



**REPUBLIC OF KENYA**

**High Court at Meru**

**Succession Cause 83 of 2003**

**IN THE MATTER OF THE ESTATE OF MUGAMBI KOBIA ALIAS M'MUGAMBI KOBIA**

**FRANCIS MUTUA MUGAMBI.....PETITIONER**

**VERSUS**

**GEREMANO MUGAMBI MURIRA.....OBJECTOR**

**R U L I N G**

The objector through Chamber Summons dated 26<sup>th</sup> February, 2013 brought under Section 45 of the Law of Succession Act sought orders that the petitioner be ordered to account for proceedings from Plot No.28A Kariene Market since 2003 and that the petitioner be ordered to deposit in court the proceedings from Plot No. 28A Kariene market till this matter is heard and determined.

The application is based on the grounds that the petitioner earns Kshs.21,5000/- from plot No. 28A at Kariene market every month and that the petitioner is not ready to have the matter finalized as long as he is enjoying the proceeds from the said plot.

That the more the matter remains pending the same remains an advantage to the petitioner. That the petitioner has not accounted for the proceeds from the said plot since the deceased passed on.

The application is further supported by affidavit of the applicant dated 26<sup>th</sup> February, 2013. The application is opposed. The respondent filed a replying affidavit dated 8<sup>th</sup> March, 2013.

When the application came up for hearing Miss Nelima, learned Advocate for the applicant made oral submissions in support of the application whereas Mr. Nyenyire, learned Advocate for the respondent made his oral submissions in opposition to the application. The court has very carefully considered the oral submissions by both Counsel. It has also considered the pleadings, affidavits and the Counsel opposing positions.

The petitioner in the instant application petitioned for grant of letters of administration in respect of the estate of Mugambi Kobia alias M'Mugambi Kobia through his petition dated 10/3/2003. The petition was gazetted on 17<sup>th</sup> April, 2003 and petitioner was issued with letters of administration of the deceased estate on 18<sup>th</sup> May, 2003. That the petitioner sought the confirmation of grant through summons for confirmation of grant filed on 30/12/2003. That on 19<sup>th</sup> July, 2004 the grant was not confirmed as parties had not agreed on mode of distribution. One M'Muriira M'Mugambi brother to the petitioner filed a protest to the mode of distribution and each party filed his proposal to distribution. That before the matter was heard and determined Murira M'Mugambi died on 28<sup>th</sup> November, 2009.

The applicant herein filed an application on 2<sup>nd</sup> June, 2010 to be made a party in this succession cause instead of Murira M'Mugambi. The application was allowed on 2/11/2011 making Geremano Mugambi the objector in this cause.

The objector contends that plot No.28A at Kariene market was developed by the deceased herein and that the petitioner had been taking charge of the same singlehandedly and for his own benefit. That the petitioner had been enjoying the proceedings alone to the detriment of the deceased estate. That the deceased estate has fully been distributed except the plot No.28A Kariene market which the petitioner do not want distributed as he enjoys the benefits from the same plot alone. The applicant averred that the petitioner gets Kshs.21,500/- per month from the same plot No.28A Kariene Market and have never accounted for the same since 2003. The applicant therefore sought that the petitioner be ordered to account for the income from the said plot and that the petitioner be ordered to deposit the proceeds from the said plot No.28A Kariene market.

The petitioner on his part filed a replying affidavit and countered the applicant's application stating that the delay in determining the matter has been due to the applicant's unwillingness to have the protest heard till petitioner's witnesses elderly witnesses dies.

The petitioner contends that plot No. 28A Kariene though registered in the deceased name, the same had been sold to him by the deceased and that the deceased could not have developed the plot as he could not have paid the money required by the County Council of Meru. That the petitioner purchased plot No. 28A but transfer has not been effected. That petitioner's brother M'Nthiri M'Mugambi knew of the transaction and recorded a statement to that effect, annexed and marked "FMMI". That the applicant's father the late Muriira M'Mugambi knew of the transaction and recorded a statement to that effect, annexed and marked "FMMI".

That the applicant's father the late Muriira M'Mugambi had complained to the Chief and clan elders who after arbitration found that the petitioner had lawfully bought the plot from the deceased and annexed the proceedings and award as annexure "FMM2". The petitioner contends that the plot belongs to him solely and the fact that it is in his father's home does not make it property of the deceased. That further in another meeting during the life time of the deceased over the ownership of the plot, the petitioner contends the same resolved the dispute in his favour. As for annexure "FMM3" the petitioner further averred that due to technicalities of law he had to go through the succession cause for the court to make orders for the plot to be transferred to him.

When the application came up for hearing, Miss Nelima, Learned Advocate for the applicant relied on the applicant's affidavit and submitted that plot No. 28A is still in the name of the deceased and was partly developed by the deceased and that to date the petitioner is currently developing the same. She urged the court to grant the orders prayed in this application pending sorting the issue of distribution. She urged that in the replying affidavit of the petitioner there is no evidence of sale of the plot to the petitioner and no evidence of any payment or any fees to the municipality.

On the other hand Mr. Nyenyire, learned Advocate for the petitioner relied on the petitioner's replying affidavit. He urged that the petitioner is the current owner of the plot and has contributed to its development. He urged that the petitioner should not be made to deposit the funds with the court because he is the owner of the plot. The petitioner further contends that he is the lawful owner of the said plot and other family members are aware of the fact and urged the court to dismiss the application.

The issue for determination in this application is whether the applicant has laid down sufficient grounds to warrant the petitioner be ordered to account for proceedings from plot No. 28A Kariene market since 2003 and whether the petitioner should be ordered to deposit in court the proceeds from Plot No.28A Kariene market till this matter is heard and determined.

In the instant application, the application is brought under Section 45 of the Law of Succession Act, which provides:-

***“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

***(2) Any person who contravenes the provisions of this section shall -***

***(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine imprisonment; and***

***(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”***

Further under Section 47 of the Law of Succession Act the High Court has jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decree and make such orders therein as may be expedient.

The Law of Succession Act under Section 3 defines the term “free property” in relation to the deceased person, as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

The provisions of Section 45 of the Law of Succession Act provides that no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of the deceased person. The provisions specifically prohibits taking possession of a property of the deceased person contrary to this provision. The provision to my understanding means that at the time of death of the deceased, the person who is taking possession was not already in possession.

That the person is changing the status quo that was obtaining at the time of death of the deceased. That the person who was in possession at the time of death of the deceased cannot in my understanding be accused of taking possession. The provision also prohibits disposal of the deceased property contrary to the said provisions and also in intermeddling with any free property of the deceased.

In the instant application it had been argued on behalf of the petitioner that the deceased by the time of his death, he had sold the property in question and released the same to the petitioner. That the petitioner took possession and at the time of the deceased death he was in possession. The petitioner’s argument is that plot No.28A at Kariene Market was not a free property which the deceased was legally competent and free to dispose as it had ceased to be his property.

Significantly the petitioner’s assertion of purchase of the said plot, and being acknowledged as lawful owner by other family members of clan, chief and even the deceased has not been controverted by the applicant by way of affidavit in reply. I find it is most probable, the deceased had disposed of the property by the time of his death. I have used the word probable, as the issue of determination as to whether the plot No.28A Kariene Market forms part of the deceased estate is subject of the pending protest before this court and making a final decision without hearing the protest would prejudice the applicant’s protest.

Furthermore, a matter of great concern and interest in this cause is that since protest was filed in 2004 the same has not been set down for hearing and determination. The other assets of the deceased estate have no dispute on how to be distributed and it is only plot 28A at Kariene Market that is yet to be agreed on how it should be distributed for unexplained reasons.

In the instant application though the property is in the deceased name, there is dispute as to whether the same at the time of his death was a free property as it is alleged he had parted with its possession and ownership after he had purportedly sold the same to the petitioner. Further the petitioner’s contention he was in possession during the deceased time is unchallenged and as such I find and hold that as the petitioner who was in possession at time of the death of the deceased cannot be accused of taking possession of the deceased property or intermeddling with the deceased estate. Further there is no evidence of threat of disposing of the deceased property.

In view of the foregoing I do find that as the issue of ownership and distribution of Plot No.28A Kariene Market, is still pending, it would be premature for this court to determine from affidavits evidence as to the ownership of the plot, when the court through directions issued on 5/12/2005 directed that the protest be determined by way of viva voce evidence.

I am of the view that once the issue of ownership and distribution of plot 28A at Kariene market is determined, and the same is declared the property of the deceased estate the petitioner may be called upon to account for the proceeds from Plot No.28A Kariene Market since the time that court would find appropriate on being moved to do so.

In the circumstances the application is declined and parties advised to promptly set this old matter down for determination of the protest.

The upshot is that the application is dismissed and each party to bear its own costs of this application being family members.

DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF APRIL, 2013.

**J. A. MAKAU**  
**JUDGE**

***DELIVERED IN OPEN COURT IN THE PRESENCE OF:***

- 1. Miss Nelima h/b for Mr. Ondieki for applicant/objector***
- 2. Mr. Nyenyire for petitioner***

**J. A. MAKAU**  
**JUDGE**