



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 87 OF 2003**

**IN THE MATTER OF THE ESTATE OF MUTEVU KYEVA (DECEASED)**

**1. LAWRENCE NORMAN MUTAVA MUTEVU**

**2. DAVID KIMITU MUTEVU.....PETITIONERS**

**VERSUS**

**1. ALICE LUTHI PETER**

**2. PRISCILLA BETTY MALUA.....OBJECTORS**

**RULING**

**Introduction**

1. The Petitioners herein applied for grant of letters of administration intestate and the grant was confirmed on 3.7.2006. However, prior in 2004 a portion of the land comprised in **Ukia/Utaati/227** had been sold to the 1<sup>st</sup> objector who was then settled on the said portion.

2. The Petitioners are sons of the deceased. The deceased is the 2<sup>nd</sup> objector's late uncle. One of the assets in this succession cause is the land parcel **Ukia/Utaati/227** which according to the 2<sup>nd</sup> objector was registered in the names of the deceased but which was to be held in trust for it was jointly owned. The Objectors filed an affidavit of protest sworn by the Objectors on 17<sup>th</sup> February, 2014, contending that the Petitioners had concealed material facts from the court and failed to disclose all the beneficiaries for the said land, and in particular that the Deceased had a brother who had an interest in half of the suit property.

3. The protest was heard by *viva voce* evidence.

**The Objectors Case**

4. The Objectors called six (6) witnesses in support of their case. The 1<sup>st</sup> objector, Alice Luthi Peter was PW1, and she confirmed that on 3<sup>rd</sup> September, 2004 she bought plot number **Ukia/Utaati/227** from Musyawa Mbuli Nzuli. She relied on exhibit 1 which is a book that has the sale agreement, as well as the sketch map. She stated that she built on the plot and has been staying on it without objections, however after her husband died, the petitioners denied her the right to bury him on the plot. On cross examination, she stated that she was told that the plot number was **Ukia/Utaati/227**, she conducted a search in 2011 and found the land in the names of Mutevu Kyeve Musembi. She further stated that in 2014 the petitioner told her to vacate the land after she had been given notice in 2011 when her husband was still alive. She stated that Mutevu Kyeve Musembi did not sell her the land but he was the brother to Musyawa Mbuli Nzuli. That the land she bought was to be divided into two portions and her portion was to be given to her. She further stated that the children and the buyer were aware that she bought the land.

5. Priscilla Betty (PW2) testified that the deceased was her uncle since her father and the deceased were brothers and her father was called Kyeve Nzuli Musembi. She stated that the land **Ukia/Utaati/227** belonged to her grandfather by the name Musyawa Mbuli Nzuli Kyeve and was to be inherited by Nzuli Kyeve and Mutevu Kyuli in equal shares. She stated that she knows Alice Luthi Peter and that the land parcel No. **Ukia/Utaati/227** was sold to Alice and her husband by her uncle Mutevu. On cross-examination she stated that the children of the late Mutevu Kyeve Musembi were not involved in the sale as they did not sign the agreement, but by the time of the sale she knew the registered owner was her grandfather. In 2001 she came to know that the land was registered in the name of the deceased. She further stated that she witnessed the agreement and produced it as exhibit 4.

6. Musyok Kyevea (PW3) who is the elder brother of the deceased stated that she knows plot **Ukia/Utaati/227** and which was sold to Cellio Kioko Mutindi. The witness was later stood down for not making sense.

7. Mathias Kyule Mutunga (PW4) testified that the deceased was his paternal uncle. That Alice Peter was a neighbor who has brought a case on land parcel 227 which land belonged to Kyevea Mutevu Musembi and Nzuli Kyevea Musembi who were both deceased. The late Mutevu called the clan elders to subdivide the land and he was among the persons who deliberated thereon and that the land was to be divided into two portions each to Mutevu and Nzuli and later the wife of Nzuli Kyevea Musembi by the name Musyawa Nzuli sought a buyer to her husband's parcel of land. The buyer was Peterson Muli Mbevi who bought with his wife Alice Luthi Muli. Priscilla Betty Malua was the daughter of Musyawa Nzuli. The land was sold and he witnessed the sale transaction and confirmed seeing the agreement, Ex 1 and that the purchase price was Kshs 200,000/-. The buyer took possession of the land and started setting up structures and when the buyer died and preparations were being made, the petitioners blocked the same. He stated that so far as he is concerned the land belongs to the buyer's wife and the petitioners are wrong to object to the land that had been validly sold thus the court should order that the land belongs to the 1<sup>st</sup> objector as it had been bought by her husband. On cross-examination, he stated that he was present during the land subdivision but there were no written deliberations. He maintained that the clan elders and family members were present. He witnessed the sale agreement though the parcel number is not indicated on the sale agreement. On re-examination, PW4 testified that he was not the secretary of the clan meetings but the agreement described the parcel being sold and he signed the agreement.

8. Titus Kyambi Kingoku (PW5) testified that Alice Ruth Muli is a neighbour and her husband was Muli Mbevi. He stated that parcel 227 belonged to Mutevu Kyevea and Nzuli Kyevea who were brothers and initially the parcel belonged to their late grandfather Kyevea. That in 2004 the 1<sup>st</sup> objector bought the land from a lady by the name Kaleli Musyawa Nzuli who was the wife to Nzuli Kyevea and her sons were involved. The 1<sup>st</sup> objector moved onto the land and erected a house in 2005 and has been there all along. Nzule Kyevea died so his surviving brother Mutevu Kyevea registered himself as the owner. The 1<sup>st</sup> objector had bought land on the portion belonging to the deceased Nzule Kyevea, later invited the clan members who subdivided the land into portions and PW5 was present. The clan also gave him an extra portion for having been the caretaker. The petitioners' claim that the whole land belongs to them is false and thus the 1<sup>st</sup> objectors claim should be accepted for she bought from the part of Nzule Kyevea. On cross-examination, he stated that Eombe Clan has officials and a seal but the clan deliberations were not minuted. He says he was not present when the sale took place. On re-examination, he confirmed that he saw the agreement.

9. According to Regina Mutindi (PW6), she knows Mutevu Kyevea and that her father was called Nzuli Kyevea and who had one wife called Musyawa Nzuli. She stated that parcel **Ukia/Utaati/227** belonged to her grandfather Kyevea which land should have gone to Mutevu Kyevea and Nzuli Kyevea who were his sons. Her father Nzuli Kyevea was given his portion but Mutevu Kyevea had it registered in his names to hold in trust for his brother. Her mother Musyawa sold the portion to Peterson Muli in 2004 and Peterson developed it in 2005 and currently his wife Alice Luuthi Muli resides thereon. They do not have any other parcel except the one sold to Peterson Muli and so their family portion should be left with the 1<sup>st</sup> objector. Further that during the subdivision, sisal plants were planted along the boundary by David Mutevu Kyevea, the sold portion should go to Alice Luuthi Muli. On cross examination, PW6 stated that the children of Mutevu Kyevea were not present during the sale agreement. The clan elders subdivided the land but there were no minutes but the division was done in 2004 between Muteru Kyevea and PW.6's mother Musyawa as her father had died. Her mother Musyawa died in 2006 and the title deed was not issued since her mother lodged the objection

#### The Respondents' Case

10. The Respondents called 4 witnesses in support of their case. Stephen Muoki Mutevu (Pet PW1) stated that Mutevu Kyevea Musembi was his late father, who in 2001 filed succession cause and grant was confirmed on 3.7.2006 and he presented a copy of the said grant (Exhibit 1a and b). He stated that a search of the property revealed that parcel 227 is registered in the names of his late father and a copy of the title deed produced as Exhibit 2). He stated that the 2<sup>nd</sup> objector is a sister to his father and that parcel 227 was given to his father by his late grandfather since his uncle Nzuli Kyevea already had a separate portion. He stated that the alleged purchaser Peterson Muli had no right over the land since he has disputed vide copies of the demand notices and court order in **Makueni PMCC 14 of 2014** which were produced as exhibits 3 and 4 respectively. On cross examination, Pet PW1 stated that the land was initially ancestral land and the title deed was issued on 8.8.1991. His grandfather Kyevea Musembi died in 1983, and was given money to purchase another plot of land but he has no proof. He also has no documents showing survey registration in the names of his father before titles were issued. He came to know Peterson in 2008 and he has lived on the land where his wife currently resides. He states that he obtained the title on 17.10.2013 upon getting the certificate of grant and all along Peterson's family were demanding for the land, he admits that he has seen the restriction entry dated 21.6.01 on the copy of the search and by the time he took the title the restriction was still in place. He stated that he doesn't know when Nzuli Kyevea died but he has no objection to the land being shared equally between his father and his uncle and in addition they also share what Nzuli Kyevea possessed separately. On re-examination, he stated that survey was done in 1977 and the grandfather died in 1983, and that the restriction lapsed on the death of the person who lodged it. The title was issued by the lands registry and thus parcel **Ukia/Utaati/227** should belong solely to Mutevu Kyevea and his beneficiaries.

11. Jonathan Muli Mutevu, Pet PW2 testified that he is aware that parcel 227 which belonged to his late father who died in 2001, was transferred by transmission to his two brothers. The 1<sup>st</sup> objector and her husband entered the land without permission. On cross-examination, he stated that parcel **Ukia/Utaati/227** initially was ancestral land and Peterson Muli had bought a portion of parcel **Ukia/Utaati/227** and erected a brick house thereon as at present. He stated that he also resides on parcel 227 and his grandfather bought the land in Masimba in which Nzuli Kyevea resided. He later learnt that Nzuli Kyevea's wife and son sold the land to the 1<sup>st</sup> objector's husband though he was not present, but he saw the sale agreement. He confirms that there are sisal plants which act as the boundary and he sought to evict the 1<sup>st</sup> objector but had no court order but got one in February, 2014 but the 1<sup>st</sup> objector resisted and that is why he is in court.

12. David Kimitu, (Pet Pw3) stated that Mutevu Kyevea Musembi was his late father. He stated that parcel **Ukia/Utaati/227** was not clan land but belonged to his father. On cross-examination, he stated that Nzuli pre-deceased his father, and Nzuli was given land in Masimba but he does not know the land reference. He says that his father never sold land, and is opposed to Nzuli Kyevea being given a portion of the land. He stated that Nzuli Kyevea had 4 daughters and that he served the 1<sup>st</sup> objector with eviction orders but she obtained temporary orders of

injunction.

13. Lawrence Norman Mutava Muteva, (Pet Pw4) stated that Nzuli Kyevea is his uncle, and that they did not sell any land to Alice Luuthi Muli. The title deed to parcel **Ukia/Utaati/227** is in his names and that of David Kimitu Muteva on behalf of the siblings; the land was not part of Nzuli's land. On cross examination, he stated that parcel 227 was an inheritance from his late grandfather and he has no information that his father excised part of the land for Nzuli Kyevea. He stated that he is aware that Nzuli Kyevea is entitled to the ancestral parcel 227. He stated that Musyoki Kyevea and Mbuli Nzuli sold the land belonging to his late father on the ground that it belonged to Nzuli Kyevea. He stated that Musyoki Kyevea was given his portion but he sold it. He later contradicted himself and stated that he does not know that Nzuli Kyevea is entitled to the ancestral land. On re-examination, he stated that parcel **Ukia/Utaati/227** is still intact and belongs to his father. Further, that during the adjudication process his father was alive in 1974 but Nzuli Kyevea had already died in 1959.

#### Submissions

14. After the parties closed their respective cases, the Court directed them to file their respective written submissions. The Objectors filed their submissions on 22<sup>nd</sup> August 2017 and also supplementary submissions on 25<sup>th</sup> October, 2018, while the Petitioners/Respondents filed their submissions on 25<sup>th</sup> October, 2018. The submissions were to a large extent a reiteration of the evidence given by the parties in Court. The Objectors averred that the suit land was proved by the 1<sup>st</sup> objector as ancestral land and was registered in the names of the deceased herein because Nzuli Kyevea who was a brother to the deceased had predeceased him. They relied on the case of **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR**. In submitting that the objector has proved their case to the required standard, counsel submitted that the petitioners and their witnesses admit that it is ancestral land thus the objectors discharged their burden of proof as per section 107 and 108 of the Evidence Act Cap 80. They also submit that the petitioners did not call any independent witnesses and have not rebutted the objectors' evidence.

15. The Petitioners on their part submitted that the court does not have jurisdiction to cancel the title on parcel **Ukia/Utaati/227**, for the land no longer forms part of the estate of the late Mutevu Kyevea as it has since been transferred. They rely on the case of **In Re Estate of Alice Mumbua Mutua (Deceased) (2017) eKLR**. They further state that the objectors have not established that land parcel 227 was trust land and relied on the case that the objectors have quoted of **George Mbiti Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR**. They submit that the witnesses who would have testified to that effect were not called to do so, and quoted section 107 (1) of the Evidence Act. The petitioners submit that the 1<sup>st</sup> objector is an intermeddler because she bought parcel 227 from the mother of the 2<sup>nd</sup> objector who had no legal capacity to sell the land parcel. They relied on the case of: **In the Matter of the Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** that found that the property of a dead person cannot be lawfully dealt with unless a person is authorized by the law.

#### ANALYSIS

16. From the pleadings, the evidence and submissions, it is clear that the interest of the objector in parcel **Ukia/Utaati/227** that is part of the deceased's estate is in dispute. The other issue left for determination arising from the evidence and arguments made by the Objectors and Petitioners is whether the court can grant the orders sought by the 1<sup>st</sup> objector.

17. The Petitioners have stated that they are the administrators and rely on the confirmed grant and the title deed to the plot confirming that the land is registered solely in the names of Mutevu Kyevea Musembi. The 1<sup>st</sup> objector on the other hand claims to have bought the land from a Musyawa Mbuli Nzuli before the adjudication was done and claims that after the adjudication, her interest was overlooked. In the same vein, she claims that the land is ancestral land, however the chairman of the clan was never called as a witness to verify the authenticity of claim that it is ancestral land, or produce minutes of the clan meetings in which the decision was made to give the two deceased brothers the said land, and there are no orders to this effect. Although PW2 and PW3, also testified that they were aware of the clan meetings PW2 stated that they do not have records of the meeting. The said meeting is disputed by the petitioners who during cross-examination maintained that no minutes of the said clan meeting were produced by the objectors. Nevertheless, the evidence on record seems to point to the fact that the 1<sup>st</sup> objector has been in possession of the land since 2004. In addition, the evidence as to who was entitled to a share to the suit property is divided, with the objectors witnesses stating that the land was held in trust for the two deceased brothers family. Further, petitioners' witnesses all testified that the land has a title deed, and therefore the proprietorship is undisputed. This Court cannot in light of the apparent doubts in evidence as to the existence of a trust and ownership make a finding on the issue of the 1<sup>st</sup> objector's interest on plot **Ukia/Utaati/227**. The same should be determined in a civil court.

18. On the second issue as regards the order for revocation of the grant and for preservation of parcel **Ukia/Utaati/227** as prayed for by the 1<sup>st</sup> objector, the said 1<sup>st</sup> objector has relied on **Section 76** of the **Law of Succession Act** that provides for the annulment and revocation of Grants. It states that:

*A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-*

*(a) That the proceedings to obtain the grant were defective in substance;*

*(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*

*(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

*(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-*

***(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

***(ii) To proceed diligently with the administration of the estate; or***

***(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(iv) That the grant has become useless and inoperative through subsequent circumstances.***

19. In effect this section requires that a party has an identified interest in the deceased's estate. In the present cause, whether or not parcel **Ukia/Utaati/227** is solely the estate of the deceased and the interest of the 1<sup>st</sup> objector in the parcel **Ukia/Utaati/227** is still in dispute. Nevertheless the evidence on record has shown that the objector has an interest in the said parcel **Ukia/Utaati/227** and the petitioners did not reveal this to court despite the fact that 1<sup>st</sup> Objector has been residing thereon. It would be prudent therefore that this interest be established in the appropriate court. Whereas it can be argued that the said objector has *prima facie* satisfied the conditions under Section 76, it is unnecessary to revoke the whole grant for it shall affect the part of the estate that is undisputed and yet from the evidence, its only parcel **Ukia/Utaati/ 227** that is in dispute while the rest of the properties in the confirmed grant have no problem.

20. In my view, the Law of Succession Act like section 3 of Civil Procedure Act has a saving provision as to the court's inherent jurisdiction. Section 47 of the Law of Succession Act provides:-

***“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”***

Rule 73 of the Probate and Administration Rules goes further to affirm the court's powers in the following words:-

***“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

#### Determination

21. The input of the abovementioned sections is that the succession court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.

22. It is in the interests of justice that parcel **Ukia/Utaati/227** is preserved and the quiet possession of the same is not interfered with as and until when the interest and entitlement of the 1<sup>st</sup> objector on the same is ascertained and realized. It is also in the interest of justice that the confirmed grant is not disturbed for it shall inconvenience innocent beneficiaries. Therefore the application dated 17.2.2014 partially succeeds.

23. I accordingly order as follows:

- a. The administrators shall hold land parcel **UKIA/UTAATI/227** in trust for Alice Luthi Peter and the named beneficiaries in the grant until such a time when her interest in the said parcel is determined in a civil court.
- b. A conservatory order be and is hereby issued to preserve the deceased's Estate and more particularly the property known as **UKIA/UTAATI/227** pending the determination of the interest of Alice Luthi Peter in the said property and her right to enjoyment of quiet possession shall not be disturbed.
- c. A rectified grant be issued to give effect to order (a) above while all the other items in the confirmed grant shall remain undisturbed.
- d. Costs shall be in the cause.

Orders accordingly.

**Dated and delivered at Machakos this 18<sup>th</sup> day of December, 2018.**

**D. K. KEMEI**

**JUDGE**