



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 452 OF 2008

IN THE MATTER OF THE ESTATE OF DANSON PAUL MBOLE (DECEASED)

BENEDICTA NDUNGE MBOLE.....PETITIONER

AND

CHRISTOPHER MUSYOKA MUSAU.....OBJECTOR

R U L I N G

1. **Danson Paul Mbole** died on the **30th October, 2007**. Letters of administration intestate were issued to **Benedicta Ndunge Mbole**, his widow. On the **22nd July, 2010**, **Christopher Musyoka Musau**, the objector, filed an affidavit of protest against confirmation of grant of letters of administration of the deceased's estate on grounds that the deceased sold him **plot No. Machakos Town/Block 1/303** (subject land) at **Kshs.50,000/= in 1985**. The subject land was never transferred to him despite the fact that the original certificate of lease/title was handed over to him whereafter he filed a suit in court in that regard; and it will be in the interest of justice for his interest to be taken care of.

2. In her response, the Petitioner stated that she was not aware of the sale of the subject land. She disputes that payment was made to the deceased as there is no evidence in that regard. However, she confirmed that she is aware of the suit and averred that it abated upon the demise of the deceased since no substitution has been effected to date as the Objector has been sitting on his rights. The suit in the lower court having been based on contract was time barred as it was filed 18 years ago and was res judicata and there is a chamber summons pending to strike it out and that the deceased sold the suit premises to **Kashmir Singh** in **2001**.

3. Pursuant to directions of the court the application for confirmation of the grant and the protest were heard simultaneously by way of viva voce evidence. **Kashmir Singh** was called by the Petitioner as a witness. It was his evidence that he purchased the subject land from the deceased. He then constructed a house thereon in 2002 which he continues to occupy. On cross examination he stated that he was aware of the caution that was registered on the title by the Objector.

4. According to evidence adduced by the Objector, he entered into a sale agreement dated the **14th May 1985** with the deceased. The agreement was witnessed by **P. N. Waki Advocate** (As he then was). Subsequently the deceased handed him the original certificate of lease. The necessary consent of transfer was obtained from the Municipal Council of Machakos. Thereafter the deceased failed to execute the transfer forcing the Objector to register a caution against the title and consequently he filed a case, **HCCC No. 160 of 1999** which he however withdrew and filed **CMCC No. 115 of 2003**. At the time of

the demise of the deceased, the case had not been heard yet.

5. In the affidavit in support of the application for confirmation of grant, at paragraph 5, the proposed mode of distribution of the estate of the deceased is outlined. The only property in dispute is **Machakos Town Block 1/303** that is to be registered in the name of **Benedicta Ndunge Mbole**. All beneficiaries to the estate of the estate of the deceased have signed a consent to the confirmation of the grant.

6. The subject land is registered in the name of the deceased. Evidence adduced by the Objector however establishes on a balance of probability that a sale agreement was made on the **14th May 1985** between **Danson Paul Mbole** (deceased) and **Christopher Musyoka Musau**, Objector. The purchase price in respect of the property that was being sold namely, **Machakos Town/Block 1/303** was **Kshs.50,000/=**. Clause 3 of the agreement stipulate thus:

“The purchase price is Kshs.50,000/= of which sum of Shs..... has been paid to the Vendor by the Purchaser (receipt whereof the Vendor hereby acknowledges).”

The document was signed before **P. N. Waki** advocate (As he then was). This document that was not in dispute was indeed admitted in evidence following a consent of both parties.

7. The Objector stated that upon the sale transaction being effected, the deceased gave him the original certificate of lease of the subject land. A copy thereof was produced in evidence. The authenticity of the document has been questioned on the grounds that he did not make the original available for perusal by the court. It is important to note that the certificate of lease was annexed to the Objector’s affidavit of protest and during hearing it was produced in evidence by consent of parties. The Objector can, therefore, not be faulted for failure to avail the original document.

8. Waki & Company advocates were accorded a consent to the proposed transfer of the subject plot. This was by a letter dated **29th May 1991**. The letter was copied to the Land Registrar but not the parties. It is also worth noting that both the Vendor and Purchaser were represented by Waki & Company Advocates the addressee of the letter.

9. What is established is the fact that following the transaction no transfer of the plot was effected. As a consequence, the Objector lodged a caution on the title on **2nd December 1991** declaring a purchaser’s interest. There was another caution registered on **17th January 1986** in favour of **Standard Chartered Bank P.L.C.** as a creditor. On **24th February 1993** the caution entry was removed pursuant to the provisions of **Section 133** of the **Registered Land Act, Cap 300 Laws of Kenya** (Now repealed). Circumstances in which the caution was removed remain unclear. According to the law then, the caution would be removed by the cautioner, or by order of the court, or the Registrar having been notified by the cautioner. This is not explained.

10. Events that unfolded culminated into the Objector filing a suit, **Machakos High Court Civil Case No. 160 of 1999**. Subsequently it was withdrawn and he filed **Machakos Chief Magistrate’s Case No. 115 of 2003** seeking an order of specific performance directing the deceased to effect transfer of the subject property. In the alternative he sought a declaration that the Objector had acquired title to the property by virtue of adverse possession. At the time of the demise of deceased the case had not been heard.

11. The Petitioner recognizes **Kashmir Singh** as the purchaser of the subject property having purchased it in 2001. It was the evidence of **Kashmir Singh** that he developed the plot thereafter and he continues to occupy it. On cross-examination he stated that he carried out a search and established that the property belonged to the deceased but there was a caution registered on the title by **Chris Musau** who claimed purchaser’s interest. He, however, paid for the plot because the deceased assured him that he was sorting out the issue.

12. It is apparent that at the time of purchasing the subject property the second buyer was aware of a claim over the property by another purchaser who was the objector herein.

13. Looking at form P&A 5, it is indicated the subject property was the deceased's asset. There is no indication of the deceased having left any liability. It was, therefore, dishonest on the part of the Petitioner not to disclose that fact.

14. From the foregoing it has been demonstrated that at the time of his demise the deceased had actually disposed off the subject property. It should not have been indicted as one of his assets.

15. Whether or not the subject property legally belongs to the Objector is a matter to be determined by a civil court, especially so considering the fact that more than one (1) year has elapsed after the demise of the deceased who was a defendant in the civil suit that he filed (**vide Order 24 rule 4 (3) of the Civil Procedure Rules**). It is also imperative to note that the Petitioner also failed to pursue the cause of action that survived the deceased (**See Section 82(a) of the Law of Succession Act**).

16. From the foregoing, I opine that the Objector has demonstrated that he may have a good claim over the subject property. It will be in the interest of justice for the issue to be addressed prior to distribution of the capital assets of the estate of the deceased. I, therefore, decline to confirm the grant and hereby refer the matter for consideration by the Petitioner/Applicant. The matter will be mentioned in 6 months' time for further orders.

17. Costs of the application shall abide the outcome of the matter.

18. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 16TH day of APRIL, 2015.

L.N. MUTENDE

JUDGE