



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: Hon. D. K. Kemei J

**SUCCESSION CAUSE NO. 205 OF 1996**

IN THE MATTER OF THE ESTATE OF **GEORGE MUKUNZU NDILI-(DECEASED)**

**BERNARD WAMBUA MUKUNZU.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**VERSUS**

**DORCAS MUTONO.....2<sup>ND</sup> ADMINISTRATOR /RESPONDENT**

**EMMA NZULA MUKUNZU.....3<sup>RD</sup> ADMINISTRATOR/RESPONDENT**

**AND**

**ANNAH MUSILI MUTUKU.....1<sup>ST</sup> INTERESTED PARTY**

**VICTOR MUTINDA MUSOMI.....2<sup>ND</sup> INTERESTED PARTY**

**THOMAS OSEA CHANGAMU.....INTENDED 3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**SABINA MUENI CHARLES.....INTENDED 4<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**BENECLIFF MUTHIANI.....INTENDED 5<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**MARCO OBITA.....INTENDED 6<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. By twin Notice of Motions dated 24<sup>th</sup> September 2019 and 7<sup>th</sup> October 2019 filed under certificate of urgency, the Applicants seek the following orders:-

**a. THAT the court be pleased to grant the Intended 3<sup>rd</sup> to 6<sup>th</sup> Interested Parties leave to be enjoined in this suit as interested parties.**

**b. THAT the orders of Hon. Justice D. K Kemei issued on the 19<sup>th</sup> day of July 2018 be reviewed and or set aside.**

**c. THAT the application for confirmation of grant dated 17<sup>th</sup> day of October 2017 be stayed pending the hearing and determination of this application.**

**d. THAT any other relief that this Honourable Court may deem fit to grant.**

2. The application dated 24<sup>th</sup> September 2019 is supported by the affidavit sworn by the Intended 3<sup>rd</sup> Interested Party/Applicant while the application dated 7<sup>th</sup> October 2019 is supported by the affidavit of the Intended 6<sup>th</sup> Interested Party/Applicant with the authority of the 4<sup>th</sup> and 5<sup>th</sup> Intended interested parties/Applicants.

3. The Intended Interested parties claim that on diverse dates and year, they purchased different sizes of acreage of land from Dorcas Mutono one of the Petitioner/ Respondents herein. They claim that Dorcas was the legitimate owner of the parcel of land namely *Mavoko Town Block 3/31809*(Hereinafter referred to as 'suit property') as evinced in a copy of official search marked as 'TC2' and 'MO2'. Interested parties depone that they have been in possession of the parcels of land and each has undertaken massive developments on the parcels of land as per the valuation report attached and marked as 'MO3' and 'TC3'.

4. The Intended 3<sup>rd</sup> and 6<sup>th</sup> interested parties depone that they filed suits at Machakos High Court ELC 216 and 215 of 2015 respectively while the Intended 4<sup>th</sup> and 5<sup>th</sup> interested parties filed suits at Mavoko Law courts seeking specific performances against Dorcas Mutono. They depone that Dorcas Mutono connived/colluded with other beneficiaries and consented to nullify the confirmed grant issued by the court on 23<sup>rd</sup> January 1997, a grant in which Dorcas had been bequeathed 20 acres of land as her share in Mavoko/Town Block 3/3180. The Interested parties depone that they will suffer prejudice if not enjoined since they have invested their retirement benefits on the parcels of land. They have asked the court to enjoin them to enable them be heard on their case.

5. In response to the application, the 1<sup>st</sup> Respondent vide a replying affidavit sworn on 21<sup>st</sup> May 2021, depones that the Applicants are intermeddlers in the deceased's estate since they executed sale agreements with the 2<sup>nd</sup> Respondent before she became an administrator hence the agreements are null and void *ab initio*. He depones that the Environment and Land Court has jurisdiction over the Applicants claim and not this court. According to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent could not have legitimate title to L.R Mavoko/Town/Block 3/3180 at the time of sale as the transfer of suit property from deceased's name to that of 2<sup>nd</sup> Respondent was illegal since the previous grant had been revoked. The 1<sup>st</sup> Respondent has asked this court to find that the application has no merit and to dismiss the same.

6. The 2<sup>nd</sup> Respondent vide her replying affidavits sworn on diverse dates, depones that the Applicants are not beneficiaries of the estate of George Mukunzu Ndili (Deceased) and hence the Environment and Land Court has jurisdiction over their claim and not this court. It is urged by the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondent obtained title deeds without legal letters of administration of the estate as the previous letters of administration had been revoked by the court which amounts to intermeddling with the estate. According to the 2<sup>nd</sup> Respondent, the applicants cannot be enjoined in the estate since the estate did not sell any land to him. The 2<sup>nd</sup> Respondent depones, based on the legal advice of his counsel that it is the Environment and Land Court that has jurisdiction over this claim and not this court. Further, that the Applicants are neither children nor wife of the deceased and hence the court lacks jurisdiction to entertain the applicant's claims.

7. It is urged by the 3<sup>rd</sup> Respondent that the suit property was in the name of the deceased when the alleged sale of the properties to 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Intended Interested parties was undertaken and hence it was illegal and that the Applicants were not innocent purchasers for value without notice. According to the 3<sup>rd</sup> Respondent, all assets were in the name of the deceased at the time and that there were preservation orders of the estate in place and therefore the 2<sup>nd</sup> Respondent did not have any right to sell the suit property to the Applicants. The 3<sup>rd</sup> Respondent depones that 2<sup>nd</sup> Respondent colluded with the Applicants during the pendency of the preservation orders in order to defraud the other administrators. It is urged by the 3<sup>rd</sup> Respondent that the Applicants are the authors of their own misfortune since the suit property was still in the name of the deceased and no confirmed grant of the estate had been issued and therefore the only valid claim by Applicants is against the 2<sup>nd</sup> Respondents and not the estate. The 3<sup>rd</sup> Respondent depones that the Applicants do not have any lawful right over the suit property and she urged the court to dismiss the two applications with costs.

8. In response, the 3<sup>rd</sup> Interested Party swore a further affidavit on 25<sup>th</sup> October 2019. He depones that the 2<sup>nd</sup> Respondent cannot claim that the 3<sup>rd</sup> Applicant is not a beneficiary of the estate since she sold her share in the estate and enjoyed the sale proceeds. Based on the advice of his counsel, he depones that the 2<sup>nd</sup> Respondent is hiding behind the succession cause to take away what he lawfully purchased from the 2<sup>nd</sup> Respondent. He depones that he has been in possession of the parcel of land since 2007. It is urged that the revocation of the grant was initiated and orchestrated by the 2<sup>nd</sup> Respondent to defeat his interest when the parcel of land has all along been in the name of the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Interested Party depones that the court did not revoke the grant but that the 2<sup>nd</sup> Respondent consented to revocation of the grant when she had already sold parcel of land to the 3<sup>rd</sup> Applicant. He depones that the letters of administration were issued on diverse dates in the year 1996 and not as averred by the 2<sup>nd</sup> Respondent that the same were issued on 26<sup>th</sup> May 2016. The 3<sup>rd</sup> Interested Party depones that the 2<sup>nd</sup> Respondent's affidavit is scandalous, malicious and lacks merit.

### **Submissions**

9. On 18<sup>th</sup> May 2021 advocates for the parties herein agreed by consent to canvass the two applications orally in addition to previous written submissions. Mrs. Morara for the applicants relied on the written submissions dated 25<sup>th</sup> February 2020 as well as earlier oral submissions presented in court on 18<sup>th</sup> November 2020 which were essentially in respect of the preliminary objection dated 8<sup>th</sup> October 2019 challenging the court's jurisdiction to hear and determine this suit and the two applications herein. In highlighting the written submissions, she submitted that the 2<sup>nd</sup> Respondent consented to an order of revocation of grant in 2016 with intention not to transfer the parcels of land she had sold to the interested parties. She submitted that the interested parties are innocent purchasers for value without notice pursuant to section 93 and 48 of the Law of Succession Act. She submitted that the interested parties have been in occupation of the parcels of land and undertaken developments for the last 12 years hence the 2<sup>nd</sup> Respondent should be stopped from committing mischief. She urged the court to note that the 2<sup>nd</sup> respondent's preliminary objection having been earlier dismissed should now proceed to reject any further attempts by the respondents to frustrate the applicants from getting what is lawfully due to them.

10. Mr. Mbonzo for the 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> Respondent will rely on the replying affidavit as well as what was on the court record.

11. Mr. Muumbi for the 2<sup>nd</sup> Respondent submitted that in addition to his earlier submissions, the Interested parties are precluded under section 93 of the Law of Succession Act hence it will not serve any purpose to grant the orders sought. According to the counsel, an

interested party is one who has a stake in a matter. It was submitted that the Interested parties are neither creditors nor beneficiaries to the estate and hence they have no stake whatsoever in the estate. He submitted that vide the ruling dated 18<sup>th</sup> May 2021 in particular at paragraph 15, the court found that the Interested parties purchased parcels of land from the 2<sup>nd</sup> Respondent who was not an administrator of the estate at the time. According to the counsel, the Interested parties claim is against a third party not the estate hence this court is bereft of jurisdiction between third parties. He submitted that the court is not properly moved regarding review of the consent dated 19<sup>th</sup> July 2018. It is urged that the Applicants are strangers to the estate and the consent by beneficiaries. Learned counsel placed reliance on the court ruling of 18<sup>th</sup> May 2021 and asked the court to dismiss the two applications.

12. The 3<sup>rd</sup> Respondent's counsel, Mr. Nthiwa informed court that the 3<sup>rd</sup> Respondent will rely on his replying affidavit sworn on 4<sup>th</sup> November 2019 and filed on 7<sup>th</sup> November 2019. He submitted that in the event that the applications are allowed, the court will be going against the averments in the pleadings. It was submitted that the 2<sup>nd</sup> Respondent sold the parcels of land without letters of administration or a certificate of confirmation of grant allocating the property to her and went ahead to register the suit property in her name. He submitted that registration happened in the year 2014 as alluded by the Applicants. According to counsel, as early as the year 2000, the 2<sup>nd</sup> Respondent did not have title deeds on the properties but registered in the name of the deceased and that the 2<sup>nd</sup> Respondent was only registered as the owner on 6<sup>th</sup> June 2014 and hence the Interested parties cannot claim to be innocent purchasers. It is urged that the Interested parties did not do due diligence of the suit property and therefore the invocation of the principle 'ignorance of the law is not defence'. Reliance was placed on the case of *Munyasia Mulili & 3 Ors vs Sammy Muteti Mulili [2017] eKLR* in particular at paragraph 28 thereof. Learned counsel submitted that cases between third parties and estates can only be determined in other forums but not the succession court. He submitted that in the above case, the court cancelled the titles and reverted them back to the estate as the beneficiary had no *locus standi* to register into her name as the transfer impugned therein was done in violation of the court order.

13. Mr. Nthiwa went on to submit that the orders dated 17<sup>th</sup> January 2002 had been issued as well as the orders of 6<sup>th</sup> April 2001 wherein the court had suspended the use of the grant until determination of the estate but in 2014 the 2<sup>nd</sup> Respondent registered the suit property in her name yet the said orders were still in force. It is urged that the violation is that the 2<sup>nd</sup> Respondent registered the suit property in her name in violation of the court orders. He submitted that the certificate of confirmation of grant had been granted to the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent. Reliance was placed on the case of *Musa Nyaribari Gekone & 2 others vs Peter Miyiinda & another [2015] eKLR* in particular at paragraphs 31, 38 to 42 thereof. He submitted that the invalid registration by the 2<sup>nd</sup> Respondent did not confer any property to the Interested parties.

14. It is urged that, the 2<sup>nd</sup> Respondent became an administrator in 2016 hence the court was justified to revoke the titles of land. According to the counsel, the Interested parties will not be prejudiced if the orders sought are declined since they have sued the 2<sup>nd</sup> Respondent in person before other courts. Counsel urged the court to dismiss applications as the Interested parties are strangers who do not deserve to be heard by this court.

15. In response, Mrs. Morara submitted that the 2<sup>nd</sup> Respondent did sell the suit property to the Interested parties since she is a beneficiary of the estate as per the Sale Agreements. According to counsel, it is not in dispute that the 2<sup>nd</sup> Respondent has a share to the suit property as confirmed in the replying affidavit of the 3<sup>rd</sup> Respondent sworn on 4<sup>th</sup> November 2019. According to the counsel, the 1<sup>st</sup> Respondent did not serve the court orders upon the land registrar so as to prevent the 2<sup>nd</sup> Respondent from proceeding to process the titles. It is urged that the Environment and Land court does not have jurisdiction to issue orders in respect of the estate. According to the counsel, the 2<sup>nd</sup> Respondent wants to have her cake and eat it by entering into the consent on revocation yet she knew the existence of the ELC matters. She submitted that the Interested parties are not indolent. According to her, the Interested parties are not precluded under section 93 of the Law of Successions Act since the vendor was a beneficiary and the Interested parties are innocent purchaser for value. She submitted that the ruling of 18<sup>th</sup> May 2021 was delivered at a time when the Interested parties were yet to be enjoined and hence the reason why the Interested parties should now be enjoined in the proceedings.

16. Finally, Mrs Morara submitted that the Interested parties have demonstrated the prejudice they will suffer if not enjoined in the suit by stating that they have been in possession of the parcels of land and undertaken developments on the land. According to the counsel, there is no undue delay to file the application since the 2<sup>nd</sup> Respondent was operating opaquely. Learned counsel urged the court to allow the application as prayed so as to stop the 2<sup>nd</sup> Respondent from committing the injustice against the applicants.

17. I have given due consideration of the Application, rival affidavits and submissions. The Interested parties are seeking leave to be enjoined in the suit, review of my orders of 19<sup>th</sup> July 2018 and stay of the application dated 17<sup>th</sup> October 2017 pending the determination of this application. The issues for determination are as follows:-

- 1. Whether leave should be granted to enjoin the interested parties to participate in these succession proceedings.**
- 2. Whether the orders of court issued on 19<sup>th</sup> July 2018 should be reviewed and/or set aside.**
- 3. Whether the application for confirmation of grant dates 17<sup>th</sup> October 2017 should be stayed.**

18. On the first issue, the interested parties are seeking to be enjoined in the suit to enable them ventilate their case. I note that the Interested parties have invoked Order 3 Rule 7 of the Civil Procedure Rules 2010 instead of Order 1 Rule 10 that deals with joinder of parties in a suit. *Order 1 Rule 10* does not expressly mention an Interested Party but a reading of the sentence 'that the name of any person.....or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added' an Interested party can be joined pursuant to Rule 10.

19. In *Skov Estate Limited & 5 others vs Agricultural Development Corporation & another [2015] eKLR*, Justice Munyao Sila stated

that:-

**“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation.....The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter.”**

20. Under the **Constitution of Kenya (Protection of Rights and Fundamental freedoms practice and Procedure Rules 2013, Rule 2** defines ‘interested party’ as:-

**“A person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceeding or may not be directly involved in the litigations.”**

21. **Gitari J.** in the case of **AMM vs JMN [2019] eKLR** had this to say about an interested party:-

**“An interested party is one who has a stake in the proceedings, though he was not party to the cause ab initio. He is one who will be affected by the decision of the Court when it is made, either way. The Court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings”**

22. From the Supreme court in the case of **Francis Kariuki Muruatetu Ltd & Another vs Republic & 5 Others in Petition No. 15/16 of 2016 eKLR**, the court identified the following elements to be considered in granting the application to include the following:-

**(1) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**

**(2) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**

**(3) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrated that these submissions are not merely a replication of what the other parties will be making before the court.”**

23. As regards the first issue, it is submitted by the Interested parties that Dorcas Mutono was the legitimate owner of the suit property as per the official search annexed and attached as ‘TC2’ and ‘MO2’. The Interested parties have attached copies of sale agreements in respect of the suit property that they entered into with Dorcas Mutono as the vendor therein. It is not in dispute that the Interested parties have taken possession and developed the parcels of land. However, it was submitted by 2<sup>nd</sup> Respondent’s counsel that the Interested parties are neither creditors nor beneficiaries to the estate hence they have no stake whatsoever in the estate and that their claim is against third parties and not the estate. In my view the Interested parties have a stake or interest in this suit since they are parties in the sale agreements that led to the sale of suit property by the 2<sup>nd</sup> respondent to them. The interested parties are after the share due to the 2<sup>nd</sup> respondent upon confirmation of grant as she is a beneficiary of the estate of the deceased. However, the key issue for consideration is whether the interested parties should wait for the confirmation to be concluded so as to pursue the 2<sup>nd</sup> respondent or they should be allowed to come into the succession proceedings and stake their claim.

24. Having established that the interested parties have an interest in the suit, the next issue for consideration would be whether prejudice will be suffered in the event they are not joined in the suit. According to the Interested parties, they will be prejudiced since they have developed the parcels of land using their retirement benefits money. It was submitted by the 3<sup>rd</sup> Respondent’s counsel that the Interested parties will not be prejudiced if the orders sought are declined since they have sued the 2<sup>nd</sup> Respondent in person before Machakos Environment and Land Court in case numbers ELC 216 and 215 of 2015 and also before Mavoko law courts seeking specific performances against the said 2<sup>nd</sup> respondent. Looking at the rival claims herein it is quite clear that the Interested parties claim is against Dorcas Mutono in person and not against the estate of the deceased and hence the proper forum would not be this court but the courts where the Interested parties have filed other suits namely the environment and land court. Already, the applicants have filed suits before the ELC at Machakos high court as well as at Mavoko law courts and hence the applicants will not be prejudiced in any way since those court will adjudicate the claims conclusively. It is also instructive that the sale transactions took place in contravention of court orders that had been in place much earlier and which had not been vacated or set aside. Again, the transactions did not involve the deceased himself or his estate through the duly appointed administrator.

25. It was submitted by Mr. Nthiwa that the 2<sup>nd</sup> Respondent sold the parcels of land without letters of administration or a certificate of confirmation of grant allocating the property to her and went ahead to register the suit property in her name. It was submitted that the Interested parties are precluded from placing reliance on section 93 of the Law of Succession Act. According to Mrs. Morara, the Interested parties are not precluded under section 93 of the Law of Successions Act since the vendor was a beneficiary and the Interested parties are innocent purchaser for value.

26. The Court of Appeal in **Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR** stated:

**“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the**

grant.”

27. In **Adrian Nyamu Kiuguvs vs Elizabeth Karimi Kiugu and Anor [2014] eKLR** the High Court at Meru stated:-

**“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid. “**

28. It follows therefore that section 93 of the Act is not available to the Interested parties because the 2<sup>nd</sup> respondent was not an administrator at the time of the alleged sale transaction. Further, it is instructive that as around the year 2000 or 2001 the earlier grant had been revoked and that orders were in place forbidding any interference with the properties of the deceased until the grant is confirmed and thus the actions by the 2<sup>nd</sup> respondent vide the alleged transaction was in violation of the said court order. I find that enjoining the applicants herein will convolute the matter yet they have no agreement with the estate. They should proceed to pursue the 2<sup>nd</sup> respondent as they have already filed suits against her before the civil courts for redress. The applicants should allow the administrators to confirm the grant and thereafter they will be at liberty to pursue the 2<sup>nd</sup> respondent for redress. In my view all is not lost for the Interested parties since they have filed suits to seek remedy against the 2<sup>nd</sup> respondent who had sold the parcels of land to them. The suits before the Machakos Environment and Land Court and Mavoko law courts are alive and thus the Interested parties have an opportunity to prosecute the suits in pursuit of their claims.

29. In the case of **Muriuki Hassan vs Rose Kanyua and 4 others [2014] eKLR**, when faced with a situation of sale of property belonging to an estate before succession was undertaken, *Makau J.* held:-

**"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."**

30. In **Re Estate of John Gakunga Njoroge [2015] eKLR**, *Murithi J.* held:-

**"10. A person can only deal with the estate of a deceased person pursuant to a Grant of 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..."**

31. In light of the foregoing observations, it is my finding that the applicants herein have not convinced this court that they merit to be enjoined into the proceedings as the transaction involved a beneficiary of the estate and as such they must pursue the said beneficiary for redress. Consequently, the applicants' applications dated 24/9/2019 and 7/10/2019 lack merit. The same are dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF JUNE, 2021**

**D. K. KEMEI**

**JUDGE**