

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2106 OF 2013

IN THE MATTER OF THE ESTATE OF MARTIN DAVID KITISYA MALINDA (DECEASED)

NOEL MUTUNGA MALINDA.....PETITIONER

VERSUS

PATRICK KARANJA NJENGA.....PROTESTER

RULING

1. The deceased Martin David Kitisya Malinda died on 17th March 2013 at the Nairobi Hospital. He was domiciled in the Republic of Kenya. He left a Will that he executed on 12th February 2008. The executors of the Will were his cousin Noel Mutunga Malinda (the petitioner) and his lawyer Linda Waitiri Muriuki. On 21st August 2013 the petitioner petitioned for the grant of probate of written Will which was issued on 16th December 2013. The petition was filed through B.M. Musau & Co. Advocates. One of the properties in the Will was LR No. 1/153 Wood Avenue in Kilimani in Nairobi. The deceased bequeathed it to his son Timothy Wathome Malinda.

2. On 2nd May 2014 Patrick Karanja Njenga (protester) filed a caveat, and on 27th June 2014 he filed an affidavit of protest. He was laying a claim to apartment No. B6 of the property L.R. No. 1/153 Wood Avenue. He had filed High Court ELC No. 1544/2013 at Nairobi against Africa Reit Limited and the petitioner claiming the apartment. The suit is pending.

3. It would appear not to be in dispute that LR 1/153 Wood Avenue was registered in the name of deceased's mother Catherine Nduku Malinda as lessee from the Government of Kenya. The property measured 0.970 of an acre and held for the estate in fee simple. On 13th May 1997 a power of attorney registered in the Registry of Documents at Nairobi as No. IP/A31789/1 was made by the deceased's mother. By virtue of the power of attorney she made the deceased her lawful attorney and agent with power to, among other things, execute a transfer or conveyance of the property and to sell the property. On 15th October 2008 the deceased entered into a property development agreement with Africa Reit Limited. On 18th February 2009 a conveyance was made between Africa Reit Limited and Catherine Nduku Mulinda and the deceased for all the property (L.R. 1/153), which was executed by the deceased by virtue of his power of attorney. It was a term of the agreement that the deceased was entitled to retain, in his name or in his nominee's name, one duplex, one three-bedroomed flat and two two-bedroomed flats. One of the retained apartments on the property was apartment No. B6. On 6th May 2010 the deceased agreed with the protester to sell and assign apartment No. B6 to the protester. The assignment agreement was amended on 16th August 2010. While the protester was buying the apartment, on 20th August 2010 Catherine Nduku Mutinda revoked the power of attorney to the deceased and appointed her daughter Consolata Ndinda as her attorney with the power to, among other things, lease or otherwise acquire and to sell, convey, let or otherwise dispose of property belonging to her (Catherine Nduku Malinda) from the date of appointment until notice of her death. It is this complication that led the protester to file the ELC Case, saying that his purchase of apartment had been made difficult and this had caused him loss and damage. He claimed there was breach of agreement. These are the reasons why the

protester seeks that the grant of probate should not be confirmed until the ELC suit has been heard and finalised.

4. The protester was represented by Muthaura, Mugambi, Ayugi & Njonjo Advocates. They filed written submissions to which counsel for the petitioner responded. Each side cited authorities. I have considered these submissions.

5. The parties agree that L.R. No. 1/153 Wood Avenue was not the free property of the deceased, under **section 3 and 5 of the Law of Succession Act (Cap. 160)**, for it to be disposed under his Will. The protester's case was that the property was pursuant to the conveyance dated 18th February 2009 transferred to Africa Reit Limited and was therefore not available to be bequeathed to the deceased's son, or at all. The petitioner's case was that a Will is intended to take effect on the death of the testator. While alive, the testator can deal in the properties comprising of the bequests in a manner inconsistent with the Will. The testator can deal with the properties in a manner divesting the beneficiary of the bequest. In the present case, the transactions starting from the transfer to Africa Reit Ltd and the assignment agreement with the protester indicated a clear intention by the deceased to exclude L.R. No. 1/153, or any part of it, including apartment No. B6, from his Will. Therefore, neither L.R. No. 1/153 nor apartment No. B6 formed part of the Will of the deceased. This was because the deceased transferred LR 1/153 and was in the process of transferring apartment No. B6. This effectively divested the deceased's son of the bequest. The second reason why the petitioner agrees that L.R. No. 1/153 was not part of the free property of the deceased was the revocation of the power of attorney on 20th August 2010. The property was, as a result, taken away from the deceased.

6. That being the case, I order that the petitioner will apply to have the grant of probate issued to him confirmed and the estate of deceased distributed, but will exclude L.R. No. 1/153 and the developments thereon from the confirmation and distribution. To that extent, the protest is allowed.

7. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 14TH DECEMBER, 2016.

A.O. MUCHELULE

JUDGE