



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 798 OF 2008

IN THE MATTER OF THE ESTATE OF NZEMBI MUSILA (DECEASED)

THOMAS MUSILA MUTAVA

AGNES MUTHINI MUSILA.....PETITIONERS/ADMINISTRATORS

VERSUS

MACHARIA CHEGE.....PROTESTOR

RULING

1. The deceased, **Nzembi Musila**, passed away on 20th July, 2007. By Summons dated 2nd February, 2021, the Administrators applied for confirmation of Grant in respect of his estate.
2. However, on 8th February, 2021, the Protestor herein, **Macharia Chege**, filed an affidavit of protest sworn on 8th February, 2021. According to him, in or about the years 1999 and 2000, he entered into an agreement with the deceased for the sale of a portion of land measuring 3 Ha from Land Parcel No. Donyo-Sabuk/Komarock Block 1/4189 at a consideration of Kshs 210,000/- and paid Kshs 190,000/- leaving a balance of Kshs 20,000/- which was to be paid to the deceased upon the deceased successfully obtaining the consent to transfer from the Land Control Board. It was averred that all the monies that exchanged hands between the two parties were done in the presence of the deceased's children including the administrators herein and 4 other witnesses living within the deceased's neighbourhood.
3. It was averred that the deceased applied for the said consent from the relevant Land Control Board but the same was issued since the administrator and some of the deceased's children declined to attend the board meeting for unknown reasons. Before they could reapply for the consent, the deceased's health took a downward spiral leaving her incapacitated and unable to carry out most of her normal functions and her children **Mutava Musila**, **Thomas Musila**, **Nzuki Musila** and **Muthini Musila** became reluctant to assist the Protestor and instead took advantage of their ailing mother's predicament by allocating their mother's land to themselves and then colluding with land buying companies to subdivide the land and sell as plots.
4. It was averred by the Protestor that prior to the board meeting and after the payment of the agreed last instalment, the deceased had invited a surveyor to the land who demarcated his portion of 3 hectares and erected beacons thereon. However, the deceased's sons uprooted the said beacons and started subdividing the same and selling them to prospective buyers. As a result, the Protestor reported the matter to the area Chief and his case was later transferred to the District Land Tribunal, Matungulu where the matter was upon being heard by the District Officer, it was determined that the deceased's family must give the Protestor his 3 Ha. However, when the District Officer presented the verdict to the deceased's family for signature, they sought leave to consult and disappeared. After that the Protestor lodged a restriction against the suit land to stop further encroachment.
5. In 2008, the Protestor came to learn that one **Thomas Musila**, one of the Administrators herein, had filed a citation in Nairobi High Court, being Succession Cause No. 1091 of 2008 – In the Matter of the Estate of **Nzembi Musila** – without the Protestor being informed despite the knowledge of the Protestor's interest in the deceased's estate. Upon the realisation that the Protestor was aware of the foregoing, the said **Thomas Musila** colluded with his elder brother, **Mutava Musila**, and the director of Bigma Housing Co., one **John Migwi**, abandoned the said Cause and instituted these proceedings, again without the Protestor's knowledge. The Protestor belatedly became aware of this new development when the Court had already issued the Grant of Letters of Administration Intestate to **Mutava Musila** and **John Migwi**.
6. It was then that the Protestor filed a protest and the said Grant was revoked and the parties were directed to prosecute the Nairobi Succession Cause. However, the Protestor sought the directions of the Court upon which it was directed that this matter be proceeded with and his interests be considered. Prior to the said directions, the administrators herein were summoned severally for mediation but they failed, refused and/or neglected to amicably settle the matter.

7. The Protestor disclosed that in early January, 2021, the said **Thomas Musila**, one of the administrators herein went to see him at Thika with an offer of 2 plots measuring 40 x 60 ft which offer was followed by a call from his advocate requesting the Protestor to go to his offices and sign the transfer documents to that effect, an offer which the Protestor turned down and demanded for his 3 hectares.
8. It was therefore the Protestor's position that the deceased's family has at all material times acted in bad faith with intent to dispossess him of his rightful share of 3 Ha by means of mischief and trickery hence this protest by which he seeks that he be granted his share of 3 Ha in accordance with the deceased's wishes.
9. In his submissions, the Protestor contended that in or about the year 2000 the protester entered into a sale agreement with the deceased herein for the sale of three Hectares (3Ha) of land which was to be hived off from Land Reference No. Donyo Sabuk Koma Rock Block 1/4184 measuring approximately Two Six Decimal Three Four Hectares (26.34 Ha) registered in the name of the deceased at a total consideration of Kenya Shillings Two Hundred and Ten Thousand only (Kshs. 210,000/=) that is to say Kenya Shillings Seventy Thousand (Kshs. 70,000/=) per Hectare. He proceeded to conduct a due diligence search at Machakos Land registry office where he found that the land was free from any encumbrances.
10. The parties proceeded to draw an agreement in writing, it was duly executed by the parties and accordingly attested to by five witnesses. Three of these witnesses were the sons and the daughter of the deceased namely **Thomas Musila**, **Mutava Musila** and **Muthini Musila** respectively and **Thomas Musila** and **Agnes Muthini Musila** are now the Administrators of the deceased's estate. The other two (2) witnesses are **Mary Wanjeri Kihunyuro** and **Esther Njeri Kamiti** who were present when the agreement was entered into between the protester and the deceased and that the consideration was paid in the presence of the deceased's children who are the administrators' herein.
11. It was submitted that it is trite law under the **Law of Contract Act** (Chapter 23) Laws of Kenya Section 3(3) that all dispositions in land must be in writing and in this case the contract in this case was done in full conformity with the legal provisions and the petitioners cannot be heard to state otherwise.
12. While reiterating the facts as narrated in the supporting affidavit, it was submitted that after paying the balance of the purchase price, which was witnessed by **Mr. Bernard Maina**, it was intended that the protestor would take possession at this point and the Protestor took ground possession and contracted one **Thomas Musila** (an administrator here-in) to put up a perimeter fence at a cost of Kshs 10,000.00. He later contracted **Mr. Bernard Maina** to bring 20 (Twenty) Lorries of sand and ballast ready to begin the construction of classrooms). However, before the deceased could apply for issuance of the Consent when the board would next be held, her health deteriorated leaving her incapacitated and she passed on. Thereafter, the deceased's children maliciously, illegally and without any color of light allocated the estate to themselves; rushed and removed the beacons placed by the surveyor and fence clearly demarcating the protestor's parcel of land; resurveyed and subdivided the land and started selling the land to prospective buyers in cohort with land buying companies one of them being **Bigma Housing Company** owned by **John Migwi**, the interested party herein.
13. It was submitted that the deceased's children were and are still blatantly intermeddling with their late mother's estate which is a criminal offence as provided in Section 45 of the **Law of Succession Act (Cap 160)**. According to the Protestor, any sale by the children is subject to the legal maxim *nemo dat quod non habet* and any interest over the deceased's estate transferred by them is void
14. It was submitted that the interested party sought to be an administrator in order to protect his interest and that of his clients who had already bought through him, albeit illegally. Though they obtained Grant, the court through its ruling delivered on 29th February 2012 by **Asike-Makhadia J.** revoked the grant and directed the parties to either consider the protestor's interests or prosecute the succession cause at Milimani to conclusion. The petitioners through their application filed on 26th April 2012 unsuccessfully attempted to set aside/vary the ruling of 29th February 2012 which application was dismissed by **L.N Mutende J.** in her ruling delivered on 28th April 2015.
15. Following the consolidation of both succession causes, the lead file number was retained as Machakos Succession 798 of 2008 with the petitioners being **Thomas Musila Mutava** and **Agnes Muthini Musila**. It was submitted that the children of the deceased have not come to court with clean hands and are out to frustrate the Protestor from recovering his land from the deceased's estate they have used all manner of ways to sideline the protestor and to delay the final determination of this matter.
16. It was noted that a keen reading of the supplementary affidavit dated 12th July 2021 clearly depicts that the same is full of mere denials, perjury and unfounded allegations since the petitioners depose that the sale agreement is unsigned and unattested while the same was duly executed and attested.
17. It was submitted that a sale agreement creates rights and obligations between the parties and they survive a deceased party by creating a trust. In this case the petitioners are not absolute owners but are holding the land in trust for the protestor otherwise known as a Cestui Que Trust.
18. It was submitted that the petitioners have neither listed the particulars of forgery nor have they tendered any evidence to show that indeed the protestor has forged any documents as the burden of proof fall upon them to do so but they have failed to do so which is a clear indication that this is a mere allegation. It was further submitted that the allegations that the protest is scandalous frivolous and an abuse of the court process is not within the purview of the protestors to determine but this falls squarely within the realm of this court.
19. It was submitted that by filing succession matters behind the protestor's back, filing two succession matters contemporaneously and abandoning one of the cases to hoodwink the protestor and advantage of the protestor by attempting to give the protestor 2 plots measuring 40X60ft and 1 Million Shillings instead of giving him the rightful claim of 3Ha from the estate, some of the petitioners have exhibited bad faith and malice towards the protestor.
20. In the Protestor's view, since the mode of distribution proposed by the petitioners is meant to further deny the protester his right over the parcel he purchased from the deceased, the Orders sought in this protest are justified and ought to be given in the interests of justice.

21. The Protestor also claimed the cost of the suit with interests, special damages and any other benefits that the court may deem fit.
22. In response to the protest, the Petitioners', in a sworn affidavit averred that there has never been any land transaction between the deceased during his lifetime and the Protestor herein as alleged in the protest. According to them the purported agreement is invalid, non-binding and of no legal effect as the same is unsigned and unattested as required by the law. It was averred that a sale agreement is merely executory and does not confer any interest in land since a disposition in land can only occur after the transfer instrument is stamped and registered in accordance with the relevant laws. As such no disposition in land ever occurred between the deceased and the Protestor.
23. It was averred that the purported District Officer's Report is a forgery as none of the deceased's children as ever summoned by the DO nor appeared at the alleged forum as there are no signatures in the said report to prove or ascertain that they were indeed present.
24. It was therefore contended that the protest is incompetent, an abuse of the court's process, destitute of merit and does not meet the threshold required.
25. On behalf of the Petitioners it was submitted, while reiterating the foregoing, that delay defeats equity and that equity does not allow parties to sleep on their rights or acquiesce in a particular situation for a significant g of time. In this case it was noted that for over two decades since the alleged agreement was entered into, the Protestor never effected the transfer. According to the Petitioners, litigation must come to an end and that in this case, there is substantially nothing to adjudicate upon as the Protestor has no material interest in the matter. In support of their submissions the petitioners cited **In re Estate of Jonathan Ngewa Kitolo (Deceased) [2021] eKLR**. It was submitted that based on the above grounds, the Petitioners' Summons for Confirmation of Grant is merited and meets the legal threshold under the ***Law of Succession Act*** and ought to be allowed while the protest ought to be dismissed.

Determination

26. I have considered the issues raised herein 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 form 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.

27. However, in the case of **Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR**, the Court stated that:

"[T]he Law of Succession Act recognizes the purchaser's rights and in support of these submissions the said (sic) the Law of Succession defines a "Purchaser". Purchaser according to the Act means a purchaser for money or money worth."

28. In this case the Protestor's claim is that in or about the years 1999 and 2000, he entered into an agreement with the deceased for the sale of a portion of land measuring 3 Ha from Land Parcel No. Donyo-Sabuk/Komarock Block 1/4189 at a consideration of Kshs 210,000 and paid Kshs 190,000/-leaving a balance of Kshs 20,000/- which was to be paid to the deceased upon the deceased successfully obtaining the consent to transfer from the Land Control Board. This transaction, according to the Protestor was witnessed by the deceased's children including the administrators herein and 4 other witnesses living within the deceased's neighbourhood. However, when the parties to the said agreement applied for the consent from the relevant Land Control Board, some of the deceased's children declined to attend the board meeting and as a consequence the consent was never issued. However, prior to the board meeting and after the payment of the agreed last instalment, the deceased had invited a surveyor to the land who demarcated his portion of 3 hectares and erected beacons thereon which beacons were uprooted by the deceased's sons As a result, the Protestor reported the matter to the area Chief and his case was later transferred to the District Land Tribunal, Matungulu where the matter was upon being heard by the District Officer, it was determined that the deceased's family must give the Protestor his 3 Ha. However, when the District Officer presented the verdict to the deceased's family for signature, they sought leave to consult and disappeared. It is therefore the Protestor's position that he acquired interest in the said portion of land during the lifetime of the deceased. If that position is correct, he would no doubt have acquired an interest therein which the beneficiaries of the estate of the deceased could be compelled to take into account in distributing the estate of the deceased. In **Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002, Makhandia, J** (as he then was), while revoking the grant in question expressed himself as hereunder:

"Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration Rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked. 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 interests. 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 their 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 they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years."

29. On their part the Petitioners disputed the existence of the said agreement and contended that the document relied upon by the Protestor was neither signed by the deceased nor witnessed by themselves. A perusal of the said agreement clearly shows that the same was signed by the Protestor herein. On the part of the deceased there is a full name written where the signature was supposed to be. It is a matter of common knowledge that there are people, particularly, those who are not very well educate, who instead of the usual signature, do write their names instead. There is nothing wrong with that. The Petitioners have not contended that the deceased's used to have a different mode of execution of documents rather than by writing her full names. They have not exhibited a sample of the deceased's signature that is different from the one on the agreement. The fact of the existence deceased's signature other than the one on the alleged agreement was particularly within the knowledge of the Petitioners and under section 109 of the *Evidence Act*, the burden of proving the same was upon them. In this case, the failed to satisfy the same.

30. Consequently, I find that the Protestor has succeeded in proving, on a balance of probability, that there was an agreement between him and the deceased. Accordingly, in distributing the deceased's estate, the Protestor's interest ought to be taken into account.

31. In the result the Summons for Confirmation of Grant herein cannot be granted in the manner proposed by the Petitioners. I therefore direct the Petitioners to propose another mode of distribution of the deceased's estate taking into account the Protestor's interest within 30 days and in default, 3 hectares of Land Parcel No. Donyo-Sabuk/Komarock Block 1/4189 shall be carved out and transferred to the Protestor herein.

32. There will be no order as to costs.

33. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021.

G. V. ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MR NTHIWA FOR MR MUSYOKA KIMEU FOR THE PETITIONER

PROTESTOR IN PERSON

CA SUSAN