



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 681 OF 2015

IN THE MATTER OF THE ESTATE OF JACKSON NTHENGE MBITHI

1. JOSEPH NTHENGE MBITHI

2. WAMBUA NTHENGE.....RESPONDENTS

VERSUS

RUTH NDUUME MWANGANGI.....PROTESTER

AND

ANTHONY WAINAINA KIMANI.....INTERESTED PARTY

RULING

1. The respondents herein sought the confirmation of grant by summons dated 23rd January, 2017. They later filed a proposed schedule and consent on distribution of the deceased's estate on 16th March, 2017 which was protested to by an affidavit sworn on 21st March, 2017.

2. The grounds upon which the protest was based are that; the protestor's husband purchased 2 acres part of the deceased land Mavoko Block 12/250 measuring 5 acres on or about 21st April, 1993 by sale agreements dated 21st April, 1993 and 8th March, 1994. That title documents were not available since the land had not been registered. That on the strength of the sale agreement and good will between the families, the protestor's husband together with the protestor took possession of the suit property in the year 1993 and erected their matrimonial home among other developments. That the protestor's family have been living on the said property without any interruption since then and her husband was buried on the said land. That although the deceased undertook to process the title documents to the property, the anticipated transfer was never done. The protestor later learnt that the deceased procured a certificate of title for the entire 5 acres and sub-divided the land in two portions thus Mavoko Town Block 12/4907 and Mavoko Town Block 12/4906 and effected registration in his favour. That in a meeting held in September, 2016 a wider deceased's family a settlement was arrived at in the following terms:

- i. That the respondents admitted that the deceased had sold the suit premises to the protestor's husband.*
- ii. That the respondents agreed to facilitate the transfer of the suit property to the protestor's estate.*
- iii. That the respondents agreed to refund one Anthony Wainaina Kimani a sum of KShs. 1,500,000/.*

3. It was contended that whereas the deceased's family may have attempted to sell the land, the third parties can be refunded.

4. The protestor and her witness Dickson Kinama Katuva were heard viva voce. The protestor's evidence was a reiteration of her averments the affidavit of protest while Dickson Kinama confirmed that he wrote the sale agreement and that the protestor's husband was buried on the said land.

5. The protest was dispensed with by way of written submissions. The protestor's submission was a reiteration of her affidavit. She emphasized that the respondent conceded to the fact that the land had been sold to her husband and further that by virtue of paying the consideration and living on the land for decades, a constructive trust was created over the suit property in favour of the protestor's property. She relied on the case of **Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] eKLR** where the court held that by virtue of payment of consideration and occupation of the premises, a constructive trust was created in the appellant's favour amounting to overriding interest warranting protection by the law.

6. On the other hand, the respondents argued that a search certificate reveals that the subject land title is registered in the name of the

deceased. That the letter of consent for sub-division was given by the land control board on 16th March, 2012 and letter of consent for transfer on 11th March, 2012. That the subject parcel is agricultural land within the meaning of the Land Control Act and was subject to the provisions of that Act. That the same therefore implies that consent for approval of the sale transaction made on 21st April, 1993 ought to have been granted within six (6) months from 4th February, 1997 in default of which the transaction became null and void. In support thereof, the respondents cited **Mary Chepsongok Rogo v. Tabitha Kipyaba [2014] eKLR, Re estate of John Manyonge Wakoli [2011] eKLR**. It was further argued that the protester's right was extinguished by the limitation of Actions Act and cited section 7 of the Limitation of Actions Act and **Alexander Mbaka v. Royford Muriuki Rauni & 7 others [2016] eKLR** and **Mary Chepsongok** (supra).

7. I have carefully considered the protest herein and the submissions tendered thereto together with the authorities cited. I have also done so bearing in mind that the underlying factor here is the issue of ownership of the subject property which is not within my jurisdiction to determine. It is noteworthy that the protester's allegation that the 1st respondent present at the family meeting annexure 'R4' admitted that the deceased sold the land to the protester's husband has not been rebutted. In view of the said failure, I reiterate Hon. Judge Mabeya's finding in **Safarilink Aviation Limited v. Trident Aviation Kenya Limited & Another [2015] eKLR** where he held that:

“Failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true...”

And find that the protester's allegations are prima facie true.

8. In view of the said disposition, I am inclined to order that the said properties be removed from the schedule of the deceased until the issue of ownership is determined by the proper court. In the alternative the Administrators are hereby directed to assign 2 acres to the protesters husband's estate ie. 1 acre from **MAVOKO TOWN BLOCK 12/4906** and the other be excised from **MAVOKO TOWN BLOCK 12/4907**.

9. In the result, it is the finding of this court that the Protestor herein has established her case on balance of probability. The Summons for Confirmation dated 23/1/2017 are tainted with some illegality and are struck off. The Administrators to file afresh Summons in which the interests of the Protestor are taken into account. The same to be filed within the next 45 days. Each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 22nd day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Nduva for the Respondents

Wata for Omari for the Protester

No appearance - for the Interested Party

Josephine - Court Assistant