



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PROBATE AND ADMINISTRATION CASE NO. 360 OF 2009

**IN THE MATTER OF THE ESTATE OF WILSON MARAKA alias MARAKA MURUNGA.
..... DECEASED**

BETWEEN

JULIUS KAKAI MURUNGA.....PETITIONER

VERSUS

RICHARD SIMIYU NGOKHO.....1ST OBJECTOR

KASILI NGOKHO..... 2ND OBJECTOR

JUDGMENT

1. The Petitioner initially moved the court for grant of letters of administration in the ***SRM's Court Webuye, Succession Cause No. 33 of 2009***. The case was transferred to this court and allocated number 360 of 2009. A grant was issued on 15th of September, 2009.
2. On 28th of January, 2011 the petitioner applied for confirmation of the grant and therein gave a list of the beneficiaries and mode of distribution.
3. The said application triggered the affidavit of protest by the objectors filed on 28th June, 2008 sworn by the 1st objector Richard Simiyu Ngokho where he claimed that he and his mother bought 1 ½ acres of **L.R. No. Bungoma/Kabisi/278** from the deceased for the sum of Kshs. 48,000/= in 1992 and that in the year 1995 the deceased applied for a consent to subdivide his property and a consent issued. He further stated that a survey was done, mutation drawn. That they took possession of the land but the deceased died before a formal transfer was done. Further that after the demise of the deceased his children became violent and uprooted the boundaries that were planted and chased them. He produced copies of the agreement, details of payment, copies of the application to the Land Control Board and consent to subdivide.
4. In his evidence in court the objector testified that they used the land between 1990 and 2005. He claimed that he accompanied the deceased to the land control board and at the time the property was still in the name of the Settlement Trustee Fund. He also claimed that on being kicked out his house was demolished in 2006.
5. The objectors' Counsel filed written submissions on the 7th of June, 2016 and in his oral submissions

added that the petitioner had an obligation under Section 51 2(h) of the Law of Succession Act to list all liabilities before confirmation but he failed to include the objectors claim.

6. In his reply to the protest dated 20th December, 2012 the petitioner deponed that he was not aware of the existence of the transaction between the deceased and the objectors; the whole estate had been subdivided among the rightful beneficiaries and there was no extra land; he further stated that any claim and or liability ought to have been raised at the “*lufu*” ceremony and since there was no such claim by the objectors their claim is therefore a forgery. The petitioner filed several other statements by witnesses. The parties herein had agreed to give *viva voce* evidence and the said witness did not turn up at the hearing. Their statements have therefore not added any value to his case.

7. At the hearing the petitioner re- iterated his statement and said further that although the objectors have an agreement they were not on the land; he was not involved in the sale, he is a brother of the deceased, and has lived on **parcel 727** which the deceased gave him while alive; the deceased left 6 widows and that has been on his portion for 40 years. All the widows have their share.

8. Counsel for the petitioner filed his submission on 7th June, 2016 where he states that the alleged payment of land does not add up to the sum claimed to have been paid; Kshs. 48,000/=; the objectors are not in possession and they have failed to explain why; they have no case against the estate, further that Section 33 of the Law of Succession does not consider purchasers, the deceased could not have obtained a consent and mutation yet the land is still under the name of the Settlement Trustee Fund and in the absence of occupation and no appearance at “*lufu*” the objectors are total strangers.

9. I have considered the evidence tendered before court, the documents and the submissions by parties. The objector has cited Section 51 2 (l) of the Law of Succession Act which he says was not complied with. The petitioner on the other had on the other hand cited 33 and the Luhya custom of Lufu.

10. Section 51 of the Law of Succession Act provides that an application for grant of representation shall include inter alia a full inventory of all the assets and liabilities of a deceased person.

Section 33 on the other hand states that the law applicable to the distribution on intestacy of the categories of properties that are agricultural land, crops and livestock shall be the law or custom applicable to the community or tribe as the case will be

11. Is the objector’s interest herein a liability for purposes of Cap 160 and can the lufu custom of declaring interest in the deceased estate after 3 days of burial capable of defeating the objector’s interest if any in the matter.

12. Liability is defined in customary.com as:-

“One of the most significant words in the field of law, liability means legal responsibility for ones acts or omissions.”

Blacks Law Dictionary defines liability to be

“The state of being bound or obligated in Law, or justice to do, pay or make good something, legal responsibility.”

In *Musa Nyambani Gikone & 2 others Vs. Peter Miyenda & another Civil Appeal No. 2 of 2014* the Court of Appeal found that a purchaser is a creditor to an estate and he must be included in the list of assets and liabilities or acknowledged as a person with interest in the land.

13. Accordingly therefore it follows that since there is evidence which evidence I find truthful and has not been distributed that the objectors purchased land from the deceased. The interest of the purchaser ought to have been acknowledged.

14. It is on record and not disputed that the deceased and the applicant attempted to follow laid down procedures and after entering into an agreement the two went to the Land Control Board. The sale agreement was entered into on the 2nd of July, 1992, last amount due was paid on the 31st of January 1993 and the deceased applied for consent to subdivide his land on 16th October, 1995. This was almost 3½ years later. The consent was obtained on 18th October, 1995. In the above quoted case of *Musa Nyambati Gekone supra*, the Court of Appeal made reference to its own case and Sironga *Ole Tukai Vs. Francis Arap Muge & 2 others [2014] eKLR* where it affirmed that under Section 6 of the Land Control Board Act, without consent of the relevant Land Control Board, a transaction involving an agricultural land is void for all purposes.

15. Under Section 8 of the Land Control Act, an application for consent in respect of a controlled shall be made in the prescribed forum to the appropriate land control board within six months of the date of making the agreement, the High Court may on application extend the time.

16. It does not come out from the statement of the 1st objector as to why it took the deceased long to apply for the consent and why after obtaining the consent the transfer was not effected. The petitioners counsel remarked that a recent search proved that the property remains in the name of the Settlement Trustee Fund. Could it then be that the deceased had incomplete business with the trust fund before he could transfer the property? This has not been claimed.

17. The sale transaction has not been disputed. Indeed I find the evidence of the objector more of the truth. I tend not to believe the petitioner and in order to resolve the strict requirement of Section 8 of the Land Control Act I make reference to *Hannah Mugure Karago Versus Mary Nyambura Karani Court of Appeal Civil Appeal NO. 156 of 2014 [Nyeri]* where the justices of appeal were of the following view

“There is no doubt that the ordinance taken re- enacted as the Land Control Act of 1967 [Cap 302] was informed by noble and deliberate public policy considerations. The act seeks to regulate transactions in agricultural land by inter alia avoiding sub-division of land holdings into uneconomical units, thus undermining agricultural production, mitigate the danger of landlessness inherent in unchecked sale and alienation of land and controlling land holding by non-Kenyans.

The statutory provisions for attaining these salutary considerations do however provide fertile opportunity to unscrupulous persons to use them as a cloak for mischief...”

It appears that human greed or inconsistency and perfidy have found a powerful ally in the provision that declares void all transactions without timely or any consent. The question becomes whether a court of Justice would so interpret the provision as to aid a fraudster, mischief maker or a contract breaker.

We are not prepared to hold that courts should provide judicial approval to such dishonesty and lack of integrity and approve results that are plainly unjust nor should they wring the hands and emit impotent sighs in the face of justice.”

18. The above judgment was delivered on the 12th of February, 2016 and is a departure from consistent judgments of the court of appeal strictly applying the provision of the Land Control Act.

19. I am inclined to align myself with the recent judgment of the Court of Appeal and find that on the face of the evidence before court where the objector paid the purchase price and took possession and just after the death of the deceased was kicked out of the land by the petitioner and others, the deceased having obtained the consent to subdivide his land albeit late, this estate should not be allowed by a court of justice to defeat the objectors interest.

20. Lufu is a traditional practice of the Luhya where parties appear to lay claim 3 days after the deceased burial. Can this custom override ones interest over land on the face of a valid agreement. I think not. The

objector may not have appeared to lay claim at lufu however; he has satisfactorily proved that he purchased land from the deceased.

21. in the circumstance I find and hold that the objector herein has a beneficial interest in the land and his interest in the estate must be taken care of at the point of distribution. I further direct the petitioner to file a fresh mode of distribution recognizing and taking into account the objectors claim within the next 30 days.

Cost to the objector.

Dated at Bungoma this 28th day of July, 2016.

ALI-ARONI

JUDGE