased).
20. It is contended that the said Kivevo Kiilu is/or was not the undisputed owner of land title number Kiteta/Kakuswi/1091. His ownership is disputed as demonstrated herein below.
21. The abstract of title for land title No. Kiteta/Kakuswi/459 confirms that;

On 06/07/1084, the land initially measuring 11.2 acres was registered in the joint names of the three deceased parties herein to whom the estates relate.

On the same date, (06/07/1084) a restriction was entered until the appeal before the Minister had been finalized.

On 11/07/2007, the above restriction was removed and,

The land register was amended to reflect plot No. 1091 vide minister’s appeal.

22. A copy of Minister’s appeal proceedings, findings, judgment and order filed by the protestors confirm that the minister’s verdict was

delivered on 20th December 1985 and pursuant to the same, the restriction placed on land title No. Kiteta/Kakuswi/459 was removed on 11/07/2007 which in essence would pave way for creation of the said Plot No. 1091.

23. The protestor/Objector in his list of documents filed a copy of title for title No. Kiteta/Kakuswi/1091 which confirms that the title was registered in the name of Kivevo Kiilu on 06/07/1084.

24. It is submitted that on the face of record, the registration is an outright fraud in that it was on the same date that a restriction had been placed on land title No. Kiteta/Kakuswi/459 in that no dealings were to be done on the title until the appeal before the minister had been finalized.

25. Again, 06/07/1984 was long before the judgment of the Minister was delivered on 20/12/1985. It thus follows that such registration of 06/07/1084 could not have flawed from the decision of the appeal to the Minister. The excision and registration of title number 1091 on 06/07/1084 was plainly and obviously irregular and of no effect.

ISSUES

26. After going through the affidavits, statements and evidence tendered, I find the issues are:

- ***Whether LR No. Kiteta/Kakuswi/1091 forms part and/or ought to form part of estates of the deceased;***

Kioko Katuvya Mailu,

Musembi Katuvya Mailu and

Munyao Katuvya Mailu?

- ***What is the order as to cost?***

ANALYSIS AND DETERMINATION

27. The protestor case is briefly that, Gideon Kiilu, the brother to Kivevo Kiilu testified in court giving a history of the property. He testified that the original property title No. Kiteta/Kakuswi/459 measuring 11.2 hectares was owned by his grandfather Ndei Kitonga who upon his death left the property to Kitonga Ilenge (an uncle) and Kiilu Mutua (his father).

28. Kiilu Mutua passed away in 1970 and his share of the property was left to his children. His brother Kivevo Kiilu who was the eldest son of Kiilu Mutua and Kitonga Ilenge supposedly sold this property to three brothers namely Kioko Katuvya, Musembi Katuvya and Munyao Katuvya (the deceased persons in these succession caused) for Twenty Six Thousand Kenya Shillings (Kshs. 26,000.00).

29. The money was paid to Kitonga Ilenge but was never shared with Kiilu Kivevo. This led to the filing of a series of cases which went all the way to the Ministers Appeal and by his judgment dated 20th December, 1985 ordered that the property be divided into two equal parts with one half awarded to Kivevo Kiilu.

30. He produced a copy of this judgement setting out the final orders together with the certificate of title for the property title No. Makueni/Kakusi/1091 in the name of Kivevo Kiilu and an extract from the original title No. Kiteta/Kakuswi/459 which clearly indicated that "parcel No. 459 subdivided to create plot No. 1091 vide Minister's Appeal."

31. He further testified that no appeal had been preferred against the Minister's orders and that followed up for many years amidst disputes with the Katuvya family before the registrar finally lifted the restriction on the property title No. Kiteta/Kakuswi/459 and issued a certificate of title for property title No. Makueni/Kakusi/1091 in the name of Kivevo Kiilu on 11th July, 2007.

32. On the other hand, Petitioners' case briefly is that, the abstract of title for land title No. Kiteta/Kakuswi/459 confirms that, on 06/07/1084, the land initially measuring 11.2 acres was registered in the joint names of the three deceased parties herein to whom the estates relate.

33. On the same date, (06/07/1084) a restriction was entered until the appeal before the Minister had been finalized. On 11/07/2007, the above restriction was removed and, the land register was amended to reflect Plot No. 1091 vide minister's appeal.

34. A copy of Minister's appeal proceedings, findings, judgment and order filed by the protestors confirm that the minister's verdict was delivered on 20th December 1985 and pursuant to the same, the restriction placed on land title No. Kiteta/Kakuswi/459 was removed on 11/07/2007 which in has paved the way for creation of the said Plot No. 1091.

35. The protestor/Objector in his list of documents filed a copy of title for title No. Kiteta/Kakuswi/1091 which confirms that the title was registered in the name of Kivevo Kiilu on 06/07/1084.

36. **Section 3(1) of the Law of Succession Cap 160 Laws of Kenya** defines an estate as follows; **"the free property of a deceased person."**

37. In the case of **REAL ESTATE OF MBAI WAINAINA (DECEASED)[2015] eKLR** the court stated that;

“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

38. The Petitioners claim that the certificate of title for property title No. Makueni/Kakusi/1091 was irregularly issued since the same was done after the death of the Katuvya brothers. The validity of the title subject herein can only be impeached in the proceedings in the Environment and Land Court as this court has no jurisdiction to determine the issue as to the ownership of the land under art 165 (2) of the constitution.

39. Thus the protests herein succeed to that extent. The Petitioners will be at liberty to initiate proceedings to impeach title subject herein in ELC court.

40. Thus the court makes the orders;

a) LR No. Kiteta/Kakuswi/1091 does not form part and/or ought to form part of estates of the deceased; Kioko Katuvya Mailu, Musembi Katuvya Mailu and Munyao Katuvya Mailu.

b) No order as to costs.

DATED, DELIVERED, SIGNED THIS 24TH DAY OF JANUARY, 2019, IN OPEN COURT.

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HON. C. KARIUKI

JUDGE