



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 328 OF 2013

IN THE MATTER OF THE ESTATE OF NDUMBUTHI KALIA (DECEASED)

DICK NDUMBUTHI.....PETITIONER

KIVINDU MWANZA

MUALUKO MULWA

MUTUKU MBUKU

PAUL MUTUNGA

NGUTA MWANGANGI.....RESPONDENTS

JUSTUS KALIA NDAMBUKI.....OBJECTOR

RULING

The Application

The Petitioner herein filed an application by way of summons dated 8th July 2015, seeking orders that Kivindu Mwanza, Mualuko Mulwa, Mutuku Mbuku, Paul Mutunga and Nguta Mwangangi, the Respondents herein, be restrained from in any way intermeddling and/or interfering with land parcel known as MACHAKOS /MATUU/2675 which is part for the deceased's estate.

The Petitioner in his supporting affidavit sworn on 18th July 2015 and supplementary affidavit sworn on 15th April 2016 averred that the deceased was his father, and was the registered proprietor of all that property known as MACHAKOS/MATUU/2675, which forms part of his estate. Further, that the Respondents have started to trespass on the plots in the said land parcel and are putting up permanent structures thereon, and their actions should be stopped so as to preserve the deceased's estate

The Petitioner denied ever selling the Respondents the said plots, and further stated that the Respondents alleged to have bought the subject land in sale transactions that took place on 8th July 2014, 6th September 2014, 24th September 2014 and 18th December 2014, despite the fact that the registered owner of the land in question died on 29th August 2001 and succession proceedings were still pending. Further, that the said sale transactions were between the Respondents and either one Mumbua Ndumbuthi or Dick Ndumbuthi who did not have title to the portions purportedly sold, and thus they could not transfer any valid title to ownership of the said portions of land.

The Petitioner's Advocates, Mutinda Kimeu & Company Advocates, reiterated the above facts in

submissions filed in Court dated 22nd June 2016 and 12th August 2016, wherein reliance was placed on sections 41, 55 and 82 of the Law of Succession Act, and the decision in **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased), [2011] eKLR** that prohibits selling deceased's property even by an administrator before the grant is confirmed.

It was submitted that the Respondents are therefore not heirs to the deceased nor dependants in accordance with Section 29 of the Law of Succession Act, and that the alleged vendors did not have title to the portions purportedly sold and thus they could not transfer any valid title to ownership of the said portions of land. Further that all the actions done in furtherance of the said sale transactions are null and void, and that the acts of continued possession in the said land by the Respondents amounts to intermeddling with the free property of the deceased.

It was also contended that the sale agreements alluded to by the Respondents were over agricultural land which are controlled transactions and are rendered void for lack of Land Control Board consent in view of sections 6(1) (a) as read together with section 8(1) of the Land Control Act, and thus cannot form a basis for a claim over land. Reliance was placed in the Court of Appeal decision in **Onyuka vs Migwalla (2005) e KLR** in this respect.

The Response

The Respondents opposed the application in their replying affidavits which were respectively sworn as follows: by Kivindu Mwanza on 21st October 2015; by Mutuku Mbuku on 15th February 2016; by Samwel Mualuko Mulwa on 15th February 2016, by Paul Mutunga on 30th June 2016 and by Nguta Mwangangi on 9th November 2015. The Respondents all denied being intermeddlers and claimed to be purchasers for value and in rightful possession of the subject portions of land, as a result of sale transactions entered into with the Petitioner or his mother with the knowledge and participation of other members of the deceased family. They attached their respective sale agreements.

Kivindu Mwanza stated that he entered into a sale agreement with the Petitioner on the 18th December 2014, wherein the Petitioner in his legal capacity as the son and administrator of the estate of the Deceased sold to him a portion of land measuring 40 feet by 100 feet, which was to be extracted from the main title deed number 2675 for a consideration of Kshs. 120,000/=. Samuel Mualuko Mulwa on his part averred that he entered into a sale agreement with one Mumbua Ndambuki, the wife of the Deceased and mother to the Petitioner on 6th September 2014, whereby she sold to him a portion of land measuring 40 feet by 100 feet, to be hived from the main Title deed number 2675 in Machakos County/Matuu Location for a consideration of Kshs. 100,000/=.

Mutuku Mbuku similarly averred that he entered into a sale agreement with Mumbua Ndambuki, the wife of the Deceased and mother to the Petitioner on the 9th July 2014, and that she sold to him a portion of land measuring 40 feet by 100 feet, to be hived from the main Title deed number 2675 in Machakos County/ Matuu Location for a consideration of Kshs.120,000/=.

Paul Mutunga on his part alleged to have entered into a sale agreement with the Petitioner on the 20th October 2014, wherein the Petitioner sold to him a portion of land measuring 20ft by 100ft, which is to be extracted from the main Title deed number MKS/MATUU/2675 for a consideration of Kshs.60,000/=. Lastly, Nguta Mwangangi stated that he entered into a sale agreement with the Petitioner on 24th September 2014, who sold to him a portion of 20 ft by 100 ft out of Land Parcel Number Machakos/Matuu/2675.

Veronica Acheng Odipo, the legal counsel for the 1st, 2nd and 3rd Respondents filed submissions dated 1st August 2016, wherein she urged that it is clear that the Petitioner and his mother are in fact the intermeddlers of first instance, for reasons that they sold the parcels of land knowing all too well that it was illegal and that they lack capacity to do so as there had been no confirmation of grant, and undertook to subdivide and transfer the said parcels of land. Further, that they therefore lack the moral and legal ground to seek any remedy from this court as it is they who first intermeddled in the estate of the deceased. Reliance was placed on the decisions in **In the Matter of the estate of Kilonzo Mbwal**

Ngesu (Deceased) (2013) eKLR and **Labh Singh Harman Singh Ltd & Another v Ahmed Salim A. Jeizan (2014) eKLR**, for the position that this Court as a court of equity should not aid the Petitioners as they are at fault.

Similar submissions were made by Sigey & Company Advocates for the 4th Respondents in submissions dated 11th August 2016, and reliance was placed on the decision in **In the Matter of the estate of Kilonzo Mbwala Ngesu (Deceased) (2013) eKLR** for the position that the circumstances giving rise to the application were created by the Petitioner.

M.M Uvyu & Company Advocates for the 5th Respondent on their part filed submissions dated 5th September 2016, wherein it was urged that the 5th Respondent is not an intermeddler as alleged, as the sale of a portion of the deceased land to him was done after the Petitioner had obtained grant of letters of administration in respect of the Estate of the deceased.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the orders for preservation of the estate sought herein are available to the Petitioner. I note in this regard that section 45 of the Law of Succession Act is the operative law when seeking to stop intermeddling with a deceased's estate and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

In the instant case, the Respondents have averred that they were sold the subject land by the Petitioner and by the Petitioner's mother who is also the widow of the deceased. They provided copies of the sale agreements they entered into with the Petitioner and his mother in this respect. Therefore, in fact, both the Petitioner and Respondents have intermeddled in the estate of the deceased, as section 55 of the Law of Succession Act provides as follows with regard to disposition of capital assets of a deceased person's estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant.

Arising from the foregoing, and pursuant to the powers of this Court under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules I accordingly order as follows:

1. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of the deceased Ndumbuthi Kalia and particularly land parcel number MACHAKOS /MATUU/2675 pending the confirmation of grant of administration issued herein, shall be that the Petitioner and Respondents shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Petitioner, Respondents and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by the Petitioner, Respondents or Beneficiaries.

2. Each party shall meet their respective costs of the Summons dated 8th July 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30th day of January 2017.

P. NYAMWEYA

JUDGE