



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

P&A NO. 22 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE MUTHOTHO KAMAU GATHATWA – (DECEASED)

STEPHEN KIGUO MUTHOTHO.....1ST PETITIONER

JACKSON KARIUKI MUTHOTHO.....2ND PETITIONER

-VERSUS-

MAINA WAMBUGU RICHARD.....PROTESTOR

RULING

1. By a certificate of urgency application dated 22nd May, 2015, the Applicant sought to rectify grants issued on 25th January, 2011 to align with Gazette Notice No.13230 issued on 21st October, 2011 and petition to include Maina Wambugu Richard.
2. That upon rectification aforesaid grant issued to Jackson Kariuki Muthotho and Stephen Kiguo Muthotho be confirmed.
3. Objection seeking revocation of grant dated 10th July, 2021 be marked withdrawn.
4. Same is supported by the grounds on the face of the chamber summons and affidavit of Jackson Kariuki Muthotho sworn on 22nd May, 2014.
5. The Applicant sought the letters issued on 25th November, 2011 erroneously omitted Muthotho Kamau Gathatwa. All beneficiaries have agreed on mode of distribution in respect of instant estate subject herein.
6. The 6 months' period has lapsed since grant was issued and objection has been amicably compromised.
7. The application faces a protest lodged by affidavit of Maina Richard Wambugu sworn on 29th October, 2019.
8. He claims to be a purchaser of a portion of estate land from beneficiaries of estate and to be in possession of 1 acre, thus if grant is confirmed he is going to lose his right to the acre aforesaid.
9. The Petitioners in rejoinder to the protest avers that the Protestor is not a beneficiary of instant estate as he is not son or creditor of deceased.
10. He bought a portion from Godfrey Macharia Muthotho who did not have capacity to sell any portions of deceased estate.

ISSUES, ANALYSIS AND DETERMINATION:

11. After going through the materials before me, I find the singular issue is ***whether the protestor has justifiable and valid claim against the estate of the deceased herein.***
12. He claims to be a purchaser of a portion of estate land from beneficiaries of estate and to be in possession of 1 acre, thus if grant is confirmed he is going to lose his right to the acre aforesaid. He confirms petitioner's averment that he is not a beneficiary of instant estate as he is not son or creditor of deceased. He bought a portion from Godfrey Macharia Muthotho who did not have capacity to sell any portions of deceased estate.

13. Needless to say, before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily.

14. The intention of the Law of Succession Act is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed.

15. In Re Estate of Paul M’Maria (Deceased) [2017] eKLR the court stated that:

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that:

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

16. In Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J held:

“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.....

For the transaction between the Applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immoveable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:

“no immovable property shall be sold before confirmation of the grant.”

Furthermore, Section 45 of the Law of Succession Act prohibits dealing with properties belonging to a deceased person before obtaining grant. It states:

“(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”

17. The only remedy protester has is to get his share from the beneficiary who purported to sell him a portion of land after beneficiary gets his share of the estate. Thus the court finds no merit in protest and grants the orders as follows;

i. The application dated 22nd May, 2015, seeking to rectify grants issued on 25th January, 2011 to align with Gazette Notice No.13230 issued on 21st October, 2011 and petition to include Maina Wambugu Richard is granted and grants to be rectified accordingly.

ii. That upon rectification aforesaid the grant issued to Jackson Kariuki Muthotho and Stephen Kiguo Muthotho will stand confirmed accordingly.

iii. Objection seeking revocation of grant dated 10th July, 2021 is hereby marked withdrawn.

iv. No orders as to costs.

Dated, Signed and Delivered at NYAHURURU this 18th day of November, 2021.

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CHARLES KARIUKI

JUDGE