



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 865 OF 2013

IN THE MATTER OF THE ESTATE OF JOSEPH MUTUA MUNGUTI (DECEASED)

FREDRICK SILA MUSEMBI.....OBJECTOR

VERSUS

JUDITH WANZA DAVID

STELLAH MWELU MUTHIANI

MAGDALINE CHEPKIRWOK (The Registered

Officials of Syoks Golden Sisters).....CREDITORS

VERSUS

MARTHA NDILA MUTUA.....1ST PETITIONER

ROBERT MUNGUTI MUTUA.....2ND PETITIONER

JUDGEMENT

Introduction

1. On 30th July, 2014, a grant of letters of administration intestate was made to the Petitioners herein in respect of the estate of **Joseph Mutua Munguti** (hereinafter referred to as “the Deceased”). Pursuant to the said grant, the Petitioners filed Summons for Confirmation of Grant on dated 21st January, 2015 on 22nd January, 2015.

2. The Objector however filed a summons for revocation of the grant dated 18th March, 2015 on the ground that the grant was obtained fraudulently by making of false statements or by concealment of something material and by means of untrue allegations of fact essential in point of law. His argument was based on his claim for a portion of land parcel known as Plot No. 2410 located at Lukenya measuring 7 acres which forms part of the deceased’s estate, and that he was not included as one of the beneficiaries.

3. On their part, the Creditors by way of an application dated 20th March 2015, sought orders that their interests over property known as Mavoko Town Block 3/29483 (part of land parcel formerly known as Mavoko Town Block 3/2510) be factored in the distribution of the deceased's estate upon confirmation of grant, and that the same be confirmed in their favour. According to them, they bought 5 acres of a land parcel then known as Mavoko Town Block 3/2510 from the deceased for the sum of Kshs.3 million which they paid in full, and that the said parcel was subdivided creating a new a title number Mavoko Town Block 3/29483 measuring five (5) acres which was to be transferred to them but the deceased died soon after receiving the agreed purchase price and signing the transfers, and that though the Creditors paid the stamp duty, the said transfer could not be registered due to a caution placed on against title number Mavoko Town Block 3/ 29483 by the 2nd Petitioner.

4. The Creditors were however of the view that the Objector's application for revocation of grant was unnecessary, as there is clear evidence that the deceased was subdividing his land to transfer 5 acres to the Creditors and 7 acres to the Objector, and the rest be left for the benefit of the deceased's estate. Further, that the proper application in the circumstances would be for rectification of the grant to include the interests of the Creditors and the Objector, and that the remainder of the estate be distributed as per the wishes of the beneficiaries of the said estate.

5. In her response, the 1st Petitioner admitted that the deceased sold 7 acres of land to the Objector and 5 acres of land to the Creditors before his death, and had no objection to the parcels of land being transferred to them and for the court to confirm the remaining estate to herself and her co- Administrator to hold the same on trust of other family beneficiaries. The 1st Petitioner was however opposed to the revocation of grant since in her view there were no sufficient reasons to warrant the said revocation.

6. The 2nd Petitioner on his part opposed the two applications as well as the 1st Petitioner's concession. According to him, annexures by the Creditors only demonstrate that the amount paid to the deceased as Kshs.1, 500,000/= leaving outstanding balance of Kshs.1,500,000/= which has never been paid, and that the deceased did not append his signature, hence he was not party to the said agreement. According to him, the reason why the 1st Petitioner was conceding to the applications by the Objector and Creditors and urging this court to confirm the grant, is because she was the beneficiary of the money paid to the deceased for the land and that the deceased's second family were absolutely disadvantaged. Further, that as a matter of natural justice, as the rightful heirs of the deceased they should not be denied the right to rightfully inherit what belonged to their late father.

7. After hearing the two applications, **Nyamweya, J** on 30th January, 2017 held that the concerns raised by the Objectors and Creditors as regards their interest in the deceased's estate could be more appropriately and adequately addressed during confirmation proceedings by way of affidavit of protests, as provided for by Rule 40(6) and (7) of the **Probate and Administration Rules**, which is the appropriate procedure when one is contesting distribution proposals made in a summons for confirmation of grant. Likewise, the opposition by the 2nd Petitioner to the Objector and Creditors' claims could also be adequately addressed in the confirmation proceedings. Accordingly, the Learned Judge declined to grant the prayers sought in the said application, but directed that the Objector and Creditors were at liberty to file and serve affidavits of protest to the summons for confirmation of grant filed by the administrators on 22nd January 2015 within 60 days of the date of the ruling.

Objector's Case

8. Following the said decision, the Objector herein filed his affidavit of protest on 28th February, 2017 in which he reiterated his earlier position and averred that he fully paid the agreed purchase price receipt of which was acknowledged in the agreement. It was his deposition that the Petitioners and the beneficiaries were well aware of this fact but the Deceased died before he could transfer the land to him. He therefore opposed the mode of confirmation proposed and sought that his interest be included and catered for so that he is not deprived of what legally belonged to him. In support of his case he exhibited a copy of the sale agreement in question.

9. According to the Objector, the sale agreement was entered into in the presence of the 1st Petitioner and that the Deceased's sons were not part of the agreement. However he stated that his witness was **Abednego Makau Sila**. He testified that he paid Kshs 250,000.00 in cash towards the transaction and this was acknowledged as evidenced by the agreement. While acknowledging that the Deceased had other children, he averred that he never saw the 2nd Petitioner until these proceedings were commenced. In his evidence, it was one **Gideon**, a younger brother to the 2nd Petitioner that was mandated to sign on behalf of the family members though the other brothers were also present. However the agreement was also witnessed by the 1st Petitioner who did not oppose the Protest.

10. To the Objector, it was the Deceased's son, **Benedict**, who introduced him to the Deceased after the family sat down and agreed to sell the land. He testified that though they had a consent letter, the Deceased passed away before the transfer could be completed. He however did not sign any transfer form.

11. In his further testimony, he stated that the Deceased passed away after paying for the demarcation of the land for the purposes of the subdivision into 3 portions with him being entitled to 2.83 acres. According to him there was no objection to the transaction from the Deceased's family. He however was not aware of the reason why the 2nd Petitioner was not present.

Creditor's Case

12. In similar vein the Creditors, who were the Trustees of Syoks Golden Sisters, a women's self-help group registered at the Ministry of Culture and Social Service (hereinafter referred to as "the Group") also filed their affidavit of protest on 20th March, 2017 in which they reiterated their earlier position and added that a friend called **Jackson**, who lived in area where the land was situate introduced the Creditors to the Deceased and arranged for a meeting between the parties which was held in the presence of the Deceased's wife, **Martha**, daughter in law, **Elizabeth** and the son. They identified a parcel of land situated in the Kananie Area within Athi River owned by the Deceased herein who agreed to dispose of 5 acres of the same. At that time the land was known as Mavoko Town Block 3/2510 which the Group confirmed, through an official search, was owned by the Deceased.

13. According to them the sale price was agreed in the sum of Kshs 3,000,000.00 for the 5 acres and an agreement was entered into in that respect which agreement was witnessed by the Vendor's wife and other family members. According to the Creditors, a meeting was arranged between the Deceased and the Group at the lawyer's office for 22nd January, 2017 at which the agreement was signed, in the presence e of the Deceased. It was disclosed that the Deceased was given Kshs 20,000.00 which was acknowledged by the Deceased's daughter in law, **Elizabeth** who passed the money to the deceased. Similarly a cheque for the sum of Kshs 780,000.00 was issued which was acknowledged by the 1st Petitioner. There was also acknowledgment of the cheque for the sum of Kshs 7,000,000.00. paid at the lawyer's office the same day and a further payment vide a cheque date 29th April, 2013, Kshs 700,000,00 deposited on 6th, May, 2013 making a total of Kshs 3 million hence no money was owed by the Creditors. It was averred that the said Vendor appeared before the Land Board after which the Vendor agreed to engage a surveyor who hived off the said 5 acres to be transferred to the Group resulting into title number Mavoko Town Block 3/29483. According to the Creditors, whereas the Vendor duly signed a transfer on 18th April, 2013, the Vendor passed away on 15th May, 2013 and the Group, without having the knowledge of the Deceased's death, paid the stamp duty to effectuate the transfer on 23rd May, 2013.

14. It was disclosed that when the Group sent the transfer documents for registration, it discovered that a caution had been registered against the title number Mavoko Town Block 3/29483 by the 2nd Petitioner claiming beneficial interest. To the Creditors, the 2nd Petitioner was unknown to them since he was not involved or included by the deceased at the time of the sale. However, the 1st Petitioner, a widow of the Deceased participated in the sale transaction and was a witness together with a son, **Benedict Mutua Munguti** and the Deceased's daughter in law, **Elizabeth Mwithi Mutua**.

15. It was their evidence that by the time of the Deceased's death the transaction was almost complete and that the Deceased had appeared before the Land Control Board and further that they had been shown the beacon and a number by the surveyors as the subdivision had been done in accordance with the mutation which they exhibited. They averred that before they entered into the transaction they carried out a search which revealed that there was no encumbrance.

16. In cross-examination by the Objector, the Creditor's witness disclosed that they agreed that the money be deposited in an account held with Cooperative Bank and that this is what they did. The cash was however paid in the presence of the lawyer. They however denied that the transaction was entered into with **Elizabeth**. According to the Creditors, they did not know how the account was owned. It was however their evidence that the cheque was drawn in the name of the Deceased but did not know how the Deceased withdrew or used the money.

17. Despite this the beneficiaries of the Deceased's estate, in their application for confirmation of the grant did not disclose the Group's interest in title number Mavoko Town Block 3/29483 hence the Group's protest to the proposed mode of distribution.

1st Petitioner's Case

18. In her witness statement, the 1st Petitioner, a wife of the Deceased, disclosed that the Deceased had a problem with his legs and requested **Mutua** to look for someone to buy his land. Accordingly, the Group was identified and it entered into an agreement for the sale of the land. According to her, the Group requested that they go to Nairobi with the deceased in order to sign the agreement. She stated that the Deceased only had problems with the legs but knew what he was doing when he signed the agreement. It was disclosed that, apart from the 1st Petitioner herself, the agreement was witnessed by Benedict and Benedict's wife, **Elizabeth**.

19. According to the 1st Petitioner, the Deceased sold to the Objector 7 acres of land to be excised out of Mavoko Town Block 3/2510 and that she was present when the sale transaction was being undertaken on 17th July, 2011 which sale was witnessed by herself. According to her the Objector paid the deceased the consideration agreed upon in cash and the Deceased notified all their children about the sale and purpose for the same. It was her averment that the Deceased also involved his younger brother, **John Katumbo** and a clan elder in the transaction. According to her the Deceased sold the said land in order to get money for the treatment of her co-wife, **Nzeli Mutua**, (the 2nd wife of the deceased and the mother of the 2nd petitioner) who was critically ill and who was being taken care of by the 1st petitioner. However the said **Nzeli Mutua** passed away while undergoing treatment and part of the money was utilised towards her burial.

20. It was the 1st Petitioner's case that as a result of the health problems of her co-wife, the Deceased invited one **Fredrick Musembi** (the Objector herein), to whom he sold 7 acres. She averred that the said purchase price of Kshs 2.5 million was fully paid by instalments until the Objector completed making the payment and that due to the sickness of her co-wife she had no problem with the land being sold. She re-affirmed that she was present when the land was being sold to the Objector but denied that she was the one selling the land or that the transaction was done in 2011.

21. In cross-examination she however disclosed that she did not know whether the payment was completed since she was not the one handling the accounts as the Deceased was doing all the transactions. Similarly, she said that she was not aware of the money the Deceased received or how much he was paid. According to her she did not know how to write and did not write any sale agreement and was not aware that the sale agreement was a forgery.

22. It was her evidence that **Benedict** and **Elizabeth** only signed the agreement when told to do so. According to her the land in question was not ancestral land as it was donated to the Deceased by his elder brother hence was not inherited land. She restated that the Deceased was selling the land because he was sick and there was no one to assist him with the money. She testified that the Objector did not assist her with any money and that the bank account opened by her husband was a joint account between the Deceased and herself. The 1st Petitioner averred that she was not aware of any Court order stopping her from withdrawing any money from the said account.

23. According to the 1st Petitioner none of their children objected to the sale and that it was only after the death of the Deceased that the 2nd Petitioner started raising complaints and became stubborn.

2nd Petitioner's Case

24. In response to the Protests, the 2nd Petitioner averred that he was a son to the Deceased who was the registered proprietor of land parcel known as Mavoko Town Block 3/2510 and Mavoko Town Block 3/2927, all measuring 60 acres and had 2 wives. According to him the grant of letters in respect of the estate of the deceased was made to the 1st Petitioner and to himself to represent the two houses.

25. It was the 2nd Petitioner's case as contained both in his affidavit in response to the protest and the witness statement that from the said agreement for sale between the Deceased and the Group, there was no evidence that the same was signed by the Deceased. Instead, the same was signed by the 1st Petitioner, **Martha Ndila Mutua**, her son, **Benedict Mutua Munguti** and her daughter in law, **Elizabeth Mwithi Mutua**. It was therefore his position that the transaction was entered into with a view to defraud the other beneficiaries of the Deceased's family. It was his evidence that at the time of the alleged sale, the Deceased was in a very bad state of health and could not make it to Nairobi for the purposes of the said sale.

26. The 2nd Petitioner further averred that there was no proof that any monies were paid to the Deceased as the bank statements relied upon cannot be evidence that the Deceased received money from the Group. As regards the purported payment of Kshs 800,000.00 it was his case that the same was received by **Elizabeth M. Mutua** and not the Deceased. The 2nd Petitioner contended that the alleged attendance before the Land Board was a mere fabrication since by the time of the alleged attendance before the Board on 7th March, 2013, the Deceased was bedridden and was not in any good state of health and mind to attend any meeting and consent to any transaction. As regards the alleged transfer signed on 18th April, 2013, it was averred that the same was a lie since the Deceased was literate and always appended his signature using a pen and never used his thumbprint in executing documents.

27. The 2nd Petitioner contended that all the circumstances leading to the execution of the purported sale agreement were orchestrated by the 1st Petitioner together with her children in a bid to defraud the Deceased and deny the 2nd house the right to rightfully inherit what lawfully belonged to their father. This position, according to the 2nd Petitioner is shown by the fact that the 1st Petitioner did not disclose in her application for grant the existence of creditors. The 2nd Petitioner disclosed that upon the discovery that the 1st Petitioner and her children were planning to transfer the land to the Group, he lodged a caution with the registrar of land stopping any further transaction in respect of the said land. It was his evidence that the 1st Petitioner and her children were aware that he was present.

28. In the 2nd Petitioner's view, the Group did not prove that it bought the land from the Deceased as the only evidence of payment was made to persons other than the deceased.

29. In response to the Objector's protest, the 2nd Petitioner averred that he did not know the Objector prior to meeting him in this Court. It was his case that the allegation that the Objector paid the purchase price was untrue since the agreement does not disclose the mode of payment thereof. Further there was no evidence that the Deceased executed the transfer documents in favour of the Objector. The 2nd Petitioner also took issue with the fact that whereas the alleged agreement between the Deceased and the Group was thumb-printed, in the case of the agreement between the Deceased and the Objector, the same was signed by the Deceased.

30. The 2nd Petitioner averred that at the time of the mapping of the land in question, the 1st house used **Kamau Mutua** who earlier on was the 2nd Petitioner before the objection of the grant was made and that he was the one who was used by the 1st house to forge the signatures of the members of the 2nd family.

31. He averred that apart from the sale agreement there was no evidence that the land was sold to the Group. To him, however, the signatures in the sale agreement were forged. Asked about the Deceased's health, he stated that the Deceased had breathing problems since he was suffering from chest and nervous system problems. To him, he did not participate in the sale transaction since the same were being carried out by the 1st Petitioner and her children. He however admitted having registered a caution on the land on 28th January, 2013 when the Deceased was still alive but who, according to him, was not in a state of mind to sell the land. In his evidence he was the one buying medicines for the deceased.

32. The 2nd Petitioner however admitted that the Deceased was the registered owner of the land and could sell the same to anyone who had the money. He admitted that he was not present when the transaction was being entered into with the Objector. While acknowledging that there was a signature of the Deceased on the agreement, he asserted that he did not see the money being paid to the Deceased.

33. He disputed the allegation that the money was being paid for the treatment of his mother since according to him, the mother was already dead. In his evidence from the year 2010, the Deceased was not in a good health though he had no evidence of this fact.

34. In his further testimony, the 2nd Petitioner admitted that he did not know if the Deceased sold the land since he was not involved in the transfer process. He however denied that his issue was with respect to money. According to him the land is 40 acres and he was not aware if the whole land was sold. He admitted that the Deceased had not subdivided the land when he died.

35. There was also a statement by **Marieta Muniyiva Mutua**, a daughter of the Deceased with the 2nd wife and a sister to the 2nd Petitioner. According to her, her mother passed away in 2005 leaving them with the father and the step mother, the 1st Petitioner. In her statement, in 2011 she went home and found her father sick but got the information that her father's land had been sold by her step mother, the 1st Petitioner who took advantage of her father's sickness. According to her when she inquired why the 1st Petitioner had acted in the manner she did which was contrary to the instructions of her father, the 1st Petitioner retorted that she would sell all the land.

36. According to her it was this development that informed the commencement of these proceedings.

37. According to her she was the second born in the family and was present when the Deceased was the land. According to her, there were people going to their home to buy land and at this time the Deceased was with the 1st Petitioner as their mother had passed away. Upon inquiry, she was informed by the 1st Petitioner that the visitors were just friends without disclosing that they had an interest in buying the land. According to her, her suspicions were triggered by the fact that the Objector used to visit with gifts to give to the 1st Petitioner. Although she reported the matter to the Chief, the matter was referred to her uncle for an amicable resolution. When she persisted, the 1st Petitioner claimed that they wanted to take away her land, so she decided to keep quiet. The witness stated that during his lifetime, the Deceased instructed them not to sell the land.

38. Referred to the Creditors' evidence she stated that from the documents produced, there was Kshs 3,000,000.00 paid. While stating that the Deceased had respiratory problems, she stated the Deceased did not sell the land. She explained that land no. 2510 was bought from a Sacco and was not ancestral land. It was her admission that the Deceased could sell the land.

Determination

39. I have considered the issues raised in this matter. The issue for determination here is the distribution of the estate of the deceased. As rightly held by **Nyamweya, J** in the earlier ruling the issues raised by the Objector and the Creditors herein are properly matters for determination during the distribution of the estate rather than for revocation or annulment of the grant. This position was clearly appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430** where he expressed himself as hereunder:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

40. According to section 3 of the Act “estate” means “the free property of a deceased person” while “free property” “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

41. However, in the case of **Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR**, the Court stated that:

“[T]he Law of Succession Act recognizes the purchaser’s rights and in support of these submissions the said (sic) the Law of Succession defines a “Purchaser”. Purchaser according to the Act means a purchaser for money or money worth.”

42. Similarly in **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the learned judge observed that :

“This Court’s view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

43. In this case the interests of the Objector and the Creditors were those of persons who had entered into sale agreements with the Deceased for the sale of portions of the lands forming part of the Deceased’s estate. If there were such agreements then their interests can be legitimately taken into account in distributing the estate of the deceased. In dealing with a similar matter, **Makhandia, J** (as he then was) in **Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002** held that:

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises...Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

44. The Court appreciates that in this case there was no evidence that the Objector and the Creditors (who are the Protesters herein) took possession of the lands in question leave alone developing the same. It is further appreciated that the fact of the sale is also disputed. However, it is the Protestors’ case that the sale transactions were in the advanced stages of completion and would have been successfully completed were it not for the death of the Deceased. Therefore if proved that the Deceased actually entered into sale agreements with the Protestors and the purchase price paid and steps taken towards the transfer of their respective plots, the Court would be under an obligation to uphold their interests in the distribution of the estate of the Deceased.

45. That now leads me to the issue of the sale.

46. According to the 2nd Petitioner and the evidence in support of his position, there was no evidence that the Objector paid the purchase price. Secondly, at the time of the alleged sale, the Deceased was not in a proper state of mind to enter into such a transaction. However according to the sale agreement exhibited, it was expressly indicated that the vendor (the Deceased) acknowledged full receipt of the purchase price. In light of that acknowledgement, there was no requirement that the Objector proves the mode of payment of the same. The said agreement bore what was indicated as the signature of the Deceased and the 2nd Petitioner has not indicated that that was not in fact his signature. To the contrary, in cross-examination, the 2nd Petitioner admitted that the agreement was signed by the Deceased.

47. As regards the Deceased's state of mind at the time of the entry into the agreement, in **Bosa & Co. Advocates vs. Vero Nassanga & Others Kampala HCCS No. 315 of 1992** it was held that:

“In deciding upon the capacity of the testator to make a will, it is the soundness of mind, and not the particular state of the bodily health, that is to be attended to... The law is that once it is proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges it. That burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of the testator; it must be shown that in the particular case, the power has been exercised, and that the execution of the Will obtained thereby... Proof of motive and opportunity for the exercise of such influence is required, but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the Will to the exclusion of others is not sufficient proof of undue influence... The influence which will set aside a Will must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire for gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by his coercion; by opportunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force or fear... Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.”

48. This Court appreciates that in that case, the Court was dealing with the validity of a will. However it is my view that where it is alleged that the Deceased, at the time that he executed the sale documents was, as a result of bad health, unable to comprehend the consequences of his action, mere allegations do not suffice. The person contending that position must adduce some evidence on the basis of which the Court can countermand what on the face of it appears to be an agreement voluntarily entered into by the Deceased. In this case there were mere allegations without thereof. In the premises I find that there was a valid agreement of sale entered into between the Deceased and the Objector in respect of 7 acres of land to be excised out of Mavoko Town Block 3/2510.

49. As regards the claim by the Creditors, it is also clear from the documents exhibited that there was an agreement entered into between the Deceased and the Creditors for the sale of 5 acres of a land parcel then known as Mavoko Town Block 3/2510 from the deceased for the sum of Kshs.3 million. There is further evidence that the sale agreement bore a thumbprint purporting to be that of the Deceased and the agreement was made before an advocate. Copies of Bank statements have been annexed showing payments made together with copies of the relevant cheques all in the name of the Deceased. There is also a Letter of Consent issued by the Athi River Land Control Board approving the subdivision of Land Parcel No. Mavoko Town Block 3/2510 into three portions as well as a mutation form. There is also a copy of the transfer form duly executed.

50. In my view there is ample evidence on record showing that the Deceased indeed intended to sale the portion of Land Parcel No. Mavoko Town Block 3/2510 to the Objector and the Creditors.

51. I the premises, I hereby confirm the Grant of Letters of Administration issued to the 1st and 2nd Petitioners herein in the following manner:

(a). 7 acres of the Land Parcel No. Mavoko Town Block 3/2510 shall be excised from the said parcel of land and registered in the name of the Objector herein, as appears in the Mutation form exhibited herein, Fredrick Sila Musembi.

(b). 5 acres of the Land Parcel No. Mavoko Town Block 3/2510 shall be excised from the said parcel of land and registered in the name of the Creditors herein, The Registered Officials of Syoks Golden Sisters.

(c) the remaining portion of Land Parcel No. Mavoko Town Block 3/2510 shall be registered in the names of the 1st and 2nd Petitioners for themselves and in trust for all the beneficiaries of the estate of the Deceased.

(d) in order to facilitate the implementation of this order the Caution entered against the said title to be removed.

(e). There will be no order as to costs.

52. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of September, 2018.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey