



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 124 OF 2012

IN THE MATTER OF THE ESTATE OF ELIAS KIRUJA MUKURA (DECEASED)

FREDRICK NKONGE MUTWIRI..... PETITIONER

-VS-

MASIA SARIONKA LEKASOOBJECTOR

J U D G M E N T

1. **Elias Kiruja Mukura (deceased)**, died on 2nd September 2001 domiciled in Meru Central, Kenya. He was survived by:-

- a) Esther Iruma Kiruja - Widow
- b) Samuel Murithi Mutwiri - Son
- c) Fredrick Nkonge Mutwiri - Son
- d) Benson Gitonga Mutwiri - Son
- e) Charles Kimathi Mutwiri - Son
- f) Simon Kiriimi Kiruja - Son
- g) James Mwenda Kiruja - Son
- h) Japhet Muthomi Kiruja - Son

2. The only asset that comprise the deceased's estate is parcel no. TIMAU/SETTLEMENTSCHEME/16 measuring approximately 7.4 Ha. On 12th March, 2012, Fredrick Nkonge Mutwiri petitioned for letters of administration intestate for the estate of the deceased. The grant was issued to him on 3rd July, 2012 and subsequently confirmed on 15th May, 2014. At confirmation, the entire estate was distributed to the widow to have a life interest thereon and thereafter to the rest of the beneficiaries in equal shares in accordance with **section 35 of the Law of Succession Act, Cap 160 Laws of Kenya ("the Act")**.

3. On learning about the confirmation of the grant, on 8th July, 2014, Masia Sarionka Lekaso ("the objector") lodged a Summons for the revocation of the grant. The grounds for the objection that were set out in the summons were that; the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of a false statement, by the concealment of material facts

and that the grant was obtained by means of a fact essential in point of law to justify the grant.

4. In his affidavit in support of the Summons, the objector deponed that he is the administrator of the estate of SILONGA MASER OLEKASO who had bought 9 acres out of the estate of the deceased; that the family of Silonga lives on the said 9 acres of which they have fully developed. The objector further deponed that there had been several cases over the said land with no success; that the petitioner did not disclose all these facts to court and had completely excluded the objector and his family from these proceedings.

5. The objector further contended that the petitioner had excluded him and his siblings from getting a share of the estate while knowing that they were entitled to 9 acres from the estate. He further complained that the petitioner did not disclose to court that the objector had put an entry of appearance in these proceedings to protect the interest of his father.

6. The petitioner opposed the Summons by way of a Replying Affidavit which he swore on 9th September 2014. He deponed that the application lacks merit and is an abuse of the court process. That objector, his father and siblings had previously litigated over their claim vide **CMCC NO. 147 of 1997** which became subject to **HCCA NO. 53 of 1999** at Meru High Court but was concluded in his favour. That a subsequent case, HCCC No. 25 of 2010 (OS) filed in Nyeri High Court was struck out with costs to the petitioner.

7. The petitioner further contended that this being a probate and administration proceedings, the objector cannot ventilate his alleged after having lost claim herein previous independent proceedings. That objectors claim was therefore res-judicata and that it is time barred by statute of Limitation of Actions Act. The Petitioner denied that the objector and his siblings were occupying the alleged 9 acres and that therefore he had no obligation to seek their consent.

8. The summons was ordered to be determined by way of viva voce evidence. The parties and their witnesses filed witness statements on which they were cross-examined.

9. **OW1 was Masia Sarionka Lekaso**, the objector. He relied on his witness statement and his bundle of documents which he had filed in court. He told the court that after the 1981 drought, his father told him to take their cattle to Timau and he found that his father had already built a home on the now disputed land. That the father told him that he had bought the land from the deceased. That however, his father fell sick shortly thereafter and died in April 1984.

10. **OWI** further testified that he and his family members went to see the deceased to effect the transfer after the demise of his father but the deceased became evasive. His family filed **CMCC NO. 147/1997** but the case was dismissed. That he subsequently filed **HCCC No. 25 of 2010** in Nyeri High Court which was not heard or determined but he is not aware of how it ended. He maintained that his father bought the 9 acres from the deceased and had obtained the consent from the Land Control Board but died before effecting the transfer. That they have lived on that property since 1982 and greatly developed it. He admitted that his family is not related to the deceased.

11. **OW2 was Stephen Nteere Manyara** who supported the testimony of **OW1**. He told the court that he used to do business with the deceased That he came to know. He knew the deceased in 1981 when he introduced Silonga to him to buy land. He confirmed having been a witness to the sale of a total of 9 acres by the deceased to the late Silonga for which the latter paid in full.

12. **PW1 was Fredrick Nkonge Mutwiri**, the petitioner. He told the court that he did not know the deceased Silonga or even that, the objector he occupies part of the land. According to him, the people occupying the estate land have been in occupation of a small portion for some time. He was only 13 years in 1981 and could not know the circumstances under which those people entered the land. According to him, they were only herdsmen with temporary structures and cattle on the estate property. He did not know if the deceased had sold any land to them. That the objector had failed to prove that they had bought any land in the previous cases. He urged that the objection be dismissed.

13. I have considered the evidence on record and the written submissions of learned Counsel. The issues for determination are: ***whether the petitioner was under an obligation to notify the objector of these proceedings and, whether the objector and his family are entitled to 9 acres from the estate.***

14. On the first issue, the record is clear. On 9th May, 2012, the firm of Mwangi E. G. & Co, Advocates entered appearance under ***section 60 of the Act.*** The purpose of such entry is to ensure that all pleadings and documents subsequently filed by the petitioner or that every step undertaken by the petitioner in the proceedings is notified the party entering appearance. It was not contended by the petitioner that he was not notified of the entry of appearance by the objector.

15. Further, it was not denied by the petitioner that he never notified the objector of the application for confirmation. His contention was that, it was not necessary such notification because the objector and his siblings were not beneficiaries of the estate of the deceased. This Court holds a different view. The moment a party enters appearance to a Succession Cause, whether he has a right in that cause or not, he is entitled to participate in the proceedings and it is not upon the petitioner but the court to determine if such a party has a right or not. To that extent, I hold that the petitioner wrongly prosecuted his application for confirmation without notice to the objector.

16. Having held that the objector was entitled to participate in the application for confirmation, does the failure to be notified of the proceedings thereof warrant the revocation of the grant? To answer the question, the court has to examine the objectors claim and establish whether it is sustainable.

17. While petitioning for the grant of letters of administration, a petitioner is required to disclose not only the assets but also the liabilities of the estate. In that regard, both the beneficiaries and creditors have an interest in the matter. They must be disclosed and be notified of the proceedings as appropriate.

18. In the present case, the objector's claim is that the estate of his late father has a claim of 9 acres of land from the estate. He produced sale agreements to show that, sometimes in 1981/82, the late Silonga Maser Olekaso did purchase some 9 acres from the deceased. That a consent for the subdivision and transfer of the estate land was obtained from the relevant Land Control Board on 5th May, 1983. It was the testimony of the objector that the transaction was not completed because the late Silonga died shortly thereafter as well as the deceased.

19. The petitioner's position was that the objector had not been able to prove the alleged purchase of 9 acres in cases that had previously been filed in respect of the matter. That since courts of competent jurisdiction had determined the issue, the matter was res judicata.

20. One of the documents the objector produced was a Certificate of Confirmation of grant issued on 13th May, 1996 in the ***Meru HC Succession Cause No. 321 of 1996, In the Matter of the Estate of the late Silonga Maser Olekaso.*** The same was issued to Joseph Kibithe Silonga. He is said to have died and the objector took representation of his estate on 10th June, 2005. In the said Certificate of Confirmation dated 13th May, 1996, there is no indication whatsoever that the estate of the late Silonga Maser Olekaso had any claim over TIMAU/SETTLEMENT SCAHEME/16. It is therefore arguable whether that estate can still maintain a claim over the said property having been fully adjudicated upon and its claim having not been noted therein.

21. The foregoing notwithstanding, this is a family court. Its jurisdiction is only limited to ascertaining who the beneficiaries of the estate of a deceased person are, what the extent of the estate is and the shares due to the respective beneficiaries. That jurisdiction does not extend to determining rights or claims against the estate. What the family court can do, is to ascertain already established claims or rights which have already enured and/or conferred to the affected claimants.

22. The family court is strictly guided by the ***Law of Succession Act and the Probate and Administration Rules.*** Its purpose is to administer the estate of deceased persons by determining the assets of the deceased, the dependants who are entitled to beneficial interest and subsequently distribute

the assets among the said dependants. It is the guardian of the deceased for it ought to protect, collect and preserve the estate until it can ascertain the rightful beneficiaries. What's more, to resolve disputes among personal representatives, survivors, beneficiaries and dependants.

23. In this case, the objector and his family are not related to the deceased but are third parties who claim ownership of 9 acres of the deceased's estate. Such a dispute is not to be resolved by this court. In the case of ***Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLRMusyoka J*** held that:-

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

...

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

24. I fully agree with the above restatement of the law. In the present case, not only is the objector's claim of that of a 3rd party, but he has litigated it in the civil courts which courts have already made decisions in those cases. Out of abundance of caution, this court called for the court files in the Meru CMCC NO. 147/1997, Meru HCA 53/99 and the Nyeri HCCC NO. 25 of 2010 (OS). The court confirmed that in all those cases, there had been final orders made. There was no appeal pending in any of those cases. As a result, this court cannot even invoke the provisions of ***Rule 41(3) of the Probate and Administration Rules*** and set aside the 9 acres for their ownership to be resolved.

25. In the circumstances, I find that the Summons has no merit and the same is dismissed accordingly. Since the petitioner did not notify the objector of the application for confirmation, I will order that each party do bear own costs.

DATED and DELIVERED this 12th day of April, 2018.

A. MABEYA

JUDGE