



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ndulu Makiti Mulandi (Probate & Administration
113 of 2017) [2024] KEHC 17133 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
PROBATE & ADMINISTRATION 113 OF 2017**

TM MATHEKA, J

MAY 9, 2024

JUDGMENT

1. Ndulu Makiti Mulandi died on 20/10/2001.
2. She was survived by her son Nicodemus Mutunga Makiti who filed MKS HC. Succession Cause No. 562 of 2007. Her assets were indicated as plot No. Nzau/Kikumini/777 and Nzau/Kikumini/617 measuring 2.2 Ha and 4.0 ha respectively.
3. Grant of letters of administration intestate was made to him on 18/12/2001.
4. Vide summons for confirmation of grant dated 13/10/2009 and filed on 19/10/2009 he sought the confirmation of grant as the sole beneficiary of his mother's estate.
5. The record shows that on 15/10/2008 Muyanga Kimotho filed an affidavit of protest dated 14/10/2008 to the effect that between 1970 – 1972 he bought the whole parcel No. Nzau/Kikumini/777 from Kamene Makiti and took possession and had been living on the said land.
6. His case is that during the adjudication in 1976, his name was deleted from the register and the land registered in the name of Ndulu Makiti, (the deceased herein) who was a co-wife of Kamene Makiti and that he only learnt about the same in 2007 when title deeds were issued. That he had engaged the petitioner who had agreed to transfer the said parcel of land to him but he had not done so, hence the protest. His prayer in the protest was that – the land Nzau/Kikumini/777 be transferred to him.
7. The matter was transferred to High Court of Kenya at Makueni in 2017 and acquired the number HC P&A Succession Cause No. 113 of 2017.
8. Both the Summons of Confirmation of Grant and the protest were heard by way of viva voce evidence. By that time of hearing the protester had passed on and had been substituted by his son.
9. I found Muyanga Kimotho Ndangili's witness statement that was filed on 27/04/2016.
10. In it he stated that Makiti Mulandi had three wives Kamene Makiti, Mulee Makiti and Ndulu



Makiti. All of them lived on the same parcel of land. That Mulandi died in 1964. That in 1970 the clan subdivided the land among the wives. That Kamene sold him her portion of land between 1970 and 1973 and when he paid the last balance she and her children moved to Kambu Kiunguni while he and his family occupied her portion.

11. According to Muyanga Kimotho adjudication was done and the survey came in 1977 and surveyed the land but that what ought to have been Kamene's portion was registered in the name of Ndulu Makiti. His claim is that Kamene's portion is what was registered as no 777 and Ndulu's was 617, but both ended up in Ndulu's name.
12. He stated further that – there was a portion of $\frac{3}{4}$ of an acre of Ndulu's portion that was in no. 777 and that the petitioner sold that $\frac{3}{4}$ piece to him completing the sale of no. 777 to him.
13. His son Boniface Mwangangi Muyanga recorded his statement on 30/8/2021. He testified on behalf of his father saying that his father bought Kamene Makiti's portion and $\frac{3}{4}$ from the petitioner to complete the purchase of no. 777. He said he had moved from that area in 2000 but his siblings whom he named as Jonathan Ndangili Muyanga and Benson Kyalo and Justus Mulwa were still living in that land. His testimony was that Ndulu Makiti was holding No. 777 in trust for his father. On cross examination he testified that the land of Makiti Muendo was in three titles for Kamene, Mulei and Ndulu.
14. PW2 was Joseph Nzomo Makiti who testified that he was the son of Kamene Makiti and Makiti Mulandi. He testified that his father shared out his land to his 3 wives; that his mother sold theirs and they moved. That at the time of sale there was no survey. He testified that farm was surveyed into the name of Ndulu – he testified that the petitioner claimed a parcel of $\frac{3}{4}$ acres from Muyanga's portion – claiming that his mother used to cultivate there and Muyanga bought that portion from the petitioner. He was of the view that the 777 belonged to Muyanga.
15. The protestor produced the sale agreement and photos.
16. The Petitioner testified and did not call any witness.
17. The petitioner adopted his statement dated 2/6/2022. He testified that his two step mothers Kamene and Mulee sold their portions of land and left for Kambu – a fact that was confirmed by the DW2. He confirmed that Kamene sold her portion to the Muyanga. He testified that his mother had moved to her parents' home due to family wrangles and the protestor occupied his mother's land but in 1987 he went back – there constructed a home for his mother where she lived till her demise in 2001.
18. That when survey was done, his mother was called by the clan elders to confirm the boundaries. The protestor was present as well and never raised any issues. That it is true that he sold the protestor $\frac{3}{4}$ of 777 but that is all he did. He produced document to show that even the chief in 2003 identified him as the sole beneficiary of his mother's estate.
19. The parties filed written submissions. For the protestor, it was submitted that he established that he is beneficiary entitled to title No. 777. He relied on section 71(2) and 68(1) of the LOSA and Rule 40(b) of the P&A Rules. He also relied on section 3(1) of the same Act which define purchaser to mean a purchaser for money.
20. The protestor referred court to:

Mwangi & Another v Mwangi (1986) KLR where it was held that the rights of persons in possession or occupation of land are equitable rights binding on the land and the land becomes subject to those



rights; High Court Succession Cause No. 85 of 2015 in the matter of the Estate of Kahoro Muchiri Kahoro where it was held as follows;

“I therefore direct that before the grant can be confirmed as sought in the summons for confirmation, the petitioner does within 14 days’ file a further affidavit proposing the mode of distribution of the estate of the deceased, among all the beneficiaries in the petition. Such proposal will include the protestor as a beneficiary to the share of one acre that he is currently occupying ... the petitioner once the grant is confirmed in order to facilitate the transfer to himself of the parcel claimed. The parties will bear own costs.”

Johnson Muinde Ngunza & Anor v Michael Gitau Kiarie & 12 Others (2017) eKLR where the court made the following remarks; -

“The law of succession Act recognizes the purchaser’s rights and in support of the said (sic) the law of succession defines a “purchaser” to mean a purchaser for money or money worth.”

In Mpatinga Ole Kamuye vs- Meliyo Tipango & 2 others (2017) eKLR the court made the following remarks; -

“The court’s view before distribution of the estate of the deceased under section 71 of Cap 160 the court must satisfy itself that the beneficiaries of the estate are legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution”.

1. In his submissions, the protestor raised 4 issues for determination:
2. Whether the protestor purchased the whole of land parcel Nzai/Kikumini/777 as alleged by himself.
3. Whether Kamene Makiti sold her own share or Ndulu Makiti Mulandi’s share land parcel No. Nzai/Kikumini/777.
4. Whether the petitioner/respondent is the legal and rightful beneficiary of all the estate of the late Ndulu Makiti Mulandi.
5. Whether land parcel No. Nzai/Kikumini/777 registration was really done fraudulently to the disadvantage of the protestor, as alleged by the protestor which he answered in the negative except the issue (iii) which he answered in positive.
 1. The issue for determination is whether the protestor has indeed established, within the purview of the LOSA, a purchaser’s right over Nzai/Kikumini/777 registered in the name of Ndulu Makiti.
 2. It is evident from the record that there is no dispute that indeed Kamene Makiti sold a portion of land to the protestor in the year 1970 – 1973. This is confirmed by the petitioner, and the son of Kamene who was OW2.
 3. The petitioner’s position is that the land that was registered as Nzai/Kikumini/777 is not the same land as the one that was sold by Kamene to the protestor – his position is that that was a different parcel of land, and that the protestor occupied what he purchased and not his mother’s land. Further that when the survey came in 1977, the protestor and the petitioner’s mother were called to the land to confirm the boundaries before the title deeds were issued.



4. I looked at the certificate of search for the land no. 777 – the entry in the register is in the name of Ndulu Makiti and was made in 1977 - the protester died in 2017. Evidently he had been in occupation of the portion he purchased from Kamene in the 70's, since the early 70's he said he completed the purchase in 1973. Hence when the survey came in 1977 he was present to see what portion was being assigned to who. It is difficult to accept that he discovered this alleged fraud in 2007, when there is nothing on record to show that he took any action to recover his land or to protest the alleged injustice, other than to file this protest.
5. The record shows that the sale agreements were witnessed by the chief, and other people but
none of them recorded statements to the effect that the land registered in the name of Ndulu Makiti belonged to him. There is no report to the chief, there is no complaint to the elders – there is nothing to support his claim that it is Kamene's land that became no. 777.
6. In addition, if the evidence of OW2 would be taken to the logical conclusion it would mean that there ought to have been three title deeds for the three separate portions of Mulandi's wives; land, and that would beg the questions as to what happened to Mulee's portion became of Mulee's land when the adjudication happened yet she too sold her land and left.
7. No evidence was laid before the court to lead the court to draw the conclusion that any of Ndulu's portions of land was once Kamene's. How come it too was not registered in Ndulu Makiti's name?
8. My understanding is that the purchaser envisaged by the LOSA is the purchaser who is sold property by the deceased, therefor obligating the legal representative to complete the transaction on her/his behalf. Ndulu Makiti did not sell land to the protester and there is no evidence before me to show that the land that was sold by Kamene is the same land that was registered in Ndulu's name to warrant the prayers sought by the protester.
9. In the circumstances, the Protester is not merited and the same is dismissed.
10. The Summons for confirmation of grant is allowed as prayed and a certificate of confirmation of grant to issue accordingly.
11. Each party to bear its own costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT ON 2ND MAY 2024

CA Ms. Nelima/ Ms. Elizabeth Petitioner /Respondent present Ms. Kyalo for the Protester

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-05-09 10:40:14

