



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. KEMEI - J

SUCCESSION CAUSE NO.205 OF 1996

THE MATTER OF THE ESTATE OF GEORGE MUKUNZU NDILI (DECEASED)

BERNARD WAMBUA MUKUNZU.....ADMINISTRATOR/RESPONDENT

DORCAS MUTONO MUKUNZU.....ADMINISTRATOR/RESPONDENT

EMMAH NZULA MUKUNZU.....ADMINISTRATOR/RESPONDENT

VERSUS

ANNAH MUSILI MUTUKU.....APPLICANT/INTENDED INTERESTED PARTY

VICTOR MUTINDA MUSOMI.....APPLICANT/INTENDED INTERESTED PARTY

THOMAS OSEA CHANGAMU.....APPLICANT/INTENDED INTERESTED PARTY

SABINA MUENI CHARLES.....APPLICANT/INTENDED INTERESTED PARTY

BENECLIFF MUTHIANI.....APPLICANT/INTENDED INTERESTED PARTY

MARCO OBITA.....APPLICANT/INTENDED INTERESTED PARTY

RULING

1. The intended interested parties claim that they purchased various acreage out of the land reference **Mavoko Town Block 3/3180** (the suit land) from Dorcas Mutono. It was averred that the 3rd intended interested party purchased 12 acres in 2007; that the 4th intended interested party purchased 1 acre in 2006; that that the 5th interested party purchased 6 acres in 2007 and that the 6th interested party purchased 6 acres in 2006.
2. The various interested parties averred that they had been in occupation since purchase of the respective acreage on the suit land hence the confirmation of grant of the estate of the deceased ought to be stayed. They also prayed that they be joined as interested parties to the instant matter and that the consent order entered on 19.7.2018 be reviewed and or set aside.
3. The administrators of the estate of the deceased opposed the applications on the grounds that the suit property at the time of the sale was in the names of the deceased hence any sale of the same was illegal. It was averred that the interested parties were not in lawful possession of the suit property. The applicants were urged to air their grievances in the Environment and Land Court.
4. On record is a preliminary objection dated 8.10.2019 filed by counsel for the 2nd administrator that challenged the jurisdiction of this court to handle the applications that touch on the sale, purchase and use of the land. The court was urged to dismiss the applications.
5. The parties agreed that the applications and preliminary objection be canvassed vide written submissions. Learned counsel for 3rd to 6th intended interested parties submitted that the interest of the purchasers ought to be taken into account hence sought to invoke section 93(1) of the Law of Succession Act.
6. Learned Counsels for the 2nd and 3rd respondents pointed out to the court that there is in existence **Machakos ELC Cases 215 of 2016, 216 of 2015, 80 of 2019 and 81 of 2019** that are pending against her in the Machakos ELC court. They submitted that the applicants had no

locus to file the protest and that their interests could be catered for in the ELC court. They urged the court to dismiss the applications and uphold the preliminary objection.

7. I am faced with two competing claims, that of persons claiming purchasers' interest, and that of the administrators of the estate of the deceased. The intended interested parties want this court to determine their status to the estate as they have alleged that they wish to be entertained by this court having been referred here by the ELC court vide the various suits they lodged against the 2nd administrator.

8. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated **In Re Estate of G K K (Deceased) [2017] eKLR** that:

“The primary function of a probate court is distribution of the estate of a dead person.”

9. It is the respondent's view that since the claims by the interested parties are that of alleged purchasers and not dependents; they are not beneficiaries of the estate of the deceased and their claims should not be tried in a succession cause. The estate of the deceased vide the replying affidavits has denied entering into any transaction with the 3rd to 6th interested parties. Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** held that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

10. It has been intimated to this court that there is pending litigation in the ELC court against the 2nd administrator. The applicants maintain that it is in the interest of justice that confirmation be stayed pending the determination of ownership of the suit property in the ELC court but that the confirmation in respect of the rest of the property of the deceased that is not the subject of this suit can be allowed to proceed.

11. The preliminary objection by the 2nd administrator dated 8.10.2019 is to the effect that the applications by the interested parties are not justiciable before a succession court but in a separate claim. Despite the directions taken by the parties herein over the disposal of the matters herein, I find on further reflection that I should dispose of the preliminary objection first before delving into the interested parties' application since the same has raised a germane issue namely the court's lack of jurisdiction to handle the dispute brought by the interested parties. This will determine whether or not the pending applications will require to be determined. I need to establish whether the preliminary objection aforesaid raises pure points of law and can help dispose the suit at this stage.

12. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners of Motor Vessel “Lilian S” v Caltex Oil (K) Ltd [1989] KLR 1** that:-

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

13. The pleadings before the court in respect of the applications dated 24.9.2019 and 7.10.2019, are to the effect that the interested parties purchased acreage out of the suit property and continued in occupation of the same since purchase that was said to have occurred in 2006 and 2007. They have attached copies of sale agreements as proof of ownership of the disputed portions of land. They have also pointed out that the ELC court has referred them to this court for redress. The respondents on their part have vehemently denied the claims and maintain that the alleged sale was done between the interested parties and the 2nd administrator who was a beneficiary and had no locus standi to purport to sell property belonging to the deceased. This definitely calls for the parties to present their rival facts for determination by the court and thus the objection seems not to raise pure points of law. In the case of **Mukisa Biscuit Manufacturing Co. Ltd-Vs- West End Distributors (1969) EA 696** it was held as follows;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

It is thus clear that in order for this court to establish whether it has jurisdiction to handle the issue brought by the interested parties it must receive the rival facts from them. If that is the position, then the preliminary objection is not on pure points of law. The issues for determination then will be whether the 2nd administrator had capacity to enter into a sale transaction with the interested parties over the assets of the deceased and whether the interested parties' claim onto the property is legitimate. The parties thus must be given an opportunity to canvass the applications dated 24.9.2019 and 7.10.2019.

14. As pointed out above, the preliminary objection has not raised pure points of law; instead there are matters of fact that can be elicited from the applications on record to which there is evidence attached that shall adequately enable this court to make a decision on their merits. They should now be allowed to proceed to canvass the pending applications.

15. In the result the preliminary objection dated 22.10.2019 lacks merit. The same is dismissed with no order as to costs. Parties are now directed to wrap up their submissions on the two applications dated 24.9.2019 and 7.10.2019 before a ruling is reserved.

It is so ordered.

Dated and delivered at Machakos this 10th day of February, 2021.

D. K. Kemei

Judge