



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO.653 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE KINGATI MUKOLYA (DECEASED)

1. ESTHER KALUNDA KIETI)

2. WILLIAM MUTUKU KINGATI)PETITIONERS

3. MUTINDA KING'ATI)

VERSUS

1. NZIOKA MUKOLYA)

2. JOSEPH KIMUYA)..... RESPONDENTS

3. GREGORY KILONZI)

AND

PAUL MUSYOKA MUTENDWAINTERESTED PARTY

RULING

1. The deceased **Kingati Mukolya** passed away on the 22/08/1972. A petition was filed on 17/10/2008 by **Esther Kalunda Kieti, William Mutuku Kingati** and **Mutinda Kingati** for grant of letters of administration intestate for the estate of the deceased. A grant was subsequently issued on 23/02/2009.

2. The Administrators on the 27/08/2009 filed summons for confirmation of grant in which they filed a schedule of distribution of the three (3) properties of the deceased namely **LR. No. Wamunyu/Kambiti/133, LR Wamunyu/Kambiti/239** and **LR. Wamunyu/Kambiti 232**. The summons were later amended on 13/11/2015.

3. The Protestors upon getting wind of the developments filed an affidavit of protest against confirmation of grant. The said affidavit is dated 02/06/2014 where it was deponed that the Protestors were brothers to the deceased herein and that parcel No. **Wamunyu/Kambiti/133** had been allocated to them by their late father Muinde Mukolya Nzioka and as such the same is not available for distribution.

4. The Petitioners filed a replying affidavit to the protest and maintained that Muinde Nzioka was their grandfather who had two wives **Mbithe Muinde** and **Nzula Muinde**. They further stated that Mbithe Muinde gave birth to two sons **Mukolya Muinde** and **Kimondi Muinde** while Nzula had one son **Kimuya Muinde**. They further averred that Mukolya Muinde had three sons namely **Kingati Mukolya, Nzioka Mukolya** and **Sati Mukolya** who were each bequeathed parcel Numbers **Wamunyu/Kambiti/133, Wamunyu/Kambiti/137** and **Wamunyu/Kambiti/136** respectively. They maintained that the Protestors interest lie in parcel **Wamunyu/Kambiti/137** and not anywhere else and hence the confirmation of grant should be made.

5. Parties agreed to canvass the protest by way of viva voce evidence.

6. The first Protestor **Nzioka Mukolya Muinde** sought to adopt the contents of his affidavit of protest plus his statement and list of documents filed. He stated that his grandfather was one Muinde Nzioka who had two wives Mbithe and Nzula. He stated that Mbithe had three sons Mukolya Muinde, Kilonzi Muinde and Kimondi Muinde while Nzula had one son Kimuya Muinde. He testified that Mukolya Muinde was his father and that his elder brother is Kingati Mukolya (deceased herein) and the younger brother was Sati Mukolya. He stated that there was a land case involving their family land in which the tribunal ruled in their favour and the family decided to sell part thereof to defray the costs of the case. He maintained that the portion set aside for disposal was taken up by the deceased herein Kingati Mukolya. He also accused the deceased for taking up Kimondi Muinde's portion as he (Kimondi Muinde) died without a family. As far as he is concerned

the portion meant for sale to meet costs plus that belonging to Kimondi Muinde should be shared equally between the sons of Mukolya Muinde. On cross –examination by counsel for the Petitioners he admitted that there was no documentary evidence of the payment of costs and that he had already sold the portion given to him by his father. He also indicated that he is not aware that Kimondi Muinde and Kimuya Muinde had sold their portions to Kingati Mukolya. He also confirmed having sold a portion of land on plot 133 to some purchasers who are currently residing thereon. He confirmed that his co-protestors have failed to turn up in court.

7. **Mbolu Kyuli** testified that he bought a portion of land comprised in **Wamunyu/Kambiti/133** at a price of Kshs.299,000/= from one Joseph Kimuya and that he has made developments thereon. On cross- examination he stated that he did not conduct a search to establish the proper ownership of the land and that he did not go through the Land Board for consent. He also admitted that the agreement is silent on the land parcel number and size bought. He also confirmed that none of the children of the deceased sold the land to him.

8. **Joseph Muendo Mailu** testified that he had purchased land from Joseph Kimuya and his two sisters at a cost of Kshs.160,000/= for five acres and that he has carried out developments thereon. On cross – examination he admitted that he did not conduct a search at the Lands Registry but has now realized that the property is in the name of the deceased herein.

9. **Paul Musyoka Mutendwa** testified that he bought land from Jeremiah Mutavi Simba who had bought it from Joseph Kimuya and Nzioka Mukolya. He stated that he bought six acres at Kshs.470,000/=. On cross –examination, he stated that he did not conduct a search on the property.

10. **Veronicah Syokau Muli** testified that she had bought land from Joseph Kimuya in 2008 at Kshs.280,000/= for eight acres. On cross-examination she testified that the sale agreement does not indicate the parcel number.

11. The Petitioners called **Esther Kalunda Kieti** and **Onesmus Mutinda Kingati**. It was the evidence of the 1st Petitioner that the deceased owned three parcels of land as per searches produced namely **Wamunyu/Kambiti/133**, **Wamunyu/Kambiti/232** and **Wamunyu Kambiti/239**. She went on to add that her grandfather had given each of his sons Kingati Mukolya, Nzioka Mukolya and Sati Mukolya their respective parcels for instance Parcel No. 137 was given to the 1st Protestor who later sold it off and relocated to Kanyangi area of Kitui and had no right to purport to sell the deceased's parcel No.133. She now wants the alleged purchasers kicked out of the land. On cross-examination, she testified that she is not aware of any land set aside for defraying costs. She denied fraud allegations levelled against the deceased by the Protestors. She stated that the deceased bought two other parcels of land. She added that Joseph Kamuya's portion was parcel No.135 which he sold and disappeared from the area. She confirmed that she is not aware of the **Tribunal Case No.23 of 2008**.

12. **Onesmus Mutinda Kingati** testified that his grandfather gave his sons parcels of land such as Kingati Mukolya (133) Sati Mukolya (136), Nzioka Mukolya (137). On cross-examination, he testified that he is not ready to have parcel 133 sub-divided as per the Tribunal verdict.

13. The Interested Party, **Harrison Wambua Kingati** testified in support of the Petitioners who are his siblings. He produced search certificates showing the ownership of the parcels by the deceased, Joseph Kimuya, Nzioka Mukolya and Sati Mukolya. He also produced sale agreement between the deceased and Kimondi Muinde which led to the amalgamation of the new portions into parcel 133. He maintained that the Protestors have no claim against the deceased's estate and that the purported purchasers ought to be kicked out from the land as they can seek redress from the alleged sellers so that the family of the deceased can remain in peace.

14. It was submitted for the Protestors that they have established their claim over land parcel **Wamunyu/Kambiti/133** by virtue of the fact that the **Yathui Land Dispute Tribunal** vide case **No.23 of 2008** ruled in their favour when it ordered that a portion thereof that had been set aside to cater for family expenses be hived off and the remaining portion be divided equally among Kimondi, Kimuya and Kingati. Learned counsel for the Respondent raised two issues for determination namely whether the Objectors have a claim on land parcel **Wamunyu/Kambiti/133** and whether the court has jurisdiction to determine the issue of ownership. On the first issue, counsel submitted that the Protestor has proved his interest in the suit property since the **Yathui Land Tribunal vide Case No.23 of 2008** had ruled in his favour and that the said decision has not been set aside and is still valid and enforceable and further the purchasers who bought land from him should be allowed quiet enjoyment of parcels purchased. On the second issue it was submitted that this court lacks jurisdiction to determine issues of ownership of land and it was the view of counsel that the said parcel should be stayed pending the determination on ownership by the Environment and Land Court. Reliance was placed in the case of **Estate of Tumbo Lavu [2019] eKLR**.

15. Learned Counsel for the Petitioners submitted that the **Tribunal award No. 23 of 2008** has never been adopted by the court and which remains mere opinions and unenforceable under the laws as no decree has been issued. It was further submitted that the said award having been made in 2008 there is an inordinate delay of over ten years without the same being adopted by the court to give it the force of law. It was also submitted that the purported purchasers on the land are intermeddlers within the meaning of Section 45 of the Law of Succession Act and should not be allowed to derail the process of confirmation of grant.

16. Learned counsel for the interested party supported the Petitioners case and submitted that the alleged award by the **Yathui Land Tribunal** dated 06/08/2008 has never been adopted and hence it has no force of law and cannot be used by the Protestor to claim land parcel **Wamunyu/Kambiti/133**. It was further submitted that the Protestors have not established that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case. It was also submitted that the 1st Protestor had been given parcel Number **Wamunyu/Kambiti/137** by his father and which he sold it and relocated to Kanyangi area of Kitui. It was finally submitted that the actions of the protestors and alleged purchasers amounts to intermeddling of the free property of the deceased and that the claims ought to be rejected so as to allow the lawful children of the deceased proceed with the confirmation of the grant.

17. I have considered the issues raised in the summons for confirmation of grant as well as revocation of grant. I have considered the evidence adduced by the 1st Protestor, Purchasers, Petitioners and Interested Party. I have also considered the submissions of all learned counsels. The issues for determination are as follows:-

(i) Whether the Objectors have a claim over parcel No. Wamunyu/Kambiti/133.

(ii) Whether the presence of purchasers on LR. Wamunyu/Kambiti/133 amounts to intermeddling of the estate of the deceased within the meaning of Section 45 of the Law of Succession Act.

(iii) Whether this court has jurisdiction to determine the issue of ownership of parcel number Wamunyu/Kambiti/133.

18. As regards the first issue, it is noted that the Objectors have staked a claim to parcel **Wamunyu/Kambiti/133** on the ground that the same had been set aside by the entire family for the purposes of defraying costs incurred during a land case. They have relied on **Yathui Land Tribunal Case No. 23 of 2008** which ruled in their favour. However the said award has never been adopted by the Magistrate's Court as a judgment so as to enable a decree to be issued and to enable the Protestors to enforce it. Indeed the Petitioners had earlier filed a Judicial Review Application against the said award but which was dismissed by Dulu – J on the ground that the said award had not been adopted by the Magistrate's court in line with Section 7(1) and (2) of the Land Disputes Tribunal Act (Cap 303 of the Laws of Kenya). It would appear to me that as long as the said award has not been adopted, then there is no decree capable of being enforced. Even though the Protestors sought reliance in the proceedings and judgement of the Tribunal aforesaid, I find that in the absence of adoption of the award then the same remain as just opinions and no more as they do not have the force of law. It is noted that the said award was made on the 06/08/2008 and to date the same has not been adopted by the Magistrate's Court. No reasons have been given by the Protestors as to why they have not taken any action to date. Again it is noted that the award did not affect the whole parcel of land. Further, it has transpired that the father to the deceased and 1st protestor and one Sati Mukolya had already subdivided the family land and gave each of them parcel numbers **Wamunyu/Kambiti/133**, **Wamunyu/Kambiti/137** and **Wamunyu/Kambiti/136** respectively. The deceased's parcel **No. Wamunyu/133** was duly registered in his names as the title deed was issued to him in 1972 as confirmed by the certificate official search produced herein. That being the position, I find that the same is the free property of the deceased available for distribution by his dependants. It also transpired from the evidence that the 1st Protestor sold his own parcel, and moved to Kanyangi area of Kitui County and therefore his turn around is in bad faith meant to harass the legitimate children of the deceased herein. It is also instructive that the 1st protestor's other brother Sati Mukolya has not raised any objection to the Petitioner's quest to have the grant confirmed. This would then imply that the 1st Protestor is a lone ranger out to wreak havoc upon the family of the deceased as it turns out that he had purported to sell land that does not belong to him to some purchasers who are now on his neck for redress. It has also transpired that the deceased had been industrious as he managed to acquire two other parcel namely Wamunyu/Kambiti/232 and 239 and that he had also bought pieces from the 1st Protestor, one Kimuya and Kimondi which were amalgamated into parcel **No. Wamunyu/Kambiti/133**. It is therefore clear that the 1st Protestor herein and his fellow Protestors are salivating over the deceased's portion of land which he had been allocated by his father and which he also purchased from relatives. Looking at the entire evidence adduced before me, I am satisfied that the Objectors have no claim over parcel **No. Wamunyu/Kambiti/133** and that they should keep off the same and to allow the deceased's dependants proceed with the distribution.

19. As regards the second issue, and in view of my finding above, the presence of the purchasers who are currently on land parcel number Wamunyu/Kambiti/1333 amounts to intermeddling with the free property of the deceased within the meaning of Section 45 of the Law of Succession Act. The evidence of the purchasers is that they bought the parcels from the Protestors long after the death of the deceased. Indeed the title to the land having been issued to the deceased in 1972 meant that the deceased was the absolute owner thereof and that the same could only dealt with by the duly appointed administrators of this estate upon confirmation of grant. It is instructive that none of the administrators of the estate of the deceased sold any land to the purported purchasers and as such the Protestors and the purchasers had no right whatsoever to deal with the property of the deceased. If the protestors were relying on the **Yathui land Tribunal Award vide No.23 of 2008** then they could only do so after having the award adopted by the Magistrate's court and obtaining a decree therefor. In the absence of the adoption and issuance of the decree the protestor therefore had no colour of right to purport to sell the said land to the purchasers. Hence the protestors and purchasers became intermeddlers. Section 45 of the Law of Succession Act provides as follows:-

(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.

(2) Any person who contravenes the provisions of this Section shall:-

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one (1) year or to both such fine and imprisonment.

(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he had intermeddled after deducting any payments in the course of administration."

From the above provisions it is clear that any interference on a property belonging to a deceased person who has died intestate without being authorized by the court to do so amounts to intermeddling with the free estate of the deceased. As noted above, the Protestors purported to rely on the award by the Yathui's land Dispute Tribunal and purported to offer part of the deceased's parcel of land reference **Wamunyu/Kambiti/133** yet the said award had not been adopted by a Magistrate's court so as to pave way for issuance of a decree and thus have the force of law. In the absence of such an adoption the Protestors had no legal capacity to pass any interest in land to the purchasers. Hence both the Protestors and purchasers were for all intents and purposes intermeddlers. In the case of **Veronicah Njoki Wakagoto (deceased) [2013] eKLR** justice Musyoka held as follows:-

"The effect of Section 45 of the Law of Succession Act is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling and makes it a criminal offence."

It is noted that the protestors did not bother to have the tribunal award adopted by the Magistrate's court so as to give them legitimacy to deal with the subject property. In the absence of such a decree and in the absence of a confirmed grant then the property of the deceased could not

be dealt with in any other manner unless authorized by the court. Hence the protestors had no interest in the deceased's land parcel Wamunyu/Kambiti/133 at the time they purported to enter into agreements of sale to the purchasers. They had no authority to do so since the law is clear under Section 82 of the Law of Succession Act that no immovable property of a deceased shall be sold before confirmation of grant. Therefore the purchasers who now purport to derive interest from the protestors cannot have any interest on the deceased's land since the protestors had no capacity to offer any interest thereon to them. The purchasers therefore have no option but to pursue the protestors for refund of their purchase money as well as damages. I sympathize with the purchasers but that is the law. Had they done a little bit of due diligence they might not have found themselves in this kind of situation.

20. As regards the third issue, the protestors have urged this court to set aside parcel No.133 so that the ELC can deal with the issue of ownership. I am alive to the fact that this court being a Succession Court has jurisdiction under Section 47 of the law of Succession Act to entertain any dispute under the Act and to pronounce such decrees and make such orders as are expedient. Further under Rule 73 of the Probate and Administration Rules the court has inherent powers to make such orders as are expedient for the ends of justice and to prevent abuse of the court process. The Petitioners have approached this court and they seek for confirmation of grant. They have presented the schedule of distribution of the deceased's assets. The protestors and the purchasers appear to target one of the properties namely Wamunyu/Kambiti/133. As the Protestors failed to have the Tribunal Award adopted by the Magistrate's court their interest if any became extinguished and therefore they could not pass any to the purchasers. There is no reason why the Petitioners should not be allowed to proceed to have the grant confirmed. The protestors and the purchasers are at liberty to proceed to take appropriate steps deemed necessary in pursuit of their claims without unnecessarily interfering with the Petitioners processes. The parcel number **Wamunyu/Kambiti/133** had bene duly registered in the names of the deceased way back in 1972 and that is the free property of the deceased and available for distribution by his dependants. The certificate of search clearly indicate that the land belongs to the deceased and since the deceased died intestate then this court has the jurisdiction to deal with the same in its exercise as a succession court in distribution of the estate of such deceased person. Once such property has been shown as belonging to the deceased then the court has jurisdiction to deal with it. Even if the property is distributed, the protestors are at liberty to maintain action against the administrators of the estate if need be since the administrators have the locus standi to sue and be sued on behalf of the estate in any legal forum. Further the purchasers are at liberty to pursue the sellers for refund of their money as well as damages if any before the appropriate courts.

21. From the evidence adduced and the rival affidavits and the above observations, I come to the finding that the protestors have failed to convince this court that the grant issued herein should be revoked. The Petitioners have not concealed any material facts from the court as regards the ownership of Land Parcel **No. Wamunyu/Kambiti/133** by the deceased.

22. In the result, it is my finding that the Protestors protest herein lacks merit. The same is ordered dismissed. The grant made to the Petitioners is hereby confirmed and that the estate of the deceased shall be distributed as proposed by the Petitioners.

It is so ordered.

Dated and Delivered at **Machakos** this **21st** day of **January, 2020**.

D. K. Kemei

Judge