



REPUBLIC OF KENYA



**Muutu & 2 others v Muutu & another; Mutiso & 18 others (Interested Parties)
(Succession Cause 199 of 2008) [2023] KEHC 1801 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 199 OF 2008**

MW MUIGAI, J

MARCH 2, 2023

BETWEEN

MATHEW MUTINDA MUUTU 1ST BENEFICIARY

JULIUS KAROKI MUUTU 2ND BENEFICIARY

SOLOMON KISOO MUUTU 3RD BENEFICIARY

AND

SAMMY MWANZA MUUTU 1ST ADMINISTRATOR

HENRY MUTISYA MUUTU 2ND ADMINISTRATOR

AND

DAVID MULWA MUTISO & 18 OTHERS INTERESTED PARTY

RULING

1. The matter herein relates to the estate of Simeon Muutu Mutisya who died intestate on October 3, 2004. A grant of letters of administration intestate was issued on January 21, 2011 to Mwanzia Muutu and Henry Mutisya Muutu. The grant was revoked on June 13, 2013. Court dismissed the grant of letters of administration for want of prosecution on July 10, 2015.
2. On 23rd of June 2017, the court issued orders directing that all parcels of suit property Donyo Sabuk Komarock /18268 in the name of Simeon Muutu Mutisya (Deceased) and/or resultant 46 subdivision portions shall revert back to the deceased Simeon Muutu Mutisya and that the order be served upon the Land Registrar Machakos.



Affidavit of Protest

3. A joint affidavit of protest was filed vide Certificate of urgency was filed on July 15, 2022 by David Mulwa Mutuso, James Angeko Maina Kahia, Margaret Nyokabi Ngungu, Joseph Maina Ngatia, Joseph Mviva Kilonzi, Patrick Mbogo, Peter Ndirangu Kahia, Peter Mwangi Kiuna, Stephen Kahira Kawira, Simon N. Nganga, Rose Mumbua Kitaka, George Nderu Ndirangu, Elishipa Watheri Murei, Edith Nyawira Muriu, Rosemary Wamuyu Muriithi, Purity Njambi Matu, James Victor Kariuki Kahura And Selestina Ngondu Wafula deponed on June 15, 2022 but was not signed by Joseph Mviva Kilonzi, Rose Mumbua Kitaka and Edith Nyawira Muriu. It is also not clear where the signature is between Stephen Kahira Kawira And Simon N. Nganga.
4. They deponed that they had beneficial interest in the subject property as between the year 2012 and March 2012, the administrators of the estate sold them parcels of land upon subdivision of the original parcel number Donyo/Sabuk Komarock/18268 (Hereinafter referred to as ‘the suit property’). They contend upon undertaking due diligence, they confirmed that the land was indeed registered in his name, he showed them the grant to confirm they were administrators of their late father’s estate and they proceeded to purchase their plots which they have been in possession of.
5. They opined that some of them had been issued with titles and have extensively developed their plots in the knowledge of the objectors and without any complaint from them. They said they had lived on the suit land for 5 years peacefully and were surprised by the turn of events. It was opined that the objectors and petitioners were engaged in sibling rivalry to their detriment as they are bonafide purchasers without notice from the foregoing. It was contended that given the massive developments and costs involved, the estate will not be able to compensate them taking into consideration that all the development took place in their knowledge of all beneficiaries who never raised a finger in protest until now.
6. I have noted that there is an authority to swear affidavit filed on July 15, 2022 but there is no list attached to it.

Responses

1st & 2nd respondent replying affidavit

7. The 1st and 2nd respondents filed a replying affidavit deponed on September 26, 2022 by Solomon Kisoo Muutu on behalf of the 1st Respondent and on his own behalf in which he contended that the interested parties were intermeddlers and were all along aware that the suit property was under succession and a confirmed grant had never been issued and cannot claim to be bonafide purchasers for value. He opined that the interested parties were out to disenfranchise the other nine (9) lawful beneficiaries of the estate by purporting to have dealt with the 1st Petitioner who all along had no authority to deal with the property of the deceased in the manner that he purported to have dealt with it.
8. It was stated that of the interested parties conducted due diligence they would have easily established that by the time they purchased the suit property, the letters of administration issued to the 1st and 2nd Petitioners were subject to revocation and were subsequently revoked on June 13, 2013. A search at the lands office in Machakos would have shown that the suit property was in the name of the deceased and not in the name of the Petitioners as claimed and it is only in 2016 when the 1st Petitioner after engaging in an unprecedented scheme of fraud transferred the deceased’s property into his name in an attempt to disinherit the other nine beneficiaries and purported to transfer the same to the interested parties.



9. It was deponed that the interested parties were aware that the 1st Petitioner did not have an interest in the deceased's property capable of being transferred to third parties and still went ahead to purchase the suit property. It was opined that the 1st Petitioner is a thief who acquires no interest or right transferable in stolen property.
10. The 2nd respondent contended that the title deeds attached by the Interested Parties were issued between 2017 and 2021 long after the deceased had passed away and the letters of administration had been revoked without a confirmed grant. Further, that the advocates on record for the 1st Petitioner in the summons application dated April 13, 2022 that led to the cancellation of titles that emanated from the subdivision were his late father's advocates and are on record for the Interested Parties which he terms as an absolute absurdity. He stated that the advocates were conflicted.
11. He deponed that on May 27, 2022 the summons dated April 13, 2017 came up for directions but the court was not sitting and the advocate acting for the interested party and the 1st petitioner fixed the matter for mention on June 23, 2022. On the said date, the firm failed to prosecute the application and failed to avail the 1st Petitioner to explain to the court how he was able to deal with the deceased in getting the land control board consent, execution of the transfer forms and effecting transfer into his name without a confirmed grant or an order from this honourable court.
12. The 2nd Respondent stated that it is clear that the deceased himself applied for the consent to transfer on October 24, 2012, attended the Land Control Board on the same date and was given consent on the same day. Further, that when lodging the transfer forms on February 22, 2016 for registration, the 1st petitioner used a picture of the 2nd petitioner as that of the deceased in a well calculated scheme to deny the other beneficiaries from benefitting from the estate of the deceased.
13. The identification number on the transfer form is not that of the deceased. He opined that the remedy of the interested parties lay in filing a suit at the Environment and Land Court against the specific individuals who purported to sell the deceased property to them without a confirmed grant or an order from the Honorable Court. furthermore, that they are strangers and intermeddlers to the deceased's estate who were fully aware of what they were getting themselves into and decided to take the risk.
14. It was opined that the authority to swear affidavit had 18 names but had only been signed by 13 interested parties. The Court was thus urged to dismiss the Summons with costs as it was incompetent, an abuse of the court process and lacked merit.

2nd Petitioners/ Respondents Replying Affidavit

15. The replying affidavit was deponed on 29.10.22 by Henry Mutisya Muutu in which he stated that the 1st Petitioner was his brother and that the grant of letters of Administration issued to them was revoked by the honourable court June 12, 2013. He deponed that he was not involved in getting the other beneficiaries to sign the relevant court documents as the elder brother had taken charge of preparation of court documents and facilitating the court process. He was aware that the court ordered them not to waste the estate and to render a just and true account of the deceased's estate and the 1st Respondent had not done so as the mastermind of the Petition herein.
16. He deponed that on March 3, 2016 the 1st respondent proceeded to fraudulently transfer the suit property into his name and subdivided it into a number of plots at which time the property was that of the deceased. Being aggrieved by the conduct and intermeddling with the deceased's estate, he lodged a complaint and the 1st Petitioner was charged in Machakos Chief Magistrate Criminal Case No. E066 of 2022. He said he was shocked to learn that the 1st Petitioner had lodged a transfer form on February 22, 2016 with his picture and the Identity card number used does not belong to him nor the deceased.



He said he is aware that the actions of the 1st Petitioner are pure fraud and a scheme to deny him and other beneficiaries from getting a share of the deceased's estate.

17. It was deponed that the Interested Parties were not known to the estate and solely dealt with the 1st Petitioner. He said the 1st petitioner was able to perpetuate the fraud as he lived on a portion of the property whereas the other beneficiaries live far away. He contended that the Interested Parties knew the property was under succession and cannot purport to be in the dark about the status of the property and they should follow up with the 1st Petitioner regarding the purported purchases. He said it is true that the 1st petitioner engaged in fraud and even forged the signature of the deceased. The court was urged to uphold its orders issued on 27.06.2022 and dismiss the Summons with no orders as to costs.

20TH Interested Party's Replying Affidavit

18. PCEA Kware Faith Church (hereinafter referred to as 'the church') filed a replying affidavit dated December 8, 2022 sworn by Elizabeth Wangui Mugambi, an elder in support of the Summons in which she deponed that in 2010 they were looking for property to establish a new church and came across the property known as Donyo Sabuk/komarock Block 1/203 that was on offer for sale by Sammy Mwanzia Muutu.
19. They conducted an official search and established that the land was freehold with no encumbrances and in the name of the vendor Sammy Mwanzia Muutu. They entered into a sale agreement with the vendor at a purchase price of Kshs 500,000 and they are the ones who catered for the costs of drafting the sale agreement. They paid Kshs 200,00 purchase deposit *vide* sale agreements dated March 22, 2010, April 16, 2010 and July 31, 2010.
20. She deponed that via sale agreement dated August 3, 2010 they complied with clause 5 by paying the full purchase price and all payments were acknowledged by the vendor with the last instalment of purchase paid on December 17, 2021. She contended that the court order issued on June 23, 2022 was unfair in the circumstances as at the time of purchase of the property known as Donyo Sabuk/komarock Block 1/203 in 2010, the land was freehold and without any encumbrances and in the name of Sammy Mwanzia Muutu.
21. She contended that another parcel of land known as Donyo Sabuk/komarock Block 1/64365 was transferred to The Presybyterian Foundation which is an establishment under the church and was sold and transferred by Sammy Mwanzia Muutua who had the title deed in his name at the time of transfer. She opined that the Respondents were dishonest having benefited from the sale proceeds and now want as second bite of the cherry. She stated that the church should not be condemned unheard as they were not notified of any proceedings leading to the orders of June 23, 2022.
22. She stated that it had been 11 years since the sake was closed and the move by the respondent's was an afterthought that should not be condoned as they have never lodged any complaint. She contended that the interested parties are bonafide purchasers for value without notice, obtained title deeds, have resided on the property for eleven years, have developed it and as such revoking the titles will be a substantial injustice.
23. It was deponed that the vendor received the monies and acknowledged the entire purchase price and cannot therefore claim to repossess the said property for a redistribution under the doctrine of equity unless they refund the monies at prevailing market price of the suit land. The court was urged to set aside its orders issued on June 23, 2022 to allow the Interested parties to ventilate on the matter so as to avert miscarriage of justice as they are bonafide purchasers for value without notice.
24. The 1st Petitioner did not participate in these proceedings.



25. By consent parties agreed to dispose of the matter by way of written submissions.
26. The 1st,2nd,3rd,4th,5th,6th,7th,8th,9th, 10th, 11th, 12th, 13th, 14th, 15th,16th, 17th, 18th,19th interested parties as well as the 1st Petitioner had no submissions on record at the time of writing this ruling.

1st & 2nd Respondents Written Submissions

27. They filed submissions dated October 21, 2022 in which he reiterated the contents of its replying affidavit and submitted on two issues. As to whether the 1st petitioner/ respondent has any interest in the suit property capable of being transferred, while relying on section 55 (1) and 82 of the Law of Succession Act (hereinafter referred to as ‘the Act’), it was submitted that at the time of the purported purchases by the interested Parties, the grant of letters of administration had been revoked and there was no confirmed grant. The 1st Petitioner had no interest in the suit property capable of being transferred, the action was pure fraud geared towards denying his siblings a share of the estate based on the following;
 - a. Grant of letters of administration issued to the petitioners had been revoked.
 - b. Revocation was done due to the fact that other beneficiaries never signed the consent when seeking grant for letters of administration.
 - c. The grant had not been confirmed.
 - d. The suit property had all along been the property of the deceased.
 - e. The 1st petitioner/respondent knowing very well that the grant of letters of administration had been revoked and without any authority from this court transferred the suit property into his name using unscrupulous means and later purported to transfer the same into the names of the interested parties.
 - f. The 1st petitioner/ respondent purported to have transacted with the deceased when transferring the suit property into his name.
28. It was submitted that as a result, the 1st petitioner was charged in Machakos Chief Magistrate Criminal Case No. E066 of 2022. In addition, while referring to section 45 of the Act, that the actions of the 1st petitioner amounted to intermeddling with the deceased’s estate and the court rightfully corrected the fraudulent actions by reverting the title in the name of the deceased. Reliance was placed on the case of Munyasya Mulili & 3 others v Sammy Muteti Mulili [2017] e KLR
29. Secondly was the issue of whether the interested parties were innocent purchasers for value without notice. While relying on section 93 (1) of the Succession Act and section 26 (1) of the Land Registration Act, it was submitted that it is clear that the interested parties did not buy from the deceased when he was alive, they bought for one of the Petitioners who is said to have shown them the grant, they were fully aware that the suit property was the property of the deceased and was under succession, they undertook due diligence before purchasing their plots in 2012 and 2013 and established that the suit property was registered in the name of one of the petitioner’s before they purchased their plots , they were dealing directly with one of the Petitioners who ended up selling the plots to them and lastly that the grant had not been issued.
30. It was submitted that the Interested parties could thus not claim to be innocent purchasers for value without notice as they were fully aware of the property they were purchasing and cannot be accorded protection under section 93 (1) of the Succession Act and section 26 (1) of the Land Registration Act as they are intermeddlers and trespassers to the suit property. Reliance was placed n the cases of Michael



Muchoki Njeri vs Stellamaris Ndunge Masila & 6 others [2017] e KLR, Re estate of Charles Meaniki Kamara (deceased) [2021] eKLR, Munyasya Mulili (supra), Re estate of the late Alphonce Wambua Ndivo [2019] e KLR.

20TH Interested Party's Submissions

31. Submissions were filed on December 16, 2022 reiterating the averments in its replying affidavit and further submitting while relying on section 93(1) of the Act and article 40 of the Constitution that the right to property is guaranteed and cannot be deprived on flimsy grounds. It was contended that a disagreement between the beneficiaries should not be a ground to revoke titles held by the interested parties.
32. It was submitted that the applicant failed to prove that the interested party was aware of any fraudulent dealings on the part of the respondents, if any, in relation to the suit land. Reliance was placed on the case of Shimoni Resort v Registrar of Titles & 5 others [2016] e KLR, Charles Karethe Kiarie & 2 others v Administrators of the Estate of John Wallace Muthare (deceased) & 5 others [2013] e KLR, Zebak Limited v Nadem Enterprises [2016] e KLR.
33. It was submitted that under section 26(1) of the Land Registration Act, 2012 the title is *prima facie* evidence that the person named as the proprietor of the land is the absolute and indefeasible owner and such title can only be challenged on the ground of fraud, misinterpretation or if proven that the title had been acquired illegally, procedurally or through a corrupt scheme. It was contended that they relied on the searches conducted which depicted Sammy Mwanzia Muutu as the owner. It was urged that the court exercise its powers under section 73 of the Probate and Administration Rules.

Determination

34. I have considered the Affidavit of protest, the responses thereto and the submissions of parties. I have also considered the court record. There are a number of issues that stand out, inter alia that the order dismissing the grant of letters of administration for want of prosecution on July 10, 2015 has never been set aside and or reviewed.
35. By ruling of 18 /12/2018, the trial court Hon D.K.Kemei J held that since the grant was revoked on June 13, 2013, there has been no application to have fresh letters of administration intestate issued. The court lacked jurisdiction to process the matter in Court.
36. This Court took over the matter, and on 17/2/2022, the court was moved by an application to reinstate the matter. This court granted orders *vide* application of 22/10/2021 reinstating the suit/matter and interim maintenance of *status quo* over Donyo Sabuk/Komarock Block 203 & Donyo Sabuk/Komarock block 1/1/18268 changed to new numbers Donyo Sabuk 64348-64388 stay for 30 days.

On 23/6/2022, counsel for applicants was in court and Counsel for 1st Respondent. They informed the court that suit property Donyo Sabuk Komarock/18268 as per the Search/Greencard was in the name of the deceased as at 22/10/2012. The deceased died in 2004 there is no grant nor confirmed grant. There can be no transmission, sale or transfer of deceased's property without a grant and confirmed grant in place. The Respondent administrators were served but failed to attend Court, be represented, file any documents and/or proceed to gazette the petition and obtain a grant if there is no objection and in 6 months thereafter file summons for confirmation of grant.

This court then ordered that the suit property Donyo Sabuk reverts back to the deceased's name and the order be served to the Land Registrar. There is the court order of 27/6/2022.



This is the genesis of the instant application of 15/7/2022 coined Joint Affidavit of Protest mainly by purchasers who allege to be bona fide purchasers for value without notice of defective title and have settled and/or developed the land.

Similarly, certificate of urgency filed on 15/7/2022 seeking review of court orders of 23/6/2022.

In this case the question arises twofold, whether the protest is properly before the court and whether this court has jurisdiction to handle land disputes.

37. It is evident that since there is no grant of letters of administration in this matter and there is no confirmed grant on record. A protest is filed against summons for confirmation of grant and where the grant is confirmed a revocation or annulment of grant is filed. In this matter, then the protest is not founded on any document. It has no legs, it is floating in the air.
38. I note that the court had addressed its mind to the issue of the orders of July 10, 2015 in its ruling dated December 18, 2018 and counsel for all the interested parties still proceeded to bring the same issue before the same court.
39. The law provides for various procedures on how to deal with different issues that may arise including the procedure for setting aside or reviewing an order even in Succession matters. It is sad that all the interested parties were misadvised and now appear before the court with a cause of action drafted procedurally. Consequently, the court cannot determine what is not founded in law.
40. Secondly, after careful perusal of the matters raised before the court, the next issue is whether this court can deal with issues appertaining land possession, occupation, title, purchase and/or ownership et al. Article 162 (2) (3) of the Constitution is a proviso on the court that has jurisdiction to deal with land disputes is the Environment & Land Court.

Article 165(5) of the Constitution provides that the High Court shall not have any jurisdiction over the matters that fall under Article 162(2) of the Constitution.

Section 13 of the Environment and Land Court Act, No. 19 of 2011 spells out the Courts jurisdiction section 2 and 101 of the Land Registration Act

41. Justice Musyoka in the case of Mariam Mathias Mwasi v Rama Adam [2020] eKLR where it was stated that ;

the Constitution limits the jurisdiction of the High Court only over land matters, it does not limit that of the subordinate courts. The Environment and Land Court is a creature of statute, and it exercises jurisdiction conferred upon it by the Constitution and various statutes that govern land matters.

42. The Law of Succession Act in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

43. Rule 41(3) of the Probate and Administration Rules provides that:-

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to



confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the [Civil Procedure Rules](#) and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

44. This Court exercises jurisdiction in application of the [Law of Succession Act](#) in administration and distribution of the deceased’s estate and confers beneficial interest to the beneficiaries of the estate and not proprietary interest to 3rd Parties/Purchasers.
45. From the Court record the family of the deceased through Administrators filed Petition for Grant of Letters of Administration intestate in 2008. A grant was issued on 4/4/2011 to Mwanzia Muutu and Henry Mutisya Muutu. Caveats were placed by Julius Kaloki Mutisya on 24/10/2012 and an Objection was filed to the grant issued on 12/6/2013 the grant was revoked by Hon B.T. Jaden LJ.
46. Since then, the estate of the deceased was left to waste some beneficiaries acted as Administrators and sold over 500 Plots between 1996 -1999 subdivided land sold 3rd parties got titles, settled and developed the purchased land.
47. The sale /transfer/subdivision was/is illegal, irregular and unlawful as it is contrary to section 45 [LSA](#) intermeddling with deceased’s estate and section 55 & & 71 [LSA](#).

Section 55 [LSA](#)- No distribution of capital before confirmation of grant

- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

section 71 [LSA](#)

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares

48. To protect and safeguard the estate of the deceased this Court in the absence of a grant and confirmed grant could not/cannot leave the estate to waste and hence ordered all property registered in the deceased’s name at the time of his demise reverts back to his name unless and until, in this Court beneficiaries through selection of Administrators or this Court appoints Administrators of the estate obtain a grant of letters of administration and within 6 months file Summons for confirmation of grant and regularize the sale of land to 3rd Parties before beneficiaries get their beneficial interest or move to ELC Court to determine the proprietary interest of 3rd Parties/Purchasers of the asset(s) that comprise of deceased’s estate.

Disposition

1. The application of 15/7/2022 is not granted to review court orders of 23/6/2022 in order to protect the estate of the deceased.
2. The beneficiaries shall select or the Court appoint Administrators of the estate of the deceased and they shall obtain a grant in the normal legal process



3. Within 6 months they shall file Summons for Confirmation of Grant in compliance with section 71 [LSA](#)
4. Alternatively, the 3rd parties/purchasers may move to ELC Court for preservation and determination of their claim/interest in the suit property that comprises of deceased's estate.
5. Status quo is maintained for 90 days to allow parties take necessary action
6. Each Party to bear own costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2ND MARCH 2023.
(VIRTUAL & PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

