



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT PROBATE & ADMINISTRATION NO.17 OF 2017

IN THE ESTATE OF MUTHIANI MUTULE.....(DECEASED)

-VERSUS-

LAZAURS MUTHIANI NGOLOTA.....1ST PETITIONER

MULEI MULAVU.....2ND PETITIONER

JUDGEMENT

INTRODUCTION

1. By an application dated **17/11/2015**, the Petitioners sought confirmation of grants made on **04/05/2015** in respect of the deceased estate in the instant matter.
2. One **Ndambuki Mutule Mutwelei** by an affidavit sworn on **17/03/2016** responded via a protest on the basis that the **LR. NO. NZAVI/KALAMBA/615**(10 acres) contained 3.5 acres or thereabout which ought to be registered in his names.
3. The Petitioner No. 1 lodged an affidavit of reply to protest sworn on **24/10/2016**, denying the Protestors claim.
4. The court gave directions that the matter be heard by way of viva voce evidence.

PROTESTOR'S CASE

5. The Protester herein through his affidavit of protest sworn on **17/03/2016**, and his testimony stated that the deceased herein was his brother. Their father named **Mutule Mutweleli** (deceased) who had passed on before his land was surveyed.
6. The protester stated that at the time of adjudication, he entrusted his brother (**Muthiani Mutule**) to have the land adjudicated. He further stated that the land was to be divided into two equal portions.
7. However, the protester stated that it came to his attention that his brother during adjudication caused him to have a small piece of land measuring **3.0 Ha**. While for himself he had **10.0 Ha**.
8. He annexed copies on the land search certificates to attest the same. He stated that upon discovering the same, he held talks with the late **Muthiani Mutule** and both agreed that the protestor be added a portion of land measuring **3.5 Ha**.

9. The Protestor told the Honourable court that he together with the late **Muthiani Mutule** called the clan officials and elders to witness the exercise.

10. The exercise was carried out on **08/09/1998**. The Protestor together with the late **Muthiani Mutule** jointly planted the first sisal plant then the elders planted the rest. The added piece of land is still under use and possession by the Protester.

11. During cross examination by the **1st Petitioner**, the Protester herein confirmed that the added piece was freely added by **Muthiani**. He also confirmed that he was somewhere else when the survey was conducted.

12. He also confirmed that the son and wife of **Muthiani** were present during the time he was added land by **Muthiani**. He stated that the additional land was done freely without duress or any coercion whatsoever.

13. He produced the search certificate for **Nzau/Kalamba/269** as **Exh. 1** and search for **Nzau/Kalamba/615** as **Exh. 2**. He also produced **clan meeting minutes** as **Exh. 3**. The protestor confirmed that he demanded that the additional **3.5** acres be added to reflect on his title but the Petitioners refused and reported the same to the D.O vide a letter dated **18/09/2014 (Exh 4)**.

14. The Protester stated that the Petitioner spoke in English at the D.O's office at Matiliku and he did not understand the language since he was illiterate.

15. PW2, Joe Mbevi Kimuyu stated that he was the Chairman of the **Auani Clan** and that he knew the deceased herein together with the parties herein as well. He stated that he had been invited by **Muthiani** and **Ndambuki** together with other elders to witness the piece of land that **Muthiani** had added **Ndambuki**.

16. He corroborated the evidence of the protestor and particularly that **Muthiani** together with **Ndambuki** planted the **1st** sisal plant and then the elders planted the others.

17. During cross examination, he confirmed that he was still the chairman of the **Auani Clan**. He also confirmed that he had purchased a piece of land from the protestor and that they only came to witness the same.

18. PW3 Ngota Nthale, corroborated the evidence of **PW2**. He stated that he was a committee member of the **Auani** clan and on **08/09/1998**; he was called by **Muthiani** and **Ndambuki** to witness the agreement. They found that **Muthiani** had added **Ndambuki** a piece of land measuring **3.5** acres.

19. They witnessed the two planting of sisal to mark the two boundaries and they planted the others. During cross examination, he confirmed that there were many people at the exercise.

20. He also confirmed that he never knew who else was to attend the exercise. He confirmed that they were only called to witness by the two parties.

THE PETITIONER'S CASE

21. The **1st** Petitioner herein testified on **22/06/2017**. He stated that the **2nd** Petitioner was his cousin and he was a son to the deceased herein. He stated that he was not present during the exercise and that the exercise by the clan was illegal.

22. He stated that his father was forced by the clan to add the protestor the land and that he was at college at the time the exercise was carried out.

23. He stated that he came from the college three months after and found the new boundaries had already been erected. He later filed a succession cause and obtained grant of letters of administration and urged

the court to confirm the same.

24. During cross examination, he confirmed that his late father did not challenge the clan minutes only for him to challenge the same after his father's death. He confirmed that land **no. 615** is where the late **Mutule Mutweleli** was residing and buried on.

25. He further confirmed that the piece added to **Ndambuki** is still under use and occupation by him. **DW2, Mulavu Muthiani** stated that he was son to the deceased. He stated that he was informed that there was a dispute in court that there was land given by **Muthiani to Mutule**. He stated that he was not present during the exercise.

26. He testified that **Ndambuki** still uses the piece of land he was added. He further told the court that some sisal plants had been planted to mark the boundaries.

27. During cross examination, he told the court that the late **Mutule Mutweleli** had two sons being the Protestor herein and one **Muthiani**.

28. He stated that the Kamba customary law provides that the ancestral land is to be divided equally among the sons of the deceased and that is what was done. He stated that the land was divided into two equal portions. He also told the court that **Muthiani** did not have any dispute with the protester herein.

29. DW3, Mathei Ngolota testified that the deceased herein was her father in law. He stated that 1st Petitioner was her son and the Protester was her uncle. She corroborated evidence of **DW3**. She stated that she knew the boundaries dividing land belonging to **Muthiani** and **Ndambuki**. She said that she could not remember the years the clan carried out the exercise. She stated that her father in law, the deceased herein was at home during the time of the exercise.

30. During cross examination, she confirmed that the two pieces of land should be of equal measure. She confirmed that there never existed any dispute between **Ndambuki** and **Muthiani** concerning the land.

PROTESTORS'S SUBMISSIONS

31. The Protestors herein opposes the summons for confirmation of grant filed by the Petitioners herein dated **17th November, 2015** vide and affidavit of protest sworn on **17th March 2016**.

32. The particulars of the protest are that the deceased herein had been entrusted by the protester to have their father's land adjudicated into two equal portions.

33. However, the deceased had the two lands adjudicated into two pieces of land being **NZAU/KALAMBA/615** for the Protestor measuring **3.0 Ha**. While the deceased herein allocated himself **NZAU/ KALAMBA/269** measuring **10.0 Ha**. The Protester claimed for additional **3.5 Ha**. From the deceased herein and who added him the portion but the title deed for the Protester remained the same indicating **3.0 Ha**, which is the subject cause in this matter.

34. From the Protester's case, it was stated that the protestor lives and still uses the piece added by the deceased herein which evidence was not rebutted by the Petitioners. It is also evident that there was no dispute concerning the added piece of land between the petitioner and the deceased herein.

35. The court cannot thus confirm the grant unless the Protesters piece is first allocated to him. We therefore submit that the summons for confirmation of grant herein be dismissed and the protest herein be allowed for parties to agree on mode of distribution.

PETITIONERS SUBMISSIONS AND THE LAW

36. The Petitioner's prayers to this honorable court are to dismiss the Protesters objection of summons for confirmation of grant issued on **04/05/2015**.

37. The Protestor never entrusted the deceased with adjudication of the land. That the Protestor told this court that the land was sold to him by the deceased.

38. The exercise to alter the boundary lines of the land no. **NZAUI/KALAMBA/269** was against the law since the authorities in charge were not involved. Therefore the elders committed an offence. From the record, the Petitioner's case is that he petitioned for Letters of Administration intestate of **Muthiani Mutule** as per the records of the estate owned by the deceased.

ISSUES, ANALYSIS AND DETERMINATION

39. After going through the pleadings, evidence on record and the parties submissions, I find the issues for determination are;

i. Whether this court can determine the protesters claim of estate of deceased estate?

ii. Whether the protester is entitled to the portion of the deceased parcel of land subject herein?

40. The core dispute is anchored in the protester claim in a protest on the basis that the LR. NO. NZAVI/KALAMBA/615(10 acres) contained 3.5 acres or thereabout which ought to be registered in his names. Thus the disputes turns on the ownership of 3.5 acres which protester claims from his deceased brother's estate.

41. The dispute is not per se revolving on distribution or administration of the deceased estate but ownership of the claimed portion.

42. In the **MATTER OF ESTATE OF GACHURU KABOGO NAI SUCC NO 2830 OF 2001** the court held that, during confirmation of grant hearing, of ownership of a property of an estate is contested ,the property not contested is confirmed and the contested is heard under **Order XXXVI (36) CPR** as separate.

43. In another matter **CHARLES MURITHI KUNGU –VS- ANN NJOKI NJENGA NAI HCCC 19 OF 2004** the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under **ORDER XXXVI RULE 1.**

44. Thus the issue as to whether this court can determine the protesters claim of estate of deceased estate is answered in the negative.

45. In the premise the second issue as to whether the protester is entitled to the portion of the deceased parcel of land subject herein can only be determined in a separate cause outside this cause.

46. The court will therefore confirm grant but on the issue of distribution, the 3.5 acres of LR. NO. NZAVI/KALAMBA/615 occupied by the protester and contested herein shall be preserved to await the cause to be lodged over same claim in the next 3 months in the Environment and land court. Failure to lodge same as ordered with the next 3 months from the dates herein, the same 3.5 acres will be subject to distribution thereof.

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2017 IN OPEN COURT.

C. KARIUKI

JUDGE

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