



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 3 OF 2019**

**DOMINIC NTHANGATHI KIBONDO.....1<sup>ST</sup> APPELLANT**

**VINCENT KIOKO DOMINIC .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PAULINE KATHINI MULWA.....1<sup>ST</sup> RESPONDENT**

**MUTHINI MULWA .....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Ruling of Chief Magistrate's Court at Kitui***

***in Civil Case No. 189 of 2013 delivered on 6<sup>th</sup> October, 2015 by***

***Hon. M. Murage, Chief Magistrate)***

**JUDGMENT**

1. In a Ruling delivered on 6<sup>th</sup> October, 2015 in Kitui CMCC No. 189 of 2013, the learned Magistrate sustained the Defendants'/Respondents' Preliminary Objection and dismissed the Appellants' suit.
2. The Appellants have filed an Appeal against the said Ruling. In the Memorandum of Appeal, the Appellants have averred that the learned Magistrate erred by writing a hasty Ruling and thereby failed to appreciate the nature of the suit; that the Magistrate erred by failing to appreciate that the Plaintiffs could sue the Defendants as the administrators of the Estate of the deceased for declaratory orders or for recovery of the purchase price and that the Magistrate failed to appreciate the provisions of Article 159(2) (d) of the Constitution.
3. The Appeal proceeded by way of written submissions. The Appellants' advocate submitted that the Appellants purchased a portion of land known as Yatta B2/Kwa-vonza/265 from the late Paul Mulwa Ndana, a husband to the Respondents; that the seller died before transferring the land to the Appellants and that the Respondents, as the administrators of the Estate of the deceased, did not make provision for the portion sold to the Appellants nor did they offer to refund the money received by the deceased.
4. Counsel submitted that the Appellants were not aware of the succession proceedings in respect of the Estate of the seller; that it was still open for them to sue the administrators claiming as creditors to the Estate for a declaratory Judgment and that the trial Magistrate ought to have allowed the suit to proceed on its merits.
5. The Respondents' advocate submitted that when the Appellants filed their Complaint, they were aware of the Certificate of Confirmation of Grant issued on 6<sup>th</sup> October, 2010; that a confirmed grant operates as a Decree and concludes all issues concerning the Estate of the deceased and that the only way that a confirmed grant can be interfered with is by having it revoked or annulled under Section 76 of the Law of Succession Act.
6. As this is a first Appeal, it is my duty to analyze and re-assess the pleadings on record and arrive at my own conclusion in the matter.
7. In the Complaint that was filed by the Appellants in the lower court, the Appellants averred that the Respondents are the administrators of the Estate of the late Paul Mulwa Ndana; that the late Paul Mulwa sold to them five (5) acres from the original parcel of land known as Yatta B2/Kwa-vonza/265 for KShs. 210,000 and that the 2<sup>nd</sup> Respondent was a witness to the said transaction.
8. The Appellants averred that their claim against the Respondents is for a declaration that they are purchasers for value of five (5) acres of land from the original title Yatta B2/Kwa-vonza from the late Paul Mulwa Ndana; that the Respondents should transfer to them the five (5)

acres and that alternatively, the Respondents should refund them the purchase price.

9. In their Defence, the Respondents averred that the suit is incompetent and bad in law. The Respondents also filed a Notice of Preliminary Objection in which they averred that the court did not have jurisdiction to entertain the suit; that the claim is time barred and unenforceable by virtue of the provisions of Section 4(1) of the Limitation of Actions Act and that the claim is incompetent by virtue of the provisions of Section 6(1) of the Land Control Board Act.

10. The Notice of Preliminary Objection was argued in the lower court. In her Ruling, the learned Magistrate held as follows:

***“I have considered the submissions before me and find that this claim ought to have been brought under the provisions of Section 76 of the Law of Succession and not as a separate civil suit. I sustain the Preliminary Objection and rule that the suit is incompetent and agree with the Defence that the court’s jurisdiction is in a succession cause and not in a normal civil suit.”***

11. Although the Appellants have averred that they were not aware of the succession proceedings in respect of the Estate of the late Paul Mulwa Ndana, they filed the Certificate of Confirmation dated 6<sup>th</sup> October, 2010 in respect to the Estate of the deceased alongside the Plaintiff.

12. The Certificate of Confirmation of the Estate of the late Paul Mulwa Ndana shows that his Estate was distributed by the court on 6<sup>th</sup> October, 2010. One of the properties that was distributed to the deceased’s beneficiary, Pauline Kathini Mulwa, is the suit property.

13. As was held in my Ruling of 26<sup>th</sup> October, 2018, this court, or the lower court, does not have the jurisdiction to undo the decision of the Succession Court, unless the proceedings have been filed in the Succession Court that distributed the Estate of the deceased.

14. Indeed, the Estate of the deceased having been distributed amongst his beneficiaries three (3) years before the filing of the suit in the lower court, there was nothing left to be distributed to his creditors. In fact, the Plaintiffs’ claim has no basis considering that after the distribution of the Estate of the deceased by the court, the administrators of the Estate of the deceased became *functus officio*. The Plaintiff’s claim only lay in the Succession Court, and not by way of a separate suit.

15. For those reasons, I find that the learned Magistrate did not err in her decision of 6<sup>th</sup> October, 2015. The Appeal is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**