



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.80 OF 2011

THE MATTER OF THE ESTATE OF TUMBO LAVU (DECEASED)

PETER LAVU TUMBO

DAVID TUMBO LAVU.....PETITIONERS

VERSUS

MUNEE TUMBO

ALEXANDER MUTUNGA WATHOME.....PROTESTORS

AND

KENYA AFRICAN NATIONAL TRADERS

& FARMERS UNION (KANTAFU).....INTERESTED PARTY

FRANCIS GEORGE GITAU WAIGANJO.....INTERESTED PARTY

JOSEPH MUTUA NGAYAI.....INTERESTED PARTY

RULING

1. The Protestors' in their various Affidavits of Protest claim purchasers' interest and exclusion of the properties of the deceased.
2. The specific facts as contained in the affidavit in protest dated **24th April, 2013** are that in the application for confirmation of grant, 3 properties were indicated and yet the deceased had about 13 parcels of land as listed in the protest. **Munee Tumbo and James Tumbo** then gave a proposed mode of distribution of the properties. **On 5th July, 2016**, after the death of James Tumbo and the substitution thereof by Hillary Mutuku, the said Hillary Mutuku filed an affidavit of protest deponing the same facts in the affidavit dated 24th April, 2013.
3. The specific facts as contained in the affidavit in protest dated **25th October, 2013** are that through a sale of land agreement dated 9th July 1992, Mathembo Tumbo (the Deceased's Wife) and Francis Mutisia Tumbo sold to **Francis Geroge Waiganjo Gitau** 5 acres of Mavoko Town Block 3/1992 that is part of the deceased's estate at a consideration of Kshs. 70,000/-. And pursuant to the said agreement, the protestor has been in occupation of the land for the last 20 years and in the proposed mode of distribution, the administrators have omitted to recognize the said Francis as one of the persons who bought 5 acres and seeks that the grant should not be confirmed until the said 5 acres are registered in his names. The agreement in question is annexed to the protest.
4. The specific facts as contained in the affidavit in protest dated **1st November, 2013** are that **Kantafu** purchased 20 acres of land which were to be excised from Plot 531 at Lukenya Ranching and Farming Co-operative Society and the plot was given title number Mavoko Town Block 3/1992. It is deponed that in the summons for confirmation, Kantafu's name is conspicuously missing and as such the grant should not be confirmed without the name of Kantafu being included in the names of the persons entitled to the estate of the deceased. The agreement in question, payment schedule and payment vouchers are annexed to the protest.
5. The specific facts as contained in the affidavit dated **23rd November, 2016** are that **Joseph Mutua Ngayai** purchased 5 acres of part of the estate of the deceased known as Mavoko Town Block 3/1992 which was initially known as Plot 531 and thereafter settled on the land and constructed structures thereon for the past 20 years. He deponed that whatever mode of distribution is adopted, his interest be taken into consideration because when the title deed was issued, his interest was not taken into consideration. The agreement in question and a

translation are annexed to the protest.

6. **Peter Lavu Tumbo** deposed in his Supplementary Affidavit dated **17th July, 2013** that Plots in Ngelani, Plot 2046 Mitaboni, Plot 1984 Mitaboni and Plot 2035 belong to a brother of the deceased. Further that **Plot 45 Ndovoini** no longer exists for it was sold and the protestors participated in its sale. Similarly, Plot 2045 Mitaboni was sold by the 1st protestor, Plot 1826 was sold when the deceased was still alive and thus all the properties listed in the schedule is all the property owned by the deceased.

7. The protest was canvassed by way of viva voce evidence.

8. **Pw1 was Alexander Mutunga Wathome** who testified that his grandfather died in August 1979 and he protests the confirmation of grant for some properties were left out from the distribution. He testified that the clan met and subdivided the properties as per the schedule that he attached in his list of documents, and he seeks that the property be distributed as per the schedule. On cross-examination, he indicated that he did not file a fresh affidavit of protest but relied on the one filed by his late father. He testified that he was not aware that the **Ngelani Plot** belonged to the deceased's brother and has already been distributed. He also stated that he was aware that **Mavoko Block 3/1992** was sold and confirmed that he was not aware that the clan did anything wrong by sharing out the property of the deceased. He testified that he was aware that the family engaged surveyors and the **Mavoko plot 1992** was shared between the three houses; Mune Tumbo got 10 acres, Muthembo Tumbo 15 acres and Nduku Tumbo 15 acres. He was aware that 10 acres of Mavoko Town Block 3/1992 was sold to Kantafu, that Mutua Ngayae and the other interested party bought land that is part of the deceased's estate. He was also aware that the petitioners have listed the Ngelani and Mitaboni Plots.

9. **Pw2 was Hillary Mutuku James** who sought to rely on his affidavit and the documents that he filed. He testified that he objects to the grant herein in that when his father died, he wanted his property distributed as per the clan deliberations and any other properties according to the houses of the deceased. On cross-examination, he testified that he is not aware of the ownership of the plots in Ngelani and Mitaboni and is not aware that the titles are out, he did not read the petition or seek for revocation of grant. He was aware that Ngelani Plot 3 has a dispute between the family of Katiku. He was also aware that there were parcels of land that were sold.

10. **Pw3 was Rose Mwelu Tumbo** who sought to rely on her statement filed on 2.11.16 and testified that she is the daughter of the deceased and Mune Tumbo. She testified that the petitioners are from one of the houses and did not involve the other two houses. On cross-examination, she testified that she does not have ownership documents of the Mitaboni and Ngelani plots but knows that the Ngelani Plot belonged to her late father and Katiku and Parcel 2685 belonged to Lavu Ngao. She testified that the family agreed and sold some portions of the land after the death of the deceased. She stated that she would like the administrators picked from all the three houses and the property distributed equally among the three houses and not among the children. She further testified that the titles for Mavoko Plot 1992 came out and were divided amongst the three houses and her mother's house sold its share to Kantafu, Mathembo's house sold 15 acres to Kantafu.

11. **Pw4 was Joseph Kivuva Lavu** who sought to rely on his statement that he recorded. He was present during the clan deliberations and sought that the matter be resolved by court. On cross-examination he testified that he is the brother of the deceased and parcel 2051, 2046 belongs to the deceased and Ngelani belongs to the deceased and Katiku but he has no ownership evidence. Plot 2685 belongs to Lavu Ngao who is his father and the deceased will get his share. He testified that he has no interest in the property of the deceased.

12. **Peter Tumbo Lavu was the 1st Petitioner.** He testified that he would like the court to agree with the affidavit in support of the application for confirmation of grant. He testified that Plots 2051 and 2040 belong to Katiku Lavu and Katiku Lavu has title to the Ngelani plot. He also testified that plot 2685 belongs to Lavu Ngao who is his grandfather and therefore he will have to wait for his share. He confirmed that his mother Mathembo Tumbo sold land to Mutua Ngayae but is not aware that land was sold to Kantafu. He sought that the property be distributed equally amongst all the beneficiaries of the deceased. On cross-examination, he testified that his mother had no share of land to sell. He testified that he was not aware of George Gitau Waiganjo.

13. **Patrick Musa Katiku was Pw2 for the petitioner.** He testified that Plot 3 Ngelani belonged to Katiku Lavu and Mutiso Mutheu and not the deceased as claimed by the protestors. Further that plot 2685 belonged to Lavu Ngao who was their grandfather.

14. **Joseph Mutua Ngayai** testified that he bought 5 acres from the Late Mathemba Tumbo who was the wife of the title holder. At the time of the purchase, there was no title deed but a plot number, however when the title came out, he was not allocated his share. He has lived on the plot since 1996 to date and seeks that his interest be considered during the distribution. On cross-examination, he testified that he bought the plot when the proprietor was already dead.

15. **Kimani Wanyoike** testified that Mathembo Tumbo sold to Kantafu 10 acres of land in Mavoko and by this time the titles were not out. He testified that in total Kantafu purchased 20 acres. On cross-examination, he confirmed that the purchase was after the death of the deceased. Further that Kantafu has filed two land cases over the land matter.

16. **George Gitau Waiganjo** testified that he also goes by the name Francis. He testified that Mathembo Tumbo the wife of the deceased sold to him 5 acres of land in Mavoko for Kshs 70,000/- and he relied on the agreement dated 9.7.1992; He would therefore like to be given the title to the land he bought. On cross-examination, he testified that when purchasing, he was shown an allotment letter in the names of Tumbo Lavu who was already deceased.

17. Learned counsel for Kantafu vide written submissions filed on 6.11.18 submitted that the 20 acres that were sold to his client are not available for distribution by the Petitioners and should be allocated strictly to Kantafu as it had lawfully purchased from the widows.

18. Learned Counsel for George Waiganjo Gitau vide written submissions filed on 4.12.18 submitted that the 5 acres that his client bought should be recognized during the distribution of the estate since he lawfully purchased the same and has been residing on the land since 1992.

19. Learned Counsel for the Petitioners vide written submissions filed on 4.12.18 submitted that the transactions on the land namely sale to

Kantafu, Waiganjo and Ngayai were done contrary to the law and amount to intermeddling and therefore are null and void. He cited the case of **In the Matter of the Estate of Veronica Wakagoto (Deceased) (2013) eKLR** where the court stated that no immovable property shall be sold before the confirmation of the grant. Counsel submitted that the protestors have no right to protest in these proceedings.

20. The protestors vide written submissions filed on 16.1.2018 submitted that the petitioners failed to furnish the court with a list of all the property that belonged to the deceased and urged the court to make a finding of all the properties that belong to the deceased so that the same could be distributed among the beneficiaries.

21. I am faced with two competing claims namely those of the interested parties and those of the protestors. The interested parties herein claim purchasers' interest in the estate having purchased portions of Mavoko Town Block 3/1992 after the death of the deceased. They claimed that pursuant to the agreements that they signed, they occupied the land and carried out enormous developments. The issue I have to determine is; what is the status of such purchasers in a succession cause?

22. 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.”

Since the claim by the interested parties is that of a purchaser and is based on a sale of land agreement with the widow of the deceased, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be entertained in a succession cause. As the interested parties are not beneficially interested in the estate, their claim cannot be litigated in this succession cause or even be set aside by this court under rule 41(3) of the Probate and Administration Rules. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot assist an unlawful transaction. For purposes of directing the interested parties, it suffices to cite Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. 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.”

23. Applying the above legal test, the protest by the interested parties fail and are dismissed.

24. Alexander Mutunga and Muneo Tumbo, the protestors allege that there are properties that have been left out from the schedule of distribution. The petitioners on the other hand have stated that not all the properties listed by the protestors are available for distribution. The protestors in their submissions have asked court to make a finding on the ownership of the properties of the deceased. The question to be answered is **“what properties are available for distribution?”** Wouldn't this be a question to be determined during the confirmation of grant bearing in mind that a fact is not proved when it is neither proved nor disproved as per Section 3(4) of the Evidence Act? Further it is trite law that submissions cannot be treated as evidence or take the place of evidence as stated by the Court of Appeal in **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another (2014) eKLR** when it held that:

“Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties “marketing language...”

25. **Rule 41(3) and 42 (2) of the Probate and Administration Rules**, empowers the Court before confirmation of a grant to remove property which is in contest from the schedule of assets and have the same determined separately. If the contested property is found to be part of the Estate of the Deceased, the same is restored back to the schedule of assets of the deceased's estate available for distribution. This position was supported by the case of **In Re Estate of Francis Peter Njuguna [2016] eKLR**.

26. The evidence on record is that the following properties are in the names of the deceased

a. Mavoko Town Block 3/1992

b. Mavoko Town Block 3/760

c. Plot Number 45, Lukenya Ranching and Farming Co-operative Society Limited

27. Similarly, there is nothing to show that Plot 2051, 2685 and 2056 Mitaboni, Ngelani Plots, Plot 42 Ndovoini belong to the deceased and in the circumstances, and I would direct that a fresh application for grant be made including the list of the protestors. In light of the question posed above, the protestors are at liberty to air their grievances during the confirmation, where the court may invoke its powers under **Rule 42 (2) of the Probate and Administration Rules**.

28. I note the interested parties' action may have been a legitimate quest for justice albeit filed in the wrong court. I also take into account the conduct of the widow in entering into the kind of agreements I have seen without proper authority of the law. On that basis I will not condemn the interested parties to costs. Similarly because the protestors and the administrator are members of the same family, I will not condemn any of them to costs.

29. The protest of the various parties has been determined. The court should now consider confirmation of the grant. Towards that end, I direct that a fresh application for confirmation be made within 30 days and thereafter all beneficiaries to appear before court on a date to be allocated for purposes of confirmation of grant. However confirmation in respect of **Mavoko Town Block 3/1992** is stayed pending the determination of ownership in the appropriate court. The interested parties are given 60 days to file the said suit, failing which confirmation in respect of the same shall proceed. This matter shall be mentioned on 5/4/2019 for further directions.

It is so ordered.

Dated and delivered at **Machakos** this 7th day of **February 2019**.

D.K. KEMEI

JUDGE