



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 371 OF 2006

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH MUTUNGI MUTUKU-
(DECEASED)**

1. ALICE NTHAMBI MUTUNGI

**2. ROSE MWIKALI MUTUNGI
...ADMINISTRATORS/RESPONDENTS**

VERSUS

**ROSE NDUKU PETER
PROTESTER/APPLICANT**

R U L I N G

1. The application dated 19/2/2013 seeks the following orders:-

1. **“That, the confirmed grant issued on the 8th day of October, 2012 be rectified and/or annulled to remove the purchaser namely; Peter Ndiku Makundi from the estate of the deceased as per the order and directions issued by the court.**
2. **THAT, the Land Registrar be in the meantime prohibited from registering any dealings in Plot Parcel No. Machakos/Kiandani/3164 till this application is heard and determined.**
3. **Costs of this application be in the cause.”**

2. The background to the application at hand is that the summons for confirmation herein was filed on 23/3/2007. However, on 6/6/2008, a protest was filed by one **Rose Nduku Peter** who claimed to be a beneficiary through her late husband, **Armstrong Peter Mutungi**, a son and beneficiary in the estate of **Joseph Mutungi Mutuku**.
3. On 7/3/2011, directions were given by the court (**Hon. Kihara Kariuki J**, as he then was) for the Protest to proceed by way of oral evidence.
4. However, when the cause came up for hearing on 21/6/12 before **Hon. Asike Makhandia J** (as he then was) the protest was compromised by the consent of the parties in the terms that whatever was due to (the late) **Armstrong Peter Mutungi** was to go to **Rose Nduku Peter, Joseph Kituku Peter, Janet Mumbua Musembi, Caroline Esther Mwelu** and **Mark Kasyoka**. Subsequently, on 10/7/2012, an affidavit of the proposed distribution of the estate was filed and the same seems to have taken the orders dated 21/6/12 into account. The grant was thereafter confirmed on 27/7/12.
5. On 19/2/2013, the Protester, **Rose Nduku Peter** applied for the rectification of the grant that was confirmed on 27/7/12 and issued on 8/10/12. The Applicants prayer is that the grant be rectified and/or annulled to remove the name of **Peter Ndiku Makundi**, a purchaser from the confirmed grant.

6. The Applicant's averment is that the said purchaser occupies her portion of land parcel No. Machakos/Kiandani/3164. That the purchaser purchased the land from a person without capacity and was not considered at the time of the distribution but his name was inserted in the certificate of the confirmed grant clandestinely through a complaint by way of a letter dated 18/10/12.
7. The application is opposed as per grounds of opposition dated 27/5/2013 on the following grounds:-
 4. **"The Objector's application is in vain as the transmission of title number Machakos/Kiandani/3164 and the transfer of the portion given to Peter Ndiku Makundi have already been effected on the strength and pursuant to the confirmed grant issue don 27th July 2012.**
 5. **Parcel Number Machakos/Kiandani/3164 is now governed under a regime other than the Probate Court and this Honourable Court has no jurisdiction to entertain the summons as filed.**
 6. **The orders sought in the summons have been overtaken by due execution of the matters contained in the confirmed grant now sought to be rectified."**
8. The application was canvassed by way of written submissions which I have duly considered.
9. It is clear from the affidavit sworn on 23/3/2012 in support of the summons for confirmation filed on 23/3/2012 that **Peter Ndiku Makundi** was reflected as a purchaser of **0.1595 Hectares** from Land Parcel **Machakos/Kiandani/3164** and again similarly reflected in the proposed distribution as per the affidavit sworn on 28/6/2012 by the administrators. It is also clear from the court record that the grant was confirmed in terms of the orders dated 21/6/12 which essentially took into account the protest by the Applicant who claimed the share of her late husband, **Armstrong Peter Mutungi**. I have compared the confirmed grant with the affidavit of the proposed distribution sworn on 28/6/2012 and the two reflect the same position. There is therefore no error or clandestine inclusion which requires rectification.
10. The affidavit of proposed distribution sworn on 28/6/2012 by the administrators who are the two widows of the deceased clearly reflect that the 1st house (**Alice Nthambi**) got Land Parcel **Machakos/Kiandani/3164** while the 2nd house (**Rose Mwikali**) got Land Parcel **Iveti/Mung'ala/597**.
11. However, it does not come out clearly from the court record who the purchaser, **Peter Ndiku Makundi** purchased the **0.1595 Hectares** from and when. The court does not know if the purchaser is an intermeddler or not. The grant was confirmed by consent. The affidavit of proposed distribution sworn on 28/6/2012 however shows the said purchaser's share was to come out of Land Parcel **Machakos/Kiandani/3164**. Be as it may, the Applicant and her children's share is reflected as 0.1101 and they are entitled to the same. It is not clear to the court why the grant has not worked out as confirmed by the court. However, if the Applicant is not the one who sold her share to the said purchaser, then the Applicant's share should not be interfered with.
12. The Applicants have confirmed in their submissions that the application falls under **section 74** of the **Law of Succession Act Cap 160** which deals with rectification of errors. This court has the requisite jurisdiction to entertain the application. However, as stated herein above, this court has found no errors that require rectification.
13. There is no evidence by the administrators to controvert the Applicant's averment that the purchaser, **Peter Ndiku Makundi** occupies her portion of Land Parcel **Machakos/Kiandani/3164**. The Applicant is entitled to her share of the estate of the deceased. The administrators should comply with the court orders regarding the distribution of Land Parcel **Machakos/Kiandani/3164**.
14. With the foregoing, I allow prayer No. 2 of the application with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 20th day of March 2014.

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B. THURANIRA JADEN

JUDGE