



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

SUCCESSION CAUSE NO. 404 OF 2012

IN THE MATTER OF THE ESTATE OF PHYLIS KINANJA BARASA-DECEASED

MANEA NAFUNA MARUMBU.....1ST PROTESTOR

VINCENT WASWA KING'ORO.....2ND PROTESTOR

VERSUS

ELVIS SITATI KINANJA.....1ST PETITIONER

COLLINS KINANJA.....2ND PETITIONER

BENARD WANYAMA.....1ST INTERESTED PARTY

FREDRICK WANYONYI MAYENDE..2ND INTERESTED PARTY

JUDGEMENT

Phylis Kinanja Barasa died on 23/12/1996 leaving behind 5 children among them the 1st and 2nd petitioners. She left behind a number of properties in her name. Elvis Sitati Kinanja and Collins Kinanja applied for letters of administration and filed their summons for confirmation of grant on 22/11/2019. The protestors filed their affidavits of protest to the confirmation on 6/12/2019.

Manea Nafuna Marumbu on her part depones that upon the demise of Phylis Kinanja Barasa (hereinafter Phylis), her late husband applied for letters of administration. The 1st petitioner approached her with a proposal to dispose off part of the estate herein to facilitate his studies whereupon after consultation with her late husband, they sold a portion measuring 1.48 Ha out of land parcel E.Bukusu/W. Sang'alo/752 to the 2nd protestor. That despite the 1st petitioner's knowledge of the sale to the 2nd protestor, he proceeded to sell the same portion to the 1st interested party on 3/7/2006.

She disputes the sale to the 1st interested party for being entered into way after the demise of Phylis and that pursuant to clan meeting of April, 2017, it was agreed that the 2nd protestor is entitled to E.Bukusu/W. Sang'alo/752 over the 1st interested party.

On his part, the 2nd protestor depones that in the year 2000, he purchased a portion measuring 1.48 Ha out of land parcel E.Bukusu/W. Sang'alo/752 upon being approached by the 1st protestor and her husband the late Yohana Marumbu, then administrator of Phylis' estate. That he paid the full purchase price and took possession and lives thereon to date.

He depones that he later on learnt that the 1st petitioner had sold and transferred the parcel to the 1st interested party. That the act of replacing him with the 1st interested party in the proposed mode of distribution is malicious and meant to deny him justice.

By is replying affidavit, Elvis Sitati depones that by judgment delivered on 10/6/2019 by Abida Aroni J, he and Collins Kinanja were appointed administrators and the court further gave an order nullifying all prior transactions on the estate. That the 1st protestor has neither appealed against nor sought a review of the judgement. He disputes having lived under the care of the 1st protestor.

The protest was heard by way of *viva voce* evidence.

The first protestor, Manea Marumbu stated that Phylis was the wife of his son Mathias Kinanja. That she was staying with Elvis, the 1st petitioner. That the said Elvis was in need of school fees thus she sent him to look for a buyer, Elvis came with Vincent King'oro. The said Vincent gave Elvis the money in the presence of his paternal grandfather and the clan chairman. That Vincent is still in occupation of the land and now wants ownership documents.

The 2nd protestor Vincent Waswa King'oro stated that he bought land from Manea Marumbu and Yohana Marumbu because Elvis wanted fees to enable him join university. At the time of purchase, the land was registered in the name of Phylis and that Elvis did not sign the agreement. He acknowledges the existence of Succession cause No. 71/2013 relating to the same estate.

Emmanuel Kinanja Makokha testified for the protestor. He stated that he witnessed the sale of the land to the 2nd protestor on 28/3/2000 where the money was given to the 1st protestor and her late husband. That the money was intended to cater for Elvis' school fees who was then proceeding to college.

Elvis Mufumba Kinanja testified as PW-1. He adopted his affidavits as evidence in chief and stated that his late father had 2 wives; Jane Simiyu and Phylis Kinanja and the 1st protestor Manea Marumbu is his paternal grandmother. That upon the demise of his mother he stayed with his maternal grandfather Jestimore Webi who paid his school fees. He denied participating in the sale of the land to the 2nd protestor.

He confirmed having sold the parcel of land known as East Bukusu/West Sang'alo/752 to Fredrick Mayende in the year 2006 though the land is occupied by the 1st protestor since the year 2000.

Collins Kinanja testified as PW-2. He stated that Phylis was his step mother. His mother passed on when he was 1 year and was brought up by Phylis.

The parties filed their respective written submissions. The protestors urge the court to find that since the sale of the parcel to the 2nd protestor has not been challenged by the interested parties, the court should hold that the sale was valid.

On the priority of purchase, counsel submits that since the 2nd protestor bought the land in the year 2000 and Fredrick Mayende bought in 2006, the court should uphold the purchase by the 2nd protestor.

Counsel also submitted that the petitioners together with Fredrick Mayende fraudulently transferred the parcel to the latter in the year 2006 when the grant of representation to the estate had not been confirmed. He submits that the purported transfer was done in collusion with the officials at the ministry of lands.

The protestors further submit that since the 2nd protestor is in possession of the land, he should be awarded the parcel.

To buttress their submissions, the following authorities have been cited; *in Re estate of Nasotokini Ole Sane alias Nasotokini Lesane (Deceased) (2019) eKLR* and *in re estate of Muthiani Mutule (Deceased) (2017)eKLR*

On their part, the petitioners submit that there is no evidence that the proceeds of the purported sale to the 2nd protestor were utilized in paying Elvis' school fees since the same was paid by his maternal grandfather.

They submit that their consent was not obtained before the property was disposed since some of the beneficiaries were minors. They urge the court to find the protest as lacking in merit.

Having considered the affidavits of protest, the replying affidavits, the parties' oral evidence and the submissions, the following issues commend themselves for determination;

- 1. Whether the protest should be sustained or in the alternative, the grant made to Elvis Sitati Kinanja and Collins Kinanja be confirmed.**
- 2. Whether the sale of E.Bukusu/W. Sang'alo/752 to Vincent Waswa King'oro should be upheld.**
- 3. Whether the sale of E.Bukusu/W. Sang'alo/752 to Fredrick Mayende wanyonyi should be upheld.**
- 4. Who bears the costs of the application**

On the first issue, the basis of the protest is the inclusion of Fredrick Mayende in the summons for confirmation to the exclusion the 2nd protestor. The protestors contended that the Vincent King'oro ought to have been included as a beneficiary of the estate having purchased the land from the 1st protestor and her late husband Yohana Kinanja for purposes of offsetting Elvis' school fees arrears as well as facilitate his studies in college. This position has been disputed by the petitioners.

Going by the evidence on record, the land was purportedly sold to the 2nd protestor on 28/3/2000. At the time, no grant of representation to the deceased's estate had been granted. Indeed, the grant was issued to Yohana Kinanja in the year 2002 and confirmed in 2009 in favour of the 1st protestor. The petitioners moved the court for revocation of the said grant. The grant was nullified by a ruling of Ali-Aroni J. delivered on 10/6/2019 and appointed the petitioners to proceed with the confirmation. The learned Judge also nullified all the transactions on the estate arising out of the grant.

This therefore means that at the time the 1st protestor and her late husband purportedly sold off the parcel to the 2nd protestor, they had no authority to so sell and the transaction, if any, merely constituted the offence of intermeddling with the estate provided for under Section 45(1) of the law of Succession Act which states;

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.

In *In Re the Matter of the Estate of David Julius Nturibi M'ithinji (Deceased) [2012] eKLR*, it was held;

I agree with the finding of the Honourable Judge in the way he defined intermeddling, however I would like to add any act that purports to dispossess or result into wastage of deceased estate or causes loss or damage or makes it impossible for administrator to administer the deceased estate by a person who is not authorized by The Law of Succession Act or by any written law or by a grant of representation under the said Act is an act of intermeddling with free property of a deceased person.

Having found that the purported sale was an act of intermeddling with the estate, the 1st protestor Manea Marumbu and her late husband had no powers whatsoever to dispose off the property, the intention to educate the 1st petitioner notwithstanding. The sale cannot confer any rights to the 2nd protestor over the property whatsoever.

On the second issue, the 1st protestor has not disputed the fact that the land was allegedly sold to Vincent King'oro by her late husband and herself. She sought to sanctify the transaction on the ground that the sale was intended to cater for Elvis' school fees. Even if this was the case, the purported sellers did not have authority to do so. It matters not that it is Elvis who sought the buyer. The transaction was illegal for all intents and purposes and cannot confer any proprietary interest on the 2nd protestor.

It is clear that at the time of the sale, there was no proper representation to the estate. Yohana Marumbu had not been made an administrator of the estate. It is immaterial that the buyer has been in occupation of the land since the time he allegedly bought it.

On the 3rd issue, Elvis confirms that he sold the parcel of land E.Bukusu/W. Sang'alo/752 to Fredrick Mayende Wanyonyi in the year 2006. By then, the grant in this matter had not been confirmed. It has not been confirmed to date. The sale is equally impugned for having been entered into before proper representation had been obtained.

The petitioners have listed Fredrick Mayende as liability in their summons for confirmation of grant. This cannot be true because the said Fredrick bought the parcel way after the demise of Phylis. He cannot therefore be a liability.

Addressing the issue, Musyoka J. in *In re Estate of Barasa Kanenje Many (Deceased) [2020] eKLR* held;

The starting point should be with respect to the fact that the applicants did not purchase the portions of the asset of the estate, that they lay claim to, from the deceased, but rather from a son of the deceased, David Wafula Kanenje. That, they have averred very clearly in their affidavit, and they have reiterated the same in their written submissions. Quite clearly, therefore, they are not creditors of the estate. They would only have a claim against the estate if they had transacted over the land with the deceased owner himself. The transaction in question appears to have been entered into after the deceased died.

It is pertinent to point out that an administrator of an estate becomes properly seized of the power to deal with properties of estate only after the grant has been confirmed.

For the above reasons, this court finds the sale of the aforesaid parcel of land to the said Fredrick Mayende was illegal for contravening the law under the Law of Succession Act.

The court proceeds to make the following orders;

1. The protest is hereby dismissed.
2. The sale of East Bukusu/West Sang'alo/752 to Vincent Waswa King'oro and Fredrick Wanyonyi Mayende is hereby declared null and void.
3. The grant issued to Elvis Sitati Kinanja and Collins Kinanja is hereby confirmed in accordance with the proposed mode of distribution already filed in court.
4. Fredrick Wanyonyi Mayende is a not a beneficiary of the estate of Phylis Kinanja Barasa.
5. The certificate of confirmation of grant to issue forthwith in the terms aforesated.
6. Costs to be borne by the protestors.

DATED AT BUNGOMA THIS 17TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE