



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HC P&A NO. 49 OF 2017**

**IN THE MATTER OF THE ESTATE OF**

**MUSYOKA NGAIA (DECEASED)**

**MUKEKU NGAIA.....1<sup>ST</sup> OBJECTOR**

**WAMBUA NGAIA.....2<sup>ND</sup> OBJECTOR**

**VERSUS**

**NTHAMBI MUSYOKA.....1<sup>ST</sup> PETITIONER**

**KYEVA MUSYOKA.....2<sup>ND</sup> PETITIONER**

**JUDGEMENT**

1. The Petitioners lodged the Petition herein on 17/03/2015 and procured Grant of Letters of Administration Intestate dated 01/09/2015.
2. Subsequently they lodged Application of Grant on 27/06/2016. They are widow and son of the deceased respectively.
3. Subsequently, on 08/11/2016 the 2 Protestors lodged Protest via Affidavit they swore jointly on 07/08/2016. They claimed as beneficiaries on their own behalf and that of their brothers. The Protestors are brothers of the deceased herein.
4. Their claim is that the suitland was registered in deceased name as a trustee on his behalf and their behalf.
5. The court gave directions that the matter be heard by way of viva voce evidence.
6. PW1 Wambua Ngawa testified that his mother had share as she contributed to the purchase of the suit land MACHAKOS/ULU/260 which is registered in the name of the deceased who is his eldest brother.
7. On cross examination, he said that the land belonged to their deceased mother.
8. PW2 Musila Ngaka, a neighbour to the parties testified that he was one of the elders who resolved the land be shared according to monetary contribution made for purchase price.
9. On cross examination, he stated that the brothers to the deceased bought land together with the deceased.
10. PW3 Nthambi Mwange testified that she was deceased sister. She said that the deceased and his other brothers contributed to the purchase of the suit land. She said there were 2 lands one was subdivided but the second one in deceased name was not subdivided as Petitioners objected to subdivision.
11. On cross examination she stated that she wanted her mother in law share.
12. After close of the Objectors case, the Petitioner tendered their testimony.

13. DW1 Pila Mukeli, a neighbour to the parties testified that the land subject matter belonged to the deceased who bought it by installment. The Protestors and Petitioners live in said land. They occupy as relatives of the deceased.
14. PW3 husband is buried in the land. He said what was agreed to be shared is parties fathers Ngawa land not the Musyoka (deceased) land.
15. DW2 Ngina Mwathi testified that she was sister to the deceased. She said the land is occupied by deceased widow but Protestors do not occupy same. She said bought the land. She agreed Wambua Ngawa lives on the land and has grown old while on the same land.
16. They moved into the land, not that they were born on the same. Their parents moved into the land and their children followed.
17. The meeting of 03/09/2013 was for sharing their father's land not that of the deceased. She said the deceased bought suit land Kshs. 1,250/= and same was paid by installment. She also paid same amount for her land. Deceased paid for his land.
18. She added him Kshs. 280/= and also one Kilonzi added him something. She also said that Mukeku added him Kshs. 90/=. Her father did not add deceased any money for purchase of suit land.
19. Wambua (Protestor No.1) added his father money to buy his land. Deceased did not buy suit land alone. He paid with is salary.
20. DW3, Mr. Musau testified that he was his workmate at Malili ranch. He said that deceased bought suit land from the Malili Ranch Kshs. 1,250/=. The money was being deducted from his salary Kshs. 100/= per month.
21. It is now occupied by 1<sup>st</sup> Petitioner on one side and the Objectors on another side.
22. On cross examination, he stated that deceased bought land alone. The price was divided from his salary Kshs. 100/= per month. He said they started buying pieces of lands 1965 to 1966.
- 23.. He got his land between 1966 and 1967. He said that nobody helped deceased buy his land.
24. Parties agreed to file and exchange submissions which they did.

#### **OBJECTORS' SUBMISSIONS**

25. Objectors claim is that they have interest in the estate of deceased. They claim as brothers. The claim is only limited to parcel No. 260.
26. They content it is a family property but registered in the names of deceased as a trustee. That they were five brothers and two of them are living on the said land.
27. That there have been having agreements on how to share the same before the chief on 03/09/2013.
28. That further, the surveyor visited the land and placed beacons and prepared a sketch map.
29. However, the Objectors learned on 03/11/2016 that succession was going on hence the protest.
30. In response, the Petitioners filed replying affidavit deponed on 28/11/2016 claiming the Objectors have interest. They claim the deceased bought the said land using his pension.
31. The 1<sup>st</sup> Petitioner Nthambi Musyoka (wife to the deceased) in paragraph 18 of affidavit deponed on 28/11/2016, she claims **"I am the one who was keeping the pension money and I remember accompanying my husband to pay Kshs. 1,200/= to the owner."**
32. It is submitted that suitland is an ancestral land where the Objectors are beneficiaries.

#### **PETITIONERS SUBMISSIONS**

33. Petitioners submit that the Objection is bad in law and there is no evidence to prove purchase:-
  - a) That Machakos/Ulu/260 was not jointly bought by family members as alleged in the submission of Mr. J. M. Tamata. No agreement of purchase was produced as evidence.
34. The Objectors claim that family members contributed to the purchase price of Kshs. 1,250/= only two brothers claimed. The other eight (8) brothers are not claiming interests in Parcel No. Machakos/Ulu/260. All brothers shared Machakos/Ulu/314 as per notes attached. Parcel No. Machakos/Ulu/314 was registered in the name of their father Ngaia. He bought it like other squatters who included a good number of his sons who bought the land from the former owner.
35. According to the law Machakos/Ulu/260 was not a free property as far as the Objectors are concerned. Ownership is *"absolute"*. There are no overriding interests at all. The objectors did not prove *"Trusts"*. There was no trusts *"express"* or *"implied"* or customary proved by the Objectors.

36. Section of the land act and contract act – sale of land must be *reduced* in writing. No such agreement has been proved in any way or produced which could support trust.

37. Section 24 of the land act provides the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges section 28 of the Act tabulates the overriding interests which are pleaded by the Objectors. There is no evidence of trusts at all section 38 of the Land Act proves. “No suit shall be bought upon a contract for the disposition of an interest in land unless;

a) *The contract upon which the suit is founded is writing is signed by all parties thereto.*

38. The Objectors alleges that there was a contribution of purchase price by the family members. Thus Kshs. 1,250/= was contributed by all family members (brothers). To prove trusts it must be based on an agreement that the property held upon trust was jointly bought and one person proceeded to obtain registration on his behalf of other proprietors openly and or fraudulently.

39. The official search indicates that the said Parcel No. Machakos/ULU/260 is registered in the name of Musyoka Ngaia as an absolute owner and not subject to any overriding interests either customary law and otherwise.

40. The objectors’ affidavit doesn’t contain evidence of ownership either as joint ownership or Parcel No. Machakos/Ulu/260. The requirement of law is that trust must be properly pleaded with particulars. It requires evidence no such requirements.

41. The Objection is a figment of imagination of two brothers no other brother had laid a claim. They have met several times at the Assistant County Commander to share Parcel No. Machakos/Ulu/314. The two brothers are gluttonous. They own many acres of land yet they want to grab this land. Their father’s land has been shared to them. They own their own land.

42. It is not true that they occupy this land. They started trespassing there recently. Again the land occupied by the family of the Ngaia were not part of the land bought by Muyoka Ngaia never occupied Parcel No. Machakos/Ulu/260.

43. The sons and the families of Ngaia were scattered on the land set aside for settlement by their employer. None could claim ownership or any other interests in Land Parcel No. Machakos/Ulu/260 the land to which all sons and children of Ngaia could claim interests in Plot No. 314 only. Consequently the objection has no merits at all and should be dismissed and the entire administration knows this.

#### **ISSUES ANALYSIS AND DETERMINATION**

44. After going through material before the court, I find the core issues are;

a) **Whether the suit land was held in trust for protestors by the deceased?**

b) **If in negative, what are the appropriate orders to make?**

c) **What is the order as to costs?**

45. The dispute is not per se revolving on distribution or administration of the deceased estate but ownership of the Suitland. In the **MATTER OF ESTATE OF GACHURU KABOGO NAI SUCC NO 2830 OF 2001** the court held that, during confirmation of grant hearing, if ownership of a property of an estate is contested ,the property not contested is confirmed and the contested is heard under **Order XXXVI (36) CPR** as separate.

46. In another matter **CHARLES MURITHI KUNGU VS ANN NJOKI NJENGA NAI HCCC 19 OF 2004** the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under **ORDER XXXVI RULE 1**.

**Section 107 of the Evidence Act, Cap 80 Laws of Kenya is worded as follows:-**

**“107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof has on that person.”**

**Section 109 of the Evidence Act, Cap 80 laws of Kenya also provides thus:-**

**“109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person.”**

47. The claim by the protestors did not meet the threshold set out in the above provisions of Evidence Act.

48. The fact that the Protestors never called a witness or produce documents on sale of subject land, can only mean that they are wrong on their unproven allegations and actually they are unsure of the sources of funds which paid for the suitland.

49. As of now the suit land is a free property of the deceased just as at the time of his demise, with no caution or caveat on it, thus there is only one route for the court to take, cause it to be transferred into the Petitioner's name as it is and, if they so choose, the Protestors can pursue their claim over it in an ordinary suit.

50. Thus court makes the following orders;

- a) **The grants are confirmed and the Suitland to be registered in petitioner's name.**
- b) **The protesters have 3 months to lodge their claim in ELC court if any.**
- c) **The petitioner shall not distribute or transfer or charge suit land within 3 months.**
- d) **No order as to Costs.**

**SIGNED, DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF APRIL, 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

.....