



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.205 OF 1996

IN 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.....INTENDED INTERESTED PARTY

VICTOR MUTINDA MUSOMI.....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/applicants in their application dated 24.2.2021 expressed to be brought under section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rule 1 and 4 and Order 51 Rules seek two main orders. Firstly, that the Land Registrar Machakos be restrained from transferring 20 acres out of Mavoko Town Block 3/88755 in favour of Rolex Waita Mukunzu pending the hearing and determination of the petition for confirmation of grant and secondly, that the consent order dated 19.7.2018 be set aside.

2. The Applicants' gravamen is that the intended interested parties are yet to be joined as interested parties to the instant cause. It was contended that the administrators are using the certificate of partial grant issued on 28.3.2019 to defeat the interests of the innocent purchasers for value by transferring 40 acres of Mavoko Town Block 3/88755 to Rolex Waita Mukunzu (20 acres) and to Emma Nzulu Mukunzu (20 acres) and in the end leave the applicants without any land yet they had lawfully purchased 20 acres from parcel Mavoko Town Block 3/3180 before the same was subdivided giving rise to parcel Mavoko Town Block 3/88755.

3. The affidavit in support of the application points out that the intended interested parties purchased parcels of land out of Mavoko Town Block 3/3180 from Dorcas Mutono Mukunzu and they had been in possession of the same for over 12 years. It was averred that cases namely ELC 80 of 2019, ELC 215 of 2015 and ELC 216 of 2015 were filed to compel the said Dorcas Mutono Mukunzu to issue title deeds to the intended interested parties; that during the pendency of the mentioned cases in the Environment and Land court, the said Dorcas caused to be recorded a consent that cancelled the distribution of the portions of land that the intended interested parties occupied. It was lamented that the said Dorcas caused the cancellation and amalgamation of title Mavoko Town Block 3/3180 and Mavoko Town Block 3/4414 that gave rise to title Mavoko Town Block 3/88755; that later it was discovered that the land registrar was in the process of transferring 20 acres out of Mavoko Town Block 3/88755 to Rolex Waita Mukunzu (20 acres) and to Emma Nzulu Mukunzu (20 acres) to defeat justice. Copies of the sale agreement, pleadings in the mentioned cases in the ELC court, search details and title deed of Mavoko Town Block 3/3180 and transfer forms in respect of Mavoko Town Block 3/88755 were annexed to the affidavit.

4. Vide further affidavit deponed by Thomas Osea Chagamu, he admitted not being party to the succession cause and reiterated that the intended interested parties are purchasers for value of land that was sold to them by Dorcas Mutono.

5. In reply to the application was an affidavit deposed by Emma Nzula Mukunzu wherein she denied that the intended interested parties purchased the suit land from the deceased. It was averred that the instant application was sub judice because there was another application pending before this court. It was averred that there was an injunction issued on 17.1.2002 preventing sale and transfer of the deceased's estate and therefore the intended interested parties were in contempt of the orders of the court. The deponent also averred that in the fullness of time she shall seek that the applicants be committed to civil jail for contempt.

6. On record is an affidavit in reply that was deposed by Dorcas Mutono where she took issue with the application being brought under Order 40 of the Civil Procedure Rules and maintained that the same did not apply to succession proceedings. The deponent averred that intended interested parties are strangers to the estate. It was averred that there is concurrent litigation over the same subject matter both in this court and in the ELC court. The deponent admitted selling portions of land out of Mavoko Town Block 3/3180 to some of the intended interested parties but however the grant that was issued to her on 23.1.1997 was revoked and she could not issue title deeds to the property; that this resulted in Emma Mukunzu applying for cancellation of title deeds so that they revert back to the estate of the deceased and which application was allowed by consent given on 19.7.2018. It was averred that the intended interested parties are intermeddlers and therefore their application ought to be dismissed.

7. The application was canvassed orally by learned counsels. Learned counsel for the applicant submitted that it was discovered that the grant that Dorcas Mutono had whilst selling the land to the intended interested parties was revoked. It was submitted that section 93(1) of the Law of Succession Act should come to the aid of the intended interested parties; that the interim orders are necessary so as to secure the 20 acres that had been earmarked for the 2nd administrator who had sold land to the intended interested parties.

8. In response, counsel for the 2nd administrator pointed out that the land that the applicants seek to injunct measures 40 acres and yet they are claiming 20 acres. It was pointed out that at the time of selling the property to the intended interested parties, the 2nd administrator was not an administrator then; counsel placed reliance on the case of **Musa Nyambari Gekone & 2 Others v Peter Miyianda & Another (2015) eKLR**.

9. It was further submitted that the 20 acres out of estate of the deceased did not belong to the 2nd administrator alone but to the beneficiaries of the estate of the deceased.

10. In rejoinder, counsel for the applicants submitted that the 20 acres of the 2nd administrator should be taken away and that the intended interested parties ought to be allowed to participate in the suit so as to protect their interest.

11. The issues for determination are firstly; what is the status of the intended interested parties in this cause? Secondly, whether the applicants have met the threshold for grant of an injunction and thirdly, whether the applicants have satisfied the requirements for the setting aside of the consent that was entered on 19.7.2018.

12. The primary duty of this court in the exercise of its jurisdiction as a probate court is now a matter of judicial notice and 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.”

13. From the onset, the record ought to be set straight with regard to the status of the intended interested parties. The intended interested parties claim to be purchasers of property that is said to be the estate of the deceased; there is no order of this court enjoining them as interested parties. In respect of ownership of estate property, Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** stated 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.”

14. I have noted that there is pending litigation in the ELC court in respect of Mavoko Town Block 3/3180, being ELC 80 of 2019, ELC 215 of 2015 and ELC 216 of 2015. Any concerns as to whether or not the title Mavoko Town Block 3/3180 was amalgamated or claims of ownership of land by the intended interested parties ought to be raised in the ELC court and not in this court. Once the ELC court has made its pronouncement then this court will be ready to receive and give effect to the same with open arms.

15. The applicants seek protection under Section 93 of the Law of Succession Act, however going by the ratio in the case of **Musa Nyambari Gekone & 2 Others v Peter Miyianda & Another (2015) eKLR**, and considering the fact that the land was sold to them by Dorcas Mutono who was not an administrator to the estate of the deceased but was a beneficiary of land that was given to her by the 1st administrator who was the sole administrator pursuant to a grant that was revoked on 26.5.2017 then there is no protection afforded to the applicants under section 93 of the Law of Succession Act.

16. The application is akin to putting the cart before the horse; the intended interested parties should have an order of court enjoining them as parties to the cause before approaching the court with the instant application that is evidently premature. The intended interested parties ought to have ensured that their application dated 7.10.2019 seeking joinder is dispensed with before approaching the court with an application such as the instant one; as it is the intended interested parties are strangers to the succession cause at this stage since their quest to be enjoined into the suit is yet to be heard in earnest. The intended interested parties should have pushed to have their pending application for joinder heard on priority basis but not to agitate for their rights while knowing that they are not parties in the suit yet and hence lack the requisite locus standi.

17. In view of the foregoing observations, it would be needless to consider the other two issues framed for consideration. In the premises, it follows that the application by intended interested parties dated 24.2.2021 fails and the same is hereby dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 18th day of May, 2021.

D. K. Kemei

Judge