



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 665 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE BETH NDUKU WAMBUA**

**FRANCIS MUSAU NDAMBUKI.....OBJECTOR**

**VERSUS**

**1. GEORGE MUKONZA WAMBUA**

**2. PAUL MUTUA WAMBUA**

**3. SAMUEL MUINDI WAMBUA.....PETITIONERS**

**RULING**

1. The petitioners filed a notice of motion dated 22<sup>nd</sup> May, 2012 seeking the confirmation of the grant letters of administration intestate issued to them on 15<sup>th</sup> December, 2010. The Objector subsequently on 16<sup>th</sup> January, 2015 filed an affidavit in protest to the application. He protested the inclusion and distribution of L.R. NO. MACHAKOS/KIANDANI/2366 and the purported sale of the said land to Kitumbi Ventures. The objector alleged that he bought the said property from Simeon Nzyuko and took possession of it. That the said Simeon passed on before he could effect the adjudication and processing the title deed in the objector's name as was agreed between the two. That after Simeon's death, the deceased took out title to the property in her name. The deceased later died and the objector engaged her children to have the property transferred to his name in vain. He wrote to the District Land Registrar to provide him with the green card to enable him put a caution and file citation cause to compel the beneficiaries to take out letters of administration for their deceased mother. He then filed Citation Cause No. 208 of 2012 in order to fast track the processing of the titles since he got wind that the beneficiaries were trying to sell the said property. That he successfully put a caution on the said land at the land registry.

2. The 2<sup>nd</sup> petitioner filed an affidavit in rebuttal to the objector's affidavit. He denied that Beth Nduku was Simeon Nzyuko's wife and stated that she was his daughter in law. He denied that the objector has been in possession of the alleged property. That Machakos/Kiandani/2366 and the alleged Plot No. 108 are two different parcels of land. He contended that the sale agreement is a forgery and a cursory look at it reveals that his grandfather, Simeon and mother, the deceased were not parties to it and stated that the objector has no right to put a caution and he is also not a beneficiary.

3. Viva voce evidence was taken in respect to the affidavit of protest. The objector testified that he bought the property **Machakos/Kiandani/2366** formerly L.R. No. 108 from the petitioner's grandfather vide an agreement written in Kamba language and dated 17<sup>th</sup> October, 1975 witnessed by Makau Mulwa, Joseph Kimeu, Teresia Ngao and Beth Nduku. It was agreed that the objector shall take possession of the property measuring 50m×100m upon payment of purchase price of Kshs. 3,000/-. In the year 1978, the objector wanted to transfer the plot to his name but found that it had a different number as No. 108. He got a letter of authority from the seller to the Land Adjudication Officer giving information that he had sold the property to the objector. He produced the letter as Exhibit No. 2. He took possession and fenced the plot. In the year 2010, the objector wrote to the Land Registrar to enable him develop the land and found out that it was registered in the deceased's name. On 5<sup>th</sup> March, 2010 he asked for the green card and obtained the said green card dated 26<sup>th</sup> March, 2010. Letter and green card were produced as (Exhibit 3 and 4). He conducted searches on 6<sup>th</sup> March, 2010, 20<sup>th</sup> July, 2012 and 30<sup>th</sup> December, 2014 which searches show restrictions. The searches were produced as Exhibit 5. The objector stated that he pursued the petitioners severally to have the property transferred to him in vain. On 15<sup>th</sup> April, 2015 someone fenced the plot. He filed a case in respect of the property Machakos ELC No. 120 of 2015 and he produced the pleadings to that effect as Exhibit 6. He stated that the suit before the Environmental and Land Court is still ongoing. That on the property are stones he had put in readiness to start building. On cross examination, the objector stated that he does not have the title deed to the land but that the number is 2366. That he is not a member of the deceased's family but claiming as a purchaser of the property. That he bought the property from Simeon Nzyuko Mutetei in the year 1975 and the plot had no number at the time. Shown exhibit 1 he stated that there is Plot No. Kiandani No. 2366. That in annexure FN2 in his affidavit there is plot No.108 Kiandani and that he inserted Kiandani 2366 much later in the year 2010 after he had known that that was the number and that no one was present when he inserted the number. He later stated that his lawyer must have inserted the number but that he did not raise a question. He admitted that Simeon Nzyuko's signature was not present in both agreements. That the deceased's name does not appear in the agreement but her signature is present. That she appears as Nduku Mwalimu. He acknowledged that he in his examination in

chief testified that he bought a plot measuring 50m×100m but that the same is not disclosed in the agreement. That he measured the plots when he purchased them. He clarified that although he stated in his affidavit that he bought the plots from husband and wife that is not the true position and stated that the deceased was not a seller. He stated that the green card reveals that the owner of Machakos/Kiandani/2366 is the deceased and not Simeon Nzyuko.

4. On re-examination, the objector stated that the difference in the agreement is the plot number. That he was purchasing part of Plot No. 108.

5. Joseph Nzyuko Kimeu (PW2) who was a witness to the agreement dated 17<sup>th</sup> October, 1975 stated that Simeon Nzyuko was accompanied by a lady whom he assumed was his wife but appears to be his daughter in law. That the other witnesses were Teresia Ngao and Nduku Mwalimu both deceased. That the objector paid Kshs. 3,000/- but that there were no title deeds then. He however stated that he is not aware of the steps followed by the objector to possess the property. He contended that the claim by the deceased's estate is not legitimate since the objector purchased the property. He stated that he is a witness which is about breach of constructive trust regarding Land Machakos/Kiandani/2366. That the court on 5<sup>th</sup> September, 2016 ordered that status quo be maintained. On cross examination, he stated that he signed an affidavit in support of the protest ('FN1') since he witnessed the agreement between the objector and Simeon Nzyuko. He however acknowledged that the seller's signature was not in the agreement and that the plot had no number at the time. He stated that the number inserted in the agreement was not in existence at the time of the sale and that he does not know who inserted the number. That the deceased signed and he witnessed the sale. He admitted that the name Beth Nduku Mwalimu does not appear in the agreement but that the one which appears is Nduku Mwalimu. That the property belongs to the deceased as per the green card shown to him in court. He denied that he is privy to the letter dated 17<sup>th</sup> September, 1978. Shown Exhibit 1, he stated that there is an insertion of Plot No. 108 Kiandani.

6. George Mukonza (DW1) testified that Plot No. 2366 was owned by the deceased who is his mother and that she did not sell the same to the objector. He stated that the deceased's name is not in the agreement dated 17<sup>th</sup> October, 1975 and that the seller was his grandfather who died in the 1980s. He stated that he was not aware whether or not his grandfather owned the said plot. That his mother was the owner and the plot is now owned by Kitumbi Ventures who bought the plot from the deceased. On cross examination he stated that he was about 11 years of age at the time the alleged agreement was made. That he is not aware whether or not the plots were registered in his father's name. He stated that his mother inherited title deeds from his father upon his passing on. That he does not know the deceased's signature. He stated that he did not bother to have the caveat removed. That Kitumbi Ventures bought the property from his mother but that he does not have the agreement to that effect. That the grant can just be confirmed despite the existence of the ELC case.

7. It was the objector's submission that no sale agreement was produced in court and that the alleged sale was effected before the confirmation of the letters of administration. That any sale done before confirmation is unlawful from the schedule and going by DW1's evidence, it is evident that the sale to Kitumbi Ventures was done after the death of the deceased. That in the circumstances, the sale is null and void. The case of **Re Estate of Isaac Kaburu Marete (deceased) 2017 eKLR** and **Bontempi Luigi & 2 Others v. Shariff Mohammed A. Omar & Another [2015] eKLR** were cited in reliance. That from the evidence presented in court, it is demonstrated that there is prima facie a justifiable dispute as regards Machakos/Kiandani/2366 and this court has the powers under section 47 of the Law of Succession Act and Rule 41 (3) and 73 of the Probate and Administration Rules to set aside any such property to await determination of the civil proceedings.

8. The petitioners on the other hand submitted that the protestor does not fall within the provisions of Section 29 and section 45 of the Law of Succession Act therefore cannot claim the property. The petitioner in this regard cited **Johnson Muinde Ngunza & another v. Michael Gitau Kiarie & 12 others [2017] eKLR**. It was further argued that the objector's claim being based on constructive trust, he ought to seek redress before the Environment and Land Court and not this court.

9. I have given due consideration to the parties' dispositions. While the petitioners claim that the property in question was registered in the deceased's name, the objector has tabled documentation in an attempt to prove that he purchased the same. It is clear to me that there is an existing dispute as to the ownership of the property. It must be noted that it is not within this court's jurisdiction to determine matters concerning ownership of land. Such matters lie within the precincts of the Environment and Land Court. There being a dispute in regard to the subject property as I have mentioned, this court is under duty (Rule 41 (3) of the Probate and Administration Rules to set aside the said property to await the determination of the ELC court dealing with the issue of ownership. In the circumstances, the said property is to be set aside to await the determination of its ownership by the ELC Court.

10. It is noted that the Petitioners in the summons for confirmation of grant dated 22/05/2012 have provided a schedule of several properties for distribution which include the property to which the protestor stakes a claim namely **Machakos/Kiandani/2366**. Since the protestor does not have a claim over the rest of the properties, I find it would be fair and just to have the grant confirmed with a rider that the property in dispute and which is the subject of the **Machakos ELC No. 120 of 2015** be held in trust by the administrators pending the outcome of the said **ELC Case No.120 of 2015**. In the case of **Benedict Ndunge Mbole =Vs= Christopher Musyoka Musau [2017] eKLR** the court allowed a grant to be confirmed subject to the suit property being vested in the Petitioner to hold in trust pending the determination of the ownership of the suit property. This court is guided by the above authority since the protestor might stand prejudiced should he succeed in the ownership dispute before the ELC court as by then the suit property will have been distributed and out of his reach. If the protestor succeeds in the ELC case then the petitioners would transfer the property to him and if he loses then the petitioners shall proceed to distribute the property to the rightful beneficiaries accordingly.

11. To that extent only, the protest succeeds. However, this court proceeds to make the following orders:-

***(a) The grant herein is confirmed but subject to the property namely Machakos/Kiandani/2366 being distributed to the petitioners to hold in trust pending the outcome of the Machakos ELC No.120 of 2015.***

***(b) Each party shall bear their own costs.***

It so ordered.

**Dated and delivered at Machakos this 15<sup>th</sup> day of August, 2018.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Langalanga for Maingi Musyimi - for the Objector

Mugure for A. K. Mutua - for the petitioners

Josephine - Court Assistant