



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

SUCCESSION CAUSE NO. 20 OF 2017

FORMERLY MACHAKOS H.C. P&A NO. 913 OF 2010)

IN THE MATTER OF THE ESTATE OF MUSAU MAUNDU ALIAS MUSAU MAUNDU YUMBYA (DECEASED)

GRACE KAVINI MUSAU.....ADMINISTRATOR

-VERSUS-

JOSEPHINE KAVOO NYAGHA & 5 OTHERS.....PROTESTORS

RULING

INTRODUCTION

1. The deceased herein died intestate on 30/04/2009 aged 80 years.
2. Grace Kavini Musau and Josephine Kavoo Nyagha (*widows of the deceased*) petitioned for grant of letters of administration intestate to the deceased's estate. The petition is not dated but it was filed on 21/12/2010.
3. The following were named as the persons surviving the deceased.
 - a. Grace Kavini Musa - 1st wife
 - b. Martha Mutheo Musau - Daughter
 - c. Jackson Maundu Musau - Son
 - d. Josephine Kavoo Nyagha - 2nd wife
 - e. Beatrice Musangi Musau - Daughter
 - f. Veronica Mwendu Musau - Daughter
 - g. Dickson Mwanja musau - Son
 - h. Kasisi Musau - Daughter
 - i. Gedion Mwove Musau - Son
4. The only asset listed in the affidavit in support of the said petition is UKIA/UTAATI/1176. There are no listed liabilities.
5. The cause was gazetted and the grant was issued to the Petitioners on 03/02/2012.
6. On 18/04/2012, the administrators applied for confirmation of the grant and proposed that the aforementioned property be distributed as follows;
 - a. Muthini Kivesi - 0.85 Ha & 0.45 Ha

- b. Benson Muthwii - 0.45 Ha & 0.42 Ha
- c. Josephine Kavoo Nyagha - 2.0.1 Ha & 0.48Ha
- d. Alphonse Mwangangi - 0.085 Ha & 0.76 Ha

7. When the matter came up for confirmation on 29/04/2013, the Court noted that the consent to the confirmation of grant was not signed and ordered that the same be done. Consequently, confirmation was deferred.

THE PROTEST

8. On 14/12/2015, an affidavit of protest was filed by M/S B. M. Kituku & Co. Advocates.

9. It was sworn by Dickson Mwanja Musau on behalf and with the authority of his co-protestors. Basically, the 2nd wife and her children are the protestors.

10. The protestors aver *inter alia* that the 2nd Administrator was misled into thumb printing the petition papers by one Mr. Alphonse Mwangangi who did not explain the contents but only told her that she would get her share from her husband's land.

11 Further, it is stated that no liabilities were stated in the petition and that the proposed distribution exceeds the total acreage of the land thus impossible to implement.

12. A Replying Affidavit was filed by Grace Kavini Musau (*herein after 'Grace'*) where she avers *inter alia* that; before his demise, the deceased had sold some portions of land to Muthiani Kivesi and Benson Makula. That after his demise, the clan elders sub-divided the remaining portions of land to the two wives.

13. That after sub-division, she sold her portion to Alphonse Mwangangi Mbaluka. That the same Alphonse bought some portions from her co-wife and step son, Dickson Mwanja Musau. She attached some documents to her affidavit which, unfortunately, are not in the Court's language. She urged the Court to dismiss the protest.

14. On 01/02/2016, Nyamweya J. directed that the matter be canvassed by way of oral evidence and it was partly heard before her on 06/10/2016.

15. The protestors were represented by learned Counsel Mr. Kituku while Grace Kavini Musau acted in person.

16. PW1, Dickson Mwanja Musau testified that the deceased was his father, Grace Kavini was his father's 1st wife and Josephine Kavoo Nyagha was the 2nd wife. He adopted his affidavit as evidence.

17. On cross examination, he said that the deceased neither sold the land nor was it sub-divided. Further, he said that it was the 1st wife who took his mother to the chief and then involved other people in the distribution of the deceased's property.

18. In re-examination, he said that his mother lives on the land but the 1st wife sold her portion and left. She stays in Makindu. He denied signing the papers filed in Court by the administrators. He also said that the proposed distribution does not tally with the size of the land and that the reason for involving elders was because the 1st wife was digging their land.

19. The matter was eventually transferred to this Court and on 27/04/2017, directions were given for the matter to proceed from where it had reached.

20. PW2 was Josephine Kavoo Nyagha (*herein after 'Josephine'*). She testified that she was married to the deceased as a 2nd wife. Grace Kavini Musau is her co- wife. That she is illiterate and was told to thumbprint the petition papers.

21. Her children did not sign. She was not aware that Grace wanted to distribute land to buyers. The land is 1.3 Ha (3.2 acres) and the proposal by Grace exceeds it's size. She wants the Court to determine her share.

22. On cross examination, she denied that the land was sub-divided by the clan but agreed that she sold a portion to Alphonse. She said that Grace wanted to take advantage of her illiteracy and defraud her.

23. In re-examination, she said that her children are five. Grace has two. That it is Grace who called the clan and not her. That they sold the portions after the death of the deceased but the land is still in deceased's name.

24. PW3, Beatrice Musangi Musau testified that the deceased was her father, Grace, her step-mother and Josephine, her mother. She disowned the signature appearing against her name in form 38 and said that the authentic one appeared in the authority to plead dated 14/12/2015.

25. She had been omitted from distribution and the allottees of the shares were strangers to her. That there were no liabilities indicated in the petition and the proposed distribution exceeded the size of the land.

26. On cross examination, she said that the deceased had two wives.
27. She agreed that the 1st wife's daughter had not been given any share. She denied having signed any Court document and that the proposal was made by the 1st wife's side. She denied that the deceased ever sold land.
28. In re-examination, she said that Martha was the 1st wife's daughter. That her side of the family consists of five siblings and they live on the parcel of land but Grace sold her portion and left. That there are no documents to show that any sale ever took place between the buyers and deceased.
29. The protestors closed their case at that juncture.
30. DW1, Grace Kaviini Musau testified that the deceased was her husband and they had two children. Josephine was the 2nd wife. The asset left by the deceased was UKIA/UATII/1176 measuring between 3 and 4 acres. It is occupied by the 2nd wife and her family.
31. That the land was sub-divided and she sold her portion but there were no titles. That all family members were present when the sub-division was done by the clan. That the land should be subdivided into two. That she wants nothing in the land save for the numbers so that she can transfer to the buyer.
32. On cross-examination, she agreed that she sold the land after the demise of the deceased. That she told Nyamweya J about signing for her children but did not know it was wrong.
33. That she is illiterate and did not know the content of the document she was signing. That she does not know what is contained in the proposal for distribution. She agreed that there was no sketch map of the proposed distribution. She said that children are entitled to share from their father's estate through their mother. She agreed that when the alleged sale to Benson took place, the deceased had died.
34. DW2, Jackson Mbithi Maundu testified that he is a clansman of the deceased. That the deceased had two wives. The 1st wife has two children and the 2nd wife has five. That the deceased left land which is occupied by the 2nd wife and her children.
35. He went on to say that the 1st wife's son, Mutie Musau, visited him at home and told him that the family wanted him to sub-divide their land. That together with the clan chairman and another clan member, they sub-divided what had been left by the deceased after sale of some portions.
36. He said that he had a record to show that Mutie, the two wives and elders signed. According to him, the land has never been surveyed.
37. On cross examination, he said he had nothing to show he was a clan member and that at the time of dividing the land, the deceased had died. He admitted that he was not a trained surveyor and did not have the original documents that they wrote.
38. DW3 was Benson Makula Muthwii. He claimed to have bought land from the deceased in bits between 1997 and 2008. He did not know the total acreage of the land he bought. The land was registered but they never went to the Land Control Board.
39. The land is occupied by the 2nd wife and her children but he farms the portion he bought. That after demise of the deceased, the land was sub-divided whereupon Grace and her son sold their portions to him.
40. On cross-examination, he said that there was a Government surveyor on the land who had been called by the two wives and buyer collectively. He was aware that they were required to go to the Land Control Board and agreed that the Court cannot confirm the grant with errors in distribution.
41. DW4 was Alphonse Mwangangi. He claimed to have bought two and a half acres (2½) of land from Grace. That they entered into an agreement and also went to the Land Control Board. The land was in the deceased's name.
42. That in October 2010, he bought a quarter (¼) acre from Josephine and there is an agreement to that effect signed by both parties. That he has been farming the portions he bought.
43. On cross-examination, he said that the succession cause should be completed first before going for his share.
44. That Benson brought the surveyor to the land knowing that the owner was deceased.
45. From the foregoing, it is my considered view that the following issues arise for determination.

a. What is the applicable law in this case?

b. Whether the deceased sold any portions of his land prior to his demise.

c. Whether beneficiaries can validly transfer their beneficial interests in land before confirmation of grant.

d. What orders should be made in this case.

APPLICABLE LAW

46. The deceased in this cause died on 30/04/2009. The Law of Succession Act came into operation on 01/07/1981. Section 2 (1) of the Act provides that:-

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

47. Administration of his estate should therefore be done according to the provisions of the Law of Succession Act.

Whether the deceased sold any portions of his land prior to his demise.

48. It is clear that the petition does not indicate any liabilities owing from the estate. One can argue that the administrators were not represented and therefore did not know how to go about it. However, if that was the position, it should have come out clearly during the hearing of the case.

49. There is absolutely no evidence that was produced to show that the deceased had sold any portion of his land prior to his demise. The only witness who claimed to have bought land directly from the deceased was DW3.

50. He however did not produce any agreement to that effect and agreed that they never went to the Land Control Board. It was also clear that the land has never been surveyed.

51. It is not in dispute that the land in question is agricultural land. The validity of transactions relating to agricultural land should be determined in accordance with the provisions of the Land Control Act cap. 302, laws of Kenya.

52. Section 6 thereof provides as follows;

“6. Transactions affecting agricultural land

1. Each of the following transactions that is to say -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

53. It is therefore clear that any transaction which falls within the definition of section 6 but lacks the Land Control Board consent is null and void for all purposes.

54. If DW3 can prove that he had entered into an agreement with the deceased and that he had paid some consideration, his recourse lies in section 7 of the Land Control Act which provides as follows;

“7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

55. The upshot of the foregoing is that there is no basis for this Court to make a finding that the deceased had sold a portion of his land prior to his demise.

Whether beneficiaries can validly transfer their beneficial interests in land before confirmation of grant.

56. DW3 claims to have bought the beneficial interests of Grace and her son. On the other hand DW4 said that he bought ¼ acre from Josephine in 2010, notably, this was before the issuance of the grant.

57. The transactions between DW3, DW4 and the beneficiaries of the estate are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act.

58. Section 45 frowns upon intermeddling with the estate of a deceased person. It provides as follows;

“45. No intermeddling with property of deceased person

(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.”

59. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of section 82 (b) Proviso (ii), which provides that:

“(ii) No immovable property shall be sold before confirmation of the grant.”

60. Again, any consideration paid to the beneficiaries pursuant to such transactions is recoverable as a debt. In **Musa Nyaribari Gekone and 2 Others –Vs- Peter Miyianda and Anor. (2015) eKLR**, the Court of Appeal held that such persons can only be creditors, not of the estate but, of the respective beneficiaries who may only be taken to have sold their respective shares to them.

61. The upshot of the foregoing is that the beneficiaries could not validly transfer their beneficial interests in the land before confirmation of grant.

What orders should be made in this case.

62. It is not in dispute that the deceased was polygamous. The provisions of section 40 (1) of the Law of Succession Act are therefore applicable. It provides as follows;

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

63. The first house constitutes 3 units and the 2nd house constitutes 6 units.

64. The land left by the deceased should therefore be divided into nine (9) equal portions and distributed accordingly.

CONCLUSION

65. The protest has merit and is hereby allowed. Further and as rightly brought out by the protestors, the proposed distribution exceeds the size of the available land; thus the court makes the following orders;

i. The land shall be divided to the 9 equal portions for each of the 9 beneficiaries.

ii. No orders as to costs.

SIGNED, DELIVERED THIS 30TH DAY JULY OF 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE