



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 134 OF 2015**

**(FORMERLY CHUKA PM'S SUCC. CAUSE NO. 57 OF 2007)**

**IN THE MATTER OF THE ESTATE OF GEOFFREY MUTUNGA MUKUNGA- (DECEASED)**

**AND**

**WILFRED KINYUA MUTANJO.....PETITIONER**

**VERSUS**

**JUSTIN K. KAMWARA.....PROTESTOR**

**J U D G M E N T**

1. This cause relates to the estate of the late Henry Geoffrey Mutunga Mukunga (deceased) who died on 27<sup>th</sup> March 2006 resident at Kirumi Sub- Location. He died intestate leaving behind the following children/dependants:-

- (i) Winfred Kinyua Mutajo
- (ii) Paul Mwendu Mukunga
- (iii) Faith Karimi Mukunga
- (iv) Linet Gakii Mukunga
- (v) Mary Kagwiria Mukunga
- (vi) Virginia Kathomi Mukunga

2. The following properties are listed by the petitioner as comprising the estate;

- a) Mwimbi/N.Mugumango/804
- b) Mwimbi/N.Mugumango/441
- c) Mwimbi/N.Mugumango/1298
- d) Mwimbi/N.Mugumango/1299

3. Wilfred Kinyua Mutanjo the petitioner herein was issued with a fresh grant of letters of administration on 31<sup>st</sup> January, 2017 after the revocation of the initial grant which had been issued on 17<sup>th</sup> August, 2007. The administrator vide summons for confirmation of grant dated 22<sup>nd</sup> May 2017 applied confirmation of the grant and proposed to have the estate distributed as follows:-

**(A) L.R. MWIMBI/N.MUGUMANGO/441 (measuring approximately 3.64 ha)**

- (i) Faith Karimi - 0.50 ha

(ii) Wilfred Kinyua - 1.12 ha

(iii) Paul Mwenda - 0.82 ha

(iv) Mary Kagwiria - 0.40 ha

(v) Ann Gacheri - 0.2 ha

(vi) Sharon Wanja - 0.2 ha

**(B) L.R. MWIMBI/N.MUGUMANGO/804 (measuring approximately 0.028 ha)**

(i) Faith Karimi - 0.007 ha

(ii) Wilfred Kinyua - 0.007 ha

(iii) Paul Mwenda - 0.007 ha

(iv) Linet Gakii - 0.007 ha

**(C) L.R. MWIMBI/N.MUGUMANGO/1298 (measuring approximately 0.80 ha)**

(i) Wilfred Kinyua - 0.2 ha

(ii) Paul Mwenda - 0.40 ha

(iii) Ann Gacheri - 0.20 ha

**(D) L.R. MWIMBI/N.MUGUMANGO/1299 (measuring approximately**

**7.64 ha**

(i) Rachel Wanja - 0.81 ha

(ii) Alice Ukima - 0.768 ha

(iii) Faith Karimi - 1.01 ha

(iv) Wilfred Kinyua - 1.01 ha

(v) Paul Mwenda - 0.768 ha

(vi) Mary Kagwiria - 0.768 ha

(vii) Linet Gakii - 0.786 ha

(viii) Virginia Kathomi- 0.768 ha

**(D) PLOT NO. 79 CHANGAMWE**

(i) Faith Karimi

(ii) Wilfred Kinyua

(iii) Paul Mwenda

(iv) Mary Kagwiria

(v) Linet Gakii

(vi) Virginia Kathomi.....jointly

4. The petitioners proposal above met resistance and protest from Justin Kamwara and Alice Ukima Mutajo. Justin K. Kamwara filed his

affidavit of protest sworn on 12<sup>th</sup> July 2017 where he deposed that he has an interest in part of the estate and in particular parcel **NO. MWIMBI/N.MUGUMANGO/1298** having purchased it from the deceased himself vide 30<sup>th</sup> October, 2004 vide a written agreement which he has exhibited as exhibit "**JK II**". He has further exhibited a Land Control Board consent and a duly executed transfer form. He has deposed that the transfer could not be finalised due to the failing health of the deceased at the time and the fact that he was resident at Mombasa.

5. At the oral hearing of the protest, the petitioner (PW1) expressed his surprise that the protestor (Justin Kamwara) was claiming a share in the estate stating that he was not aware of the purchaser's interest. He also claimed that he was not aware of the documents exhibited by the protestor claiming that he had not seen the original of the documents to vouch for their veracity. He maintained that as far as he is concerned, the assets comprising the estate belonged to the deceased and no purchaser taken possession of any part of the estate. He disowned his own affidavit sworn on 12<sup>th</sup> February, 2013 where he had included the protestor herein as a beneficiary of 2 acres of the estate. He denied having sworn the affidavit.

6. Justin K. Kamwara (the protestor) on his part testified that the deceased herein was his uncle in the sense that he was a brother to his mother. He testified that he purchased 2 acres of land out of parcel **NO. MWIMBI/N.MUGUMANGO/545** at an agreed price of Ksh.230,000/- and tendered a sale agreement as P. Exhibit 1 to prove his claim. Apparently the agreement was drawn and witnessed by I.C Mugo Advocate on 30<sup>th</sup> December, 2004. He told this court that he was instructed to deposit Kshs.200,000/- directly to the deceased's account which he did. He tendered the deposit slip dated 30<sup>th</sup> December, 2004 of A/C No.0110090278700 at Co operative Bank- Mombasa Branch belonging to Henry G. M. Mukunga (deceased herein) as P. Exhibit 2.

7. The protestor further testified that he paid the deceased 5000/- cash at time of signing the agreement and later paid him the balance of 25,000/- when he executed transfer form after attending Land Control Board who gave consent to the transaction. He tendered Land Control Board consent as P. Exhibit 4, the application to the Land Control Board as P.Exhibit 3 and a duly executed transfer as P. Exhibit 5 in respect to L.R Mwimbi/N.Mugumango/1298 which measures 2 acres and is a resultant parcel after subdivision of **LR MWIMBI/N.MUGUMANGO/545**.

8. The protestor's claim was supported by Justus Mbae M'Nkuene (DW2) who told this court that he was a brother to the deceased in this cause. He told this court that the protestor's claim is legit because he was a witness in the agreement between the deceased and the protestor. He testified further that he was present when the protestor deposited the money in consideration at the bank and confirmed that the total consideration of Kshs.230,000/- was paid by the protestor to the deceased.

9. Alice Ukima Mutajo who had been listed as a protestor testified and told this court that she was the wife of the deceased and she was contended with the petitioner's proposal. She denied having protested to the proposed mode of distribution by his step son the petitioner herein.

10. This court has considered the protest herein which is basically hinged on purchaser's interest. I have considered the response made to the protestor's claim. There is no denial that there was a transaction between the protestor herein and the deceased. None other than the petitioner's counsel himself drew up the agreement and witnessed it on 30<sup>th</sup> December, 2004. As a matter of practice I.C Mugo advocate should have in fact ceased acting for any of the parties herein owing to the obvious conflict and interest and the attendant absurdity of having rubish his own document (tendered by the protestor as P. Exhibit 1). Advocates should avoid acting in matters where they are likely to find themselves in an awkward position due to conflict of interest. However because that is water under the bridge, I will leave that issue at that.

11. The issue at hand is whether the protestor's claim in this cause is legitimate or whether the claim should be canvassed in another fora which the petitioner submits should be at Environment and Land Court. Granted, the protestor is not a dependant within the meaning of **Section 29 of Law of Succession Act** and his claim is not based on dependency. This court has considered the documents exhibited in this court and there is no denying that the documents giving rise to the protestor's claim are legitimate and legal. It is quite obvious, that the petitioner apparently was fully aware of the protestor's claim which is a liability to the estate because in his own affidavit sworn on 12<sup>th</sup> March, 2013 made in support of summons for confirmation of grant dated 11<sup>th</sup> February, 2013 he clearly deponed that Justin K. Kamwara the protestor herein was to get 2 acres of land out of L.R. Mwimbi/N. Mugumango/545. That is the parcel which was subdivided by the deceased and resulted to Mwimbi/N. Mugumango/1298 measuring 2 acres and parcel No.1299 measuring 18.89 acres. When you look at the agreement (P. Exhibit 1) executed by both the deceased and the protestor duly witnessed by I.C Mugo and Justus Mbae M'Nkuene (DW2) the 2 acres purchased by the protestor was to be carved out of parcel No.545. The deceased applied to Nithi Land Control Board vide an application dated 22<sup>nd</sup> April, 2005 (P Exhibit 3) and the said Land Control Board gave its consent vide a letter of consent exhibited by protestor as P. Exhibit 4 and dated 28<sup>th</sup> April, 2005.

12. The deceased duly executed the transfer of land in respect to the same parcel Mwimbi/N.Mugumango/1298 which measures 2 acres in favour of the protestor. The transfer was not completed but the question posed is whether parcel No.Mwimbi/N. Mugumango/1298 was part of deceased's "**free property**" as defined under **Section 3 of Law of Succession Act**.

The answer, given the evidence in this cause is clearly in the negative. The interest in the said parcel (1298) claimed by the protestor had passed on to him at the time of demise of the deceased for all practical purposes. As I have observed, the petitioner acknowledged that fact in his own affidavit in support of the Summons for Confirmation of Grant and cannot turn back and say that he was not an executor of that affidavit. All factors point to the fact that the protestor's claim is justified and must be considered as a liability in the estate. The submissions by the petitioner that the claim should be canvassed elsewhere in my view just like disowning his own affidavit sworn on 12<sup>th</sup> March 2013 is diversionary and aimed at either delaying the cause of justice or defeating it altogether. Either way the same certainly will not serve the ends of justice. The protestor purchased parcel No. Mwimbi/N.Mugumango/1298 and paid the total amount in consideration to the deceased evident by P.Exhibit 2 and P.Exhibit 1. That transaction having been okeyed by Nithi Land Control Board is legit for all purposes including the distribution of the estate herein and this court finds it so.

13. The parties in this cause save for the protestor have otherwise agreed. Alice Ukima Mutajo earlier wrongly listed as a protestor came and

told this court that she is agreeable to the proposed mode of distribution made by the petitioner. The beneficiaries have all appended their signatures to the proposed mode and therefore this court shall adopt the proposal save for parcel No. Mwimbi/N. Mugumango/1298 which shall go to the protestor.

14. In the premises and for the reasons aforesaid the grant issued to the petitioner on 31<sup>st</sup> January, 2017 is hereby confirmed as per paragraph 8 of the Petitioner's submissions save that parcel No. Mwimbi/N.Mugumango/1298 measuring 0.80 ha shall go to Justin Rukenya Kamwara Alice Ukima having been re-married and expressed no interest in the estate of the deceased loses her life interest in the estate pursuant to the provisions of **Section 35 of Law of Succession Act** which states that a widow who get re-married extinguishes her life interest in the estate upon re- marriage to any person. I make no order as to costs so each party to bear own costs.

**Dated, signed and delivered at Chuka this 19<sup>th</sup> day of December, 2018.**

**R. K. LIMO**

**JUDGE**

**19/12/2018**

Judgment signed, dated and delivered in the open court in presence of Kaaria holding brief for Mugo for Petitioner and Mutegi holding brief for Murithi for protestor.

**R.K. LIMO**

**JUDGE**

**19/12/2018**