



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.357 OF 2006

IN THE MATTER OF THE ESTATE OF KIITI MULINGE NGAO (DECEASED)

GRACE KAILU KIITI

PAUL WAMBUA KIITI.....PETITIONERS

-VERSUS-

PHILIP KISILU KIITI.....OBJECTOR

RULING

1. The Protestor claims that the land 412 Kathekani Settlement Scheme does belong to the deceased and should be included and distributed.
2. The specific facts as contained in the affidavit in protest deponed on **16th May, 2017** are that the deceased moved to the suit land in 1965 and secured a parcel that is now Kathekani Settlement Scheme and that the clan had sat down and deliberated on how the same ought to be distributed. He has annexed a copy of a sale agreement and the distribution as per the clan deliberations.
3. In reply, the 2nd petitioner vide affidavit deponed on 12th February, 2018 averred that the suit property belongs to Kailu Kiitu as per the annexed letters by the assistant chief Kathekani Sub location and the District Land Adjudication and Settlement Officer Kibwezi District.
4. The 2nd petitioner has on record three witness statements, one by himself, and others by Anthony Nguluma Mulinge and Boniface Kyule which is to the effect that the parcel number 412 Kathekani Settlement Scheme had been allocated and registered in names of the 1st Administrator herein Grace Kailu Kiiti and that the same does not form part of the estate of the deceased. The 2nd petitioner averred that the deceased was his father who had two wives namely Grace Kailu Kiiti and Ndakava Kiiti and 15 children including the protestor. He stated that the deceased had two properties namely Kalama/Kiitini/ 648 and 566 and that parcel 648 was given to the objector by the deceased while parcel 566 was to be subdivided amongst his two wives. He went on to add that the deceased's wishes were effected. He further stated that his mother took possession of the suit property and therefore the same belongs to her solely and does not form part of the estate of the deceased.
5. **Anthony Nguluma Mulinge and Boniface Kyule** in their statements dated 13th September, 2018 reiterated the contents of the 2nd petitioner's statement.
6. There are no statements in support of the protest.
7. It was agreed that the protest be canvassed by way of written submissions. The petitioners duly filed their submissions while the objector did not.
8. Learned counsel for the petitioners vide written submissions filed on 7.5.2019 framed three issues for determination: firstly whether the suit property is part of the deceased's estate, secondly, whether the protest is merited and thirdly, who should bear the costs. On the first issue, counsel submitted that no evidence has been tendered to support the protestor's allegation. He cited the case of **Re Estate of Job Ndunda Muthike (2019) eKLR** and submitted further that the petition is not merited and the same be dismissed and that the petitioners be awarded costs in terms of Rule 69 of the Probate and Administration Rules.
9. I am faced with two competing claims namely, that of the protestor, and that of the wife of the deceased. The issue for determination is whether the protestor has proved his case in this succession cause on a balance of probabilities.

10. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated in **Re Estate of G K K (Deceased) [2017] eKLR** that:

“The primary function of a probate court is distribution of the estate of a dead person.”

11. The protestor seems to front the position that the suit land is free property for distribution but which was opposed by the petitioners who annexed letters by the assistant chief Kathekani Sub-location and the District Land Adjudication and Settlement Officer Kibwezi District indicating that the suit land belongs to the 1st petitioner. The protestor relied on his affidavit sworn on 16th May 2017 in which he annexed several documents. However I note that none of the persons who are alleged to have participated in the alleged transactions filed witness statements or were called to testify.

12. The standard of proof in this matter being a civil matter is on a balance of probabilities and from the evidence on record it is more probable that the petitioner’s version is true; the same is corroborated by the witness statements on record of independent persons. On the other hand, the protestor relies on an affidavit authored by himself. Therefore considering the quality and weight of evidence available, the balance sways in favour of the petitioners that the suit property is not free property of the deceased. The chief’s letter dated 12th August 2008 as well as the Ministry of Lands letter dated 25th September 2008 clearly left no doubt that the parcel number Plot No. 412 Kathekani Settlement Scheme is registered in name of the 1st Petitioner Grace Kailu Kiiti. The name of the deceased is nowhere. The petitioners have explained how the said land came into the possession of the first petitioner. This is evidence that the said property is not free property of the deceased for purposes of distribution. Section 3 of the Law of Succession Act defines free property as one in which the deceased person was legally competent freely to dispose of during his lifetime and in respect of which his interest has not been terminated by his death. As the property in dispute was not registered in name of the deceased, I find that the same is not available for distribution as contended by the objector as it did not form part of his estate. That being the position, the subject property Plot No. 412 Kathekani Settlement Scheme should be excluded from the estate of the deceased.

13. The protestor in his affidavit of protest seems to suggest that the petitioners had left him to take care of the deceased’s medical bills and other expenses at great cost. However he has not availed any documentary evidence to that effect. It would appear to me that the protestor wants to settle scores by ensuring that the other house is not permitted to benefit from owning the property in dispute and now wish that it should be included in the distribution yet it is clear that the same does not form part of the estate. I find the protestor’s claim not convincing at all since the petitioners have availed credible evidence that the property does not belong to the deceased. As the property is registered in names of the 1st Petitioner, the objector still has a remedy by pursuing his claim before another forum namely the Environment and Land Court.

14. In the result it is my finding that the Objector’s protest lacks merit. The same is hereby dismissed. The Petitioners are hereby directed to proceed to set down the summons for confirmation of grant as a matter of priority owing to the fact that the matter is fairly old. As parties are members of one family, I order each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 31st day of July, 2019.

D. K. KEMEI

JUDGE.