



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO 146 OF 2010

IN THE MATTER OF THE ESTATE OF JONATHAN NGEWA KITOLO (DECEASED)

FREDRICK KIMEU NGEWA.....APPLICANT/ADMINISTRATOR

VERSUS

ATTANUS MUTUKU NDAVI.....PROTESTOR

RULING

1. The Petitioner herein **Fredrick Kimeu Ngewa** filed summons for confirmation of grant dated 16/08/2018. In support of the said summons is an Affidavit of the Petitioner as well as copies of official searches regarding the deceased's properties and a Surveyor's report regarding the proposed distribution of the Estate.
2. The protester herein filed an affidavit of protest sworn on 19/10/2018 wherein he deposed that he had purchased two (2) acres out of **Land Parcel Masii/Kithangaini/353** from a son of the deceased who is a beneficiary named **Benjamin Kasia Ngewa** on 5/02/2000 upon payment of Kshs. 60,000/-. It was further deposed that the said beneficiary and the deceased herein died before transferring ownership to him. He further added that he had filed a citation in which he cited the beneficiaries of the estate of the deceased directing them to take up letters of grant of administration only to learn about the existence of this succession cause. It was finally deposed that his interest as a purchaser should be protected. He annexed copies of sale agreement and search certificate.
3. The Petitioner filed a response to the protest dated 17/01/2020 in which he vehemently opposed the protest and maintained that claim if any would lie against the estate of the beneficiary Benjamin Kasia Ngewa but not the estate of the deceased herein. Finally, the Petitioner maintained that the Protestor did not buy land from the deceased herein and neither did he buy from the legal representative to the estate and hence the protest is unfounded and must be dismissed with costs.
4. The Protestor filed a supplementary affidavit dated 6/05/2020 wherein he deposed *inter alia*: that the petitioner is dishonest and has suppressed some material facts from the court; that the deceased herein had given parcel number **Masii/Kithangaini/353** to Benjamin Kasia Ngewa from whom he purchased two (2) acres; that it is not practically possible to independently pursue the estate of Benjamin Kasia Ngewa because the only asset for distribution is **Masii/Kithangaini/353** that is in the name of the deceased and which the Petitioner now intends to distribute to the sons of the seller and a local church; that he has been in possession of the land since 2000 and has made developments thereon.
5. Parties agreed to canvass the protest and summons for confirmation of grant by way of written submissions which are duly on record.
6. Learned counsel for the Protestor submitted that the deceased herein had bequeathed to his son Benjamin Kasia Ngewa land parcel **Masii/Kithangaini/353** before he died and hence the protestor purchased the two acres of land from the said beneficiary on the understanding that the whole land had been given to him by his late father. It was further submitted that the said beneficiary had authority to dispose the portion given to him by his late father as can be seen when he sold a piece to Maikua AIC Church. It was the contention of counsel that if the grant is confirmed then it will not be possible for the protestor to pursue the estate of the seller as by then the land will have been shared out and thus the need to factor two (2) acres of land out of **Masii/Kitangaini/353** for the protestor. Reliance was placed in the case of **Re Estate of M'Mithamia Mwendwa (deceased) [2016] eKLR**.
7. Learned counsel for the Petitioner first submitted that the first limb of the application dated 16/08/2018 sought for rectification of grant since the same had been erroneously issued in the names of the deceased instead of the administrator. Secondly, counsel submitted that the protest is a non-starter and an abuse of the court process since the purported sale did not involve the deceased and that the alleged beneficiary was not even an administrator. Counsel pointed out that the protestor should pursue the estate of the beneficiary who had purportedly sold the land to him. Finally, it was submitted that if any such sale took place, then the same amounted to intermeddling with the estate of the deceased. Reliance was placed in the case of **Benson Mutuma Muriungi -vs- C.E.O. Kenya Police Sacco & Another [2016] eKLR**.

8. I have considered the rival affidavits as well as the submissions of learned counsels. I find certain issues not in dispute. Firstly, the Petitioner had sought for letters of grant herein and that the said grant was erroneously issued in the names of the deceased instead of his names and which discrepancy was corrected by this court when it issued a rectified grant on the 25/03/2015 and again on the 24/10/2018 and therefore the Petitioner's request for rectification of grant must be deemed as spent since the same had already been granted earlier on. Secondly, the deceased herein died on 17/04/1991 as per the certificate of death filed in support of letters of grant and hence the sale transaction entered into by the protestor and Benjamin Kasia Ngewa (a beneficiary) was done before the grant had been issued and confirmed. Fourthly, the Petitioner has presented his proposed mode of distribution of the estate backed with a surveyor's report and map while the protestor proposes that two (2) acres out of parcel **Masii/Kithangaini/353** be allocated to him by virtue of the sale agreement between him and the beneficiary namely Benjamin Kasia Ngewa as he has not been catered for by the Petitioner. This being the position I find the following issues necessary for determination namely:-

(i) Whether the protestor has established his claim against the estate of the deceased.

(ii) What orders may the court make?

9. As regards the first issue, the Protestor has staked his claim to the estate of the deceased and seeks to be treated as a creditor to the estate by virtue of section 66 of the Law of Succession Act. However, the Protestor confirms in his affidavit of protest that he did not enter into a sale transaction with the deceased prior to his demise but rather that he had purchased the two acres of land from a son of the deceased going by the name of Benjamin Kasia Ngewa who apparently is also deceased. The protestor further confirmed that the said beneficiary was not the legal representative of the estate. Even though the Protestor claimed that the deceased had already bequeathed parcel of land **Masii/Kithangaini/353** to Benjamin Kasia Ngewa, no evidence was put forward by him or even the Petitioner. The deceased herein having died on 17/04/1991 then his intestate estate could only be dealt with pursuant to the provisions of the Law of Succession Act. The Protestor being a purchaser from a beneficiary is neither a beneficiary nor a dependant of the deceased. Had he purchased from the deceased, then he would have been treated as a creditor and which interest would be noted as a liability to the estate and to be considered during the distribution of the estate. It is noted that the grant herein was issued on 13.10.2010 and hence the purported sale transaction carried out on 5/02/2000 between the protestor and the beneficiary amounted to intermeddling with the estate of the deceased and went against the provisions of sections 45 and 82 of the law of Succession Act. Several courts have expressed the succinct position that dealings that affect estates of deceased persons before confirmation of grant should not be recognized and should be nullified. I agree with the holding of Muriithi – J in **Re Estate of John Gakunga Njoroge [2015] eKLR** where he stated as follows:-

“A person can only deal with the estate of a deceased person pursuant to a grant representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in section 45 of the Law of succession Act.....”

As the transaction between the protestor and the beneficiary of the estate of the deceased was entered into before the grant of letters of Administration and before the confirmation of the same, the contract of sale is invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transaction was by the administrator, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82(b) proviso(ii) which provides that:-

“No immovable property shall be sold before confirmation of grant.”

10. The above position was also held by the court in the case of **Morris Mwiti Mburungu –vs- Denis Kimathi M'Mburungu [2016]** as follows:-

“... Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same.”

Going by the above authorities and the clear provisions of section 45 and 82 of the law of the Law of Succession Act, I have no doubt in my mind that the transaction entered into by the protestor and the concerned beneficiaries before issuance of confirmation of grant of representation amounted to an act of intermeddling and cannot be protected by a Succession Court. As there is no evidence that the concerned beneficiary had been bequeathed land parcel **Masii/Kithangaini/353** by the deceased prior to his demise, the said property registered in names of the deceased formed part of the assets and free property of the deceased available for distribution to dependants. The only recourse available to the protestor is to pursue the said beneficiary or his estate (if deceased) for redress in the appropriate forum. According to the Affidavit of protest, the protestor has confirmed that his interest is against the estate of the deceased beneficiary Benjamin Kasia Ngewa and if that is so then he should pursue the said estate for redress. Learned counsel for the protestor has submitted that the protestor has found himself in some sort of conundrum and now wants this court to help him out. This court unfortunately, will not come to the aid of the protestor in view of the fact that the sale transaction violated sections 45 and 82 of the Law of succession Act. The protestor having been established not to be a creditor to the estate of the deceased herein, must now proceed to pursue the estate of the deceased beneficiary. He should leave the administrator carry out his duties of distribution of the estate of the deceased. The protestor's claim that he is now helpless since the properties are likely to be shared out among the children of the deceased beneficiary to his detriment and now wants this court to come to his aid is not convincing since nothing has prevented him from pursuing the estate of the deceased beneficiary in the appropriate forum where he can properly adjudicate his claim and seek the appropriate reliefs. I am satisfied that the protestor has not established his claim against the estate of the deceased. The Petitioner should now be allowed to proceed with the task of distributing the estate without any hinderance.

11. As regards the last issue and in view of the above observations, the protestor must now seek for redress elsewhere and allow the Petitioner to carry on with the task of distributing the estate. However, I note the petitioner has not filed a consent to confirmation of grant and distribution of the estate by the beneficiaries. This is mandatory in order to allow the summons for confirmation of grant to sail through.

12. In the result it is my finding that the Protestor's protest lacks merit. The same is dismissed with no order as to costs. The Petitioner is directed to schedule the summons for hearing upon securing the requisite consent by the beneficiaries. Towards that end, the Petitioner is granted leave to file a supplementary affidavit annexing the consent to confirmation and distribution.

It is so ordered.

Dated and delivered at Machakos this 8th day of February, 2021.

D. K. Kemei

Judge