



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Succession Cause 452 of 2011

BUNDI MWITIPETITIONER/RESPONDENT

VERSUS

COSMAS N. MARETEOBJECTOR/APPLICANT

R U L I N G

The applicant in an application dated 22nd August, 2011 brought under Section 47,76,83 and 84 of the Law of Succession Act and rules 44,49 and 73 of the Probate and Administration Rules seeks the following orders:-

- 1. That this application be certified as extremely urgent and this Honorable Court be pleased to issue interim orders in the first instance pending service of the same for interpartes hearing.**
- 2. That this honourable court, be pleased to order that Chuka SPM's Succession Cause No.46 of 2010 be transferred to this Honourable Court.**
- 3. That the grant issued to Jacob Mutua and confirmed on 8th June, 2011 be revoked and/or annulled.**
- 4. That there be an order of inhibition prohibiting any dealings with Land Parcel No.Nkuene/L.Mikumbune/69 or any subdivision thereof pending the hearing and determination of this application inter partes.**
- 5. That this order be served upon District Land Registrar Imenti North District for compliance.**
- 6. That this Honourable Court be pleased to issue any further orders as may meet the ends of justice herein.**
- 7. That the costs of this application be provided for**

The application is based on the following grounds:-

- (a) That the properties left by the deceased are situated at Mikumbune South Imenti District.**

(b) That the petitioner herein instead of applying to this court, secretly filed the succession cause at Chuka Law Courts.

(c) That no member of the family was consulted or involved in the said Succession Cause.

(d) That the Estate of the Deceased is worth over 2,000,000/- and hence succession cause ought to have been filed before this Honourable court and not before the subordinate court at Chuka.

(e) That the rectified certificate of confirmation of grant dated 10th August, 2011 even contains the name of a deceased Beneficiary Jacob Mutua which is a material.

The application is supported by affidavit of the applicant. The applicant in the affidavit deponed as follows. That on 21st February, 2009 he purchased ¼ acre of land No.Kunene/Lower Mikumbune 169 from a beneficial owner one Jacob Mutua at a purchase price of Kshs.350,000/= as per annexed agreement for sale of land marked”CNMI”. That the land was to be transferred upon conclusion of Succession Cause No.46 of 2010.

That the applicant has been in possession of suit property since 2009. That applicant purchased a further portion of ¼ acre from one Paul Kirimi also a beneficiary of the deceased estate as per sale agreement marked “CNM2”. That the succession cause was filed by Jacob Mutua in 2010 with assistance of the applicant. That it was agreed the applicant would be included in the application for confirmation of grant as a purchaser. That Jacob Mutua who was the petitioner refused to include the applicant in the list of purchasers yet he included one Linus Mworira J. Kirimi.

The certificate of confirmation of grant is annexed and marked “CNM3”. That later the petitioner Jacob Mutua was murdered and on 15th August, 2011 the respondent herein Bundi Mwiti applied to be substituted as the administrator and he was accordingly substituted. That one Paul Kirimi has sworn an affidavit that the grant was confirmed in his absence and that he would like the land he sold to be transmitted to the applicant.

The applicant has deponed the land is situated in South Imenti District and petition ought to have been filed in Meru High Court as the estate is worth over 2million and Chuka Principal Magistrate did not have jurisdiction to deal with the matter. The applicant in his application prayed for Chuka file to be transferred to this Honourable court and the grant be revoked so that a proper grant can be issued with the concurrence of all affected beneficiaries.

The respondent filed a replying affidavit on 8th September, 2011 in which he stated as follows. That the applicant was consulted prior to the institution of the cause at Chuka. That the petitioner and the late Jacob Mutua are the ones who filed the cause at Chuka Law Courts. That the objector is not a dependant of the deceased. That the sale agreement was breached by the applicant for he only paid Kshs.41,000/= out of the consideration of Kshs.309,000/=. That applicant should have directed his claim against the widow of Jacob Mutua and not the respondent.

That the respondent has deponed that he was made an administrator on 15/8/2011 following murder of the said Jacob Mutua, purposely for completion of the Succession Cause. The respondent stated that the acts of the applicant purchasing land of the deceased amounted to an offence of intermeddling with the estate of the deceased hence the agreement was null and void ab initio. The respondent further stated that his brothers have their respective shares and if any has interest in selling his share he has no objection or control over their respective shares. The respondent stated the applicant has no claim against him and as such the applicant should not have lodged any proceedings against the respondent.

That on 2/11/2012 the respondent filed a notice of preliminary objection. When this matter came up for hearing on 29/2/2012 the respondent raised the preliminary objection. The respondent’s preliminary point of objection is as follows:-

“NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the petitioner’s Advocates shall raise a preliminary objection to the effect that the proceedings offend the provisions of Section 45,66,67 and 68 of the Law of Succession Act and shall pray for the entire proceedings to be struck out.”

The learned counsel for the respondent submitted that the applicant is a mere purchaser of the land from a beneficiary Jacob Mutua. That the purchase took place before succession cause was lodged. He submitted the act of purchasing land from a beneficiary is a contravention of Section 45 of the Law of Succession Act.

Section 45(1) of the Law of Succession Act 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.”

Section 45(1) of the Law of Succession Act states except expressly authorized by the Law of Succession Act or by any other written law, or by grant of representation under the Law of Succession Act no person for any reason is authorized to take possession or dispose of or otherwise intermeddle with, any free property of a deceased person.

In view of the foregoing if the applicant herein purportedly purchased land from Jacob Mutua without express authorization by the Law of Succession Act or any written law or by grant of representation under the Law of Succession Act then his acts amounts to intermeddling with the deceased estate.

The respondent counsel further stated that under Section 66 of the Law of Succession Act the applicant is a stranger to the family of the deceased and cannot as such petition for grant of letters of administration over the deceased estate.

Section 66 of the Law of Succession Act provides:

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

The respondent argued the applicant did not have priority to the respondent so as to seek to be an administrator of the deceased estate. He submitted that Section 39 of the Law of Succession Act lists the order of priority in seeking grant of letters of administration.

Section 39 of the Law of Succession Act provides:-

“39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead
(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.

(e) The relatives who are in the nearest degree of consanguinity upto and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs

(a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

The learned counsel for applicant Mr. Kiambi in his oral submission stated as follows: - That the initial succession cause was filed in court without jurisdiction. That the court under Section 76 of the Law of Succession Act can on its own motion revoke the grant.

Section 76 of the Law of Succession Act provides:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-“

The applicant’s counsel submitted that the petitioner is estopped from relying on Section 45 of the Law of Succession Act when he is in breach of the said Section by having sold a parcel of land to a third party when he is not authorized by the Law of Succession Act to do so. That the respondent it was submitted cannot be heard to say he is not properly sued as the rectified grant confirmed grant to the respondent.

The applicant’s counsel submitted that the applicant is entitled to the deceased estate as he purchased the benefit of a beneficiary and the petitioner should not be allowed to use Section 45 of the Law of Succession Act which deals with intermeddling when he had intermeddled with the estate by selling a portion of the land to another purchaser. The counsel said the Law of Succession Act recognizes the purchaser’s rights and in support of his submissions he said the Law of Succession Act defines a **“Purchaser”**.

Purchaser according to the Act means a purchaser for money or money’s worth. He argued the applicant as a purchaser is seeking revocation of the grant so that he can pursue his claim. The applicant’s counsel submitted if grant is not revoked the intended objector has no chance to prove what he is seeking from the deceased estate. That he needs not to be a petitioner to make his claim. It was submitted that under Section 66 of the Law of Succession Act the purchasers are included amongst the persons who can petition for grant of letters of administration.

I have considered the preliminary objection and matters raised in opposition of the same. I note the preliminary objection is not based on a particular Section of the Law of Succession Act or a particular Rule of the Probate and Administration Rules. It is a general preliminary objection.

I think striking out a suit should be used rarely and sparingly. It should only be exercised in cases which are clearly hopeless and which court has seen that the plaintiff has got no case at all, either as disclosed in the pleadings or statement of claim. The courts has said in more than once that the striking out of the suit must be exercised in plain and obvious case and as such the jurisdiction must be exercised with extreme caution.

In case of **D. T. Dobie & Company(K) Ltd – V – Muchina (1982) KLR 1** Court of Appeal held:-

“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

(Obiter Madan JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the Trial judge in disposing the case.

(Obiter Madan JA)The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

The applicant is seeking to have grant revoked on grounds that the trial court lacked jurisdiction. That is to say the proceedings to obtain the grant were defective in substance or the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently or the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

The court cannot shut its ears and its eyes to an allegation that the grant issued at Chuka court might have been issued by court which lacked jurisdiction. The applicant’s application raises trial issues, and it matters not, whether applicant shall succeed or not.

It is for that reason that applicant has to be given a chance to be heard on his application.

In view of the foregoing the preliminary point of objection is rejected. That the Chuka Senior Principal Magistrate’s Succession Cause No.46 of 2010 is already transferred to this honourable court, I order that the application for revocation of grant be set down for hearing by way of viva voce evidence. That there be an order of inhibition prohibiting any dealing with Land Nkuene/L.Mikumbune/69 or sub-division thereof pending the hearing and determination of this application.

Costs of the application to the applicant.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF MARCH, 2012

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. Muriuki for petitioner
2. Mr. Mbaabu for respondent

**J. A. MAKAU
JUDGE**