



In re Estate of Gedion Kathumo Muathe & James Makau Muathe (Deceased) (Succession Cause 12 & 13 of 2006 (Consolidated)) [2024] KEHC 9070 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 12 & 13 OF 2006 (CONSOLIDATED)**

MW MUIGAI, J

JULY 25, 2024

**IN THE MATTER OF THE ESTATE OF GEDION KATHUMO
MUATHE AND JAMES MAKAU MUATHE (DECEASED)**

BETWEEN

SIMON MWEU MUATHE 1ST ADMINISTRATOR

HENRY MAKAU MUATHE 2ND ADMINISTRATOR

MWANZIA KATHUMO 3RD ADMINISTRATOR

AND

ANTHONY MWENDWA NZUKI APPLICANT

JUDGMENT

Chamber Summons

1. The Applicant filed summons dated 3/11/2016 under certificate of urgency seeking the following prayers:
 - a. That pending hearing of this application, the administrators/ Respondents herein be restrained from collecting rents from the deceased plot No 57 situated in Tala Market.
 - b. That the administrators herein being the holders of the rectified confirmed grant issued by this honourable court on 9/6/2008 be compelled by an order of this court to transfer the deceased plot No 57 – Tala Market to the applicant herein
 - c. That the rectified confirmed grant issued by this honourable court to the administrators be rectified further to the extent that the only property listed in the schedule thereto plot No. 57 –Tala Market be registered in the name of the applicant herein



- d. That this honourable court's deputy registrar do sign all the necessary documents to facilitate transfer of the deceased plot No- 57 Tala to the applicant herein
 - e. That the cost of this application be paid by the administrators /respondents.
2. The application was supported by the supporting affidavit of Anthony Mwendwa Nzuki, the applicant herein where he deponed that on or about 2012, the administrator /respondents in conjunction with the other family members of the deceased's family sold plot No. 57 Tala to him at a purchase price of Kshs 700,000 which he fully paid for as Kshs 354,000 (bank transfer) paid to Samuel Muathe as a refund of money he had earlier paid to the respondents/ deceased's family as purchase price of the same property and the balance of Kshs 346,000 (cash) paid to the administrators/ respondents and to various beneficiaries of the deceased's estate as advised by the administrator.
 3. That the administrators/respondents have not transferred the said plot to him and the same remains registered in the deceased's name and thus still part of the deceased estate hence this application.
 4. It was deponed that the administrators have continued to unlawfully collect monthly rents from the tenants occupying the plot yet it had been 4 years since he paid for the plot and that the sale of the plot to him was lawful and valid and the plot ought to be transferred to him whether or not the rectified confirmed grant is revoked.
 5. That the administrators/respondents cannot continue collecting rents from a property which they lawfully and validly sold over 4 years ago

Replying Affidavit

6. In their Replying affidavit dated 18th September 2017, the Administrators herein deponed that the application was misconceived as they have never sold the plot to the applicant and that the applicant allegedly bought the plot from strangers/fraudsters.
7. That the alleged initial buyer Samuel Muathe is a beneficiary and hence had no capacity to sell and that the applicant should claim a refund of the money he gave the fraudsters and not the plot

Evidence

Interested's Party Case

8. Pw.1- Anthony Mwendwa Nzuki told the Court he was a business man in Tala and Kangundo. He was the applicant in the application dated 3.11.2016 and that the administrators were known to him only that Simon Mweu the 1st administrator was deceased. He purchased the property Plot 57 Tala Market. The 2nd administrator Henry approached him that they wished to sell the plot and showed him a copy of the confirmed grant. The plot was wholly developed with commercial property and had two doors. He told him that they were ready to sell 20 by 100 ft which was half of the plot. He did a search and confirmed the records were correct. Later the 3rd administrator joined in the negotiations.
9. They agreed on Kshs 700,000 and the Administrators informed him that the portion had been sold to Samuel Muathe who owed them some balance. He contacted Samuel who intimated that he had no problem with the Plot being sold to him as long as he was refunded his money. They then signed an Agreement. The payment was made in batches, the first Kshs 354,000 being refund on behalf of the administrators and Kshs 346,000 paid to the administrators and relatives. The members signed a schedule. The members were Kathumo, Mbee Mweu and Makau. The Administrators gave him a list



- and was paying them as per the sums apportioned. There are some beneficiaries who were yet to collect their share which is around Kshs 100,000. The Kathumo family did not turn up for the payment.
10. He further testified that the two administrators have refused to put him into possession of the plot and have been collecting rent from the tenants since July 2021. He has never benefited from his investment. He wanted the court to order the Respondents to transfer 20 by 100 feet from plot No 57 Tala Market to him.
 11. On Cross – examination by Mr. Tamata Advocate for the Administrators, he reiterated that he still had a small balance to pay. He did a search to establish the owners of the plot and transacted with the administrators. Only one family had not signed for the money. He refunded money to the first buyer Samuel who had paid the family members. Those who did not sign the schedule were yet to be paid. The sale agreement did not indicate whether payment had been made and the amounts to be paid were directed by the administrators.
 12. On cross examination by Mr Ruiru he stated that he saw the confirmed grant and that he only bought half of the plot. He did a search and learnt that the property was owned by the Kathumo brothers and that he did not deal with one John Muisyo.
 13. On re-examination he stated the property sold was one door of 20 by 100 feet from plot number 57 Tala township. The ownership of the property was disclosed in the sale agreement. The agreement stated the purchase price. It was the administrators who gave him the list to pay the listed beneficiaries. He made his first bank transfer on 25-7-2012 and a further payment on 1-8-2012. There were tenants at the time of the agreement. The administrators did not put him in possession nor handed over the tenant.
 14. Witness 2 Francis Mutwii stated that he was the son of Simon Mweu Muathe the 1st administrator who was deceased. There was a plot at Tala Market which was fully developed. He confirmed that the interested party herein had bought part of the plot measuring 20ft by 100 ft at Kshs 700,000. The money was shared among the family members. All the administrators involved the whole family in the sale of the property to the interested party. The grant was confirmed and issued however the remaining administrators have refused to hand over the portion to the interested party and should be compelled to do so.
 15. Witness 3 Boniface Mutua stated that his father was Raphael Mbee Mutua (deceased). His father had brothers namely Gideon Kathumo Muathe, Simon Mweu Muathe and James Makau Muathe. The four of them bought a plot No. 57 Tala Market. A portion measuring 20ft by 100ft was sold to the interested party at Kshs 700,000/- and that the same should be given to him as he had not been given vacant possession. The 2nd and 3rd administrators had rented it out to tenants.

Further Cross examination of the Interested Party Witnesses

16. On Cross Examination by Tamata Francis Mutwii Mweu stated that the plot was being claimed by 4 brothers Raphael Mbee Muathe, James Makau Muathe, Gideon Gathuma Muathe and Simon Mweu Muathe. John Muisyo a step brother was not entitled to the share of the plot. Simon Mweu an administrator who died in 2010 did not participate in the sale of the plot as he was already deceased. They all agreed to sell the plot to Antony Mwendwa. They met as a family and orally agreed to sell the plot. They are over 20 family members. The plot was sold for Kshs 700,000 and was not sure if all the amount had been paid out. He received a downpayment of Kshs 3000 leaving a balance of Kshs 12,050. The list from number 1-9 did not show identity card numbers and he could not vouch for those who did not sign the document. Mwanzia Kathumo did not sign the agreement. He could not tell if other family members were paid like him. He stated that there was a case filed in Milimani Court



sometime back by one of the beneficiaries Samuel Muathe who had purchased the property from the rest of the family in July 2012.

17. On Re-examination he reiterated that the family agreed to sell the property and share the proceeds. Previously the plot had been sold to Samuel Muathe for Kshs 400,000 but he paid Kshs 354,000. The four houses later decided to sell the property to someone else. Samuel Muathe was refunded Kshs 354,000 while the balance was shared amongst the family members. He was paid Kshs 15,000/-.
18. The confirmed grant was issued in June 2008 and the sale to the interested party took place long after the confirmation of the grant. None of the family members had brought claim of not being paid their dues. The two administrators have refused to give the plot to the interested party.
19. PW2 Boniface Mutua Mbee was recalled for cross examination where he stated that he was the son of Raphael Mbee. The four brothers were joint owners of Plot no. 57 Tala Market. He could not recall the seller of the plot, amounts involved and the amount his father contributed towards the purchase. He was not one of the administrators, he was aware of two Succession Causes involving the estate of Gedion Kathumo Muathe and James Makau Muathe. He had not instituted any Succession Cause over the estate of his late father. The deceased were brothers to his late father. He was pursuing his father's share in Plot 57 Tala Market and was aware that the interested party had purchased the plot. He had an interest in the plot as it was jointly owned by his late father. He received money from the interested party and signed the document. His brother and sister inlaw also received the money. He could not recall if his other siblings signed for the payments. Mwanzia, Mutwii Kithuka were present from the family of Gideon Muathe. He was present when Gedion Kathumo family members were being paid money although he could not tell the amounts.
20. He further stated that prior to the interested party coming in, the plot had been bought by Samuel Muathe and he was refunded by the interested party because he could not manage to pay a balance of Kshs 300,000. He maintained that all the 4 families had been represented. The interested party had cleared his payments.
21. On reexamination he stated that his father was Raphael Mbee who had 3 brothers Gideon Katumo, Simon Mweu and James Makau . he was not present when his father and his brothers bought the plot. The plot was developed and leased out, the monies were shared equally amongst the four brothers. The plot had earlier been sold to Samuel Muathe by the two administrators and they received Kshs 350,000 from him and on failure to pay the balance , the plot was sold to the interested party. The money was refunded to Samuel. Some family had many wives and children which created problems on sharing. It was the administrators who prepared the payment list and gave to the interested party. None of the family members raised issues over the payment. plot 57 Tala Market belonged to the interested party but was being frustrated by some administrators

Administrator's /Respondent's Case

22. Pw.1 Boniface Mwanzia Katumo stated that he comes from Tala he recorded his statement of 12/9/2022. He referred to the Plot 57 Tala which belonged to Gedion Kathumo and James Muathe. He was the administrator of Gedion Kathumo. He did not sell the plot and did not receive any money.
23. On cross – examination by Ms Kwamboka, he stated that Gedion Kathumo was his father. Samuel Dominic Muathe was from his family and they did not sell him any shamba. He saw the agreement.
24. Antony Mwendwa affidavit in reply of 20/1/2020 indicated in 2012 20ft by 100 ft plot Plot 57 Tala was sold at an agreed price of Kshs 700,000. He saw Anthony Mwendwa and did not know of what



happened later. He did not sell Samuel any shamba and there was no sale agreement. Plot 57 Tala has shops and are rented and they collect the rent.

25. Pw2 Francis Mutwii Muathe testified that he was a farmer and he had never testified in court before. He was not involved in the sale of the land plot 57 Tala. Plot 57 Tala belonged to Gedion Kathumo, James Makau, Simon Muathe their fathers. He did not sell the plot to anyone. They did not meet and sell the land at all. His father had 5 wives and they are a big family, if they were to sell any land, they would sit as a family and agree and administrators would have the agreement. Plot 57 Tala was never sold. The case was dismissed and the family of Gideon Kathumo and them would distribute the proceeds.
26. On cross examination he stated that Mwanzia Kathumo was his brother and he was a beneficiary. Plot 57 was for 3 families.

Written Submissions

Interested Party's Submissions Dated 22Nd February, 2024

27. The Interested party raised the issue for determination;-
 - i. Whether the interested party herein purchased the property from the legal representatives of the estate of the deceased?
28. The *Law of Succession Act* under Section 3 proffers an astute definition as to the meaning to the term "Free Property" it provides;

"free property" in relation to a deceased person, means 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.
29. It is not in dispute that the property plot no 57 measuring 40 by 100 belonged to the deceased. From the evidence led by both protestors and interested party and their respective witness only serve to show that indeed the interested party purchased a portion of the same measuring 20 by 100ft.
30. Reliance was made to the case of *Muriuki Hassan vs Rose Kanyua & 4 Others* on the position of interested parties in a succession case.
31. It is submitted that the beneficiaries to the estate particularly the protestor son to the late James Makau Muathe a direct beneficiary to the estate does not contest and/or challenge selling Plot No. 57 to the interested party herein.
32. It was finally prayed that the application be allowed to the extent that the interested party's interest in plot No. 57 be acknowledged and the administrators be directed to vest possession on the interested party and that they account for the rent they have been collecting.

Administrator's Submissions

33. The administrators submitted that the transaction that was conducted by the interested party in relation to the alleged purchase of the Plot 57 Tala Market did not involve family members and that all administrators were not involved in it thus the transaction is a nullity and no binding effect on them.
34. It is submitted that the said property Plot 57 is the asset of the estate and all beneficiaries have a say in it. The Applicant never sought the consent of all beneficiaries /administrators prior to entering the purchase agreements.



35. It is submitted that the Applicant has an option of mounting a suit against those who received the money in a civil suit and that he had failed to disclose that not all beneficiaries/ administrators agreed to his intention to purchase the subject plot
36. Reliance was made to the case of *Estate of Julius Ndubi Javan(deceased)* [2018] eKLR.
37. The court was urged to find that the application lacks merit and thus dismiss it with costs.

Determination

38. The Court is to determine the question/issue whether the interested party purchased the property plot 57 Tala Market from the administrators of the estates of deceased owners or not.
39. The interested party Anthony Mwendwa Nzuki claims a proprietary right over the suit property Plot 57- Tala Market registered in the names of the 4 brothers namely; Raphael Mbee Muathe, James Makau Muathe, Gideon Kathumo Muathe and Simon Mweu Muathe.
40. The interested party relied on the Sale Agreement between him and the beneficiaries, he also produced copy of receipt on monies paid to Samuel Dominic as allegedly refund of the sum he had paid for the Plot 57 Tala market and a Schedule of payment to the beneficiaries per house and family as instructed by the Administrators Simon Mweu Muathe, Henry Makau Muathe and Mwanzia Kathumo.
41. The interested party claimed that The 2nd Administrator Henry Makau Muathe approached him that they wished to sell the Plot and showed him a copy of the confirmed grant. The Plot was wholly developed with commercial property and had two doors. He told him that they were ready to sell 20ft by 100 ft which was half of the plot. He did a search and confirmed the records were correct. Later the 3rd Administrator joined in the negotiations
42. That they agreed on Kshs 700,000/- and the Administrators informed him that the portion had been sold to Samuel Muathe who owed them some balance. He contacted Samuel who intimated that he had no problem with the plot being sold to him as long as he was refunded his money. They then signed an agreement. The payment was made in batches , the first Kshs 354,000 being refund on behalf of the administrators and Kshs 346,000 paid to the administrators and relatives. The members signed a schedule. The members were Kathumo, Mbee Mweu and Makau. The administrators gave him a list and was paying them as per the sums apportioned. There are some beneficiaries who were yet to collect their share which is around Kshs 100,000. The Kathumo family did not turn up for the payment.
43. The Administrators on the other hand claimed that they did not sell the Plot 57 Tala Market to anyone and if at all the interested party had purchased the property, it was sold to him by fraudsters and he should therefore ask for a refund from them.
44. The Administrators also submitted that the interested cannot allege to have bought a property which belonged to the Estate from a section of beneficiaries and without the consent of all the beneficiaries.
45. Section 112 of the *Evidence Act*, Cap 80, which is categorical that in civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disproving that fact is upon the claimant. From the averments made in his application, coupled with the annexures thereto and the oral evidence on record, the interested party seems to have paid out monies to Samuel Mwendwa and some to the other beneficiaries whom are alleged parties to the sale agreement.
46. The Court finds that the Plot 57 Tala Market is a property of the estate of the deceased and/or live owners and had been distributed as per the Certificate of Confirmation of Grant the interested Party



was shown in aid of negotiations of sale of ½ of the said Plot 57 Tala Market. Therefore, based on distribution as per the said grant it was not a preserve of certain beneficiaries at the exclusion of others.

47. The interested party Antony has evidence to show that there was sale with members of owners families. There was a confirmation of grant which was shown to him. Whether ALL family members consented and/or knew of the intended sale the administrators or that the administrators were involved in the sale of the property is not clear from the evidence on record. There seems to have been a sale gathering from the oripr buyer who was refunded his part payment. The interested party by his own admission stated that he had not finished paying the purchase price and there are some family members who had not taken their share.
48. The Applicant/interested Party herein lays claim to Plot 57 Tala Market, not as an beneficiary of the estate of the deceased herein, but as Purchaser/Buyer by alleging that portions of that property was sold to him by the estate through administrators. The sales are contested by the Administrators which would mean the court has to decide a question of ownership of the said property as between the estate and the Applicant.
49. The alleged sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution & Section 13 of Environment & Land Act.
50. Secondly, the interested party/applicant is not a beneficiary nor dependant of the estate. Having held that the alleged sale of the property of the deceased was not properly done, the route of the interested party to be transferred half of the plot No 57 Tala market is not tenable as doing so will amount to legitimizing an illegality as there is already certificate of confirmation of grant that was not challenged by revocation of grant application. The only available remedy is to seek redress from receipts of funds paid. It is purely a civil claim recoverable by filing a suit seeking either specific performance of the contract or recovery of his purchase price if proved before Environment and Land Court.

Disposition

1. The Court is satisfied that the suit property Plot No. 57 Tala Market still belongs to the estate of Gedion Kathumo and James Makau.
2. The interested party's application is dismissed
3. Any claim to the title/ownership/use of land and/or any proprietary interest can be ventilated before Environment & Land Court.
4. The preservation of deceased's estate is maintained under Section 45 of LSA pending the outcome of hearing and determination of contested sale in ELC Court.
5. If matter not filed within 90 days/3 months the estate refunds to interested party Ksh 700,000/- or receipt of rent.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 25/7/2024 (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence of

No appearance for the Adminsitrators



No appearance for the Applicant
Mundia h/b Nzei for the Interested Party
Geoffrey/Patrick – Court assistant(s)

