



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 321 OF 2000

IN THE MATTER OF THE ESTATE OF DANIEL KIBOI NDIANGUI (DECEASED)

GICHUKI MUTUKUI.....1ST PETITIONER

MARY NJOKI KIBOI.....2ND PETITIONER

AND

MARGARET WANGUI KIBOI.....OBJECTOR

AND

MUTHIKA NDIKU.....1ST INTERESTED PARTY

BERNARD MURIITHI MUGO.....2ND INTERESTED PARTY

RULING

Introduction

The Petitioners herein were issued with a grant of letters of administration intestate on 7th August 2008 with respect to the estate of the deceased Daniel Kiboi Ndiangui (hereinafter referred to as “the deceased”). The 1st Petitioner was a joint owner with the deceased of the land parcel registered as MUPUTI/KIIMA-KIMWE/275, while the 2nd Petitioner is the 2nd wife of the deceased. The Petitioners subsequently filed a summons for confirmation of the said grant dated 4th July 2008.

The Objector was the 1st wife of the deceased and was substituted by her son, John Ndiangui Kiboi, who filed an affidavit of protest he swore on 23rd November 2008. The Objector claims that there are properties of the deceased which have not been included in the confirmation proceedings.

The Interested Parties also filed an affidavit of Protest to the summons for confirmation of grant sworn on 17th September 2008 by the 1st Interested Party. The 1st Interested Party claims that title number MUPUTI/KIIMA-KIMWE/275 was his property which the Deceased and 1st Petitioner fraudulently and unlawfully registered wholly in their name, when he had only sold to them a portion of the said land measuring 100x100 feet in 1972, which was to be excised from the said parcel of land.

Further, that he had also sold a portion of the said land measuring 170x150 feet to Kiilu Nzomo, who later

sold the said portion to the 2nd Interested Party in 1994. Lastly, that he is entitled to 0.09 hectares out of 0.25 hectares of the said parcel of land, which he did not sell.

This Court (Lenaola J. as he then was) gave directions on 3rd November 2008 that the Interested Parties' Affidavit of Protest be heard to determine their interest in land parcel registered as MUPUTI/KIIMA-KIMWE/275. The hearing proceeded by way of viva voce evidence, and the Interested Parties called a total of six witnesses to testify.

The Evidence

Simon Muthoka Ndiku who is the 1st Interested Party testified, and also called Joseph Musyoki Wambua as his second witness. The evidence of the two witnesses was that the 1st Interested Party only sold a portion of his land to the Deceased and 1st Petitioner before it was adjudicated. Further, that he had before then also sold another portion of the same land to Kiilu Nzomo, who later sold his share to John Mugo the 2nd Interested Party. The 1st Interested Party claimed that he had entered into a sale agreement with the deceased and 1st Petitioner, a copy of which was shown by him during proceedings but was not produced as an exhibit.

Benard Muriithi Mugo the 2nd Interested Party, testified that a portion from the land which is the subject matter herein was sold to him by Michael Kiilu, who had bought it from the original owner, one Muthoka Ndiku. Further, that he has been in occupation of the land since 1994. He produced an agreement dated 23 / 12/ 1998 as an exhibit.

Lawrence Nzioka Nthiwa was the 2nd Interested Party's second witness, and he stated that he was the Chief of Kiima Kimwe Location and that he became aware of the transaction between the 2nd Interested Party and Kiilu Nzomo when he was called to arbitrate a land boundary dispute between the 2nd Interested Party and one Mwikali Mutua. Further, that he realized later that the land was registered in the names of the Deceased and 1st Petitioner.

The third witness called by the 2nd Interested Party was Grace Mumo Wandiku Muthoka, the wife of the 1st Interested Party. The witness substituted the 1st Interested Party who died during the proceedings. She testified that her husband only sold a small portion of land called a "kalebo" to the Deceased and 1st Petitioner. Further, that the said land is at Kyatia, Muvuti location, and was being cultivated by a lady called Kanini Mboka and another person called Mugo who bought from Kiilu, who in turn had bought the land from Muthoka Ndiku the father to her husband.

The last witness called by the 2nd Interested Party was Michael Kiilu Mumo, who testified that Muvuti/Kiima Kimwe/275 belonged to Muthoka, who sold it to him and he in turn sold it to the 2nd Interested Party. He stated that he did not know the father of Muthoka, and that he knew the 1st Petitioner who owned a portion of land neighbouring his. He also testified that the 2nd Interested Party has been using the land and has a right to own his portion of land, but needs to complete payment of the purchase price. He produced a letter written by his advocate as proof of the agreement to sell his portion to the 2nd Interested Party.

The Petitioners called two witnesses to testify. Their first witness was Joseph Kinyajui who stated that he works as a Registrar attached to Machakos Land Registry, and that the registration of title No. MUPUTI/KIIMA-KIMWE/275 was done on 25/5/1977 in the names of Daniel Kibo and Gichuki Mutuku as joint owners in equal shares, and measures 0.25 hectares. Further, that a caution in relation to the said property was placed on 26/10/2001 by Margaret Wangui Kiboi. He further stated that if there was a dispute relating to the property it would have been entered in the green card, and he was not aware of any tribunal proceedings in relation to the land.

Mary Njoki Kiboi, the 2nd Petitioner, was the second witness, and she stated that she is the 2nd wife to the Deceased. Further, that the Deceased jointly bought MUPUTI/KIIMA-KIMWEI 275 with Gichuki Mutuku from Simon Ndiku Muthoka, and that she was present during the transaction. She

further stated that the seller sold the whole portion. The 2nd Petitioner testified that during the adjudication process, the land was registered in the names of the two buyers and that she did not know Benard Mugo until 2000 when he sued the buyers demanding a portion of land parcel No. MUPUTI /K IIMA KIMWE/275.

The Issues and Determination

After the hearing was concluded, the 2nd Interested Party's counsel applied for the Court to visit the *locus in quo* (disputed site) and conduct a hearing thereat, which application was allowed by Muriithi J. in a ruling delivered on 21st March 2016. The site visit was adjourned several times due to the inability of the 2nd Interested Party to proceed, and this Court consequently directed the parties to file their submissions on the Interested Parties' protest and reserved the matter for ruling.

L.N Ngolya & Company Advocates, the Interested Parties counsel, filed submissions dated 21st March 2017. The Petitioner's counsel, Nzei & Company Advocates, also filed written submissions, while the submissions filed by Mulwa, Isika and Mutua Company Advocate's for the Objectors are dated 24th April 2017.

According to the Interested Parties, the 2nd Interested Party's claim was proved as there is sufficient, credible and consistent evidence that he bought his portion from Kiilu Nzomo. Further, that although title number MUPUTI /KliMA- KIMWE / 275 is registered in the names of Mr Kiboi and Mr Gichuki, the said registration recognizes the Interested Parties' interests in the said title, and a presumption of trust is to be inferred in favour of the Interested Parties. The Court was urged to find that the Interested Parties have demonstrated the existence of protectable interest in the deceased's estate, and that such interest should be taken into account during the Confirmation of the Grant issued to the Petitioners.

The Petitioners on the other hand submitted that the Interested Parties claim to have bought part of the deceased's land from the original owner, and they have never held title to the said land. They therefore have no valid claim over the deceased's estate, and by cultivating the land are intermeddlers under section 45 of the Law of Succession Act.

The Objector's submissions were that the adjudication process in relation to the suit land was done and the land in title number MUPUTI/KIIMA -KIMWE/275 registered in the names of Gichuki Mutikui and Daniel Kibot at a time when the 1st Interested Party was present. In addition, that he did not challenge the registration of the property into the buyers' names and only waited until the institution of a succession cause which was done 25 years after the transaction. Further, that none of the interested parties adduced evidence to indicate that the registration of the suit land into the buyers' names was illegal, unprocedural or through a corrupt scheme, and even if it was, the succession court cannot determine this issue.

According to the Objector, this court's jurisdiction in a succession cause is limited to dealing with only the assets and liabilities comprising the estate of the deceased to exclusion of any other extraneous and or foreign issues. This jurisdiction cannot be extended to entertain the issues raised by the interested parties regarding the authenticity of the disputed title deed, and that the Interested Parties should have filed a separate suit within which the issues they are raising herein could be heard and determined, because their claim goes beyond the estate of the deceased.

I must first deal with the preliminary issue raised by the Objector in their submissions as to whether this Court, sitting as a succession Court, is the correct forum to adjudicate the Interested Parties claim. Musyoka J. in this regard in **In Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the

deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

The issue as to this Court’s jurisdiction can therefore only be determined by first answering the question of the nature of the Interested Parties claim over the disputed property vis-à-vis the Deceased. This Court in this respect is alive to the ranking of beneficiaries of an intestate as provided under Part V of the Law of Succession Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the order of priority under section 39 of the Act.

It is notable in this respect that the Interested Parties are neither spouses, children or relatives of the Deceased. Section 66 of the Law of Succession Act however also recognises adverse interests to the estate of a deceased including those of creditors at section 66 as follows-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- (c) the Public Trustee; and**
- (d) creditors:**

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

In addition, section 86 of the Law Succession Act enjoins the personal representative of the estate of a deceased, to pay all the estate's debts of every description that are enforceable at law and owed by or out of an estate, before any legacy is paid or settled.

One of the definitions of a creditor given by the **Black's Law Dictionary, Ninth Edition** at page 424 is “a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation”. A debt under page 462 also includes “a non-monetary thing that one person owes another such as goods or services”. Therefore, a purchaser of land from the deceased is deemed to be a creditor and to have a debt owed to him or her by the deceased, the extent that the deceased was under a legal obligation to transfer the land to the purchaser or refund the purchase price. Again, the 2nd Interested Party claims to have bought the portion of MUPUTI/KIIMA-KIMWE/275 from a third party other than the Deceased, and is therefore claiming a parallel title to the land. He is therefore not a creditor of the deceased.

Any person with a beneficial interest in the estate of the Deceased can also apply for consideration of his interest in confirmation proceedings. A beneficial interest is defined in **Black's Law Dictionary (supra)** as ‘a profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.’ To the extent that the 1st Interested Party claims that he only sold a portion of the land parcel MUPUTI/KIIMA-KIMWE/275 to the Deceased and 1st Petitioner, he can be argued to have a beneficial interest in the same.

This finding notwithstanding, it is still evident that that the dispute herein is not one of succession, but one of the interest in, and to title to land parcel MUPUTI/KIIMA-KIMWE/275 as between the Deceased, 1st Petitioner, 1st Interested Party and the 2nd Interested Party, which is claimed as arising before and independent of the Deceased's death. This is therefore not a dispute that can be determined solely within the framework of the Law of Succession Act, as there are claims of fraudulent registration of title in the Deceased and 1st Petitioner's name that need to be determined.

In addition, the dispute also involves and affects the 1st Petitioner as a co-owner of MUPUTI/KIIMA-KIMWE/275, as the Interested Parties are challenging his title to the said property. The proper forum therefore to decide and determine the Interested Parties beneficial interest if any, in the suit property is the Environment and Land Court. In addition, as the said property is currently registered in the name of the Deceased as joint owner which title has not been cancelled, this Court shall proceed with the distribution of the same in the normal manner.

I accordingly dismiss the Interested Parties' affidavit of Protest and order that the Summons for Revocation of Grant and Objector's Affidavit of Protest proceeds to hearing. The Interested Parties shall however be at liberty to move this Court once, and in the event that their interest in MUPUTI/KIIMA-KIMWE/275 is determined by a court of competent jurisdiction.

There shall be no order as to costs

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1st day of August 2017.

P. NYAMWEYA

JUDGE