



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 233 OF 2015

IN THE MATTER OF THE ESTATE OF MASILA MWANIKI (DECEASED)

BONIFACE TITO MASILA.....APPLICANT

VERSUS

MWANIKI MASILA.....RESPONDENT

AND

EMERITUS KASEE MUSYA.....INTERESTED PARTY

R U L I N G

- 1. Boniface Tito Masila**, the Applicant approached this court seeking issuance of preservatory orders for the protection of the intestate Estate of **Masila Mwaniki** (Deceased) namely **Kyangwithya/Kaveta/970, 277, Matinyani/Mutulu/69, 34 and 40** and any subunits/parcels produced as a result of the subdivision of the aforesaid original titles, against any intermeddling, transfer, lease, charging or by whatsoever other means the Respondent, his agents and/or proxies may use to defeat the ends of justice.
2. Secondly, that the court be pleased to order/or direct that one **Kasee Muasya** (intermeddler) do stop demolishing the houses and/or buildings, belonging to the Applicant which are situated within parcel **Kyangwithya/Kaveta/1382** a product of subdivision of **Parcel No. 970** part of the disputed Estate of the Deceased.
3. The Applicant swore an affidavit in support of the application where he deposed that he is seeking revocation of grant because he was omitted as a beneficiary to their late father and his consent was not obtained at the point of distribution of the Estate. The Respondent has subdivided the Estate and disposed off part of it. He has sold the part of the portion that he (Respondent) resides on to **Kasee Muasya** who has started demolishing and pulling down buildings and carting away materials claiming that he has purchased a portion (land) including buildings (houses). The buildings stand on Parcel No. **Kyangwithya/Kaveta/1382** which is a product of subdivision of **Kyangwithya/Kaveta/970** part of the Estate of the Deceased.
4. In a response thereto **Mwaniki Masila**, the Respondent filed a replying affidavit where he deposed that they applied for the grant of Letters of Administration as a family and when they put an advertisement in the Kenya Gazette there was no objection filed. The Applicant did not object to confirmation of the grant which was done on **26th September, 2005**. He inherited **Kyangwithya/Kaveta/970** while other property was given to other beneficiaries.
5. **Emeritus Kasee Musya**, an Interested Party swore an affidavit in response to the application. He

stated that he purchased Parcel No. **Kyangwithya/Kaveta/1349** from the Respondent who had title to the land. Subsequently the title was transferred to him. Todate he is in occupation of the land that he has developed. He dismissed the application herein as an afterthought as the grant was confirmed in **2005**.

6. Prior to considering the remedy sought herein it is important to look at the background of the matter. From the skeletal documents filed, two (2) Certificates of Confirmation of Grant were issued. On the **12th** day of **April, 2005** a certificate was issued to **Munima Masila**. The property was distributed to two (2) people. **Munima Masila** got **Kyangwithya/Kaveta/970** and **Matinyani/Mutululu/69** while **Katuu Masila** got three properties **Kyangwithya/Mutululu/34** and **Matinyani/Mutululu/40** and **Kyangwithya/Kaveta 277**.

7. Another Certificate of Confirmation of Grant was issued in respect of the same Estate on the **20th** **September, 2005** to **Munima Masila** and **Kawasya Masila**. The schedule of distribution of property indicates beneficiaries and their entitlement as:

Mwaniki Masila – Kyangwithya/Kaveta/970 – 40 Hectares and George Mwema Syengo 1.0 Hectare of the same Property.

Katuu Masila got:

Matinyani/Mutululu/69

Kyangwithya/Kaveta/277

Matinyani/Mutululu/34

Matinyani/Mutululu/40

A letter from the Chief availed indicates that the Deceased was survived by:

Kawusya Masila (Wife)

Mumina Masila (Wife)

Titus Masila (Son)

Mwaniki Masila (Son)

Mukui Masila (Daughter)

Cosmas Masila (Son)

Masaa Masila (Daughter)

Katuu Masila (Son)

Belta Masila (Daughter)

8. On the **8th** day of **April, 2010** the Applicant filed summons for revocation of grant arguing that the grant was obtained fraudulently by concealment of material facts and other beneficiaries were disregarded amongst other averrements. When the application came up for hearing on the **27th** February, 2012 it was dismissed following the absence of the Applicant to Prosecute the matter.

9. On the **20th** **March, 2012** an application was filed to have the order dismissing summons for revocation of grant set aside. Prior to prosecuting the application the Applicant filed the instant

application.

10. In her submissions, Counsel for the Applicant, **Ms. Anne Kiusya** stated that the Interested Party is an intermeddler in the land Parcel No. **Kyangwithya/Kaveta/1832** which is a subdivision of Parcel No. **Kyangwithya/Kaveta/970** and he is not an administrator of the Deceased's Estate and any transfer having been made to him is in violation of the **Law of Succession Act**. Further that allowing the Interested Party to demolish the houses and/or buildings which have been set up will occasion the Applicant irreparable damages.

11. Counsel for the Interested Party, **Mr. Mwalimu** on the other hand submitted that the Interested Party acquired title through a valid sale agreement and has been in occupation of the property since **2010**. He can therefore not be enjoined from enjoying what is rightfully his.

12. I have considered what is averred by all parties herein and the submissions of both Counsels. From evidence adduced by way of affidavit and annexures it is apparent that the Estate of the Deceased was distributed in the year **2005**. Subsequently, on the **27th October, 2010**, a parcel of land **Kyangwithya/Kaveta/1349** which is stated to have been subdivided from a property that initially formed part of the Estate of the Deceased was sold to the Interested Party herein. This was during pendency of the application for revocation of grant that was later dismissed.

13. The only application pending hearing is the one seeking to have orders dismissing the summons of grant reinstated. The grant having not been revoked the Estate of the Deceased stand distributed. In the premises the application is not meritorious.

14. However, looking at the affidavits sworn and annexures thereto, it may be in the interest of justice to have the application dated **20th March, 2012** heard on merit. In the premises I direct parties herein to maintain status quo obtaining as of today, pending fixing of hearing of the application dated **20th March, 2012** within **14 days**.

15. In default, this application will stand dismissed.

16. No orders as to costs.

Dated, Signed and Delivered at Kitui this 27th day of July, 2016.

L. N. MUTENDE

JUDGE