



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PROBATE & ADMINISTRATION CAUSE NO.290 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE WAMALWA KABIENGA (DECEASED)

AND

MAURICE WANYONYI WAFULA.....PETITIONER/1ST RESPONDENT

WILLIAM WAMALUKU MWANDA.....2ND RESPONDENT

VERSUS

HENRY KITERE WELIKHE.....OBJECTOR/APPLICANT

JUDGEMENT

1. This matter devolves around the Estate of the late Wamalwa Kabienga who died domiciled in Kibuchai within Bungoma on the 14th of July, 2006.

According to a letter by the Chief of Mukuyuni division dated 1st September 2010, the deceased was survived by 1 son – Maurice Wanyonyi Wafula and 6 daughters – Grace Nakhuminja

- Alice Nasipondi
- Rose Nanjala
- Everlyne Nekesa
- Gladys Nelima &
- Judith Naliaka

2. His son Maurice Wanyonyi Wafula petitioned for grant of letters of administration and in the application he gave 3 other names of survivors of the Estate none of whom appears on the Chief's letter as a survivor.

3. A grant was issued on the 29th of March, 2011 and subsequently the Petitioner sought to have the grant confirmed through an application dated 16th June, 2011 where names similar to those on the Petitioner not being the names of the children of the deceased given as names of survivors and proposals of distribution made.

4. On the 11th of May 2012 the grant was confirmed distributing the only asset as follows;

- Ruth Nanjala Wafula 0.2 acre
- William Wamaluku 0.9 acre
- Evans Namsake 0.1 acre

5. The Objector herein Henry Kitere Walikhe moved the Court by way of summons for revocation of grant on 4th of February 2013 seeking to have the grant revoked and annulled on the grounds that the Petitioner had registered the name of one William Wamaluku Mwanda as a

beneficiary of 0.9 acres of the Estate leaving out the Objector and that the Petitioner had threatened to evict him. Further that the grant was obtained secretly without his knowledge and yet the Petitioner and his deceased father had sold the property to him, he had paid the entire purchase price and has since been in occupation.

In his supporting affidavit he averred that the deceased had signed the transfer forms but was short of obtaining the Land Control Board as the deceased fell ill and subsequently died.

The Objector produced several notes/receipts where both the Petitioner and his father received the purchase price. He also produced the transfer forms signed by the deceased.

6. In an affidavit sworn on 28th of August 2014 by one William Wamaluku Mwanda he admitted having entered into a sale agreement with the objector to purchase 0.9 hectares of the subject property. He stated further that on discovering that the Objector was not the registered owner he approached the Petitioner who agreed to include his name as a beneficiary of the Estate.

7. At the date of hearing the 4th of May, 2017 only the Objector was present the Petitioner was not present. This being an old matter an adjournment was declined.

The Objector proceeded and testified. He informed the Court that he bought the property from both the deceased and his son the Petitioner in 1994 and has since been in occupation. That the deceased signed the transfer form but died before he could obtain a consent from the Land Control Board. That during the traditional ceremony of Lufu done a few days after the funeral within the Bukusu, he made known his claim to the deceased clan where he was informed that the deceased son the Petitioner would give him his portion. From a neighbour, in 2012 he learnt that the property was being surveyed at 6p.m.

It was also his testimony that in 2005, he entered into an agreement with one William Wamaluku Mwanda (William) to sell to him the said portion for Kshs.150,000/-. William paid Ksh.60,000/- and was to pay a balance of Kshs.90,000/-. The said William left to appear in 2010 and on return the Objector demanded a further Kshs.75,000/- on top. The buyer did not pay but went to the Petitioner who then transferred the land to him yet he had not paid the entire purchase price to the Objector.

It was also his contention that he now had no need of selling the land and would rather refund the money to his said purchaser.

8. In his submissions the objector stated that the Petitioner knew that he was a beneficiary of his father's Estate yet he excluded him from the distribution of the Estate and went ahead to include William and therefore the Succession process was not properly done.

9. The Petitioner's Counsel in brief submitted that the receipts produced made reference to an entirely different parcel of land, further that there is an admission by the Objector that he sold his portion to William and having so admitted the Objector cannot have a claim in the Estate and if he had any case against his purchaser then his claim is misplaced. Further the Sale Agreement and / or receipts were not specific over the acreage sold.

10. In my considered opinion William Wamaluku Mwanda although joined as a respondent has no capacity to defend on behalf of the Petitioner. The issue before Court is between the Objector and the Petitioner. Interesting enough the Petitioner did not file any response to the application for revocation nor did he appear before Court to testify. It appears as though William is his proxy.

11. The issues for consideration are:-

a). whether the objector laid enough proof to be considered as a liability to the Estate.

b). whether the consideration by the Petitioner of Willam Wamaluku Mwanda as a liability was proper.

c). whether or not to revoke the grant confirmed on 11th May, 2012 on the basis laid down by the Objector.

12. The Petitioner did not file a response to the application for the nullification and / or annulment of the grant, neither did he file a witness statement or adduce evidence. He showed disinterest in the matter totally. William who appears to be shouldering the Petitioner's case confirmed the Objector's Evidence that the Objector sold to him the property in 2005 for Kshs.150,000/- and thereafter he approached the Petitioner who agreed to give him title.

13. There is no challenge by the Petitioner that the Objector paid both him and his father a sum of Kshs.55,000/- as purchase price in 1994 and took possession of approximately 0.9 acres of the suit land and that the deceased had not only given him possession but had signed a transfer but remained to obtain the Land Control Board consent before he was taken ill and died and that the Objector remains in occupation to date.

14. Since there is no doubt that the Objector paid and occupies land which he bought from the deceased having paid the deceased and which the Chief of Mukuyuni confirms the issue of contradiction in the land reference number cannot hold. All are in agreement on the portion in question and I find and hold that the land subject matter is none other than land parcel No. **Bokoli/Mukuyuni/117** a portion of which the Objector purchased.

15. I further find as a matter of fact that the Objector holds a transfer signed by the deceased and his failing to have obtained a Land Control Consent does not vitiate his interest in the land as in Law the doctrine of a constructive trust must be applied. The Objector entered into the property in the lifetime and with the permission of the deceased and he therefore ought to have been considered as a liability to the Estate and

his interest noted.

16. There is an admission by the Objector that he entered into an agreement to sell the same land to William. There is no nexus however between his interest being held by the Estate and William's Interest against him. William paid some money, did not conclude the transaction and left. No details of the terms and condition of sale were disclosed. William went for 5 years having partly performed his part of the contract and on return the Objector wanted to renegotiate but William did not do so he went behind his back. Is this justice? Should William be allowed to do so against the Objector's interest?

17. Considering the facts of this case and the need to ensure substantive justice is applied at the end of the day.

I have considered the decision of **Macharia Mwangi Maina and 87 others versus Davidson Mwangi Kagiri Civil Appeal No.26 & 27 of 2011** where the Court of Appeal stated as follows on the need to dispense with Justice

“22. We take note that the Judicial decisions cited by the respondent were all made prior to the promulgation of the 2010 Constitution and before the overriding objective Principles were enacted into the Appellate Jurisdiction Act, Chapter 8 of the Laws of Kenya. This Court is enjoined to dispense substantive justice. What is Justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity. (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and propriety estoppel shall apply in such cases. Lord Denning in Hussey Vs Palmer (1972) 3 All ER 744 held that a constructive trust is a trust imposed by the Law whenever Justice and good conscience required.

It is an equitable remedy by which the Court can enable an aggrieved party obtain restitution.”

18. In this case humanity and good conscience demands that the Objector who paid the full purchase price to the deceased and some of the proceeds thereof taken by the Petitioner for 0.9 acres on **L.R. Number Bokoli/Mukuyuni/117**, which he is in occupation and which he occupied since 1994 ought not to be taken away from him but ownership be affirmed by him getting title to the same. And that William who partly performed a contract he had entered into with the Objector pursues him elsewhere if he has a good claim.

19. Consequently I find and hold;

- i). That the Objector ought and should have been listed as a liability against the Estate having purchased the portion of 0.9 acres in Bokoli/Mukuyuni/117 from the deceased.
- ii). That the principle of constructive trust is applicable the Estate is holding the same in trust for the Objector.
- iii). That the Objector's share was illegally and irregularly given and distributed to William Wamaluku Mwanda.
- iv). That the title issued to the said William Wamaluku Mwanda be and is hereby revoked and in its place a fresh title do issue in the names of Henry Kitere Welikhe.
- v). Any claim by William Wamaluku Mwanda against the Objector may be pursued elsewhere in a Civil claim.
- vi). Costs to the Objector.

DATED and DELIVERED at BUNGOMA this 23rd day of November, 2017

ALI ARONI

JUDGE