



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 232 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE TOM NZIOKA SAMUEL (DECEASED)

MARY SAMMY MUSILA.....1ST PETITIONER

SABINA NDUKU MUTUKU.....2ND PETITIONER

VERSUS

ESTHER NDULU MUTUKU.....APPLICANT

AND

MUTUKU NGEI.....OBJECTOR

R U L I N G

1. The two Petitioners herein were issued with a grant of letters of administration intestate on 24-6-2013. They later filed summons for confirmation of the said grant which was duly allowed and a certificate to that effect was issued on the 28-7-2014 in which the only property of the deceased namely Machakos Town Block 1/88 was given to the 2nd Petitioner. The objector herein later filed summons for revocation which was considered by Mutende- J and who allowed the revocation of the certificate of confirmation of grant as well as cancellation of a certificate of lease on L.R. Machakos Block 1/88 issued to the 2nd petitioner. The learned Judge further directed the objector to file an affidavit of protest to the application for confirmation of grant.

2. The Objector duly filed his affidavit in protest to confirmation of grant sworn on 8-2-2016 and filed on 9-2-2016. Vide the said affidavit the objector averred that he had purchased land parcel **Machakos Block 909/266** now known as **Machakos Block 1/88** from the deceased herein and later took vacant possession thereof. He averred that he later learnt that the petitioners had petitioned for letters of administration of the estate and proceeded to obtain a full grant without disclosing to the court the fact that the property had been sold by the deceased to him. The objector contended that the grant was obtained fraudulently by the concealment from the court of the sale of the property and which was a material issue to the case. The objector finally averred that a certificate of confirmation of grant be issued reflecting that parcel **Machakos Block 1/88** be given to **MUTUKU NGEI**.

3. The Petitioners did not file any response to the affidavit of protest to confirmation of grant.

4. Parties took directions that the protest and confirmation be heard via *viva voce* evidence. However, the parties later changed the mode of disposing the protest to confirmation of grant and opted instead to file and exchange written submissions. However, it is only submissions by counsel for the objector that are on record.

5. Mr. Francis Mulwa, learned counsel for the objector submitted that his client had purchased the property from the deceased and duly paid the total purchase price and took possession. He submitted that the petitioner deliberately failed to disclose this fact and now that the objector has brought the requisite proof of purchase of the only property of the deceased the same should be registered in his names. Reliance was placed in several cases namely: **Estate of Joseph Mutua Munguti (2018) eKLR** and **Simon Wambua Nzioka & Another V. Gabriel Githua Ndungu (2017) Eklr**.

6. I have considered the objector's affidavit of protest as well as the submissions by his learned counsel. It is not in dispute that a grant of representation has already been issued to the petitioners herein. It is not in dispute that the only property of the deceased is land parcel number **Machakos Block 909/366** and now known as **Machakos Block 1/88**. It is also not in dispute that the registration of the said title in name of the 2nd petitioner has since been cancelled and hence the title ownership has reverted back in the name of the deceased. It is also not in dispute that the objector had purchased the said property from the deceased and paid the full purchase price to the deceased. The agreement dated 23-5-1983 together with transfer form as well as a consent from the then Machakos Municipal Council leaves no doubt that indeed the deceased had expressly passed the ownership of his only property to the objector who actually took possession thereof. The issue

for determination is whether the objector has established his protest on balance of probabilities so as to warrant an order that the said parcel be distributed to him entirely.

7. The sale agreement, transfer form and consent from the local authority clearly shows that the deceased disposed his only property to the objector. The deceased was then of sound mind and duly signed the requisite sale agreement and transfer form in the presence of an advocate. Upon receipt of the entire purchase price his interest on the said land thus became extinguished and from then on the property belonged to the objector. It is noted that the process of transfer of ownership delayed due to the objector's illness and before the same went through the seller passed on. Upon the demise of the seller it was the responsibility of the administrators of his estate to take up letters of grant and to proceed to distribute the said property to the objector. It seems they did not do so and hence the present proceedings. The objector has now proved his interest in the estate of the deceased and is therefore entitled to be given the said property. The petitioners have deliberately failed to respond to the protest and this speaks volumes in that it is highly likely that they had been aware of the objector's interest in the land as he had been in possession all along. Upon being furnished with copies of sale agreement, transfer form and consent from the local authority, the petitioners ought to have availed a contrary response if indeed they felt that the objector's claim on to the land has no basis. They did not do so thus leaving no doubt that they are in agreement with the objector's claim against the estate of the deceased. The protest is thus unopposed. Again the petitioners have been aware of the objector's presence on the land in question all along. The 1st petitioner being the wife of the deceased must have been aware of these matters all along. It is my considered view that there is sufficient evidence placed on record showing that the deceased indeed sold his property namely Machakos Block 909/366 now known as **Machakos Block 1/88** to the objector herein.

8. In the premises I find merit in the protest. The same is allowed with the consequence that the grant of letters of administration issued to the 1st and 2nd petitioners on the 24.6.2013 is hereby confirmed in the following terms:

(a) Land Parcel Machakos Block 1/88 shall be registered in the name of the Objector MUTUKU NGEL.

(b) There will be no orders as to costs.

It is so ordered.

Dated, delivered at **Machakos** this 21st day of **April, 2020**.

D. K. Kemei

Judge