



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 3 OF 2009

IN THE MATTER OF THE ESTATE OF NELSON WAMBUA MASILA (DECEASED)

MUTISYA MUINDI NZUSYO.....1ST PLAINTIFF/OBJECTOR

BEATRICE AVATA WAMBU.....2ND PLAINTIFF/OBJECTOR

VERSUS

MARGARET K. WAMBUA.....1ST DEFENDANT/PETITIONER

KINGSTONE K. MULEWA.....2ND DEFENDANT/INTERESTED PARTY

JUDGEMENT

1. Briefly, the history of this cause is that a certificate of confirmation of grant issued on 3rd July, 2009 to Margaret Kavisa Mbaluka (Margaret) who is one of the two wives of the deceased Nelson Wambua Masila (the deceased) was revoked upon the challenge of Beatrice Kavata Wambua (Beatrice) the other wife of the deceased. On 11th May, 2015 a joint grant was issued to the two co-wives. On 19th May, 2016 the co-administrator entered an oral consent in which they distributed the estate of the deceased. In the consent, it was agreed that the issue of Plot No. 54 Ngala Estate in Malindi be heard by way of oral evidence. This judgement determines that issue.

2. Mutisya Muindi Nzusyo, the Objector herein indicates that he bought Plot No. 54 from a person who had purchased the same from the deceased and hence it does not form part of the estate of the deceased for purposes of distribution or to be dealt with otherwise. On the other hand, Kingstone Mulewa, the Interested Party, claims that he bought the property for value as a *bona fide* purchaser from Margaret when the initial grant subsisted.

3. At the trial, Beatrice who testified in support of the Objector's claim stated that the deceased had sold the subject property to one Peter Kirubi and that she later learnt that Peter Kirubi sold the land to the Objector. She at the same time stated that during the distribution of the estate the said property was given to Margaret as she was the one managing it and that it belonged to her. Beatrice also pointed out that Margaret sold the property to the Interested Party.

4. In his testimony, the Objector relying on his bundle of documents told the court that after purchasing the property in 1988 he started servicing the loan which the deceased had taken in order to purchase the plot. The Objector also testified that he had been paying the ground rent though he never developed the plot nor lived there. He stated that there was a house on the plot when he bought it and denied being aware of any disputes over the plot at the time of the purchase. He acknowledged the revocation of the permission that had been given to him by the local authority to construct on the plot. The Objector also stated that Margaret had sued him over the plot claiming that it belonged to the deceased but later withdrew the case and the injunctive orders issued therein without any conditionalities.

5. In opposition to the objection, Margaret testified that her husband who died in 1986 bought the subject property in 1980. It was her testimony that the deceased never sold the property to Peter Kirubi and claimed the sale agreements produced by the Objector were fake as she had always been in possession of the property and constructed on it. She produced a bundle of documents, which included receipts, in the name of the deceased. She further explained that in one receipt for Kshs. 17,610 which she had paid in relation to the property, the portion number is indicated. Further, that the plot number is abandoned upon payment so that the portion number now features.

6. Margaret informed the court that the allotment letter for the plot was given to her after the family discussed the distribution of the estate. Further, that the Interested Party bought the plot when she had the certificate of confirmation of grant which was later revoked.

7. During cross-examination she stated that the deceased left an oral will. She confirmed that she held the grant from 2009 to 2011 before it was revoked. She explained that the deceased bought the property from the Municipal Council of Malindi and that she was issued with a

letter of allotment in 2011. Margaret emphasized that Beatrice gave her the subject property on 28th October, 2013. Margaret further claimed that she had been paying the land rates but was not issued with receipts. She further explained that the suit she had instituted against the Objector was meant to stop him from demolishing the structures on the plot. It was her testimony that she sold the property to the Interested Party in September 2009.

8. The Interested Party claimed to have purchased the property after due diligence based on the confirmed grant and an agreement between the deceased and the Municipal Council. The Interested Party produced a bundle of documents in evidence. He stated that he was unaware of a letter of allotment issued in 2011. He further disclosed that he had constructed a house and erected a fence on the plot.

9. The issue is whether Plot No. 54 forms part of the estate of the deceased for purposes of distribution. Justice William Musyoka, a guru in family law, has compiled a book on the law of succession often quoted by courts. In **Bob Njoroge Ngarama v Mary Wanjiru Ngarama [2014] eKLR; Mombasa Succession Cause No. 307 of 1997**, M. Odero, J quotes page 581 of the said book wherein it is stated that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

10. The learned Judge in his book cites **Re Diplock v Wintle [1984] Ch 485** which makes an exception to the general rule in a case where the holder of such property is a *bona fide* purchaser for value.

11. The definition of a *bona fide* purchaser is as found in **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR; Civil Appeal No. 146 of 2014 (Nairobi)** where the Court of Appeal cited the Ugandan Court of Appeal case of **Katende v Haridar & Company Limited [2008] 2 E.A. 173** where it is stated that:

“For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, ... (he) must prove that:

- a) he holds a certificate of title;**
- b) he purchased the property in good faith;**
- c) he had no knowledge of the fraud;**
- d) he purchased for valuable consideration;**
- e) the vendors had apparent valid title;**
- f) he purchased without notice of any fraud;**
- g) he was not party to any fraud.”**

12. Though in the instant case an issue of fraud has not been raised, there are two purchasers and there is need to establish if both or any of them were *bona fide* purchasers. The Objector in support of his case produced a sale agreement dated 28th June, 1985 between the deceased and Peter Kirubi. He also produced a sale agreement dated 8th August, 1988 between himself and Peter Kirubi. The sale agreements are in respect of Plot No. 54 Ngalla Estate within Malindi Municipality. Although Margaret brushed off the agreements as fake, she did not produce any evidence to show that they were indeed fake. The Objector has exhibited among other documents a copy of a receipt issued on 28th January, 1988 showing payment of Kshs. 8,500 indicated as **“sell of house”** to the Municipality.

13. The Objector has also exhibited a letter dated 14th November, 2006 from the town treasurer to the town clerk of Municipal Council of Malindi showing that the Objector had paid Kshs. 86,542 as loan repayment for Plot No. 54. There is also a certificate of clearance issued by the Municipality on 16th September, 2010 showing that the plot belonged to the Objector. Among the many receipts produced by the Objector is one dated 26th April, 1993 in which he paid Kshs. 7,000 as loan repayment for the plot. There is also evidence that on 1st March, 1991 he paid to the Municipality Kshs. 4,572 as loan repayment.

14. Issues of ownership of the plot arose much later. This is evidenced by the letter dated 13th May, 2010 from the Municipal Council of Malindi in which the Council revoked the development plan that had been issued to the Objector on the ground that the genuine allottee of the said land was claiming a serious land dispute. Through that letter the Council **“recommended to the Commissioner of Lands to hold the processing of the title documents in the name of Mutisya Muindi Nzusyo.”**

15. Even as Margaret was selling the plot to the Interested Party on 27th September, 2009 the person recognized in the records of the Municipal Council of Malindi as the owner of the plot was the Objector.

16. This is not even a question of the effect of the revocation of the grant issued and confirmed to Margaret on the sale of the plot to the Interested Party. The evidence adduced shows a straight forward case in which the plot that Margaret purported to sell to the Interested Party was sold by the deceased when he was still alive. The meaning of this is that the property was not part of the estate of the deceased and was not available for distribution by the administrators of the estate of the deceased. It is immaterial that the Objector had not obtained a title document for the land. The evidence shows that he bought the plot from Peter Kirubi who had purchased the plot from the deceased.

Margaret had no authority to sell the plot to the Interested Party as the plot did not form part of the estate of the deceased in 2009 when the sale agreement was signed between her and the Interested Party.

17. The consequence is that the Objector's objection is sustained and it is declared that plot No. 54 Ngalla Estate within Malindi belongs to the Objector, Mutisya Muindi Nzusyo.

18. In the circumstances of this case I do not find it necessary to load costs on any of the parties. Each party will therefore bear own costs of proceedings.

Dated, signed and delivered at Malindi this 19th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT