



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 764 OF 2013

IN THE MATTER OF THE ESTATE OF ONESMUS NZYOKA NDOLO
(DECEASED)

GABRIEL GITHUA NDUNGUOBJECTOR/APPLICANT

VERSUS

WAMBUA NZIOKA 1ST PETITIONER

JOSEPH MUSEMBI NZIOKA 2ND PETITIONER

RULING

The Summons

The Objector herein has filed an Objection dated 4th August 2014 wherein he claims that he bought a portion of land of 0.80 hectares (2 acres) from title No. Donyo Sabuk / Koma Rock Block 1/7290 from the deceased Onesmus Nzioka Ndolo in the presence of the deceased's wife Alice M. Nzioka, and also in the presence of Agnes Muthoni Ndungu, who is the Objector's wife. Further, that there were two other witnesses namely Eliud Ngare Munene and Joseph Ngure Karanga.

The Objector stated that he paid Kshs.110,000/= (one hundred and ten thousand shilling only) on 29th October 1997 for the said portion of land, which was later demarcated by a land surveyor and consent given for the sale by the Land Control Board Matungulu Tala on 12/11/97. The Objector wants to be given his portion of land by the deceased's administrators, whom he says have sold the said land to a second buyer. He attached documents showing his purchase of the said land. The Objector further wishes to be included in the succession for the estate of the deceased, which he states is pending confirmation of grant. The Objector reiterated these facts in submissions he filed in Court on 30th November 2015.

The Petitioners did not file any response to the Objection despite being served with the same and submissions by the Objector.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the Objector's prayers that he be included in the succession proceedings should be granted. I have perused the Court record and note that a grant of representation with respect to the estate of Onesmus Nzioka Ndolo was made to Wambua Nzioka and Joseph Musembi Nzioka on 5th February

2014. No summons for confirmation has been filed by the said administrators.

Any person who has an interest in the estate of the deceased is entitled to bring forth an objection and have his or her right determined before the court can give an order on distribution of the assets of the deceased. It is also noteworthy that this court has jurisdiction to determine a dispute arising from the filing of an objection as provided for in section 69 of the Law of Succession Act as follows:

“(1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”

In addition, the Law of Succession Act 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 the present application the Objector has brought evidence to show that he bought a portion of land from the deceased person and that he paid for the said portion. The Objector is therefore a creditor for purposes of section 66 of the Law of Succession Act, and I do find therefore that he is entitled to bring the objection herein. However, this Court can only determine and rule on the Objector's interest at the stage of distribution of the estate, which is at the time of confirmation of grant.

In light of the competing claims to the deceased's estate and the applicable procedure provided for as to determination of such claims, I order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

- 1. The Administrators of the estate of the deceased Onesmus Nzioka Ndolo shall file and serve the Objector with the summons for confirmation of grant within 90 days of the date of this ruling.**
- 2. The Objector shall thereupon file and serve his affidavit of protest if need be to the said Administrators' summons for confirmation of grant within 30 days of service.**
- 3. The hearing of the summons for confirmation of grant and affidavit of protest shall proceed by way of *viva voce* evidence.**

4. **The *status quo* obtaining as at the date of this ruling with respect to the occupation and possession of the properties belonging to the estate of the deceased Onesmus Nzioka Ndolo shall continue to obtain and be maintained pending the hearing and determination of the summons for confirmation of grant and affidavit of protest. There shall however be no further transfer of the said properties, and/or further destruction, wastage, and/or development on the same by the Administrators, and/or their agents and servants, pending the hearing and determination of the said summons for confirmation of grant and affidavit of protest.**
5. There shall be no order as to costs.
6. The Objector shall serve these orders on the Administrators within 14 days of the date of this ruling.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of March 2016.

P. NYAMWEYA

JUDGE