



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 45 OF 2004

IN THE MATTER OF THE ESTATE OF WAMBUA MUMO (DECEASED)

JOHN WAMBUA MUMO.....PETITIONER

VERSUS

PETER MUEMA MUSYOKA.....PROTESTOR

RULING

Introduction

The Petitioner herein was issued with a grant of letters of administration intestate with respect to the estate of the deceased Wambua Mumo (hereinafter referred to as the deceased) on 26th July 2010. The Petitioner subsequently applied for the grant to be confirmed by way of summons for confirmation of grant dated 12th November 2010.

The Petitioner in the said application listed the heirs and beneficiaries of the deceased as the deceased's wife, Gaciiku Wambua Mumo; the deceased's adult daughter, Nzisa Kombo Nduto; and himself as the deceased's adult son. He also proposed that the deceased's parcel of land known as Makueni/Kako/332 be registered in his name. A copy of an official search was attached that showed that the said parcel of land was registered in the deceased's name on 1st September 1967.

The Protest

On 19th January 2011, Bernard Musyoka Ndambuki, hereinafter referred to as "the original Protestor"), filed an Affidavit of protest he swore on 18th January 2011 in protest against the proposed confirmation of grant. The said Protestor claimed that he had purchased the whole land in title number Makueni/Kako/332 from the deceased in the year 1967, at a purchase price of Kshs. 5,600/=. Further, that the said purchase was made in the presence of Kasiku Wambua, wife to the deceased. The original Protestor averred that he was therefore a creditor and a beneficiary of the deceased estate. He stated that his family had settled on the said land since 1967, and that the deceased had died before transferring the land to him.

The original Protester died on 4th February 2012, and Peter Muema Musyoka, the current Protester, obtained limited grant of letters of administration *ad litem* for purposes of substituting the original

Protestor in these proceedings. His application to substitute the original Protestor was made by way of a Chamber Summons dated 31st October 2014, which was allowed by this Court on 20th November 2014.

On his part, the current Protestor also filed an affidavit he swore 14th June 2013 wherein he reiterated the averments made by the original Protestor. He in addition stated that the Petitioner did not disclose in the affidavit in support of the letter of administration that the original Protestor purchased the whole of land title Makueni/Kako/332 from the deceased Wambua Mumo. He also claimed that the Petitioner did not use the said land in any way.

The Petitioner did not file any replies to the said Affidavits of protests.

The Submissions

The parties agreed by consent at a hearing held on 23rd March 2015 that the summons for confirmation of grant and affidavits of protest were to proceed to hearing by way of written submissions, based on the pleadings filed in Court. Musyoka Kimeu & Company Advocates, the learned counsel for the Petitioner, filed submissions dated 21st March 2016, wherein they contested the alleged sale agreement attached to the affidavit in protest by the Protestor, for not adducing an affidavit by the assistant chief Kako sub-location to vouch for its authenticity.

It was also argued that the Protestor was not a dependant within the meaning of section 29 of the Law of Succession Act. Further, that the Protestor was a stranger to the estate of the deceased, and an intermeddler within the meaning of section 45 of the Law of Succession Act. In addition it was pointed out that the Protestor had stated that he was in use of the said land, yet the title had never been transferred to him and he was therefore unlawfully occupying the land.

It was also submitted that the purported sale agreement was allegedly authored on 27th April 1967, and yet the certificate of search annexed to the affidavit in support of the distribution revealed that the deceased had applied for registration of the land in September 1967 and the registration was occasioned on 11.07.1968. Further, that no transfer had been registered in favour of the Protestor before the deceased's died in 1975, indicating that there had not been a sale. Lastly, it was submitted that the Protestor had no right over the said land.

The Protestor's learned counsel, J.M Tamata Advocate, filed submissions dated 16th July 2015, in which he submitted that the Protestor took vacant possession after the sale of the said land by the deceased. Further, that the deceased never claimed the land while he was alive, or interfered with the quiet possession of the Protestor. It was also submitted that the Petitioner never occupied the said land.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issues to be decided are firstly, whether the original Protestor purchased the land known as Makueni/Kako/332 from the deceased; if so secondly, whether the said parcel of land is available for distribution, and lastly, how the deceased's estate should be distributed.

On the first issue as the Protestor's entitlement to the deceased's estate, section 66 of 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 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.

In the present application, the Protestors attached a copy of the sale agreement dated 27th April 1967 and acknowledgment of receipt of purchase price dated 30th June 1967, both written in Kamba language and certified translations thereof in the English language. The same were attached to the Original Protestor's affidavit of protest as Annexure “BNM 1”. It is not contested that the deceased Wambua Mumo died in 1975 although the actual date of death is unknown and is not indicated in the death certificate filed in Court. This was after the date of the sale agreement and acknowledgment of purchase price relied by the protestor.

The Petitioner however wants the authenticity of the said documents confirmed by an affidavit by the assistant chief Kako sub-location, who is shown to have witnessed and stamped the said agreement and acknowledgment of payment. I am in agreement that the said documents do need to be authenticated by production of the originals, as the copies that was annexed are not certified as a true copies of the original; and by the evidence of those who may have been present at the said transactions, including the wife of the deceased.

It is thus my decision that oral evidence needs to be led on the first issue, and a determination on all the arising issues is therefore pended to await the said oral evidence. I accordingly order that this hearing proceeds by way of oral evidence, but which shall be limited to the production of the original sale agreement dated 27th April 1967 and acknowledgment of receipt of purchase price dated 30th June 1967, and evidence on the said transactions and events. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of June 2016.

P. NYAMWEYA

JUDGE