



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 4 OF 2016**

VIVI MUTISYA.....1<sup>ST</sup> APPELLANT

MUTHILE MUTISYA.....2<sup>ND</sup> APPELLANT

MORRIS MUTISYA.....3<sup>RD</sup> APPELLANT

WAMBUA MUTISYA.....4<sup>TH</sup> APPELLANT

**VERSUS**

PETER MUSYOKA MWANZIA.....RESPONDENT

**JUDGEMENT**

1. The objectors/appellants herein are wives and sons of the deceased herein. They had raised an objection to the petitioner/respondent getting a share of parcel number Matinyani/Kalindilo/346 which the petitioner/respondent claims to have purchased. The first objector the first wife of the deceased denied that the petitioner/respondent had purchased a portion of the land.

2. However, the petitioner/respondent in his evidence produced two agreements for purchase of two portions of land from the deceased. The agreements were signed by the deceased and all the four objectors/appellants.

3. After the matter was fully heard, the trial court ordered the petitioner to get 12 acres of the suit land.

4. The appellants/beneficiaries being dissatisfied with the above ruling appealed and set out 3 grounds of appeal namely;

**(i) The learned Senior Principal Magistrate erred in law, in allocating 12 acres to the respondent knowing that there was no evidence in support of the same.**

**(ii) The learned Senior Principal Magistrate erred in law when he failed to note that the objectors/appellants were the only beneficiaries of the estate of the deceased.**

**(iii) The learned Senior Principal Magistrate erred in law when he allocated to the Respondent a portion of the land parcel Matinyani/Kalindilo/346 in spite of the fact that the LAND PARCEL NUMBER the Respondent bought was not indicated hence creating doubt on the authenticity of the agreement and being unable to prove that fact beyond any reasonable doubt.**

5. Parties were directed to file submissions to canvass appeal but none did.

**EVIDENCE IN SUMMARY**

6. The objectors/appellants/appellants herein are wives and sons of the deceased herein. They raised an objection to the Petitioner/respondent getting a share of parcel number Matinyani/Kalindilo/346 which the petitioner/respondent claims to have purchased. The first objector the first wife of the deceased denied that the petitioner/respondent had purchased a portion of the land.

7. The petitioner/respondent in his evidence produced two agreements for purchase of two portions of land from the deceased. The agreements were signed by the deceased and all the four objectors/appellants.

8. The agreements did not specify the sizes of the portions sold and where from and which parcels of land. The objectors/appellants case was that the sale transaction fell within the provisions Land Control Act Cap 302 Laws of Kenya. However, it was respondent case that the deceased passed away before the period of six months had expired since the sale agreement was entered into. The transactions therefore fell

within the succession law.

## ISSUES

9. After going through the record and the affidavit by the parties, I find the issues for determination are;

**a. Whether the agreements of sale were enforceable in the succession matter?**

**b. If above in negative, what is the appropriate orders to make?**

**c. What is the order as to costs?**

## ANALYSIS AND DETERMINATION

10. The objectors/appellants who are wives and sons of the deceased raised an objection to the petitioner/respondent getting a share of parcel number Matinyani/Kalindilo/346 which the petitioner/respondent claimed to have purchased from the deceased. They denied that the petitioner/respondent had purchased any portions of the land from the deceased.

11. The petitioner/respondent in his evidence produced two agreements for purchase of two portions of land from the deceased. The agreements were signed by the deceased and all the four objectors/appellants. The objectors did not rebut that piece of evidence.

12. It is apparent that, the agreements did not specify the sizes of the portions sold nor from which parcels of land they were to be gotten from. The objectors/appellants case was that the sale transaction fell within the provisions of Land Control Act Cap 302 Laws of Kenya.

13. Whereas the respondent case was that it was not so since the deceased passed away before the period of six months had expired since the sale agreement was entered into. Thus the transactions therefore fell within the succession law.

14. The trial court in its finding and conclusion held the following;

***“I have carefully considered the evidence and the exhibits produced. I have also considered the respective submissions. The two sale agreements were not disputed it is clear that the deceased had an intentional to sell a portion of land to the petitioner/respondent. The objectors /appellants have not denied that they signed the agreement. In any case, the deceased had the right to dispose his property. Although the number of the parcel of land or size of portion sold was indicated, there is no evidence that the deceased had another portion of land.***

***From the foregoing I find that the petitioner/respondent is entitled to a portion of the parcel of land parcel number Matinyani/Kalindilo/346. The petitioner/respondent claims a portion measuring 8 hectares. There is no justification for that submission. There is no evidence as to how much an acre was going for in 1984 though it is common knowledge that cost of land was very low. I find that a cost of Kshs.1,000/= per acre would be reasonable. I therefore order that the petitioner/respondent be given a portion measuring twelve (12) acres from parcel land number Matinyani/Kilindilo/346. The remainder be shared equally among the four objectors /appellants. Each party to bear its own costs as each has benefited from the estate.”***

15. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

### **“41. Hearing of application for confirmation**

***(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.***

***(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any Will.***

***(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.[Underlining mine for emphasis]***

***(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together***

*with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.*

*(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.*

*(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.*

*(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away."*

16. It is trite law that the respondent's claim should be dealt with under Order 37 of the Civil Procedure Rules (previously Order XXXVI, rule 1 of the Civil Procedure Rules), but the decision to pack or appropriate and set aside the property or portion thereof in dispute for determination under order 37 of the Civil Procedure Rules is made by the Probate Court under rule 41(3) of the Probate and Administration Rules. For emphasis I reproduce the said sub rule below:-

*"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant."*

17. For better appreciation of the effect of the determination of ownership under Order 37 of the Civil Procedure Rules on a succession cause and the relationship between the two proceedings, see **Musyoka J in *Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR** that:

*"...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it."*

18. By virtues of the law, the Respondent is an interested party and he has locus standi to apply for grant as a creditor. I should state, albeit in passing that, where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions.

19. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased.

20. In the circumstances of this matter there are issues as pertains to the validity of the agreements in issue to do with the provisions of Contract Act Cap 23 Laws of Kenya and Land Control Act Cap 302 Laws of Kenya inter alia to be determined by the ELC court as the said court deals with petitioner's entitlement of the claimed portions allegedly purchased by the petitioner from the deceased.

#### FINDINGS AND ORDERS

21. The analysis above leads me to this; in exercise of my powers under the Law of Succession Act and specifically under rule 41(3) of the Probate and Administration Rules, I hereby make a finding that the dispute on the ownership in respect of LR No. Matinyani/Kilindilo/346 cannot be conveniently determined in succession proceedings. And I accordingly, subject to the provisions of section 82 of the Act, by order appropriate and set aside part of LR No. Matinyani/Kilindilo/346 to abide the determination of the question in proceedings under Order 37 rule 1 of the Civil Procedure Rules. Subject to the proviso to section 71 (2) of the Act and consent of the beneficiaries herein, the court may proceed with the distribution of rest of the estate.

22. The appeal therefore succeeds to that extent and the trial court decision awarding petitioner 12 acres from the suit land is quashed.

23. Thus the court makes the following orders;

*i) The trial court shall proceed to confirm grant and distribute deceased estate to his beneficiaries but preserve 12 acres awarded to the petitioner to await ELC court to determine entitlement of the same by the petitioner.*

*ii) The petitioner is to file suit in ELC court within 30 days to claim the 12 acres' subject herein and in default the beneficiaries to share the 12 acres' subject herein accordingly.*

*iii) Parties to bear their costs.*

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT THIS 17TH DAY OF JANUARY 2020.**

**C. KARIUKI**

**JUDGE**