



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO.557 OF 2007**

**IN THE MATTER OF THE ESTATE OF ELIJAH MBITHI KIAMBA (DECEASED)**

**JACOB KIMONGO MBITHI.....1<sup>ST</sup> PETITIONER**

**JACKSON MUTUKU MBITHI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JAMES WAMBUA MUIA..... 1<sup>ST</sup> OBJECTOR**

**ROSE KANINI.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The ruling relates to the application dated 3.9.2013 filed on 4.9.2013 and what remains for determination is a prayer for revocation of grant that was issued to the petitioners on 8.1.2008. The subject grant as per the record was issued on 18.1.2008 and confirmed 10.11.2008.

2. The objectors claimed that the grant was obtained fraudulently by concealment of material facts, that most beneficiaries were left out, that the petitioners used the grant to register all the ancestral parcels in their names and that the petitioners have filed cases of forcible detainer against the beneficiaries in order to evict them. The application was supported by an affidavit deponed by James Wambua on 4.9.2013 wherein he averred that he deceased was his uncle and that the petitioners are his sons. It was averred that the 1<sup>st</sup> objector who is the deponent is a son to a brother to the deceased and that it was agreed during the adjudication of the land that ancestral lands be registered in the names of the deceased who was then the eldest and everyone was to maintain their occupation. However after his death in 2002, the petitioners changed and attempted to evict the objectors after obtaining grant in their names and transferring title to the land in their names. The deponent sought that the letters of administration issued to the petitioners be revoked and the title deeds issued be cancelled for proper distribution.

3. The application was opposed vide a replying affidavit deponed by Jackson Mutuku Mbithi on 18.11.2013 wherein he averred that the objectors are strangers to the estate of the deceased. It was averred that the estate of the deceased was distributed as per the order of the court and that the deceased owned land parcels 2580, 2714, 2717, 2784, 2948, 2792, 2572, 2705 and 2645 at Ngelani Adjudication Section and that as far as his concerned he held no property in trust for anybody. It was averred that after the confirmation of grant and issuance of title deeds, a civil suit 1062 of 2011 was filed against James Wambua Muia, John Muia Kiamba and Boniface Nzioka Kiamba in relation to Title Mitaboni/Ngelani/2784 and in which they failed to defend themselves. It was averred that the objectors father owned parcel 2778 that is within Ngelani Adjudication Scheme.

4. The objection proceeded vide viva voce evidence. Pw1 was James Wambua Muia who testified that the petitioners are his cousins and that the deceased was their father. It was his testimony that the subject land was held by the deceased in trust for the family members and that the petitioners want the objectors evicted yet Pw1 lived on the land since 1970. He told the court that he wanted the land given to his father as the land had not been bought by the deceased but was family land. It was his testimony on cross examination that the 2<sup>nd</sup> objector is his wife and that the deceased held the land in trust for the family. He testified that Mitaboni/ Ngelani/ 2710 was registered in the names of the deceased.

5. Pw2 was Boniface Nzioka Kiamba who testified that the deceased was his elder brother who held several lands in trust for his four brothers two of who passed on. He told the court that he resided on parcel 2572 with the wife of the deceased and later the petitioners transferred title to their names. On cross examination, he testified that family members discussed the distribution of the land but he did not have the minutes of the same in court. He also told the court that he did not have records of how the properties were distributed but that parcel 2787 belonged to Joash Kitulia. The objector closed their case and the petitioners led their evidence.

6. It was the testimony of Pet PW1, Jackson Mutuku Mbithi that the objectors are his uncles and denied that the deceased held any land in trust. He outlined that parcels 2572, 2784, 2948, 2792, 2645, 2580, 2717, 2714 and 24 had been purchased by the deceased and were not trust

land. It was his testimony that parcels 681 and 2787 belonged to his grandfather and that none of the objectors lodged claims during the lifetime of the deceased who educated them. He testified that the deceased allowed the 1<sup>st</sup> objector to live on parcel 2572 and plant crops on parcel 2784 but however the 1<sup>st</sup> objector stuck onto the plot and further that the objectors brought claims in 2013 when they had been evicted. He told the court that the objector's father was buried on plot 2787 and the 4<sup>th</sup> objector was buried on parcel 2580. On cross-examination, he testified that the deceased died whilst the 1<sup>st</sup> objector was on parcel 2572 and that the objectors have their family lands.

7. Pet Pw2 was Loice Mbatha Mbithi who testified that she was married to the deceased and that she and her husband used to purchase land and the objectors did not contribute any money. She told the court that the objectors have their land and that they have no entitlement to the lands that they are claiming.

8. Pet Pw3 was Paul Malemba Kiamba, a younger brother to the deceased who testified that the deceased had six parcels of land that he bought and none was ancestral land.

9. The court directed that the application could be canvassed vide written submissions. There are no submissions on record for the objectors. Learned counsel for the petitioners vide submissions dated 3.6.2019 placed reliance on the case of **In the Estate of Njuguna Igwima (2017) eKLR** where it was held that the succession court had no jurisdiction to entertain a question of existence of customary trust but the Environment and Land Court did. Counsel urged the court to dismiss the objection.

10. The issue I have to determine is whether the application has merit.

11. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated **In Re Estate of G K K (Deceased) [2017] eKLR** that:

**“The primary function of a probate court is distribution of the estate of a dead person.”**

12. A perusal of the pleadings and analysis of the evidence on record indicates that the claims by the objectors are based on customary trust. In **Re Estate of the Late Jonathan Kinyua Waititu (DECEASED) [2017] eKLR**, the court held that:

**“This court (M.K. Ibrahim J. as he then was) in a decision cited with approval by this court in In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No.432 of 2009 (unreported) had this to say on the issue of probate court's jurisdiction to resolve a claim based on land held in trust. He stated:**

**“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.**

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”

13. In **Muthuita v Muthuita (1982-88) 1 KAR 42 at 44** it was held that,

**“customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.”**

14. If there is no certainty of intention, the transferee will take the property outright. If there is a lack of certainty of subject matter, then the whole transaction is ineffective (with the result of course, that the potential transferor remains liable for tax purposes). If there is no certainty of objects then the trustee will hold on a resulting trust for the transferor, or if he is dead, his estate (**Underhill & Hayton, Law of Trusts & Trustees 18<sup>th</sup> ed, [David Hayton](#), [Paul Matthews](#), [Charles Mitchell](#)**).

15. Proof of trust would necessitate meeting the requisite standard in a separate suit and not in the application for revocation of grant that is before me. The cause of action in the instant application ought to be tried in the Environment and Land Court and not in a probate court and I find that this court lacks jurisdiction to entertain the instant application. The petitioners should be left to proceed to administer the estate of their father without any interference. The objectors are at liberty to move to the appropriate court to ventilate their grievances.

16. In the result it is my finding that the objectors protest lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Machakos this 22<sup>nd</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**