



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO.284 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE STEPHEN MUSYOKI KIKULUI(DECEASED)

HENRY MWATU KIKULUI.....1ST PETITIONER

BETH NTHALE.....2ND PETITIONER

VERSUS

MWALUKO MUMO.....1ST OBJECTOR

NICHOLAS MUTEMI IKO.....2ND OBJECTOR

AND

JOHN KIMATU NTHUKU.....INTERESTED PARTY/PROTESTOR

RULING

1. The deceased, **Stephen Kikului Musyoki**, passed away on 1st September, 2005. Subsequently, the Respondents herein, **Henry Mwat Kikului** and **Beth Nthale** in their capacity as Son and Daughter respectively of the deceased petitioned for grant of letters of administration intestate and they were duly issued with the same. By summons dated 3rd May 2011, the petitioners sought for confirmation of the said grant in which the mode of distribution of the estate was proposed.

2. However, by an affidavit of protest sworn on 30th December, 2013, **Nicholas Mutemi Iko**, (hereinafter referred to as “the Objector”) protested against the proposed mode of distribution. In his said affidavit he deposed that some time on 12th September, 2011, one of the wives of the late **Stephen Musyoki Kikului** sold to him land parcel no. Masii/Mbani/154 measuring 7 acres which he fully paid for. However, the said property is yet to be transferred to him and in this petition, his interests are not taken into account as he is not disclosed as a purchaser hence he stands to lose irreparably. He therefore sought that he be awarded the said property.

3. In a further affidavit sworn by the same Objector on 10th November, 2015 he attached a copy of the agreement. In the said further affidavit, he clarified that in the said agreement of 12th September, 2011, he purchased 3 acres which were to be excised from land parcel Masii/Mbaani/154 from one Mthenya Kikului who represented herself as the legal representative of the estate of the deceased herein. According to the Objector, the said agreement was properly executed and witnessed by among others the 2nd petitioner and other family members.

4. It was further deposed that on 14th April, 2012 the Objector entered into a second sale with the same **Nthenya Kikului** for the sale of an extra 4 acres to be excised from the same property and similarly, the said vendor represented herself as the deceased’s legal representative. Just like in the earlier agreement, this agreement was executed and attested by an advocate and the 2nd respondent herein together with the family members.

5. It was therefore the Objector’s case that the deceased’s family members cannot now claim that they don’t recognise his interest.

6. In support of his Protest, the Objector reiterated the contents of his said affidavits and referred to the sale agreements dated 12th September, 2011 and 14th April, 2012. It was his testimony that the seller, **Nthenya Kikului**. Was the deceased’s wife and that the said agreement was witnessed by the deceased’s children, **Elizabeth Nthuli**, **Beth Mutano Ndalo** (one of the administrators), **Monica Mateli** and **Mutavi Kukului**, a son of the deceased. According to the objector, the services of **Mr Kavoi**, a surveyor, were contracted to demarcate

his portion. While the first family of the deceased has agreed to give him his acres, some of the deceased's children chased his cows from the said land yet the same belongs to the first family and the second family has not settled in it.

7. In cross-examination by **Mr Muthama**, learned counsel for the Petitioners, the Objector stated that he did a search and found that the property was in the name of the deceased and by the time of the agreement he was already deceased. It was however his evidence that **Nthenya**, the vendor was the next of kin while Beth is an administrator. Though the vendor represented herself as the administrator, she was not. He however insisted that the legal representative was present and supported the transaction. Asked about **Henry Kikului**, he admitted that he knew him but stated that Henry did not sign the agreement.

8. In re-examination by **Mr Mulei**, learned counsel for the Objector, the Objector reiterated that Beth had letters of administration and that the sales took place in 2011 and 2012 and that she witnessed as the administrator of the estate representing the first family while Henry is from the 2nd family which is not settled on the said land. However, the mother was still alive.

9. The Petitioners did not call any evidence.

Objector's Submissions

10. It was submitted on behalf of the Objector that rule 41 of the **Probate and Administration Rules** states that, at the hearing of the application for confirmation the court shall consider all the affidavits and written protests. It is therefore correct procedure that this court considers the affidavit of protest dated 30/12/2013 by the Objector. According to the said Objector, when petitioning for the grant of letters of administration, the petitioners fraudulently did not disclose to the Court his interest as the Creditors to the Estate of the deceased and as a result the petition herein is clearly based on falsehoods. Instead, the Petitioners/Administrators herein fraudulently omitted to include his name in the petition for Grant of Letters of Administration as Creditors to the Estate of the deceased in their capacity as a Purchaser of a portion of Land parcel Masii/Mbaani/154.

11. It was submitted that the gist of the protest herein is that the Objector purchased various portions of land comprised in Land Parcel Number Land parcel Masii/Mbaani/154 from the deceased's wife, one **Nthenya Kukului** and beneficiaries of the said estate were witnesses to the sale agreements. As at the time the petitioners petitioned for Letters of Administration, the petitioners were well aware of the said purchases which constituted liabilities to the estate but failed to include the 2nd objector as a creditor to the estate.

12. According to the Objector, curiously neither the 2nd petitioner who was a witness to the sale agreements when her mother sold their beneficial portions of land to the 2nd objector nor her mother, the vendor, have sworn any affidavit denying that they sold the land to the Objector. Therefore, the purchase of the land by the Objector not having been denied by the 2nd petitioner and the beneficiaries, the petitioners should be ordered to excise and transfer to him the respective portions of land sold to them by **Nthenya Kukului**.

13. It was submitted the Petitioners' conduct amounts to unfair enrichment since they have decided to deprive the 2nd objector what justly belongs to him. Accordingly, the Grant should not be confirmed before considering his interests since failing to do so will be quite prejudicial to him as he will suffer irreparable damages. It was further submitted that there is sufficient evidentiary basis for the Doctrine of Estoppel by conduct to apply, because the 2nd administrator herein was one of the individuals who attested to the said sale agreements and was therefore acting on behalf of the other beneficiaries. They are therefore barred from claiming ownership of the properties that they already sold to the Objector.

14. The Court was urged to be guided by the provisions of Article 159 of the Constitution to uphold substantive justice and the overriding objective of the court as opposed to technicalities and allow the protest herein and put into consideration the rights of the Objector under Article 22(a) as read together with Article 40(b) of the constitution.

15. In conclusion, the Objector, while appreciating that the law is clear that the protestors cannot inherit the estate of the deceased since they are not dependants, nevertheless urged the court to invoke the Provisions of Rule 73 of the **Probate and Administration Rules**, which gives the court the inherent power to make orders that will make ends of justice to be met.

Petitioners' Submissions

16. On their part the petitioners relied on **Muriuki Musa vs. Rose Kanyua and 4 Others [2014] eKLR, Re Estate of John Gakunga Njoroge [2015] eKLR, Paul Gituma Kiogora vs. Doris Mukiri Magiri [2017] eKLR, Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR**, section 45(1) and 79 of the **Law of Succession Act**, and urged the court to dismiss the protest with costs.

Determination

17. I have considered the issues raised in this application. The issue for determination herein is whether there was a sale of the suit property to the Objector by the said **Nthenya Kakului** whether that sale was valid; and whether the Objector is entitled to the said property.

18. As regards the first issue, in the absence of any replying affidavit or evidence adduced by the petitioners controverting the facts as presented by the Objector, this Court finds that indeed there was a sale agreement between the Objector and **Nthenya Kikului**, a widow of the deceased in respect of sale of part of the suit land and that the Objector did pay the agreed purchase price.

19. As regards the second issue, from the evidence adduced by the Objector, he entered into a sale agreement with a widow of the deceased after the deceased's death and the said widow was not the administrator of the estate of the deceased. 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. Section 79 of the same Act, on the other hand provides that:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

21. In Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 others [2014] eKLR, Makau, J held that:

“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court’s decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.”

22. In Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR Muriithi, J was of the view that:

“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act...For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

(ii) no immovable property shall be sold before confirmation of the grant.

The persuasive authority of Wakiaga J. in *Stephen Waweru Ng’ang’a v. Kimani Ng’ang’a*, Nyeri HC P&A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”

23. In the same vein, Gikonyo, J in Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another [2017] eKLR held that:

“I see the claim by the Protestors is that of a purchaser and is based on a sale of land agreement with the widow of the deceased. Doubtless, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be tried in a succession cause...As the protestors are not beneficially interested in the estate, their claim cannot be litigated in this succession cause or even be set aside by this court under rule 41(3) of the Probate and Administration Rules. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot draw from its inherent jurisdiction to assist an unlawful transaction. I do not, however, wish to say much about the legality or otherwise of such transaction or the validity and enforcement of the agreement in question in order to avoid any prejudice to any future litigation on it. There are, however, ample judicial decisions on the matter and I do not wish to rehash them.”

24. In arriving at the said decision, the learned judge cited the decision of Musyoka J in Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

25. Just like my learned brothers above, I find that the widow of the deceased qua widow, had no powers to dispose of the deceased’s properties when she clearly was not the administrator and in any event before the grant was confirmed. That one of the administrator witnesses the sale agreement is neither here nor there since the said administrator herself had no such powers, firstly because the grant had not yet been confirmed and secondly because there were two administrators of the estate of the deceased. In such cases the administrators are trustees and must act jointly.

26. In the premises, the Objector is not entitled to the orders sought in the subject protest. Accordingly, the protest fails and is dismissed.

27. As was appreciated by **Gikonyo, J** in **Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another** (supra) that:

“The protestors are not left without remedy or recourse as they are at liberty to pursue their claim in the appropriate court. I note the protestors’ action may have been a legitimate quest for justice albeit filed in the wrong court. I also take into account the conduct of the Petitioner and the widow in entering into the kind of agreement I have seen without proper authority of the law. On that basis I will not condemn the protestors to costs. The order I make is that each party shall bear own costs of the protest.”

28. Accordingly, there will be no order as to the costs of the protest.

29. It is so ordered.

G. V. ODUNGA

JUDGE

Read, signed and delivered in open Court at Machakos this 30th day of July, 2019.

D. KIMEI

JUDGE

Delivered in the presence of: