



SUCCESSION

- *S. 82 Cap 160 forbid sale of immovable property before confirmation of grant.*
- *Intermeddling with the deceased property constitutes an offence S. 45 Cap 160.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 216 OF 2010

IN THE MATTER OF THE ESTATE OF MUSA M'IBURI KARARU (DECEASED)

GRACE MUKOMPORA 1ST PETITIONER
ALICE CIOMALIA 2ND PETITIONER
PENINAH MBUI 3RD PETITIONER

VERSUS

KOOME KAMUI 1ST OBJECTOR
ELIJAH NTOTENE M'IBURI 2ND OBJECTOR
JOYCE CIONGONDU KAMANJA 3RD OBJECTOR
KABIRI M'ABWITHANIA 4TH OBJECTOR
MARGARET MUTHENYA KAMUI 5TH OBJECTOR
GEORGE MUNGANIA 6TH OBJECTOR
MARITHA MUTHINYA 7TH OBJECTOR
MUTURA IBURI KARARU 8TH OBJECTOR
M'ANAMPIU KAMUI 9TH OBJECTOR
FRANCIS KABURIA IBURI 10TH OBJECTOR
M'IMANA IBURI 11TH OBJECTOR
SAMUEL KIJUKI IBURI 12TH OBJECTOR
EZEKIEL NDUBI IBURI 13TH OBJECTOR
EZEKIEL NKUNJA IBURI 14TH OBJECTOR
DAVID KALIUKO KAMUI 15TH OBJECTOR
REBECCA CIOTHARU IBURI 16TH OBJECTOR

JUDGMENT

The deceased in this cause died leaving surviving him four wives and many children. It is accepted by all that the deceased had married ten wives in his lifetime. However, at his death only four of those wives survived him. The deceased's wives had children who also survived the deceased. The deceased died intestate. One of his wives, namely Grace Mukopara Musa petitioned for grant of letters of administration

before the Maua Magistrate Court being Succession Cause No. 13 of 2006. Although she had petitioned for the grant in her sole name, the court issued a grant in the joint names of two wives namely, Grace and Alice Ciomacila. The Maua Succession Cause was transferred to this court and a new case number was assigned to it as can be seen from the title of this case. By summons dated 17th June 2010, the petitioners are seeking confirmation of that grant. The only property that belongs to this estate is Plot No. 34 Maua Township upon which there is a shop. Presently, it seems that the shop is rented out. In the application for confirmation filed by the four surviving wives of the deceased, it is sought that the only property of the estate being Plot No. 34 Maua Township be distributed between those four wives to the exclusion of about 15 children of the deceased. The names of the four surviving wives of the deceased are:-

1. **Grace Mukopara**
2. **Alice Ciomacila**
3. **Zipporah Kathao M'Iburi**
4. **Penina M'Iburi**

An affidavit of protest was filed by Francis Kaberia Iburi on his behalf and on behalf of twenty other beneficiaries. He did not name those twenty other beneficiaries and it is therefore not clear who they are. Looking at the affidavit in support of the petition, there is listed there seventeen children who were stated to have survived the deceased. Francis further deponed that the entire estate of the deceased except Plot No. 34 Maua Township was distributed to the heirs and beneficiaries of the deceased. He did not however specify what he meant with what he termed the entire estate nor did he state to who it was distributed to. He further stated that Plot No. 34 Maua Township only measures 80 x 40 ft. That it has a building constructed thereon. He then stated in that affidavit:-

7. ***That the four widows to whom it is proposed Plot No. 34 Maua be registered were all catered for; each one of them has land upon which they dwell.***
8. ***That the beneficiaries i.e. sons and daughters of the deceased herein who make up the objectors view of the impracticability of sub-dividing plot No. 34 Maua among the many heirs (sic) sat and resolved to sell the plot to the 21st objector.***
9. ***That Valerio Kibaara the 21st objector has paid Kshs. 2,500,000/= for the plot which money was shared amongst ourselves i.e. the beneficiaries.***
10. ***That the 20 objectors are sons and daughters of all the 10 wives of the deceased and none of us is interested in plot No. 34 Maua. The same should go to the 21st objector whose money we have received and used.***

The letters annexed as stated in paragraphs 7 above are from the Ministry of Lands and are dated 21st July 2010. The district land adjudication and settlement officer Igembe states in those letters that parcel number 9161 Amwathi/Maua Adjudication Section is demarcated and surveyed in the names of Grace Mukopara Musa. He further stated that parcel No. 9162 Amwathi Maua Adjudication Section is demarcated and recorded in the name of Zipporah Kathao M'Iburi. Further he states that parcel No. 9164 Amwathi Maua Adjudication Section is demarcated and surveyed in the names of Penina M'Iburi. It ought to be noted that there was no land identified by Francis as being demarcated or surveyed in the name of Alice Ciomacila M'Iburi. The sale agreement referred to in paragraph 9 quoted above is dated 10th August 2006. The vendors shown on that agreement are:-

- **M'Anampiu Kamui**
- **Francis Iburi Kaberia**
- **M'Imaana M'Iburi**
- **Hezekiah Ndubi Iburi**
- **Joyce Ncongondou Kamaja**

- *Eliya Ntutene M'Iburi*
- *Ezekiah Nkunja Iburi*
- *Samuel Kijuki Iburi*
- *Rebecca Ciathiru Kamui*
- *Margaret Mwaninithi*
- *Maritha Muthenya*
- *David Kaliuko Kamui*
- *Joyce Kabiri M'Ibuthanio*
- *Koome Kamui*
- *Mutura Kamui*

That list of vendors does not entirely correspond to the persons listed as children who survived the deceased in the affidavit in support of the petition. It is therefore unclear who exactly are the children of the deceased, when one looks at that agreement and the affidavit in support of the petition. The purchaser as seen in that agreement is stated to be Valerio Kibaara. There are two issues relating to that agreement of sale which need to be considered in this judgment. Firstly, the said purchaser was warned not to enter into the transaction of the purchase of Plot No. 34 Maua by the advocate who was then representing the petitioners by letter dated 16th October 2006. That letter is in the following terms:-

***“Balelio Kibara
C/O Joblodge Maua
MAUA
Dear Sir,***

***RE: PLOT NO. 34 – MAUA
GRACE MUKOMPORA, ALICE CIOMA M'IBURI
ZIPPORAH KATHAO & PENINA MBUI***

We refer to the above matter and write to you in connection with the same and whose details are well within your knowledge.

You are well aware that the above captioned plot is registered in the name of the late Musa M'Iburi Kararu and distribution of his estate is yet to be determined by the pending succession cause No. 13 of 2006.

As far as the Law of Succession is concerned, the people who are entitled in priority to administer the deceased estate are the surviving widows in this case the following:-

- a) *Grace Mukompara*
- b) *Alice Ciomalia M'Iburi*
- c) *Zipporah Kathao*
- d) *Penina Mbui*

It therefore follows logic that any dealings with the said plot should directly involve the above named persons if at all it is to materialize.

The above named widows have categorically indicated to you that they do not intend to sell the said plot and therefore any conspiracy with their sons is obviously an exercise in futility as they do not even have any capacity legal or otherwise to transact any of the said estate on behalf of the other dependants.

Be informed that if you have paid any money to them, it is at your own risk as the same has not been approved by the legal representatives of the said estate. Ours is therefore to advise you which we hereby do, that you stop wasting your resources down the drain otherwise should you opt to continue with the said conspiracy, it is at your own peril.

Yours faithfully,

M.G. KAUME & CO. ADVOCATES

**CC THE PRINCIPAL MAGISTRATE
MAUA LAW COURT**

CLIENTS”

It does now seem that Valerio did not heed that warning because he proceeded to pay the purchase price to the person listed above as vendors of Kshs. 2,500,000/=. By his affidavit dated 4th December 2006 Francis denied that there was collusion amongst the children of the deceased to sell plot No. 34. He deponed in that affidavit as follows:-

“That the applicant only alleges that we are colluding to sell our deceased’s father’s plot No. 34 at Maua to one Valerio Kibaara yet they have not exhibited any agreement of such sale and/or stated the said money that is said to have been paid as part consideration.”

By that paragraph Francis was denying what was obviously going on. He was therefore not truthful. It is interesting to note that Francis in that affidavit of 4th December 2006 did not allege that the deceased widows had been allocated land as he later alleged in his affidavit of protest. There are two issues for determination. The first is, whether the children of the deceased had authority to sell Plot No. 34 to Valerio and if not, how should the plot be distributed. The answer to the first issue is in the negative. Section 82 (b) (ii) of the Law of Succession Act Cap 160 provides as follows:-

“No immovable property shall be sold before confirmation of grant.”

The grant in this case was issued to Grace Mukopara Musa and Alice Ciomacila. That grant to date has not been confirmed. The persons who purported to sell the deceased Plot No. 34 Maua Township had no authority as provided under the Law of Succession Act to sell that plot. That purport of sale was contrary to section 45 (i) of that Act. That section provides as follows:-

“45 (i) 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 (ii) further provides that anyone who either disposes or intermeddles with the deceased free property is guilty of an offence. The sale of Plot No. 34 to Valerio was unlawful and it will not be upheld by this court. On the second issue, I am guided by the affidavit of Francis dated 4th December 2006. He deponed in paragraph 8 as follows:-

“That while our father died in 1992, we have always allowed the applicant to enjoy the rent proceeds from the said building and she has not shared any part to us and her fear now is misplaced and fortunate.”

Francis by that affidavit confirmed that the rental income of Plot 34 had been enjoined by the widows of the deceased with the consent of the deceased children. In considering distribution I am minded to give the four surviving widows of the deceased a life interest over the plot and there after the same to be shared between the children of the deceased. In attempting to know who are the children of the deceased, I am guided by a letter of the chief of Antuamocio Location, Igembe Meru North dated 4th October 2006. Those children listed in that letter will be the remaindermen of this estate. The judgment of this court is as follows:-

1. *The sale of Plot No. 34 Maua Township to Valerio Kibaara is declared null and void and unenforceable.*
2. *Plot No. 34 Maua township shall be distributed to the four widows, namely:- Grace Mukopara Musa, Alice Ciomacila M'Iburi, Siphora Kathao M'Iburi and Penina M'Iburi for their lifetime and it is only when all of them have passed away that the said plot shall be shared equally amongst the deceased children namely, M'Anampiu Kamui, Francis Iburi Kaberia, M'Imaana M'Iburi, Hezekiah Ndubi Iburi, Joyce Ncongondou Kamaja, Eliya Ntutene M'Iburi, Ezekiah Nkunja Iburi, Samuel Kijuki Iburi, Rebecca Ciathiru Kamui, Margaret Mwaninithi, Maritha Muthenya, David Kaliuko Kamui, Joyce Kabiri M'Ibuthanio, Koome Kamui and Mutura Kamui*
3. *There shall be no orders as to costs.*

Dated, signed and delivered at Meru this 10th day of August 2011.

MARY KASANGO
JUDGE