



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 80 OF 2011

IN THE MATTER OF THE ESTATE OF TUMBO LAVU (DECEASED)

PETER LAVU TUMBO)

DAVID TUMBO LAVU).....PETITIONERS

VERSUS

MUNEE TUMBO

ALEXANDER MUNEE WATHOMEPROTESTORS

AND

KENYA AFRICAN NATIONAL TRADERS

& FARMERS UNION (KANTAFU)INTERESTED PARTY

FRANCIS GEORGE GITAU WAIGANJO.....INTERESTED PARTY

JOSEPH MUTUA NGAYAIINTERESTED PARTY

RULING

1. The Petitioners herein filed an application dated 5/08/2020 seeking the following:

- (a) Spent.
- (b) That in terms of the confirmed grant issued on the 23/01/2020 Land Number **Mavoko Town Block 3/1992** now be distributed as per the annexed schedule of distribution.
- (c) That an order does issue lifting all restrictions registered against the title of Land Number **Mavoko Town Block 3/1992** to enable the three purchasers process their titles.
- (d) That costs of the application be in the cause.

2. The application is supported by grounds set out on the face thereof as well as the annexed affidavit of David Tumbo Lavu. The Petitioners case is that the claims of some interested parties vide **Machakos CMC ELC Numbers 36 of 2019** and **60 of 2019** have since been determined and that the same should be honoured by the petitioners in line with the ruling of this court dated 23/01/2020 wherein the listed properties in the schedule of distribution were to be shared equally between the beneficiaries once a determination is made in favour of the administrators by the Environment and Land Court. It was further the Petitioners case that the Environment and Land Court decrees be honoured by the decree-holders being given their parcels of land from **Mavoko Town Block 3/1992** while the remainder do remain in the names of the deceased. Finally, it was their case that the restrictions registered against the title be lifted.

3. Alexander Mutunga Wathome a protestor herein filed a replying affidavit sworn on 1/10/2020 wherein he raised several issues *inter alia*:- that the petitioners have already sold their portion comprising 15 acres in **Mavoko Town Block 3/1992**; that the purported decrees from the two Environment and Land Court cases were irregularly obtained as the rest of the houses of the deceased were not involved; that all the 40

acres in **Mavoko Town Block 3/1992** have been claimed by interested parties namely Kantafu, Joseph Mutua Ngayai and Francis Waiganjo Gitau; that **Machakos ELC No 29/2019** involving an interested party and the Petitioners over the parcel **Mavoko Town Block 3/1992** is still pending determination; that the petitioners should have served all the concerned parties with the present application to enable them respond thereto appropriately.

4. The second Petitioner herein upon being served with the replying affidavit filed a further affidavit dated 23/10/2020 where he raised several issues inter alia; that they are not aware of any suit lodged by a purchaser named Kantafu against the estate of the deceased; that the purchasers in **Machakos CMC ELC No. 60 of 2019** and **36 of 2019** have since obtained decrees and ought to be given their title deeds; that the protestor herein is raising the same issues which were resolved vide the rulings dated 7/02/2019 and 23/01/2020; that the application should be allowed as prayed.

5. The application was disposed of via written submissions. The petitioners' submissions are dated 23.10.2020 while those of the protestors are undated but filed on 19.1.2021. It was the submission of Mr Muumbi learned counsel for the Petitioners that the alleged civil suit filed by a purchaser by the name Kantafu has not been made known to the Petitioners since they are only aware of **Machakos CMCC ELC 60 of 2019** and **36 of 2019** wherein decrees have been issued. It was further the view of learned counsel that once the issue of ownership has been resolved pursuant to the rulings of this court dated 7/02/2019 and 23/01/2020 then the Petitioners should now be allowed to transfer ownership of the 15 acres out of land parcel **Mavoko Town Block 3/1992** to the decree holders in ELC No 60 and 36 of 2019 and the balance of 25 acres do remain in the name of the deceased to await determination of the other pending cases and or to be filed suits. M/s Anne Kiusya advocates for the protestor submitted that the application is premature as there are other parties involved in the matters of the estate whose cases are still pending determination by the ELC and are likely to be prejudiced. It was the contention of counsel that the petitioners should be patient and wait for the full determination of the ownership of the suit land so as not to leave out other parties.

6. I have given due consideration to the Petitioner's application dated 5/08/2020 together with the rival affidavits and the submissions. It is not in dispute that this court received oral evidence from the Petitioners and protestors herein and three purchasers (interested parties) regarding the protest and summons for confirmation of grant leading to the rulings dated 7/02/2019 and 23/01/2020. Vide the ruling dated 7/02/2019 I held as follows:-

“The protest of the various parties has been determined. The court should now consider confirmation of grant. Towards that end, I direct that a fresh application for confirmation of grant be made within 30 days and thereafter all beneficiaries to appear before the court on a date to be allocated for purposes of confirmation of grant. However, confirmation in respect of Mavoko Town Block 3/1992 is stayed pending the determination of ownership in the appropriate court. The interested parties are given 60 days to file the said suit failing which confirmation in respect of the same shall proceed....”

Pursuant to the above ruling, the Petitioners duly filed a fresh summons for confirmation of grant dated 1/03/2019 and upon consideration, the same was allowed vide the ruling dated 23/01/2020 which vide paragraph 19 thereof was as follows:-

“In the result, the summons for confirmation of grant dated 1/03/2019 is allowed to the extent that the grant dated 10/02/2012 is hereby confirmed and that the estate of the deceased comprising the three (3) properties listed in the schedule of distribution shall be shared equally between the beneficiaries once a determination is made in favour of the administrators by the Environment and Land Court.....”

The above ruling was arrived at by this court upon establishing that the estate through the administrators had been sued vide civil suits namely **Machakos ELC cases numbers 288/2012** and **29/2019**. The Petitioners have now confirmed vide their present application that there exists two other civil cases namely ELC 36 and 60 of 2019 wherein decrees have been issued. The Petitioners now seek to enforce the said decrees. The issue for determination is whether the Petitioners application has merit.

7. The Petitioners have approached the court seeking for an order lifting all restrictions against the title to land parcel **Mavoko Town Block 3/1992** so as to enable them process title to three individuals who have obtained decrees vide **Machakos CM ELC Nos. 36 and 60 of 2019**. It is noted that the said individuals had not filed any protests or sought to be enjoined as interested parties during the hearing of the protest and confirmation. The interested parties who participated herein and who were directed to institute their claim at the ELC were Kantafu, Joseph Mutua Ngayai and George Gitau Waiganjo. Apart from the above two finalized ELC cases, there are still two more namely **ELC 288 of 2012** and **29 of 2019** to be determined. All these cases have been lodged against the estate of the deceased over parcel number **Mavoko Town Block 3/1992** which measures approximately 40 acres and from the look of the various claims the same appear to be in excess of the available portion of land in dispute and that the Petitioners might have to wruck up their brains in a bid to satisfy the said claims against the estate. I note that the petitioners vide their affidavit in support of the application as well as the further affidavit have deliberately denied the existence of **ELC 29 of 2019** wherein they have been sued by one of the interested parties namely Kantafu and who had presented their protest before this court pleading to the ruling dated 7/02/2019. I find the Petitioners conduct in denying such a fact to be in bad faith yet it is clear that they are litigating with the said interested party vide ELC 29/2019 which is yet to be determined. Again, the petitioners have deliberately failed to confirm the existence of ELC 288 of 2012 which is still pending determination. It appears the petitioners are now using the order vide the ruling dated 7/02/2019 to settle claims brought against the estate by new interested parties and thereafter avoid meeting the claims that had been brought by the other interested parties and who had participated in these proceedings. Allowing the Petitioners request would lead to throwing the other interested parties under the bus since their claims are yet to be determined by the Environment and Land Court. It is proper and fair for Petitioners to wait for the determination of the pending Environment and Land Court matters whereupon they will then proceed to settle those claims by finally distributing the estate of the deceased. This court has already confirmed the grant vide the ruling dated 23/01/2020 which is to the effect that the Petitioners will distribute the estate equally between the beneficiaries once a determination is made in their favour by the Environment and Land Court. The Petitioners have not availed evidence that a determination has been made in their favour vide **ELC numbers 36 and 60 of 2019**. If anything the decrees shown indicates that it is the plaintiffs and not the petitioners who won in those cases and thus it was the responsibility of the decree holders to pursue their judgements to conclusion and not the Petitioners who are the judgment debtors. In any event nothing prevented the said decree-holders from approaching the Environment and Land Courts for appropriate orders if need be. It is also noted that the interested parties in **ELC No. 288/2012** and **29/2019** might not be aware of the petitioners present application as there is no evidence that they were served with the same. It was necessary to serve them since they have staked a claim onto parcel **Mavoko Town Block 3/1992** and are thus likely to stand prejudiced if orders are made in their absence.

I am inclined to agree with the sentiments of the protestor herein Alexander Mutunga Wathome and his learned counsel that the present application is premature and made in bad faith and further that the same was not served upon all parties having claims to the estate's parcel **Mavoko Town Block 3/1992** so as to enable the court decide the issues between all parties and thereafter avoid multiplicity of applications. As this court vide ruling dated 07/02/2019 had directed that confirmation of **Mavoko Town Block 3/1992** be stayed **pending** determination of ownership in the appropriate court, allowing the present application will lead to piece meal distribution of the property. I find it is appropriate for the petitioners to wait for determination of all the pending Environment and Land Court suits and thereafter proceed with distribution of the said property. Allowing the present application will amount to the petitioners stealing a march against other claimants who might have genuine and legitimate claims onto parcel Number **Mavoko Town Block 3/1992**.

8. In view of the foregoing observations, it is my finding that the Petitioner's Application dated 5/08/2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

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

D. K. Kemei

Judge