



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A. NO. 35 OF 2017

ESTATE OF MUTUNE MUTHOKA MUTINI (DECEASED)

MUSANGO KIMATU NGUYU.....PETITIONER

-VERSUS-

ESTHER KOKI PETER 1ST PROTESTOR

DAUDI MUTUNE.....2ND PROTESTOR

RULING

1. The matter here relate LR no. Makueni/Kyaluma/84 registered in the name of Mutune Muthoka Mutini.

2. The Petitioner seeks confirmation of grant purposely to obtain title for nine (9) acres out of the above suit land which he claims to have bought from the deceased person herein.

Protestor's case

3. The Protestor testified as DW2 Daniel Mutinda Mutune and told this court that he joined this case to replace his brother Daudi Mutune who passed on when the proceedings of this case was in progress.

4. DW2 stated that he would rely on the affidavit sworn by 1st Protestor on 14th September, 2017 and filed in court on 28/09/2017. In reply to the Petitioner's statement, joint witnesses statement by Nthuka Mwilu and Mutua Nganda dated 20th April 2017 and filed in court on 26th April 2017. Affidavit on protest against confirmation of grant sworn by Daudi Mutune on 10th July, 2012 and filed in court on 13th July, 2012.

5. DW2 stated that the Petitioner's statement was made out of false allegations, contradicting himself and had totally failed to proof which year he purchased the 9-acre land from Mutune Muthoka (deceased) and where the sale agreement for the said 9 acres was recorded because the said agreement was not seen anywhere in the bundle of sale agreements he presented to this court.

6. DW2 stated that the demand letter dated 25/07/2011 and marked as exhibit "DM III" on the affidavit in protest of confirmation of grant indicates that the Petitioner Musango Kimatu purchased 9 acres out of **MAKUENI/KYALUMA/84** in between the year 27th October 1991 and 26th June, 1993.

7. It was the evidence of DW2 that the demand notice and the statement of the Petitioner reflect two different purchases of land at the same time which is quite impossible in that: -

i. Demand notice gives evidence that Musango Kimatu purchased 9 acres between 27th October 1991 and 26th June, 1993.

ii. Musango Kimatu in his statement said that on 27/10/1991 he purchased an additional piece of land measuring 20 footsteps and paid in instalments until mid-1993.

8. DW2 stated that: -petitioner bought pieces of land in phases ie;

i. Phase one (i) of the land was purchased in the year 10/09/1984 by the Petitioner at a cost of Kshs. 7,750/= which was paid in instalment till 3/12/1985.

ii. Phase two (2) of the land was purchased by the Petitioner in the year 5/10/1987 at a cost of Kshs. 3,500/=.

iii. Phase three (3) was purchased in the year 27/10/1991 which measures 20 footsteps at a cost of Kshs,10,500/= and was paid in installment till 26/6/1993.

9. From the above different times of purchase, it is proved that the Petitioner never enjoyed quiet activities since the 9 acres was not in existence.

Protestor's Witnesses case

10. The 1st witness testified as DW3 while 2nd witness testified as DW4 and both filed a joint recorded statement. DW3 is called Nthuka Mwilu while DW4 is Mutua Nganda all of Mukwimani sublocation, Kilimani location.

11. Nthuka Mwilu said that the late Mutune Muthoka was his uncle. Mutual Nganda said that the late Mutune Muthoka was his brother in law.

12. They said that their testimony is based on what they witnessed in the year 27th October, 1991. They stated that Mutune Muthoka called them to witness a sale of a portion out of his land to Musango Kimatu in the year 27/10/1991.

13. DW3 and DW4 state that at the site and specifically in parcel No. **MAKUENI/KYALUMA/84** the late Mutune Muthoka made out 20 foot steps out of the said land and sold the same to Musango Kimatu at a cost of Kshs.10,500/=.

14. They stated that the Petitioner paid Kshs2,200/= and the balance was paid in instalment until 15th July,1993. They stated that after the Petitioner paid the balance, the three portions were consolidated together to add up to approximately half (1/2) acre the total size of land purchased by Musango Kimatu from the larger land parcel No. MAKUENI/KYALUMA/84.

15. It is in the evidence of the 2nd Protestor that the Petitioner through false allegations and maliciously failed to forge the 20 footsteps portion to be 9 acres as he wrongly purported to have purchased.

PROTESTERS SUBMISSIONS

16. The Protestors submit that, they have proved to this honorable court that the Petitioner has totally failed to produce the sale agreement in which he purport to have recorded when he purchased the 9 acres of land in between the year 27/10/1991 and 20/6/1993.

17. Referring the sale agreement made in the year 10/09/1984, in between the Petitioner, (Musango Kimatu and Mutune Muthoka, the cost of portion of land purchased was Kshs.7,750/= meaning that the said portion was smaller in size compared to the portion of 20 footsteps purchased in the year 27/10/1991 at a cost of Kshs.10,500/=.

18. It is submitted that there was no prove that he was in quiet possession of the 9 acre land before the additional piece of land measuring 20 footsteps, bearing in mind the only purchased a portion of land at cost of Kshs.7,750/= in the year 10/09/1984 and another one in the year 05/10/1987 at a cost of Kshs.3,500/= before the additional 20 footsteps.

19. It is submitted that, the protestor has proved the total size of the three portions when added together gives an approximate size of half (1/2) acre but not 9 acres.

20. The Petitioner told court on 20th September, 2018, that he was given the 9 acres of land because he stood for the burial expense of Mutune Muthoka's 1st wife.

21. It is in the evidence of the protestors that the petitioner failed to bring forth the cost of burial expense he incurred and the medical receipts in which he purports to have paid as a medical bill at Makueni Hospital.

22. The Petitioner also failed to produce any written agreement and/ or a consent in between himself and Mutune Muthoka if at all the Petitioner had any instruction to meet the cost of burial expense.

23. Thus it is submitted that, the Petitioner has not discharged the burden of proving that he purchased the 9-acre land from Mutune Muthoka Mutine in the year 27/10/1991 and 20/06/1991.

24. It was the burden of the petitioner to produce reliable documentary evidence in relation to possession of the 9-acre land out of parcel No. MAKUENI/KYALUMA/84.

Petitioner's Case

25. The petitioner adopted his statement dated 3rd July, 2017 and on cross examination by Daniel Mutune he stood firm with his testimony. The Petitioner testified that it was the money challenges that the deceased had in ensuring that his 1st wife, Mbuli was treated that he sold the land and that the last portion he sold was because of famine.

26. He further testified that after the last agreement had been cleared in 1993, the land was equally subdivided by the elders in the presence of the deceased. He further restated his claim for 9 acres from the parcel of land known as MAKUENI/KYALUMA/84.

27. He produced a search as exhibit 2 to show indeed that the land was registered in the name of the deceased and he produced as exhibit 3 a letter from the firm of his previous advocates, J.A MAKAU & CO Advocates seeking that the portion he had bought be transferred to him. The Petitioner also testified that they were in the process of having the land transferred to him before the deceased died and that he had given him the title deed to show he was serious about it.

28. The second witness for the Petitioner, Munyasya Mwasaa testified that he was there when the Petitioner bought the last portion and that he could confirm that the total portion bought by the Petitioner was approximately 9 acres and that he used to till the land. He also testified that he started purchasing in 1984 and that the payment was done in instalments.

PETITIONER SUBMISSIONS

29. The Petitioner submits that What the 1st witness of the Protestor testified to was purely hearsay and he admitted that he was informed by her mother who failed to testify when she was asked to be sworn. Such testimony should not be taken seriously by this court. **How does one testify to hearsay and upon seeking the person who informed him to testify, that other person refuses to be sworn?**

30. Further he testified that a deduction can therefore be made that such testimony is untruthful and ineligible. The said witness agreed that the land that the Petitioner was claiming was bought in phases as evidenced in the Petitioner's exhibit 1 and which exhibit (bundle of agreements) had also been annexed by the Protestors to their affidavit of protest, from the said exhibits, it is clear that the 1st agreement was entered into on 10/09/1984 and was completed on 03/12/1985.

31. Another agreement was entered to on 05/10/1987 which read ***"there is another piece added by Mutune Muthoka The money was paid and no balance was left"*** The Petitioner urges this honorable court to take judicial notice of the meaning of English words as stipulated under Section 60 of the Evidence Act.

32. The word 'add' indicates that there was another portion that the Petitioner had purchased previously. Indeed, the agreement read 'another piece of land'. In any event, they have demonstrated that there was the initial purchase in 1984 and which the said witness admitted to. The said witness also admitted that the 2nd Protestor who has since passed on was present when the second portion was sold in 1987.

33. The portion that the protestors alleged the Petitioner was entitled to was the third portion he bought on 27/10/1991 and which in the agreement it is clearly indicated that it was another piece of land sold to the Petitioner.

34. The said agreement was completed on 15/07/1993 when the balance was fully paid and the boundary marked as described. From the foregoing, it is evident that the petitioner did not only purchase the 20 steps of land (the so called half acre) but he purchased three portions from the said parcel of land which added up to 9 acres as was testified by the petitioner. The claim by the Petitioners that he was entitled to only half an acre therefore lacks merit.

35. The protestors relied on two other witnesses which were noted by the court to have been in court when the 1st witness testified and therefore they heard what he said and as such their testimonies were not independent and should also be ignored and/ or taken lightly by this honorable court.

36. The second and the third witness for the protestor testified that they lived in Kisau which was far away from where the deceased herein lived and that they were not aware of the original agreements between the Petitioner and the deceased. How could have they known? In any event, the deceased was under no obligation to inform them, the land was purchased and not customary as both witnesses testified.

37. Indeed, the second witness, Nthuka Mwilu testified he was living and working in Mombasa then and Mutua Nganda admitted that the Petitioner paid for burial expenses for the 1st wife of the deceased herein as well as cleared hospital bills. Further, the protestors third witness who was a son in law to the deceased testified that he came to learn that his father in law had another wife after they had buried the 1st wife (his mother in law) and this adds weight to their submission that during the initial agreements the 1st Protestor had not been married and as such she cannot contest what is not within her knowledge.

ISSUES

38. After going through the affidavits, evidence and submissions I find the issues are ;***whether this court is the appropriate forum to determine the sale of land contested herein? If above in negative, what is the order on distribution? What is the order as to costs ?***

39. By chamber summons dated 25/11/2011 the petitioner sought confirmation of grant and distribution of suit land by him getting 9 acres and the balance to go to the deceased beneficiaries.

40. He claimed to have bought same portion of land from the deceased way back in 1991 and took possession; however the deceased died in 1993 before he could transfer same to him.

41. Thus he lodged instant matter as a creditor to get the purchased 9 acres.

42. The protesters are beneficiaries of the deceased led by Ist interested party Esther Koki Peter deceased and replaced by her son Daudi Mutune. Their position vide Esther koki peter Affidavit sworn on 14/9/017 is that the petitioner bought parcel of land from the deceased in 3

phases namely ; a) 10/9/84 he bought a portion by instalments for ksh 7,750 ,b) 5/10/87 another portion was bought at ksh 3,500 and finally c) on 27/10/91measuring 20footsteps. There are bundle of agreements translated from Kamba to English on record.

43. According to the protester the total amount of land bought, cannot exceed ½ acres. The petitioner has never had any quiet possession or occupation of the same.

44. The parties agreed to hear the matter via viva voce evidence where they testified and called witnesses.

45. 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.”***

46. 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.”

47. The issue of sale of land and adverse possession herein emerging as the core contest is akin to trusteeship determination over land which will suitably be dealt with in a suit where evidence will be rendered to determine same claims. The forum suited to determine the same is ELC court under the provisions of the constitution and the ELC Act.

48. To safe guard parties interest, the court makes the following orders;

1. The grant issued on 24/5/011 are revoked and instead to be issued fresh to Daniel Mutinda Mutune.

2. same are confirmed as such.

3. The distribution will await the petitioner suit to be instituted in ELC court for the claim of 9 acres from the suit land within 60 days from dates herein.

4. If the suit aforesaid is not filed within 60 days, the new administrator will be at liberty to proceed with distribution of estate herein.

5. Costs to abide with results of suit to the ELC.

DELIVERED, SIGNED THIS 31ST DAY OF MAY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE