



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 376 OF 2006**

**IN THE MATTER OF THE ESTATE OF SAMUEL KAVILA KATINDA (DECEASED)**

**JOSEPH MUNYAO KAVILA.....APPLICANT**

**VERSUS**

**FRANCIS KIOKO KAVILA**

**SOLOMON MUSYIMI.....RESPONDENTS**

**RULING**

1. By a Summons for Rectification of Grant dated 28<sup>th</sup> August, 2017, the Applicant herein, who is an administrator of the estate of the deceased, seeks that the Certificate of Grant made to them on 23<sup>rd</sup> February, 2009 and issued on 24<sup>th</sup> February, 2009 be rectified and/or amended by deleting or removing therefrom Land Parcel Nos Mitaboni/Mutituni/1895 and Katelembo Plot. 5 on the ground that they do not belong to the deceased.

2. According to the Applicant, by error they included the said properties yet Land Parcel Nos Mitaboni/Mutituni/1895 belongs to the deponent's brother while Katelembo Plot. 5 does not exist. The Applicant therefore averred that it is only fair that the grant be rectified and amended to have the said properties removed/deleted from the Certificate of Confirmation of Grant. It was the Petitioner's position that no prejudice will be occasioned to any party if the orders sought are granted.

3. The application was however opposed by the Respondents, who are also Co-Petitioners. According to them, the grant which the applicant attached is not the true grant as the applicant erased some of the properties listed in the certificate of grant confirmed on 23<sup>rd</sup> February, 2009. It was their position that the grant was confirmed without any error and that all the properties listed in the grant belong to their deceased father. They averred that Mitaboni/Mutituni/1895 was bought by their father in the year 1940 and exhibited a copy of a sale agreement. As regards the Katelembo Plot 5, it was averred that the same does in fact exist and is registered in the name of their deceased father and that a share certificate was issued by Katelembo Athiani Muvuti Farming & Ranching Co-operative Society Limited and a copy of the share certificate was exhibited.

4. The Respondents' position was therefore that the certificate of confirmation of grant is without any error and therefore needs no rectification.

5. In a rejoinder, the applicant denied that he had erased the certificate of grant as issued by the court. He insisted that there is an error on the Certificate since some properties not belonging to the deceased were inadvertently included in the schedule of distribution and that the deceased had before his demise sold his membership to the applicant who became member no. 5 within Katelembo Athiani Muvuti Farming & Ranching Co-operative Society. It was averred that at the time of the said transaction, the deceased had only one share but later the applicant topped up and became a fully paid member of three shares and to prove this the Applicant exhibited a copy of the share certificate, membership card and receipts for payment. He deposed that when the share membership was transferred from the deceased to his name, all due procedures laid down by the society were followed and witnessed by the deceased's family members and he exhibited a copy of the transfer form. He was accordingly, allocated plot no. 2671 by the Society and later the title deed was issued being Machakos Town Block 3/1073 and he exhibited a copy of the allotment and title deed. It was therefore his case that plot no. 5 does not exist.

6. Not to be left behind, the Respondents also filed a further affidavit in which they deposed that Land Parcel No. Mitaboni/Mutituni/1895 was bought by their deceased father in 1940 but was unscrupulously registered to **John Munzyu Kabila** on 9<sup>th</sup> April, 1987, 5 years after the death of the deceased on 24<sup>th</sup> May, 1982. According to them the deceased was the original owner of Plot 5 through his share No. 5 at the society and they exhibited copies of the share certificate and a letter from the society confirming the position. However, the said share was illegally and fraudulently transferred by the applicant to his name without the knowledge and consent from the deceased on 25<sup>th</sup> July, 1983,

two months after the demise of the deceased.

7. They therefore contended that the applicant has intermeddled with the deceased's property and that the two properties belong to the deceased.

8. In support of the application, it was submitted by the applicant that the title deed for Land Parcel No. Mitaboni/Mutituni/1895 was issued in 1987 in the name of the **John Munzyu Kabila** hence did not belong to the deceased and was therefore not part of the estate. Similarly plot 5 Katelembo Plot did not exist. It was also submitted that the applicant demonstrated that the deceased sold his share in the society to the applicant before his death and the sale was witnessed by inter alia the deceased wife and the officials of the society.

9. It was submitted that there was no evidence to support the respondent's contention that the deceased bought the said parcel in 1940 as the agreement does not mention the parcel of land and where situate. It was averred that the Respondents sneaked the said 2 properties in the confirmation of the grant and that this was not noticed until much later.

10. The Respondents also submitted that they approached the society in order to know how share no. 5 was transferred from the deceased to the applicant and the society denied any involvement in the transfer and that the same was fraudulently effected and that the society was in the process of reversing the transfer. It was submitted that the transfer form relied upon by the applicant was purportedly signed by one **William Wambua** for the deceased which was very strange. The said transfer was done on 25<sup>th</sup> July, 1983, several months after the demise of the deceased on 24<sup>th</sup> May, 1982. This action, it was submitted offended against section 45(1) and 82(b)(ii) of the **Law of Succession Act**.

11. According to the Respondents, the applicant's application is tainted with a lot of illegality yet the applicant is seeking the court's assistance in benefiting from intermeddling with the estate of the deceased. To the Respondents the applicant is claiming from the deceased estate through unconventional procedure under the guise of an application for rectification. In the Respondents' view the applicant's claim can only be settled in a proper suit in Environment and Land Court.

### **Determination**

12. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

13. The main issue for determination here is whether the Certificate of Confirmation of Grant in respect of the Estate of the deceased herein contains as part of the deceased's estate some properties which do not belong thereto in particular Land Parcel Nos Mitaboni/Mutituni/1895 and Katelembo Plot. 5.

14. According to 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.

15. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that:

**"This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."**

16. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for grant or confirmation thereof.

17. In this case, the applicant contends that by error they included Land Parcel Nos Mitaboni/Mutituni/1895 as part of the deceased's estate yet the title deed for the said parcel was issued in 1987 in the name of the **John Munzyu Kabila** hence did not belong to the deceased and was therefore not part of the estate. According to the certificate of official search in respect of the said property, the same was registered in the name of **John Munzyu Kabila** on 9<sup>th</sup> April, 1987. It is true that the deceased died on 24<sup>th</sup> May, 1982. However, there is no evidence that before 9<sup>th</sup> April, 1987, the said property was registered in the name of the deceased. Whereas the Respondents contend that the said property was purchase by the deceased in 1940, the copy of the alleged agreement for sale of the said land does not disclose the particulars of the land that was being sold. From the certificate of confirmation of grant, it is clear that the deceased had two other parcels of land in the same area. Therefore, without the particulars of the land the subject of the said agreement, one cannot say with certainty that the said agreement was in respect of Land Parcel Nos Mitaboni/Mutituni/1895. In the premises there is no evidence that the said parcel was, according to section 3 of the **Law of Succession Act**, the free property of a deceased person i.e. that it was a 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. In other words there is no evidence that the said property was part of the estate of the deceased. The only evidence is that the property was registered in the name of **John Munzyu Kabila** on 9<sup>th</sup> April, 1987. In the absence of any other credible evidence to the contrary, that parcel is the property of **John Munzyu Kabila** and unless a court of competent jurisdiction finds otherwise, it ought not to be comprised in the estate of the deceased herein.

18. As regards plot no. 5 Katelembo, it was averred that deceased had before his demise sold his membership to the applicant who became member no. 5 within Katelembo Athiani Muvuti Farming & Ranching Co-operative Society. It was averred that at the time of the said transaction, the deceased had only one share but later the applicant topped up. and became a fully paid member of three shares and to prove

this the Applicant exhibited a copy of the share certificate, membership card and receipts for payment. He deposed that when the share membership was transferred from the deceased to his name, all due procedures laid down by the society were followed and witnessed by the deceased's family members and he exhibited a copy of the transfer form. He was accordingly, allocated plot no. 2671 by the Society and later the title deed was issued being Machakos Town Block 3/1073.

19. From the documents exhibited by the applicant, it would seem that the purported transfer of the said land was done after the death of the deceased. If that is the position, the contentions by the Respondents that the action amounted to intermeddling with the estate of the deceased may well have some validity. Section 45 of the *Law of Succession Act* provide as follows:

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

20. I associate myself with the opinion of Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR that:

**“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

21. I also agree with the position in re Estate of M’Ngarithi M’Miriti [2017] eKLR that:

**“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”**

22. However, in this case, the title to the said property belongs to the applicant. Unless and until that title is cancelled and the land is reverted to the deceased, the applicant must remain the proprietor thereof. However, this Court cannot close its eyes to what may well be an illegality. I say this cautiously because that is a matter for another tribunal and this court cannot, in these proceedings make a definite finding that there in fact is an illegality.

23. Therefore, the order that commends itself to me is that the Respondents herein are given 60 days within which to take appropriate steps to protect their interests in the said land. In default, Katelembo Plot. 5 shall be removed from the certificate of confirmation of grant in respect of the estate of the deceased herein.

24. There will be no order as to costs.

25. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 26<sup>th</sup> day of March, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Watta for Mr Kamollo for the 3<sup>rd</sup> Petitioner**

**CA Geoffrey**