



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 372 OF 2000**

**IN THE MATTER OF ESTATE OF THOMAS MAILU NTHAKYO (DECEASED)**

**GEORGE MUINDE MAILU.....OBJECTOR**

**VERSUS**

**1. STANISLUS MUIA MAILU**

**2. KASIA MAILU**

**3. KILONZO MAILU**

**4. MBITHI KILONZO**

**5. LEONARD KIAMBA.....RESPONDENTS**

**JUDGEMENT**

**Background:**

1. The deceased to whose estate these proceedings relate is Thomas Mailu Nthakyo who died intestate on 28<sup>th</sup> June 1979. Kasia Mailu and Stanislaus Mailu (hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> Respondents), applied for Letters of Administration intestate on 13<sup>th</sup> September, 1999 vide **Nairobi Succession cause 2041 of 1999** and later withdrew the same. On 27<sup>th</sup> November, 2000 they filed a citation directed at the objector herein and on 21<sup>st</sup> December, 2000, Kasia Mailu and Kilonzo Mailu filed **Machakos Succession Cause 372 of 2000**. On 14<sup>th</sup> March, 2001, the objector herein filed a summons for injunction to restrain the petitioner from wasting and disposing the estate of the deceased and also seeking that the citation filed by the petitioners be declared null and void. On 5<sup>th</sup> October, 2001, letters of Administration Intestate were issued to Kasia Mailu Nthakyo, George Muinde Mailu, Stanislaus Muia Mailu and Kilonzo Mailu Nthakyo. On 16<sup>th</sup> April, 2002, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed summons for confirmation of grant dated 12<sup>th</sup> April, 2002 to which George Muinde Mailu (hereinafter the Protestor), filed an affidavit of protest dated 19<sup>th</sup> April, 2002 and filed the same day. On 18<sup>th</sup> June, 2002, an amended summons for confirmation of grant was filed by Kasia Mailu Nthakyo, Stanislaus Muia Mailu and Kilonzo Mailu Nthakyo together with a consent to confirmation though it was signed by the applicants save for the objector. Parties agreed to canvass the protest by way of viva voce evidence.

**The Petitioner's case**

2. The Petitioner did file an application for confirmation of grant on 29<sup>th</sup> August, 2002 and the affidavit in support was deponed by Kasia Mailu on the same day. The petitioner avers that the parties have not consented to the distribution of the estate and therefore the court should proceed and make a determination on the distribution of the estate amongst the beneficiaries. He further depones that Plot 37 Kitanga Settlement Scheme was ancestral land where the deceased lived and had already been sub-divided by the surveyor into 2 equal portions of 32 acres each for the two houses of the deceased. The petitioners rely on all the oral and documentary evidence presented in court by his 5 witnesses.

3. Hearing began on 11.6.2004, and James Mwanzia Katilu was PW1. He testified that he is a farmer at Kitanga Settlement Scheme having lived there since 1968, and was also a member of the management committee. He stated that he knew the deceased as one of the members of Kitanga settlement scheme and that receipts were issued to members who owned land on the scheme and there was a register of members. He stated that in 1979, the government brought surveyors to subdivide the land and each member was given a share number, however the deceased died before the subdivision was over and he did not know his portion. Thus his land, later identified as number 37 was given to the heads of his family, who were Kasia and Mailu. He stated that the family chose Muia Mailu as the representative and showed him the land, the said Muia together with Muinde lived with the deceased but Kasia and Kilonzo were settled in other schemes. On cross-examination, he

stated that the deceased's name was cancelled from the register and replaced with Stanislaus Muia but however he had no letter of administration or authority from court to do so. He stated that Kasia and Kilonzo still reside on the land that their father left them at Mua but Muia lives in the father's farm at Kitanga. He stated that he knows Nzioka Maithya who was a committee member of the society and his land borders that of the deceased, and that his plot number could be either 36 or 38. On re-examination he stated that the land belonged to the deceased and he never introduced his son to take over the land, that Muia used to represent his father in meetings but not the land and that the certificate of outright purchase was issued by the government if one finished paying the government loan.

4. Stanislaus Muia Mailu was PW2 and he stated that he is the last born son the deceased had with the 2<sup>nd</sup> wife who was called Mumbua Mailu, whereas Kilonzo Mailu was the 1<sup>st</sup> born. He stated that Kasia Mailu, Muinde Mailu and the objector are sons of the 1<sup>st</sup> wife. He stated that he took over the responsibility on behalf of the family and in March 1979 took a loan of Kshs 10,270 to purchase the property and thereafter a charge was registered on the property. After the father died, as a family they agreed to sell the property to pay the loan and sold 15 acres of it to **Prof Japheth Mati** who paid the loan in his names and receipts were issued and once the account was cleared they came together as a family, all the 4 brothers and agreed on how to divide the remaining portion of the land between the two houses. He stated that problems started in 1990 when the Objector claimed that the land was his and it culminated into the certificate of purchase being cancelled and the Objector was instructed to file for letters of administration. He filed the application in Nairobi because it was the nearest court. He further stated that Kilonzo and Kasia purchased their own plots and occupy the same and that the only family land is the Kitanga scheme and which belongs to Mailu Nthakyo. On cross-examination he stated that he has never heard or seen Iveti Sections 805 and 605. He stated that in 1979, Kasia Kilonzo nominated him as next of kin when the deceased was still alive and that he and Objector are settled on plot 37 however in 1988 the objector sold a portion to Prof Mati. In addition, Stephen and Kiamba bought part of plot 37 but however plot 37 belongs to all the sons of the deceased.

5. Pw1 was recalled and he stated that there was a dispute between Muia and his three brothers over plot 37 since Muia had taken the certificate of outright purchase but however plot 37 belongs to Mailu.

6. PW3 was Kasia Mailu Nthakyo. He testified that the deceased died before the title to plot 37 was issued and the family decided to give Muia Mailu's name for the title to be issued but no title was issued. However the family agreed that the plot be divided equally between the two houses and he would like court to take this approach. Despite the objector claiming that the whole parcel is his, he maintains that this is not true as the deceased never gave him the land. Nevertheless part of the land was sold to Prof Mati to pay a loan they had taken, and the family accepted the sale and participated in the sale agreement and the remaining 64 acres was to be shared equally between the two houses. On cross-examination, he stated that Plot No. Kitanga 37 measures 78 acres. He further stated that Kilonzo settled in Mua after purchasing land there and he was not aware that the Objector gave the deceased money to buy shares in Mua and Kitanga therefore it is not true that the Kitanga plot belonged to Objector but was registered in the names of the deceased. He stated that Muia's name was entered on the register after the deceased died and this was on agreement by Objector, Kasia and Kilonzo. He stated that he was unaware that Kioko or Kiamba or Matthias bought the land as he was only aware of Prof Mati who was sold 15 acres and the money used to repay a loan. He further stated that he was unaware of the land at Iveti but was aware of the plot 37 and which belongs to the deceased and was not to be occupied by Muia. He says that he has never settled on plot 37 though once grazed cows there. On cross-examination, he testified that he never sold plot 37 alone since the objector was the one who brought Prof Mati. He stated that he did not know Iveti.

7. Prof Japheth Kimanzi Mati was PW4 and who stated that he met the Objector in 1988 and who took him to plot 37 and indicated that he wanted to settle a loan from the settlement trustee fund and also introduced him to Muia who confirmed a sale and a sale agreement was signed in that regard. The agreement was signed by all the sons of the deceased including the objector and it was dated 9.10.1988. The agreement was tendered as P ex 1. He said he knew the owner of the land as Mr. Mailu though the agreement stated that the vendors were the sons of Mailu. He stated that when he bought it, Muia and Objector lived there but now Kilonzo's son lives on part of the remainder which is about 50 acres. On cross-examination, he stated that he saw the objector signing the agreement together with his wife.

8. PW5 was Margaret Mwikali Mati. She testified that Mutuku Ngei, a former councilor introduced her and her husband to the Mailu family and she issued the first cheque to pay for the land and she obtained the requisite consent from the land board. She stated that the land in question belonged to the whole family and not Objector alone. On cross-examination, she stated that the cheques were issued in the names of Muia and payment was never in cash. She stated that she was not aware that the sale of the 15 acres to her and her husband was fraudulent. She stated on re-examination that the Objector was with them throughout including the survey of the land. The Petitioners closed their case. A date was given for the hearing of the objector's case.

9. The petitioners filed written submissions through their learned counsel Kitheka and Co Advocates. It was submitted for the Petitioners that the only ascertainable property of the deceased was Plot No. 37 Kitanga Settlement scheme and the deceased died intestate. The counsel relied on Section 38 of the Succession Act that provides for the manner of distribution and urges the court to dismiss the objection with costs. Counsel relied on the case of **Gitonga M'Murithi v Faith Ngira Murithi (2005) eKLR**. He further submits that the idea of a trust as alleged by the objector has no basis and there is no evidence that the plot No 37 Kitanga Settlement Scheme was a gift *inter vivos* made by the deceased to the objector.

#### **Objector's case:**

10. The Objector on the strength of the application, dated 6<sup>th</sup> March, 2001 has annexed an affidavit sworn on the same day and filed in court on 14<sup>th</sup> March, 2001 together with the 7 annexures thereto. The objector also relies on all the oral evidence presented in court by himself.

11. The Protestor in his affidavit deposes that the deceased died and had the following properties in his names; Plot 37 Kitanga settlement scheme, Plot 604 and 845 Adjudication Section. He says the said plots have no title deeds but the deceased's name appears in the register of members. He further avers that the petitioner has sold plots Plot 604 and 845 Adjudication Section before obtaining the grant of letters of administration and has obtained a buyer for Plot 37 Kitanga settlement scheme where he resides and has attempted to fraudulently transfer the ownership document to Stanislaus Muia Mailu, a copy of the letter of allotment and charge was annexed and marked GMM4. He further avers that the said Stanislaus Muia and his brother have received Kshs 350,000/- that they have shared amongst themselves excluding the objector. That having sold all the properties belonging to the deceased, the petitioners are in the process of selling Plot 37 Kitanga settlement

scheme that the objector has occupied when his father was alive and they have motives of denying him his legal right of ownership as a beneficiary of the estate of the deceased, *a fortiori*, the petitioners sole intention is to waste away the estate of the deceased and therefore he seeks that the petitioners be restrained from selling the property of the deceased and fully disclose the property owned by the deceased.

12. The objector on 25<sup>th</sup> July 2002 filed a replying affidavit to the amended summons for confirmation of grant that his father Mailu Nthakyo (deceased) orally bequeathed the whole of Plot 37, Kitanga settlement scheme to him solely and his late father had bequeathed Plot no 46 and 162 in Mua Hills settlement scheme to his co-administrators namely Kilonzo Mailu and Kasia Mailu respectively. He further states that he is not agreeable to the mode of distribution proposed by the petitioners and proposes that the distribution should be; Plot 37 Kitanga settlement scheme be given wholly to him, Plot 604 and 845 Iveti Settlement Scheme to be registered in the names of Kasia Mailu Nthakyo, George Muinde Mailu, Stanislus Muia Mailu and Kilonzo Mailu Nthakyo. On 8<sup>th</sup> October, 2002, the objector filed a reply to the summons for confirmation of grant dated 29<sup>th</sup> August, 2002. He deposed that Plot 37 Kitanga settlement scheme was wholly given to him by the deceased for he worked on the said plot and this was witnessed by elders and members of the scheme. He seeks that the court should proceed to take evidence before proceeding to distribute the estate of the deceased who had distributed his property before he died.

13. The hearing of the protestor's case began on 15.6.2009. He confirmed that the deceased was his father and that his brother had properties namely Kajetani Iveti Plots 845 and 604 in Iveti. He says he used to send money to his father and his father bought the land in the names of Kasia and Kilonzo that they occupy currently. He says that the Plot 37 Kitanga was bought using his money which he had given his father. He says he used to work on the scheme as a farm hand and he later established a home in Kitanga. He says that his father left a will but it was burnt by Pw1. He stated that according to the rules of the settlement scheme, plot 37 was supposed to revert to him but it was not done and instead the names of Stanislus Muia Mailu was recorded. He stated that later Muia's names were removed and replaced with the names of the deceased. He stated that the land was originally 70 acres but his brothers sold 40 acres and specifically denies being party to the sale of the land to Prof Mati or to anyone else. He stated that he never gave consent for the land to be sold to Prof Mati. He further complained that his nephew, Peter Mbithi was selling parts of the land as the case is going on. He stated that he is entitled to Plot 37 solely. On cross-examination, he stated that his name was left out of the list of Kitanga members at the instance of Kasia. He denied being aware of a charge on the land but he stated that he paid Kshs 10,270/- of the loan that was given to purchase the land. He denied the signature on the replying affidavit dated 6.3.2001 as well as the one sworn on 22.7.2002. He further denied signing the affidavit sworn on 8.10.2002 as well as the sale agreement. He stated that the documents he signed were not before court. He was not agreeable to the land being shared equally and if it is shared equally, everyone must take an oath. He was not aware that Mati's money was used to pay off the loan nor is he aware that a certificate of outright purchase was given to Mr Muia. On re-examination, he confirmed that the signatures on affidavit sworn on 22.7.2002, 8.10.2002, 6.3.2001 were not his. He further confirmed that the signature on the sale agreement dated 9.10.88 was not his. He stated that he used to send his father money and that the land at Kitanga was acquired after independence and it was given for squatters and his father's family were squatters. He added that he had educated Mailu.

14. The Protestor vide submissions dated 22<sup>nd</sup> October, 2018 submitted that the deceased held the land in a constructive trust and the deceased was not even buried there. It was submitted that the objector's mother was buried on the land and though the land was registered in the names of the deceased, the land did not belong to him. It was also submitted that the respondents' acts of selling amounted to intermeddling and the objector has demonstrated that he has not sold the land and therefore the entire land should be transferred to him.

#### Analysis:

15. I have considered both the Petitioners and the Protestor's cases. It is clear that the property in dispute is the ownership of plot 37 Kitanga Settlement Scheme. The issue for my determination is whether the grant should be confirmed.

16. The petitioners confirm that in 1988 they entered into some sort of an agreement in respect of part of land known as Plot 37 Kitanga Settlement Scheme and which is currently occupied by Prof Mati. There is a sale agreement which the objector had denied ever executing or receiving money from the said Prof Mati. The evidence as to whether the objector specifically has a sole interest on the said land has not come out clearly though the objector has stated that the land was given to him in a will. The will has not been produced in court nor is there evidence that he gave money to the deceased. On the other hand, one of the officials of the settlement scheme has testified to the effect that the deceased was a member and was allocated Plot No 37. The petitioners have testified that they needed money to offset a loan so as to retain the plot and thus sold part of it. The person who purchased the land has testified and he has identified the objector as one of the persons who agreed to the sale and the same objector has denied his signature not only on the sale agreement but the affidavits in support of his case. I find that the evidence on the court's record is not enough to support the objector's contention that he is solely entitled to the suit property to the exclusion of the family members. On the other hand there is sufficient evidence to confirm that plot 37 is part of the deceased's estate and I agree with the submissions of the petitioners that Section 38 of the Law of Succession Act should guide the court in the distribution of the estate of the deceased who died intestate.

#### Determination

17. The objector in the application dated 6<sup>th</sup> March, 2001 has annexed an affidavit sworn on the same day and filed in court on 14<sup>th</sup> March, 2001, but he denies signing the said affidavit. I have perused the affidavit of protest dated 19<sup>th</sup> April, 2002 and find that there is no sufficient ground shown not to distribute the estate in accordance with the proposal in the application for confirmation of grant filed on 29<sup>th</sup> August, 2002 by the Petitioner/ Respondents. The objector came out as a person who was untruthful in view of the clear evidence that showed he had indeed signed the sale agreement and the several affidavits filed by him.

18. In the absence of any evidence to controvert the petitioners' evidence that I find credible, I draw the conclusion that the proposal by the petitioners in the application for confirmation of grant filed on 29<sup>th</sup> August, 2002 is reasonable in the circumstances and is in tandem with the clear provisions of Section 38 of the Law of Succession Act as the deceased died intestate.

19. In the premises I find that the applications dated 6<sup>th</sup> March, 2001 and 19<sup>th</sup> April, 2002 lack merit and are dismissed with no order as to costs. The petitioners are directed to proceed with the confirmation of grant so that this matter could finally be brought to a closure.

It is so ordered.

**SIGNED, DATED and DELIVERED at MACHAKOS this 19<sup>th</sup> day of December, 2018**

**D.K. KEMEI**

**JUDGE**