



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 126 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE ROSE AKUKU AOKO (DECEASED)

BETWEEN

PHINIAS OKELLO MIREMBE.....APPLICANT/PROTESTOR

-VERSUS-

RUTH OTIENO.....PETITIONER/RESPONDENT

JUDGEMENT

At the heart of this dispute is the estate of Rose Akuku Auma who died intestate on 9/6/2012. The deceased's estate comprises the following property:-

- a) Suna East / Wasweta II/2174
- b) Suna East / Wasweta 1/4358
- c) Money at Narclays Bank Migori Account No. [...]

On 2/7/2020 J. Mrima in his ruling, ordered that the grant of Letters of administration intestate issued to Ruth Otieno in Migori High Court Succession Cause No. 126 of 2014 on 20/4/2014 and the grant of letters of administration intestate issued to Phinias Okello Mirembe in Migori CM's Court Succession Cause No. 211 of 2018 on 29/1/2019 be and are hereby revoked. A fresh grant of letters of Administration was issued jointly to Phinias Okello (Protestor) and Ruth Otieno (Petitioner) on 29/7/2020.

Both the protestor and the petitioner separately filed summons for confirmation of the joint grant issued to them on 29/7/2020.

On 2/3/2021, this matter came up for hearing. **Learned Counsel Mr. Awino** appeared for the protestor while **Learned Counsel Mr. Soire** appeared for the petitioner.

Phinias Okello (PW1) testified as the protestor. He produced and adopted his statement dated 11/12/2020 and filed in court on 14/12/2020 as evidence in chief. In further support of his case, he produced and marked a total of six exhibits as 'PEXhibit 1' to 'PEXhibit 6' which include a **sale agreement dated 24/8/1981; green cards with an entry of a caution placed by the protestor dated 17/6/1985 and 7/12/1987 respectively; nullified grants dated 29/1/2019 and 20/6/2019 and the ruling by Mrima J dated 2/7/2020.**

Briefly, it is the protestor's case that the deceased owned land Parcel **SUNA EAST/ WASWETA/1376**. It was later subdivided to form land parcel numbers **SUNA/WASWETA I/4358** and **SUNA/WASWETA I/4359**. The protestor owns land parcel number **SUNA/WASWETA I/4358, measuring 100 x 50ft** the suit property herein which he bought from the deceased and fully paid the purchase price.

The protestor testified that the deceased did not transfer the land to him because she did not have a title deed although he took possession of the suit property. In cross - examination, he admitted that he was not a beneficiary of the deceased's estate. His relation to the deceased was the sale agreement dated 24/8/1981 for the purchase of the suit property. He further testified that he took possession of the suit property when the deceased allowed him to build on it. He built a house whose roof was later blown away by the wind. He only got dispossessed of the suit property when the court nullified the grant via its ruling dated 2/7/2020.

On re-examination he testified that the only claim he has from the deceased's estate is his interest in the suit property as a purchaser.

Ruth Otieno(DW1) testified as the petitioner. She produced and adopted her statement dated 7/12/2020 as her testimony in evidence in chief. She testified that the deceased is her mother. Her deceased mother's estate comprised of three (3) parcels of land and some money in the bank. She filed for letters of administration intestate to the said estate and a grant was issued to her upon which she administered the estate. In relation to the suit property, the petitioner testified that she sold the land to one **Omar Feisal Mohammed Jamaa** in 2014 after which he obtained a title to it. It was her further testimony that the protestor had never taken possession of the land.

In cross - examination, the petitioner testified that the suit property is located within Migori town and that the protestor had never bought land from the deceased. She further testified that she is Ruth Otieno and not Ruth Adhiambo. In the year 1983 when it was alleged that she witnessed the agreement, she was fourteen (14) years old.

It was the petitioner's further testimony that she sold the land to one Omar Feisal Mohammed Jamaa in 2014 although she did not produce any sale agreement in respect thereof. The petitioner denied that she tried to sell the land again in 2020 as the grant was nullified by the court. The petitioner admitted that she knew the applicant had a title when she was summoned by the court and that Mohammed's title was nullified by the Registrar. The petitioner further admitted that she did not have the title to the suit property.

The petitioner concluded her testimony that the case in Kisii High Court was filed by one Onyango and not the protestor herein. The case ended and in 2013, summons were issued and she produced a death certificate of the deceased. The petitioner proceeded to close her case.

In support of her case, the protestor filed her submissions dated 9/4/2021 evenly. The protestor further relied on his submissions dated 12/3/2020 and the authorities relied upon in particular **Kisumu Civil Appeal No. 2 of 2014 between Musa Nyaribari Gekone & 2 Others v Peter Miyenda & Another**.

The protestor submitted that his interest in the estate of the deceased is in his capacity as a purchaser for value of the suit property on the strength of the Sale agreement dated 24/8/1981 between him, a co-purchaser and the deceased. The agreement was partially signed by the petitioner (Ruth Otieno) which has not been challenged on grounds of fraud.

Further to the foregoing, the protestor submitted that the question of whether a purchaser for value falls under the category of beneficiary is well settled. He placed reliance in the cases of **Machakos Succession Cause No. 865 of 2013 (In Re Estate of Joseph Mutua Munguti (deceased) 2018 eKLR; Johnson Muinde Nguza & Another vs Michael Gitau Kiarie & 12 Others (2017) eKLR; Mpatinga Ole Kamuye vs Meliyo Tipango & 2 Others (2017) eKLR; Titus Muraguri Warothe & 2 Others vs Naomi Wanjiru Wachira HCSC No. 12 of 2012** The protestor urged the court to be persuaded and register the suit property namely **Land Parcel No. Suna East/ Wasweta I/4358** in the name of the protestor **Phinias Okello Mirembe**.

The petitioner filed her submissions on 9/4/2021 on even date. The petitioner recounted the facts of this case, the oral testimony in chief and the evidence adduced by both parties.

The petitioner submitted that the only issue in dispute is the suit parcel of land i.e. Suna East / Wasweta I/4358; that the protestor is not a beneficiary of the estate of the deceased; that his claim is solely based in an Sale Agreement entered into in 1981 which did not obtain Land Control Board Consent. That the protestor admitted that he is currently not in occupation of the suit parcel of land as he was evicted in the year 2009 or thereabouts.

The petitioner further submitted that the protestor's claim is statute barred and unsuited; that his claim cannot be litigated in this cause. The petitioner placed reliance on the case of **Rubo Keprigetich Arap Cheruiyot vs Peter Kiprop Rotich (2013) eKLR** to support her argument. She urged this court to dismiss the protest with costs.

In response to the petitioner's submissions, the protestor submitted that the suit property does not require land board consent as it is within Migori Township along Migori - Isebania road near Migori Bridge.

After carefully considering the rival oral and written arguments, the evidence and submissions by the parties before this court, the single issue for determination is,

i. Whether the protestor's summons for confirmation of grant is merited.

The following are the undisputed facts: -

i. That the deceased's estate comprised parcels SUNA WASWETA 11/2174 and SUNA WASWETA 1 / 4358. That parcel number SUNA WASWETA 11/2174 is not in contest in this case;

ii. That there exists a sale agreement between the deceased, the protestor and another co-buyer by the name J.E. Odongo Ogembo in regard to SUNA WASWETA 1/4358;

iii. That pursuant to a ruling delivered on 2/7/2020 by Hon. Mrima J, and the directions TAKEN thereafter, a joint grant of letters of administration in the name of Ruth Otieno and Phinias Okello Mirembe in respect of the Estate of Rose Akuku Aoko (Deceased) was issued;

iv. The title of the suit property issued to Omar Feisal Mohammed Jamaa was cancelled by the Registrar of Lands upon being served with the confirmation of grant and the same fact was observed by Mrima J in his ruling of 2/7/2020 in

paragraph 3;

I have carefully considered the proceedings which gave rise to the ruling delivered on 2/7/2020, the issues raised then and now are similar. There is no need of re-litigating on the same issues.

The parties herein fully complied with the directions given by the court in its aforementioned ruling. One of the directions given by the court was: -

“(e) The Administrators and/or any of them shall apply for the confirmation of the new grant within 30 days of this ruling. The application shall be served upon all the beneficiaries and/or interested parties to the estate of the deceased.”

The issue of the protestor’s interest in the deceased’s estate was well settled in the said ruling at paragraph 21 which I am inclined to associate myself with it is as follows:-

“Phinias was therefore entitled to the estate as a purchaser and/or an interested party.”

The protestor produced a Sale Agreement in respect of the suit property dated 24/8/1981 (PEXNO.1). The part payments were finalized on 26/6/1983. The petitioner did not satisfactorily challenge the existence and authenticity of this agreement. Although she tended to say that she did not sign it, no fraud was alleged. This agreement was entered into over three years before the deceased’s death. As has been held in various decisions, a purchaser for value falls under the categories of beneficiaries in the estate of a deceased person. As was held in **HCC (NKS) 865 OF 2013 In the Estate of Joseph Mutua Munguti (deceased) 2018 KLR**, it was held :

“According to section 3 of the Act “estate” means “the free property of a deceased person” while “free property” “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.”

See also **Johnson Muinde Ngunza & Another =vs= Michael Gitau Kiarie & 12 others (2017)EKLR**.

The petitioner was aware of the protestor’s claim and that is why she sneaked to Rongo Court to file this cause instead of Migori Court where the suit land is situated and there is even a High Court.

Like was held in **Titus Muraguri Warothe & 2 others vs Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2020** that though aware of the purchaser’s interest, the petitioner ignored the protestor’s interest and even tried to get rid of the property in order to defeat the protestor’s rights. The court said as follows:

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them.

The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises... Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interest. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account the interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

The Petitioner submitted that there was no land Control Board consent obtained in respect of the sale of land. However, as admitted by the petitioner herself, the suit land is situated in Migori Town. It is not agricultural land and does not require the land Control Board consent.

Although the petitioner submitted that the protestor should have filed a suit in the ELC Court, yet the law allows a purchaser for value to be included as one of the beneficiaries or to take into account the purchasers interest.

Although the petitioner claimed to have sold the land to one Jamaa in 2014, she failed to produce the Sale agreement to prove the sale. The

petitioner had been issued with a grant in this matter on 20/11/2014 which was confirmed on 19/6/2017. The question is whether the petitioner had capacity to transact any such sale even if there was one. She could only have sold the land after 19/6/2017. Even if there was a sale, it is apparent that it was made before the grant was confirmed to the petitioner and the sale would have been a nullity in any event.

In compliance with the court's directions, the protestor filed this summons for confirmation of grant dated 30/7/2020 on 19/8/2020 as a purchaser of the suit property in which his interest was well settled. Similarly, the petitioner filed a summons for confirmation of grant dated 15/8/2020 on 25/9/2020.

There is no existing appeal from the ruling of J. Mrima dated 2/7/2020, I find merit in the Protestor's application and I hereby allow the application for summons of confirmation of grant dated 30/7/2020 as prayed.

Consequently, I make the following orders:-

- a. The summons for confirmation of grant filed by Phinias Okello Mirembe dated 30/7/2020 in respect to Land Parcel Number SUNA/WASWETA I/4358 be and is hereby allowed.**
- b. The Summons for confirmation of grant filed by Ruth Otieno and dated 18/8/2020 is hereby allowed in respect of land parcel Suna Wasweta II/2174 and the cash held in Barclays Bank in Account number [...].**
- c. The Land Parcel Number SUNA/WASWETA I/4358 shall be registered in the name of Phinias Okello Mirembe within thirty (30) days.**
- d. Ruth Otieno (Petitioner) shall sign the necessary documents needed for the successful registration of the Land Parcel Number SUNA/WASWETA I/4358 in the name of Phinias Okello Mirembe. In default, the Deputy Registrar of this court will sign in her place.**
- e. Each party to bear its own costs.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 7TH DAY OF JULY, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Awino for the protestor.

No appearance for the petitioner.

Nyauke Court Assistant.