



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

P&A CAUSE NO. 886 OF 2013

IN THE MATTER OF THE ESTATE OF MUTISYA MATUA (DECEASED)

NDULU MUTISYA MUTU.....PETITIONER

VERSUS

1. MUTUKU MUTUA NGUYO)

2. MUTISO NZAU).....INTERESTED PARTIES/PROTESTORS

RULING

1. The 1st Interested Party herein **MUTUKU MUTUA NGUYO** has filed an affidavit of Protest dated 14/11/2017 in which he opposes the Petitioner's quest to have the grant herein confirmed. His case is that he is a purchaser of a portion of land parcel Number **MUPUTI/KIIMA KIMWE/2235** having bought it from one DAVID MUTISYA MUSINI in the year 1976 jointly with the deceased herein who was his brother. The Applicant went further to state that initially the original parcel was **MUPUTI/KIIMA KIMWE/24** and after subdivision two portions were created namely parcel Numbers 2235 and 2236 and that the deceased ended up registering himself as the sole proprietor. The Applicant annexed copies of notes indicating payments made by him to the seller David Mutisya Musini.

2. The protest was opposed by the Petitioner who filed a replying affidavit sworn on the 12/2/2018 in which he deponed *inter alia*; that the Protestor is not a beneficiary of the deceased; that the Protestor had engaged the deceased in a land dispute which was arbitrated by the Land Disputes Tribunal and Provincial Land Dispute Appeals Committee whereupon the Protestor lost the case as it was ruled that the land parcel **Muputi/Kiima Kimwe/2235** rightfully belongs to the deceased.

3. The Protest was canvassed by way of written submissions. It was submitted by Mr. Munyasya for the Protestor that a portion of land parcel **Muputi/Kiima Kimwe/2235** should be reserved for the Protestor having bought the same and it should not be solely held by the deceased. It was also submitted that the said property should be set aside prior to confirmation of the grant as the Protestor has a beneficial interest thereon.

Mr. Kamolo for the Petitioner submitted that the Protestor has not seen it necessary to get backing from the family of the seller to confirm if indeed a purchase of land had taken place. It was submitted that the Land Dispute Tribunal and the Appeals Committee had already deliberated on the Protestor's claim and dismissed it and that the Protestor did not see it fit to move to the High Court to quash that decision and hence the Protestor cannot purport to use the protest herein as an appeal through the back door.

4. I have considered the Protestor's affidavit of protest and the replying affidavit of the Petitioner and the annexures. I have also considered the submissions of the learned counsels. It is not in dispute that the land parcel **Muputi/Kiima Kimwe/2235** is registered in the names of the deceased having been a subdivision from parcel Muputi/Kiima Kimwe/24 by the initial holder David Mutisya Musini.

5. The issue for determination is whether the Protestor herein has presented sufficient reasons to justify an order barring the Petitioner from proceeding with the summons for confirmation of grant.

The Protestor has annexed some notes denoting some agreement with one David Mutisya Musini. The notes show some monies having been paid in bits. However the parcel number in question has not been indicated and further there is no evidence that the deceased herein Mutisya Matua was part of the transaction.

After the said parcel **Muputi/Kiima Kimwe/24** belonging to David Mutisya Musini was sub-divided into two portions namely **Muputi/Kiima Kimwe/2235 and 2236**, the deceased herein became the registered proprietor of parcel 2235. It was then that the Protestor mounted a claim against the deceased over part of the said parcel and that the then Land Disputes Tribunal found that the Protestor's claim had no merit and dismissed it and directed him to claim for refund of any money paid from the seller David Mutisya Musini. It seems the

Protestor had lodged an appeal to the Provincial Land Disputes Committee vide No.118 of 2007 and which was dismissed with an order that the parcel number **Muputi/Kiima Kimwe/2235** had been bought and registered under Mutisya Matua. The Appeals Committee directed the Protestor to claim his money or land from the family of Mutisya Musini. The decree dated 12/07/2010 is quite clear on the matter. It is noted that the Protestor has never moved to the High court seeking to quash the Tribunals decision or by way of an appeal since the 12/07/2010 to date. The Protestor has slept on his rights and has now come to this court by way of protest. I find the protest herein to be disguised as an appeal. Definitely the Protestor's claim if any lies elsewhere. In any event it is noted that the Protestor has not even bothered to involve the seller or any of his family members to back his claim that indeed he had purchased land from the seller. Further the seller has since subdivided the original land and is left with parcel Muputi/Kiima Kimwe/2236 which the Protestor can rightly claim from the seller as directed by the Land Disputes Tribunal and the Land Disputes Appeals Committee. I find there is no nexus between the Protestor's claim of purchase of land and the deceased herein. The only nexus is that the original seller's parcel Muputi/Kiima Kimwe/24 has been subdivided into two portions namely 2235 belonging to the deceased and 2236 belonging to the seller. As the parcel has been subdivided the Protestor should readily pursue the seller and leave the deceased's portion as the nexus has already been disconnected following the subdivision of the original parcel of land.

It would appear that the 2nd interested party has since realized the folly of joining the 1st Interested Party in this journey and has since pulled out as evidenced by his notice to withdraw suit dated 4/6/2018. This withdrawal is a clear message to the 1st Interested Party that the 2nd Interested Party does not agree with him over the claim against the Petitioner.

6. In the result it is the finding of this court that the protestor's protest dated 14/11/2017 lacks merit. The same is ordered dismissed. The Petitioner is directed to set down the summons for confirmation of grant for hearing on priority basis. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 24th day of October 2018.

D.K. KEMEI

JUDGE