



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 899 OF 2009

IN THE MATTER OF THE ESTATE OF NDETO MUOKA – (DECEASED)

BETWEEN

MUMBUA NDETO.....PETITIONER

VERSUS

JOSEPH MUTUNGA NDETO.....APPLICANT

AND

JOSEPH MUNYAO KAKULA.....OBJECTOR

RULING

1. By Summons for Confirmation of Grant dated 11th July, 2017, the applicant herein, **Joseph Mutunga Ndeto**, seeks an order that the Grant of Letters of Administration intestate or with Will Annexed made to **Mumbua Ndeto**, now deceased on 17th April, 2012 in this matter be confirmed.

2. According to the applicant, on 17th April, 2012, a Grant of Letters of Administration Intestate of the estate of the late **Ndeto Muoka** who died on 9th May, 1991 was issued to his mother one **Ndeto Mumbua** (now deceased).

3. The applicant averred that there were no pending applications nor estate duty payable towards the deceased's estate, and that the deceased left the following heirs/beneficiaries surviving him:

1) **Joseph Mutunga Ndeto.**

2) **Mbaika Mutua**

3) **Elizabeth Mwikali Paul**

4) **Urbanus Musau Ndeto**

5) **Shadrack Mutisya Ndeto**

6) **Bernard Kivuva Ndeto**

7) **Nthenya Mulwa Munyao**

8) **Patrick Thyaka Ndeto (Deceased)**

4. The applicant therefore proposed that the parcel No. Matungulu/Kyaume/1888 measuring 0.7 hectares be transferred into his names and that the grant be confirmed accordingly.

5. On 13th September, 2017, **Joseph Munyao Kakula** filed an affidavit of protest to the summons for confirmation of grant.

6. According to the Objector, there is a judgement by the SRM's Court, Kangundo on 24th February, 1993 in PMCC No. 94 of 1992 on which the Objector was the Plaintiff while **Mumbua Ndeto** was the defendant. In that judgement, the Court ordered that the defendant gives vacant possession of a plot measuring 50 x 100 feet in Matungulu/Kyaume/1888 forthwith. Though the Defendant therein lodged an appeal against the judgement the same was not pursued and the last time the matter came up was on 14th January, 1998 when **Mwera, J** (as he then was) stood the matter for mention on 13th February, 1998 for fixing a hearing date and penalised the appellant in adjournment costs. However no action has been taken by the appellant, 19 years later, a clear demonstration that she is not interested in getting the appeal heard.

7. The Objector averred that from the affidavit in support of the summons, the said appellant having died on 28th January, 2013, four years ago, the appeal has abated pursuant to Order 24 of the Civil Procedure Rules.

8. The Objector therefore urged the Court that if the grant is to be confirmed then parcel No. Matungulu/Kyaume/1888 be subdivided to accommodate his entitlement as decreed in the said suit. The Objector disclosed that the applicant was aware of the said judgement as he was one of the witnesses who testified before the Magistrate's Court.

9. In his reply to the protest, the applicant averred that the deceased to whom this cause relates is **Ndeti Muoka** who left the suit land registered in his name while the Kangundo suit was between the objector herein and **Mumbua Ndeto**, the widow of **Ndeti Muoka** who is since deceased. It was therefore the applicant's case that the Objector's perceived claim is against the estate of persons other than the estate to which these proceedings relate and are thus irrelevant to these proceedings.

10. It was further contended that the judgement in Kangundo Court having been delivered on 24th February, 1993, is not enforceable in view of section 4(4) of the **Limitation of Actions Act** in that more than 2 years have lapsed since the date of its delivery. In his view the nature of the Objector's claim can only be ventilated in the Environment and Land Court hence the Objector is not entitled to the orders sought.

11. I have considered the application, the affidavits filed in support of and in opposition to the application as well as the submissions made.

12. The Objector's claim herein is based on the existence of a judgement. There is no averment that the Court which handed down the said judgement had no jurisdiction to do so. Whereas there was an appeal filed, as is clearly shown the said appeal has since abated by operation of the law. In the proceedings leading to the judgement in question, it was clear that the Defendant therein was sued in her capacity as the widow of the person who sold the land to the Objector. That is the same person who is the subject of these proceedings. It is therefore my view that to contend that these proceedings relate to the estate of a person who was not the subject of the Kangundo Case amounts to splitting the hairs. In any case the said judgement was a judgement that bound both the defendant therein as well as the Applicant herein since it was determining the status of the said land. In **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** it was held that:

"In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."

13. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Martemms & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

"A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant."

14. It follows that the Applicants whose claim to the subject property is based on his deceased's title who was found by the Kangundo Court to have sold the subject land to the Objector, can only claim the same subject to the rights and interests of the Objector.

15. As regards the issue of limitation I agree the same does not apply in light of the appeal which was lodged by the Defendant and in any case these proceedings do not amount to an action by the Objector.

16. In the premises the Grant of Letters of Administration Intestate of the estate of the late **Ndeti Muoka** who died on 9th May, 1991 issued to **Ndeti Mumbua** (now deceased) is hereby confirmed and Certificate of Confirmation of Grant be issued on the following terms:

1) Part of the land parcel No. Matungulu/Kyaume/1888 measuring 50 x 100 feet be registered in the names of the Objector, Joseph Munyao Kakula.

2) The remaining portion of land parcel No. Matungulu/Kyaume/1888 be registered in the name of the applicant herein, Joseph Mutunga Ndeti.

17. There will be no order as to costs.

18. It is so ordered.

Read, signed and delivered in open Court at Machakos this 24th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of

Mr Muumbi for Mr Kingara for the Objector

Mr Nthiwa for R. M. Matata for the Respondent

CA Geoffrey