



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 167 OF 1996

IN THE MATTER OF THE ESTATE OF MBUTA NDOLO (DECEASED)

EZRA DAVID NDOLO1ST ADMINISTRATOR

ESTHER WANZA MBUTA2ND ADMINISTRATOR

REUBEN KINYUMU MBUTA3RD ADMINISTRATOR

AND

JACKSON MUTUAL KAVILAINTERESTED PARTY

RULING

Introduction

1. Before the Court are two applications dated 28th February 2012 and 4th December 2012, respectively seeking a determination of the Deceased's Estate prior to the determination of application for confirmation of Grant dated 30th June 2009 and an order to restrain the interested Party from dealing with a parcel of land 2916 Mang'etele Settlement Scheme which the applicant claimed to form part of the Estate of the Deceased. The first application was filed by the Interested Party and the second application by the 1st Administrator.
2. On 11th November 2013, the Court (B. Thurania Jaden, J) gave directions that the first of the two application dated 28th February 2012 be heard first and for that purpose the parties were directed to file written submissions for highlighting on a date to be fixed at the Registry.
3. Subsequently the matter was mentioned before the Court for mention on 6th October 2014 and 24th March 2015 when it was adjourned as the parties had not filed their submissions. On the latter occasion counsel for the 1st Administrator also sought leave to file a supplementary Affidavit which was granted.
4. On 7th October 2015, when the matter first came up before me, Counsel for the Interested Party had filed his set of submissions to both applications of 28th February 2012 and 4th December 2012. The 1st Administrator had not filed his set of submissions and two counsel attended court and sought to appear for him. Counsel then on record, Mr. Mulei of O.M. Makau & Mulei Advocates, indicate to court that they had not filed the further affidavit and submissions for lack of instructions by the 1st Administrator. The Court set the matter for mention on a later date for the issue of representation of the 1st Administrator to be resolved.

5. On 10th November 2015, Ms. Kinyanjui of Kittony Maina Karanja Advocates indicated to court that representation of the 1st respondent had been resolved by a Consent which the Court adopted as follows:

“The firm of O.M. Makau & Mulei Advocates be granted leave to cease acting for the 1st administrator and the firm of Kittony Maina Karanja Advocates to be placed on record for the 1st administrator. The firm of Kittony Maina Karanja Advocates to file a Notice of Change of Advocates within 7 days and the firm of O.M. Makau & Mulei be at liberty to tax its Bill of Costs in respect to Advocate-Client Bill of Costs.”

6. On the same date, Mrs. Nzei, Counsel for the Interested Party/Applicant and also appearing for the 2nd and 3rd Administrators prayed that the two applications dated 28th February 2012 and 4th December 2012 be heard together indicating that she had already filed her submissions on the two applications. On her part Ms. Kinyanjui for the 1st Administrators requested for 21 days to file a replying affidavit, and Mrs Nzei sought corresponding leave to file a further affidavit after service upon her of the 1st Administrator’s Replying Affidavit.

7. Consequently, the Court made the following Orders on 10th November 2015:

1. The 1st Administrator to file replying affidavit with 21 days.
2. The 2nd and 3rd Administrators and the Interested Party to file, if necessary, further affidavits within 14 days of service.
3. Mrs. Nzei for the 2nd and 3rd Administrators to file submissions within 14 days of filing further affidavits.
4. The 1st administrator to file submissions within 14 days of service of the 2nd and 3rd Administrator’s submissions.
5. Mention on 4th February 2016 for highlighting of submissions, if necessary.”

8. On 4th February 2016, which is almost 3 months since the order for filing of replying affidavit and submissions were given, the 1st Administrator appeared by a Mr. Wang’ombe, Advocate who stated that he held brief for Ms. Kinyanjui and had instructions to seek a further mention as they had not received instructions from their client. Counsel for the 2nd and 3rd Administrators and the interested Party, Mrs. Nzei, objected to the adjournment and sought to make submissions on her application dated 28th February 2012.

9. The Court considered that the 1st administrator had had ample opportunity to file his replying Affidavit and submissions in the matter, and consequently declined the adjournment and made an order that the “Application of 28th February will proceed to highlighting of submissions as scheduled.”

The Application

10. By Chamber Summons dated 28th February, 2012, the Intersted Party sought the following specific Orders:

- 1. That this Honourable court gives directions that this Honourable court first identifies the properties belonging to the deceased’s estate before hearing the summons for confirmation of grant dated 30th June, 2009.***
- 2. That properties belonging to Jackson Mutua Kavila, the Interested party herein and listed in***

“Mrs. Nzei - Highlighting of submissions on applications dated 28th February, 2012. Applicant seeks relief under Section 47 of the Laws of Succession Act and rule 73 of Probate and Administration Rules. Supported by affidavit of Jackson Mutua of 28th February, 2012. Written submissions filed by the applicant’s Counsel M/s Nzei & Co. Advocates on 6th October, 2014. I will only address on the submissions on application of 28th February, 2012. Submissions filed by directions given by Jaden J. on 11th September, 2013.

Interested party is not a member of the deceased’s family and he is not an elder to the family. He has been drafted by Mr. Ezra Ndolo by listing the Interested Party’s properties forming part of the Estate – See summons for confirmation of Grant of 30th June, 2009. The properties are:

Plots 602, 912, 1160, 1902, 2916 and 3609 all which are situated with Mang’etele Settlement Scheme. The interested party has been drafted to the proceedings by these properties. Upon the listing, he filed affidavit of Protest by Affidavit of 11th July, 2011. He subsequently filed the application of 28th February, 2012. The application of 28th February, 2012 seeks-

1. Identification of the properties forming deceased estate.

2. Properties belonging to Jackson Mutua Kavila be removed and Interested party be discharged.

Court directed that application be heard before the confirmation of Grant. Prayer No. (1) is therefore already heard.

Properties have never been registered in the name of the deceased. The properties are in a Settlement Scheme Mang’etele Settlement Scheme. Before the Settlement Scheme. Before the settlement, the property was Government land - see letter of Ministry of Lands dated 17th August, 2011 by District Lands Adjudication Officer Kibwezi indicating the membership allocation of properties. The properties earlier belong to the Interested Party. Mang’etele is a Squatter Settlement Scheme and was and is still a Government land. The land is a government land which was allocated to settlement squatters. The properties belongs to the Interested Party are his property – and he is not answerable to the Administrators of the Estate.

Section 3(1) of the Laws of Succession Act defines an Estate of deceased as the free property of a deceased. The property in issue have never been the deceased person’s free properties which he could dispose and issue title. It is not part of the estate of the deceased as a matter of law. The properties have been confirmed to belong to the interested party and should be isolated and removed from the list of assets of the Estate.

The application has not been opposed although the 1st Administrator has been given time to respond, he has not done so. The 2nd and 3rd administrators did file Protest to the Summons for Confirmation of Grant on grounds that the list provided by 1st Administrator included property belonging to interested party. Affidavit of Protest of 23rd October, 2012 sworn on 19th October, 2012.

The application which is not opposed is merited and ought to be granted.”

13. When called upon to reply to the submissions by Counsel for the Interested Party and the 2nd and 3rd Administrators, Counsel then appearing for the 1st Administrator, Mr. Wang’ombe, told the Court that he did not wish to make any submissions on the matter.

The Issue for determination

14. The Issue for determination is whether the properties the subject of the application dated 28th

February 2012 are the property of the Deceased so as to be included as part of the Deceased's Estate.

Determination

15. The Court has noted the contents of the letter dated 17th August 2011, reproduced in full below:

"LA/KBZ/MAN/VOL.11/815/109/208 17th August, 2011

TO WHOM IT MAY CONCERN

RE: CERTIFICATE OF OWNERSHIP P/NOS. 602, 911, 912, 1159, 1160, 1161, 1902, 2743, 2793, 2892, 2916, 3609, 3613, 3362- MANG'ELETE SETTLEMENT SCHEME

This is to certify and confirm that the above plots situated at Mang'elele Settlement scheme of Nthongoni Location of Mtito Andei Division of Kibwezi District of the Republic of Kenya is owned and recorded as shown below as per records held by this office.

<u>P/NO.</u>	<u>NAME OF THE OWNER</u>
602	JACKSON MUTUA KAVILA
911	NDUNGE MBUTA NDOLO
912	JACKSON MUTUA KAVILA
1159	ANNAH MBUTA NDOLO
1160	JACKSON MUTUA KAVILA
1161	NDUNGE MBUTA NDOLO
1902	JACKSON MUTUL KAVILA
2743	CHRISTPHER NDOLO MBUTA
2793	MBUTA NDOLO WATER CANAL
2892	ANNAH MBUTA NDOLO
2916	JACKSON MUTUA KAVILA
3362	SAMUEL ESITOKO IMBANYI RODAH MUNYIVA ESITO
3609	JACKSON MUTUA KAVILA
3613	NDUNGE MBUTA NDOLO

Note: Mang'elele is a squatter settlement scheme and was/is still a government land.

Please accord assistance requested if need be.

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ALI C. HUSSEIN

FOR: DISTRICT LAND ADJUDICATION/SETTLEMENT OFFICER

KIBWEZI DISTRICT”

16. On a balance of probabilities, there being no evidence of allocation or acquisition by the deceased, the Estate or indeed the 1st Administrator of interest in properties the subject of the application and having considered the letter of the District Land Adjudication/Settlement Officer dated the 17th August 2011, which confirms ownership of the plots Mang’etele Settlement Scheme Nos. 602, 912, 1160, 1902, 2916 and 3609, the Court must find and hold that the said properties belong to the Interested Party and therefore do not form part of the Estate of the Deceased.

Orders

17. Accordingly, the Court grants the relief sought in the Chamber Summons dated 28th February 2012 in the terms prayed under prayer 2 of the Summons.

18. Costs in the Cause.

DATED AND DELIVERED THIS 31st DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Ms. Nzei for the Interested Party, 2nd and 3rd Administrator

No appearance for the 1st Administrator

No appearance for the Objector

Ms. Doreen- Court Assistant.