



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 53 OF 2008

IN THE MATTER OF THE ESTATE OF KITUMA NGANDA MUSAU (DECEASED)

KAMENE KITUMA NGANDA.....PETITIONER

VERSUS

JULIUS MUTHUNGU MUKANDA.....PROTESTER

RULING

1. **Kitema Nganda Musau** (deceased) died domiciled in Kenya on the **18th May, 1997**. The grant of Letters of Administration Intestate (Grant) in respect of his Estate were issued to **Kamene Kituma Nganda** on the **29th May, 2008**.
2. On the **22nd day of December, 2008** she filed an application for confirmation of the grant.
3. The application is supported by an affidavit sworn by the Applicant who avers that the deceased was survived by:
 - **Kamene Kituma Nganda (Petitioner).**
 - **Mbulung'a Kituma Nganda (Son).**
 - **Katila Kituma Nganda (Son).**
 - **Mutiwa Kituma Nganda (Daughter).**
 - **Susana Kituma Nganda (Daughter).**
4. She proposed that the asset forming the Estate of the deceased – **Ukia/Utaati/449** be registered in her name in order for her to hold it in trust for other beneficiaries.
5. **Julius Muthungu Mukanda** filed an Affidavit of Protest against the confirmation of the grant. He deponed that he purchased the whole of land Title No. **Ukia/Utaati/449** from the deceased on **5th September, 1981** at **Kshs. 13,775/=**. He took possession of the land, settled thereon and he has undertaken substantial development on it; After the sale, the deceased migrated with his family to **Kambu** in **Kibwezi**, but his son **Mbulunga Kituma** later returned to the land and started disturbing him; The deceased died prior to transferring the land to him. Therefore he is a beneficiary to his Estate and is entitled to ownership of the whole land.
6. Further, that the Petitioner and her son **Mbulunga Kituma** sued him in the **Makueni District Land Disputes Tribunal** Case No. **66 of 2007** and the Tribunal awarded the land to him. The Petitioner filed the Succession Cause herein secretly without consulting him and concealed material facts to the court.
7. The Protest was heard by way of *viva voce* evidence. The Protester stated that he was notified by **Mbulunga Kithuma** a son of the deceased of his intention to sell land that was being surveyed. They reduced the sale agreement into writing and he paid **Kshs. 13,775/=**. All payments to the deceased were made in the presence of **Mbulunga Kithuma**. The final sale agreement was

- signed by an advocate. After the sale the deceased moved his family to **Kambu**. However, the deceased requested him to let **Mbulunga** stay on for two (2) years to enable his children complete school. Two (2) years later **Mbulunga** changed his mind and requested to refund the purchase price. He had taken possession of the land and constructed thereon a permanent house, a kitchen, two (2) roomed stores and a latrine.
8. In **1992** he learnt of an intention to sell the land to another person. He lodged a caution on the land at the Land Registry. **Mbulunga** filed a case at the **Land Disputes Tribunal** seeking his eviction. The case was found in the Protester's favour and the family of **Mbulunga** was ordered to vacate the land. At the time of his demise the deceased had not transferred the land to him. On cross examination he stated that the deceased was buried on the same parcel of land as it had not been transferred to him.
 9. The Petitioner **Kamene Kituma**, stated that she used to live at **Kambu** but she has since moved to stay with **Katila**. She denied having been present when the stated land at **Utaati** was disposed off. She claimed that at the time her husband was of unsound mind and had chased her away. She heard that the Protester bought the land and he has developed it (constructed thereon). She argued that she could not give him the land. She concluded by stating that the deceased was buried on that parcel of land because he had no other land. She was willing to refund the Protester's money.
 10. On cross examination she denied having moved away from **Utaati** after sale of land. Further, she stated that she had no medical evidence to establish that the deceased was of unsound mind. She was willing to refund the Protester **Kshs. 10,000/=** as directed by the Chief.
 11. She called **Mbulunga Kituma** as a witness who stated that the Protester invaded their land claiming that he had purchased it from the deceased. He was coerced to sign the sale agreement. He was however present when the land was being sold. His brother **Katila** was compelled to sign the agreement, he ran away on doing it. The land was sold in **1980** and the deceased passed on in **1997**. They objected to the transfer that is why the land was not transferred to the Protester. He believed the deceased was of unsound mind because he would disappear from home then return. He concluded by stating that it is the only land they own and his three (3) children have been buried on it.
 12. On cross examination he admitted having signed the sale agreement before the advocate.
 13. The Petitioner filed submissions that I have taken into consideration.
 14. It is not in dispute that the deceased sold to the Protester all that piece of land known as **Ukia/Utaati/449** on **5th of September, 1981**. According to the agreement signed in the presence of **P. M. Mulwa Advocate** it was sold free from encumbrances and any rights attaching thereto. The Vendor was to give the vacant possession but if he failed to transfer it he ought to have refunded all monies received.
 15. As at **28th May, 1991**, the **Land Adjudication/Settlement Department** recognized the sale of land by the deceased. In the year **2007** the Petitioner and his son **Mbulunga Kituma Nganda** filed a claim against the Protester before the **Makueni Land Dispute Tribunal**. The Tribunal found that the land belonged to the Protester. The award was adopted as judgment of the court. An eviction order was issued. The Petitioner did not appeal.
 16. There is further evidence that on **24th February, 1992** the Protester lodged a caution on the title claiming a purchaser's interest.
 17. It is alleged without proof that at the time of the sale transaction the deceased was of unsound mind. It is also alleged without proof that the deceased did not transfer the land following an objection by the family members.
 18. It is therefore established that at the time of petitioning for the grant, the Petitioner was aware of the existence of the Protester. The property that is subject of distribution is in the name of the deceased but as aforesaid was sold and there is a caution lodged at the Land Registry on the title.
 19. The deceased having sold the land was under an obligation to convey the land to the Protester. He however died prior to completion of the sale transaction. It would therefore be the obligation of the legal representative of the Estate to complete the transaction. In the instant case they are not willing to do so. They have offered to refund what the Protester paid.
 20. However, it is a case where the Protester was put in possession of the property by the deceased and he has been in continuous possession of it for the last **thirty four (34) years**. The Petitioner is therefore obligated to make an attempt of regaining possession of the land peaceably by negotiating with the Protester.

21. From the foregoing, I decline to confirm the grant until the Petitioner recognizes the Protester as a person who may be entitled to benefit from the Estate of the deceased. Having failed to notify the court of that fact was not inadvertent but deliberate. In the circumstances, pursuant to the provisions of **Rule 41 (2)** of the **Probate and Administration Rules**, I refer the matter back to the Petitioner/Applicant for further consideration.

22. It is so ordered.

Dated at Kitui this 22nd day of October, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 9th day of November, 2015.

P. NYAMWEYA

JUDGE