



REPUBLIC OF KENYA



**In re Estate Henry Medosi Masake (Deceased) (Succession Cause  
258 of 2014) [2023] KEHC 23908 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 258 OF 2014  
DK KEMEL, J  
OCTOBER 19, 2023**

**BETWEEN**

**WASHINGTON OSAIRI MASAKE ..... 1<sup>ST</sup> PETITIONER**

**BENARD MASAKE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PATRICK CHEMOBO CHESEBE ..... RESPONDENT**

**RULING**

1. The petitioner/applicants herein filed an application dated 13.1.2013 pursuant to rule 47 of the [Law of Succession Act](#) seeking the following reliefs: -
  - a. Spent.
  - b. That this honourable court be pleased to cancel the Title Deed issued to Patrick Chemobo Chesebe on 10.1.2017 in respect of land parcel No. N. Malakisi/ W. Sasuri/1690.
  - c. That upon grant of prayer (b) hereinabove, the Title Deed do revert to Henry Medosi Masake(deceased).
  - d. That the costs of the Application be provided for.
2. The application is supported by the grounds set out on the face thereof and by the affidavit of Benard Masake, the 2<sup>nd</sup> Petitioner sworn on even date on his behalf and on behalf of the 1<sup>st</sup> Petitioner. The Petitioner's gravamen is inter alia; that the deceased herein Henry Medosi Masake was the registered owner of land parcel No. N. Malakisi/ W. Sasuri/1690 prior to his demise; that the deceased died on 1.4.2010; that the Respondent herein illegally and unlawfully caused parcel number N. Malakisi/ W. Sasuri/1690 to be transferred to his name without following the due process; that the petitioners have finally been issued with a grant of letters of administration intestate and they now wish to proceed with confirmation thereof; that the transfer of the said property to the name of the Respondent was not only



- illegal but fraudulent; that the act of transferring the said land without valid succession proceedings amounts to intermeddling with the property of the estate of the deceased; that it is in the interest of justice that the registration of Patrick Chemobo Chesebe as the proprietor of land parcel N. Malakisi/ W. Sasuri/1690 be cancelled so that the same reverts to the name of the deceased Henry Medosi Masake.
3. The Respondent strongly opposed the application vide his replying affidavit sworn on 30.7.2023 wherein he averred inter alia; that the application is incompetent and has been brought after an inordinate and unreasonable delay; that the petitioners have failed to disclose material facts hence the application amounts to misrepresentation of facts; that a land title deed can only be cancelled by an order if the court gives the parties an opportunity to present their evidence; that he obtained his title deed upon purchasing the land from one Ronald Masake Isaya who is a son to the deceased in 2011 as per a sale agreement annexed to his affidavit; that he has extensively developed the land and permanently settled his family as well as running a hotel thereon ; that he has been in possession quietly, peacefully and/or notoriously for a period of over 12 years and is thus entitled to the land; that he stands prejudiced if the orders sought are granted; that all the beneficiaries acknowledge his interest in the estate and that in the event the court decides otherwise, then he should be allowed to remain in possession of the land as he awaits to get a fresh title.
  4. The application was canvassed by way of written submissions. Both parties duly complied.
  5. Mr Murunga, learned counsel for the Petitioners, raised one issue namely whether the Respondent acquired a good title in respect of LR. No. N. Malakisi/ W. Sasuri/1690. It was submitted that the answer to the issue is negative due to several reasons inter alia; that the deceased prior to his demise was the proprietor of the suit property; that the deceased died on 1.4.2010 yet the respondent was registered on 10.1.2017; that the respondent is not an administrator of the estate; that the transfer of the suit land into the name of the respondent was not only illegal, irregular but fraudulent and hence the title should be cancelled so as to revert back to the deceased Henry Medosi Masake to pave way for distribution.
  6. Mr Were, learned Counsel for the Respondent, submitted that this court lacks jurisdiction to hear and determined the dispute as the property is currently not registered in the name of the deceased at the moment and hence not part of his estate in these proceedings and thus he is a stranger. It was also submitted that the petitioners' approach is not proper as they ought to have filed the suit in the Environment and Land Court so as to prove the allegations of fraud. Learned counsel further submitted that the Respondent is in open, quiet and notorious possession of the land for over 12 years and has developed the same with the full knowledge of the petitioners. Finally, it was submitted that the petitioners have deliberately decided not to approach the ELC on the ground that they will be met with the issue of limitation of actions.
  7. I have given due consideration to the rival affidavits and submissions. It is not in dispute that the suit property number N. Malakisi/ W. Sasuri/ 1690 had been registered in the name of the deceased prior to his demise on 1.4.2010. It is also not in dispute that the Respondent herein purchased the suit property from one of the sons of the deceased on 1.8.2011 and that he has since caused himself to be registered as proprietor in 2017. It is not in dispute that the estate of the deceased which comprises several assets is yet to be a distributed as there is a pending summons for confirmation of grant plus a protest which are awaiting determination. That being the position, I find the only issue for determination is whether application has merit.
  8. Pursuant to section 82 (b) (11) of the *Law of Succession Act*, it is provided that no immovable property of a deceased person shall be sold before confirmation of grant. Hence, any sale and transfer of land belonging to the estate of the deceased amounts to intermeddling with such an estate and is a punishable offence under section 45 of the said Act. It is instructive that the grant herein is yet to be



confirmed and as such, any dealing with the property of the deceased before confirmation is frowned upon by the Law of Succession. From the averments of the Respondent, he does not dispute the fact that he got into the scene in 2011 after the deceased had passed on. It was thus necessary that he ensured that he enters into the sale transactions after the confirmation of grant. Since he did not do so, i find his actions and those of the sellers to amount to intermeddling with the estates of the deceased herein. In the case of *Munyasia Mulili & 3 others -VS Sammy Muteti Mulili* ( 2017) eKLR the court held as follows:-

“ .... No immovable property shall be sold before confirmation of grant. Any such distribution of the deceased’s properties before confirmation of grant whether by way of registration of title or sale is thus liable to revocation pursuant to the powers granted to this court by section 47 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules*”.

From the foregoing, it is clear that all the assets of the deceased should be dealt with only upon confirmation of grant. The schedule of distribution prepared by the petitioners vide their summons for confirmation of grant indicates that all the assets of the deceased including the suit property have been listed for distribution among the beneficiaries. Even though the Respondent has urged me to find that the dispute should be in the Environment and Land Court by dint of article 162 (2) (b) of *the Constitution*, i find that none of the parties have filed a suit in that court so as to persuade this court to isolate the property to await a determination thereon by the ELC. Further, and as noted above, this court has the requisite jurisdiction to entertain the matter and make orders as appropriate as regards the estate of the deceased. In fact, the Respondent is still at liberty to participate during the confirmation of grant and protest hearing and to agitate his interest if any. He does not have to solely rely on the ELC Court for redress. That being the position, i am inclined to reject the Respondent’s contention that this court lacks jurisdiction. As a probate court, it has jurisdiction to determine all matters affecting properties of deceased persons. In the case of *Re Estate of Alice Mumbua Mutua (deceased)* (2017) eKLR the court held as follows:-

“.....The *law of Succession Act* and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets”.

As the estate of the deceased is yet to be distributed and since the Respondent acquired the suit property without the grant being confirmed , it is my considered view that all the assets of the deceased must be distributed amongst the beneficiaries and any person seeking a beneficial interest . The Respondent has the right to participate in the confirmation proceedings if he has any interest in the property of the deceased. I find that the proper course of action is to have the title in possession of the respondent cancelled and to revert in the name of the deceased for distribution together with other assets. No prejudice will be suffered by the Respondent as he has recourse against the concerned beneficiary or he can contest the confirmation proceedings and present his interest, if any. He also has a right to move to the ELC and sue the estate or the concerned beneficiary for redress.

9. In view of the foregoing observations, i find merit in the Petitioners’ application dated 13.1.2023. The same is allowed in the following terms: -



1. The Title Deed issued to Patrick Chemobo Chesebe on 10.1.2017 in respect of Land Parcel Number N. Malakisi/ W. Sasuri/ 1690 be and is hereby cancelled and that the same do revert in the name of the deceased Henry Medosi Masake.
2. The County Land Registrar Bungoma is hereby ordered to execute the order herein forthwith.
3. The summons for confirmation of grant dated 14.11.2022 and the Protest dated 6.4.2023 are hereby fixed for directions on the 13.11.2023.
4. The Respondent herein be at liberty to file responses to the summons for confirmation of grant or protest if need be within 14 days from the date hereof.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**D. KEMEI**

**JUDGE**

In the presence: -

Murunga for Petitioners

Wanyonyi for Were for Respondent

