



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 562 OF 2015**

**IN THE MATTER OF THE ESTATE OF KOSUT KIMAIYO KIPTUI (DECEASED)**

**ELIJAH MALAKWEN KIMAIYO.....APPLICANT**

**RULING**

**BACKGROUND**

1. The Petitioner filed a grant of letters of administration intestate on the 27<sup>th</sup> August 2015, letters of administration were issued to **Elijah Malakwen kimaiyo** on 9<sup>th</sup> November 2015. Summons for confirmation of grant allegedly filed by the Administrator were filed on 18<sup>th</sup> July 2018, which summons were later expunged from the court and proper summons for confirmation of the grant were filed on 20<sup>th</sup> May 2019.
2. Following filing of the summons for confirmation of grant by the Administrator **Elijah Malakwen Kimaiyo** an Affidavit of Protest was filed by **Jacob Ngucie Mwangi** on 24<sup>th</sup> June 2019, a purchaser who claimed that he purchased 7.5 acres of the estate of the deceased. In his affidavit, he avers that he is the manager of Ngucie Investments Limited listed as one of the beneficiaries in the summons dated 17<sup>th</sup> July 2018. He states that Ngucie Investment Limited entered into an agreement for sale of 7.5 acres of Marmanet Settlement Scheme Plot No. 260 with the deceased in the year 1993, and subsequently in the year 1998 purchased another 2.5 acres from the deceased.
3. He avers that the transfer to Ngucie Investment Limited during the lifetime of the deceased did not take place. That from the summons for confirmation of grant the land allocated to Ngucie Investment is 7.5 acres as opposed to 11.5 acres which the administrator has failed to allocate him despite numerous pleas.
4. In reply to the Affidavit of Protest, the Administrator filed his Replying Affidavit on 3<sup>rd</sup> October 2019; in the affidavit, the Administrator avers that the application for the confirmation of grant filed on 17<sup>th</sup> July, 2018 was filed without his consent and without the genuine signatures of other beneficiaries. He averred that the affidavit of protest is misplaced, frivolous and an abuse of the court process; that all beneficiaries to the estate of the deceased have confirmed that they are amenable to the mode of distribution attached to the application dated 20<sup>th</sup> May, 2019.
5. He averred that the annexures JNM 01 on the said affidavit is a forgery and the purported signature of the deceased is a forgery; annexure JNM-02 is undated and unwitnessed. He also avers that the land in question is different from the land in the succession cause as title was obtained on 7<sup>th</sup> February, 1992 before the purported agreement was drawn.
6. The protestor **Jacob Ngucie Mwangi** and **Ngucie Investments** are 2 distinct persons and no authority has been filed authorizing Jacob to transact on behalf of the company. The Administrator denies the existence of the sale agreements produced as evidence.
7. He further averred that the court lacks the jurisdiction to entertain the affidavit of protest herein as the protestor is not a beneficiary of the estate of the deceased and urged the court proceeds to confirm the grant as it is since the Protestor has not shown any interest in the estate of the deceased and his only interest is to delay the confirmation.
8. The court directed that the affidavit of protest be disposed by way of written submissions.

**PROTESTORS SUBMISSIONS**

9. The protestor submitted that on 7<sup>th</sup> July, 1993 **Ngucie Investment Limited** entered into an agreement for sale of 7.5 acres of Marmanet Settlement Scheme Plot 260 with the deceased, and later in the year 1998 **Ngucie Investments Limited** purchased another 2.5 acres of the same land from the deceased, however the plots were not successfully transferred during the life time of the deceased.

10. He submitted that this court has the jurisdiction to hear and determine this matter conclusively as per **section 47 of the Law of Succession Act** and **Section 73 of the Probate Rules**. He cited the case of **Owners of Motor Vessel Lilian SS Vs Caltex Oil Kenya (1989) eKLR**. The court's jurisdiction flows from the constitution or legislature or both.

11. He further submitted on the issue of Constitutional Avoidance Principle which was discussed in the case of **Communications Commission of Kenya & 5 others Vs Royal Media Services Limited & 5 others (2014) eKLR**.

12. He further submitted that the negotiations in purchasing Marmanet Settlement Plot No.260 culminated in writing of the agreement which was witnessed by the parties but not attested to, as per the requirements of **section 3 (3) of the Law of Contract Act** which provides that an agreement for the sale of land is valid and enforceable if three conditions are met namely: contract is in writing, signed by the parties and witnessed.

13. Further, the protestor quoted **section 76 of the Law of Succession Act** and submitted that the passing of consideration intended to create a legal relationship between the deceased and the Protestor. He submitted that there was offer and acceptance supported by consideration equate to a contract, reliance was made to the case of **Charles Mwirigi Miriti Vs Thananga Tea Growers Sacco Ltd & Anor (2014) eKLR and the Karmali Tarmohammed & Another V. H Lakham & Company (1958) EA 567**.

14. He further submitted that Marmanet Settlement Plot No. 260 forms part of the estate of the deceased as it was one of the properties of the deceased and the Law of Succession Act recognizes the rights of purchasers, and urged the court to consider his interest as a purchaser of the deceased estate; that the duty of the court is to distribute the estate of the deceased to the legal beneficiaries.

15. He further submitted that the Protestor being the sole director of Ngucie Investment Limited has the authority to act as agent of the Company and urged the court to disallow the application for confirmation of grant as filed.

### **PETITIONER'S SUBMISSION**

16. In his submission filed on 28<sup>th</sup> August, 2020, the Petitioner submitted that the court has no jurisdiction to determine the Affidavit of Protest filed as it raises issues pertaining to title of the land of the deceased and the prayers sought in the affidavit are akin to those of specific performance of the sale agreement Marked as JNM 01 and JNM 02 violates Section 4 of the limitations of Actions Act.

17. He further submitted that the matter as raised by the Protestor falls within the purview of the environment court and as such this court lacks the jurisdiction to determine the matter. He quoted **article 162 (2) (b) of the Constitution of Kenya** on the jurisdiction of the High Court and cited the case of **Annah Kimitei & 11 others v Erick Kibiwott Tarusi & 51 others (2020) eKLR** and submitted that the court sitting as a succession court lacks the jurisdiction to entertain the Affidavit of protest.

18. On the issue whether the Protestor's claim is time barred, the administrator submitted that the protest is time barred under the Limitation of actions Act. The argument is that the deceased died on 17<sup>th</sup> April, 2000 a period of over 20 years and protestor has not brought any complaint in court for over 27 years. Further that the alleged contract attached puts a pre-condition that if the land control board consent is not obtained within 6 months, the sum paid as deposit is to be refunded; that no proof has been attached to show the consent was ever obtained.

19. The Administrator submitted that the affidavit of protest is hopeless and the same ought to be struck out; that he agreement marked as JNM 02 is undated and bears the date 1<sup>st</sup> December, 2012 below, then signature of the protestor, the same is not witnessed or dated. He further submitted that the alleged signature of the deceased is a forgery. He further submitted that there is no proof of payment of the consideration in the transaction.

20. Further that title in relation to the Marmanet Settlement Plot 260 was issued in the year 1992 and thus an agreement for sale entered in the year 1993 would have reflected the title number.

21. He urged the court to find that the Protestor and the company are a separate legal entity and thus the protestor acted without authority in representing the company; that the protest filed herein be dismissed for want of jurisdiction and the application for summons of grant be allowed.

22. The Protestor filed further submissions in response to the Administrator's submission and submitted that time begun to run when the petition was filed and that was in the year 2015, and thus the Protestor's claim is not time barred. He further submitted that the Petitioner has not backed up his allegation of the forged signature with sufficient evidence.

23. Having looked at the submissions and the law the issues for determination are as follows: -

- i. Whether this court has jurisdiction to entertain the protest
- ii. Whether the protestor is entitled to a share of deceased's estate and to what extend?

#### **i. Whether this court has jurisdiction to entertain the protest**

The administrator's argument is that this court has no jurisdiction to deal with the protestor's claim as that the claim falls under ELC Court. **Section 93** as read with **Section 24** gives a blanket protection to purchasers. Courts have applied it only in cases where according to the circumstances at hand, the purchaser can be rightly deemed to be '**a bona fide purchaser for value without notice.**'

24. In *Jacinta Wanja Kamau V Rosemary Wanjiru Wanyoike and Another (2013) eKLR* the court of appeal stated as follows: -

**“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...”**

25. From the evidence adduced herein, there is no doubt that at the time the deceased died, he had sold portions of land to various purchasers, the same is supported by the application for grant of letters of administration filed herein by the petitioner; it has a list several purchasers including the protestor as a beneficiaries of the estate of the deceased. The same is further support by the chief’s letter date 4.8.2015 attached to the petition which also list the protestor among other purchasers as beneficiaries of the estate of the deceased.

26. It is thus not clear why the summons dated 20<sup>th</sup> May, 2019 omit the protestor as a beneficiary. The first application for the confirmation of grant which has been withdrawn from the record did recognize the protestor as a beneficiary and allocated it 7acres of the portion of land, however the second one omitted him as a beneficiary. In my view the omission of the protestor as a beneficiary of the estate of the deceased is an afterthought.

27. The Administrator’s argument that the purchaser should have litigated the claim in a land’s court was dealt with in the **decision of the Court of Appeal in the case of *Rubo Kipnetich Arap Cheruiyot vs. Peter Kiprop Rotich Civil Appeal No. 128 of 2008* where the court stated as follows: -**

**“The Respondent's claim that the Appellant should have lodged his claim to the suit land in the deceased's succession cause has also no merit. There is no legal provision for it. We agree with Mr. Nyairo that deceased persons' succession causes are for purposes of determining and appointing the legal representatives of deceased persons and also for ascertainment of the deceased's heirs and their respective shares. Claims by third parties to deceased persons' properties, although sometimes lodged in the succession causes of such deceased person, are better litigated in separate suits. The Respondent's contention therefore that the Appellant's suit was incompetent for failure to lodge the claim in the deceased's succession cause has therefore no basis in law.”**

28. From the foregoing, I find that this court has jurisdiction to entertain the protestors claim.

**ii. Whether the protestor is entitled to a share of deceased’s estate and to what extend?**

29. **The protestor in his submissions has averred that it entered into a** contracts with the deceased prior to his demise. The first contract entered on 7<sup>th</sup> July, 1993, for the purchase of 7.5 acres, while the second one was later in the year 1998 for the purchaser of 2.5 acres. Both agreements have been attached herein as evidence proving the sale of the property. The Purchaser paid consideration for the said parcel of land. However, the protestor is only claiming 7.5 acres form the estate of the deceased.

30. The claim by the administrator that the written agreements between the deceased and the protestor are forgeries. **Section 107** of the **Evidence Act** that he who alleges a fact has the burden of proving it. In this case, it is the administrator has alleged that the written agreements were forgeries but he did not tender an iota of evidence thus the allegation for forgery cannot stand.

31. **Section 93(1) of the Law of Succession Act** provides:

**“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a 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.”**

32. **Section 24 of the Land Registration Act, 2012. No. 3 of 2012** provides:

**“Subject to this Act—(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”**

33. On the issue that the Protestor’s claim being time barred, lack any basis the Administrator filed the summons for the confirmation of grant on 20.5.2019 which omits the protestor as a beneficiary of the estate of the deceased it is upon those summons that the Protestor filed the affidavit of protest I find therefore that the law on limitation of actions act does not apply.

34. Having established that the protestor was a purchaser of the deceased estate protected under section 93 (1) of the law of succession act I find that he is entitled to the distribution of the estate of the deceased. I therefore order that the administrator include the protestor in the distribution of the estate of the deceased.

**35. FINAL ORDER**

- 1) The Protestor is bona fide purchaser of the estate of the deceased and I direct that his share of 7.5 acres be given to him.**
- 2) Each party to bear own costs.**

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Lepikas - Court Assistant

Mr. Tom for Administrator

No appearance for Protestor