



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 937 OF 2012**

**IN THE MATTER OF THE ESTATE OF ROSE KAKII MULUNGU (DECEASED)**

**CHARLES KIVEVO MUASYA.....1<sup>ST</sup> PROTESTOR**

**MUTUA MULEVU.....2<sup>ND</sup> PROTESTOR**

**TIMOTHY MUTISO.....3<sup>RD</sup> PROTESTOR**

**DOROTHY MUSAU.....4<sup>TH</sup> PROTESTOR**

**VERSUS**

**DAVID MUSAU MULUNGU**

**RICHARD MULUNGU KAKII.....PETITIONERS/APPLICANTS**

**RULING**

1. By a Summons for confirmation of grant dated 30<sup>th</sup> April, 2014, the Petitioners herein, **David Musau Mulungu** and **Richard Mulungu Kakii** sought an order that the grant of letters of administration made to the said administrators on 6<sup>th</sup> May, 2013, be confirmed. There was another summons of the same date in which the Petitioners sought an order that they be granted leave to refile a corrective Form P&A5 and that the one annexed be deemed duly filed.

2. According to the administrators, the deceased herein, **Rose Kakii Mulungu** (Deceased), who died on 6<sup>th</sup> August, 2008 left one adult son, one minor son and three daughters as his heirs/beneficiaries surviving him. It was therefore sought that the title of the deceased in Land Parcel No. Machakos/Mua Hills/684 be substituted with that of her son, **Richard Mulungu Kakii** and consequently, the register be rectified to reflect that substitution. From the certificate of search exhibited, it was however clear that the proprietorship of the said parcel of land was joint in the names of **David Musau Mulungu**, **Joseph Wambua Mulungu**, **Kasia Mulungu** and **Muthike Mulungu**.

3. As regards the summons for rectification of Form P&A5, it was deposed that the asset for which the administration is sought is a share of the deceased in land title no. Machakos/Mua Hills/684 and that the name appearing therein is **Muthike Mulungu** which refer to the deceased herein, **Rose Kakii Mulungu**. It was therefore deposed that it is fair and just that the said rectification be done

4. By an affidavit of protest sworn by **Charles Kivevo Muasya** on 14<sup>th</sup>, March, 2017, the Protestors herein averred that the estate of the late **Mr. Mulungu Ndiku** the father of the deceased herein, comprised of parcel number Machakos/Mua Hills/134 which property was sub divided and transmitted to **Nthenya Mulungu** (deceased) and subsequently produced title number Machakos/Mua Hills/684, Machakos/Mua Hills/685 and Machakos/Mua Hills/686. It was however contended that the Administrator's herein fraudulently failed to disclose to this court, that in the purported estate which they seek to distribute, Machakos/Mua Hills/684 is indeed a product of a sub division of Machakos/Mua Hills/134 which property belongs to the late **Mr. Nthenya Mulungu** and not their sister **Rose Kakii Mulungu** (deceased) and has for a long time been the subject matter of succession cause 597/2005, where the administrator herein colluded to fraudulently omit the current protestors.

5. It was deposed that at the time of his death **Mr. Ndiku Mulungu** (deceased), their father, was survived by **David Musau Mulungu**, **Nzuki Boniface** (deceased), **Kasia Mulungu**, **Joseph Wambua Mulungu** and **Rose Kakii Mulungu**. According to the Protestors, before his death **Mr. Ndiku Mulungu** (Deceased) had already sold 6 acres for a consideration of Kshs 6,000.00 to **Timothy Mutiso**. The Protestors claimed that at the time of her death, **Bibiana Nthenya Mulungu** (Deceased) had divided, sold and shared out the land to his children and other third party purchaser listed in the affidavit. Overtime prior and subsequent to their death, the beneficiaries of the late **Mulungu Ndiku** (deceased)

and **Bibiana Nthenya Mulungu** (deceased) indeed hived off and sold sections of their share of the land which they had already inherited. The Protestors averred that they acquired and bought land from the beneficiaries/deceased's dependents' in the following portions; -

- a) **Mrs. Nthenya Mulungu** (widow) – sold 5 Acres to **Mr. Peter Musau Muthini** on 9<sup>th</sup> February 1985 at a consideration of Kshs 8,800/= per acre totalling to Kshs 44,000/=
- b) **Boniface Nzuki Mulungu** – 14<sup>th</sup> January 1986 the second son sold 1 Acre to **Charles Muinde Ndiku** at Kshs 9,500/=.
- c) 21<sup>st</sup> November 1987, **Boniface Nzuki Mulungu** again sold 3 Acres to **Benjamin Muasya** at a consideration of Kshs 57,000/=.
- d) 30<sup>th</sup> December 2000 **David Mulungu** – sold ¼ Acre at Kshs 30,000/= to **Mutua Mulelu**.
- e) 1<sup>st</sup> February 2005, David Mulungu sold 75 by 50 ft to **Mutua Mulelu**.

6. It was therefore the protestors' case that in view of the foregoing it is clear that the interest in all that parcel of land known as Machakos/Mua Hills/684 was alienated excised and sold off to third parties by the proprietor and the beneficiaries as hereinabove detailed. According to the protestors, upon acquiring a purchaser's interest, they have continually cultivated and lived on the subject land for over 25 years without any interference and with the acquiescence of the proprietor and all the beneficiaries, as such the property cannot form or comprise of the estate of **Rose Kakii Mulungu**, (deceased) who has not demonstrated what interest she holds, if any, over land parcel Machakos/Mua Hills/684.

7. The Protestors averred that despite the clarity of the foregoing and full knowledge of the above transactions the administrators proceeded to fraudulently subdivide title No. 134 into three parcels namely Machakos/Mua Hills/684, Machakos/Mua Hills/685 and Machakos/Mua Hills/686 and that during subdivision and registration of title the respondent's herein connived and fraudulently ignored all the other third party purchasers currently present and residing in Machakos/Mua Hills/684 and consequently apportioned land to themselves, land which had been already sold off.

8. It was contended that the said portions have since been apportioned sold and appropriated by the administrators in total disregard of the purchasers who hold a purchaser's interest in the title number Machakos/Mua Hills/684. In furtherance of their illegalities and in an effort to fraudulently alienate and deny the purchaser's their interest in subject land, the administrators cunningly and mischievously abandoned Succession Cause 597/2005 and instituted the current succession cause without their knowledge and have fraudulently attempted to introduce the deceased's name on the title deed wrongly denying, frustrating and extinguishing purchasers right over the property.

9. The protestors reiterated that Machakos/Mua Hills/684 has been sold entirely to the protestors, as such the same cannot form or comprise of the estate of the deceased **Rose Kakii Mulungu**, who does not have any beneficial interest therein. According to them, the attempt to pass off title number Machakos/Mua Hills/684 as part of the estate of the deceased herein is most fraudulent and aimed at coning the protestors from their land, attempts which this court ought to avert. Instead the protestors deposed that title number Machakos/Mua Hills/684 should be transmitted to the purchasers herein identified, in the identified acreage, failure which the protestors will be exposed to severe loss and damage. They insisted that parcel No. Machakos/Mua Hills/684 cannot comprise in the estate of the deceased herein or at all.

10. In response to the protest, the petitioners contended that the protestors' claims are against the estates of other persons other than the estate to which these proceedings relate since the said claims are directed at the actions of the mother of the deceased herein and the brothers of the deceased. It was further contended that the protestors allegedly bought portions of plot No. 134 which is not the subject of these proceedings which plot was in the year 2007 subdivided into three being 684, 685 and 686. Accordingly, as it cannot be ascertained in these proceedings where the said portions fall, the protest is frivolous since it does not disclose any or any reasonable cause of action against the estate of the deceased herein. It was contended that the protestors' claim can only be ventilated in the Environment and Land Court. The petitioners insisted that according to the documents exhibited in the petition, Land Parcel No. Machakos/Mua Hills/684 is the deceased's entitlement. Accordingly, the petitioners urged the court to strike out the protest with costs.

11. It was submitted on behalf of the protestors that the subject property Machakos/Muahills/684 belonged to the late **Nthenya Mulungu** and for a long time has been the subject of proceedings in Succession Cause 597/2005, where the administrators colluded to fraudulently to omit the current protestors. According to the protestors, they have produced evidence to demonstrate that the parcel herein already been sold to them by the beneficiaries of the estate of **Mrs. Nthenya Mulunga** and beneficiaries thereof as evidenced by the exhibited sale agreements. However, despite having full knowledge & existence of the above transaction and purchasers interest held by the protestors the applications fraudulently and without notice proceed to sub-divide the above parcels more specifically Machakos/Mua hills/134 to produce Machakos/Mua hills/684, 685 and 686 that in an effort to defraud the protestors, property Machakos/Mua hills/684 was registered in the names of the beneficiaries to the exclusion of the purchasers once the protestors realized this animally the applicants abandoned the proceedings in SC 597/007 and sought to perpetuate their fraudulent conduct in the instant proceedings.

12. It was contended that the property Machakos/Mua hills/684 having been sold to third parties, cannot be part or parcel of the estate of the deceased herein. In any event, the title document annexed and marked as "JMM 6" on the Protestors Affidavit, indeed does not demonstrate any interest the deceased had in the subject property.

13. It was therefore submitted that the application for confirmation herein is wholly defective as it seeks to introduce a new party on a title document without proof of ownership thus rendering the application incompetent as it does not set out with clarity the mode of proposed distribution and in what shares each beneficiary would benefit from the above title. It was however proposed that in the event that the court is inclined to distribute the above property the same to be divided as follows;

- a) Peter Musau Muthini .....5 Hectares
- b) Chares Muinde Ndiku .....1 Hectare
- c) Benjamin Muasya .....3 Hectares
- d) Mutual Mulelu ..... 1/4 Hectares

14. On behalf of the Petitioners, it was however submitted that this Succession Cause arose after the demise of **Rose Kakii Mulungu** (also known as Muthike Mulungu) who was a joint owner of title No. Machakos/Mua Hills/684 and the 1<sup>st</sup> Petitioner is her son and heir of the deceased. However, the title is registered in the names of **David Musau Mulungu, Joseph Wambua Mulungu, Kasia Mulungu** and **Muthike Mulungu** and was so registered in 2008.

15. According to the petitioners, the sole purpose of this petition is to substitute the name of the deceased joint owner of Machakos/Mua Hills/684 with that of the deceased's rightful heir. It was submitted that if the Protestors were to initiate any claim over the title, they could certainly require the deceased **Muthike Mulungu** also known as **Kakii Mulungu** to be substituted in the title and this is exactly what the Petitioners have endeavoured to do. Therefore, the granting of the orders sought by the Petitioners will indeed create a forum for the Protestors to ventilate their perceived claims.

16. It was submitted that while counsel for the Protectors argues that the subject property Machakos/Mua Hills/684 belonged to **Nthenya Mulungu** and had been the subject of proceedings in Machakos Succession Cause No. 797/2005, the Protestors did not offer any evidence to that effect. It was submitted that they should have produced an abstract of title to prove that indeed the title belonged to **Nthenya Mulungu** at any given time and also should have produced a copy of P & A 5 in the said Succession Cause to demonstrate that the title was one of the assets in that cause.

17. According to the petitioners, the Protestors may as well have purchased portions of Machakos/Mua Hills/134 but not Machakos/Mua Hills/684 and that if the Protestors had any claim in Machakos/Mua Hills/684, they could have objected to the registration of **Muthike Mulungu** and no wait until she died to object to the registration in favour of her heir. It was contended that contrary to the Protestors' submissions, they have not produced any evidence relating to Machakos/Mua Hills/684 and that their evidence in form of exhibit "JMN-4" is in relation to Machakos/Mua Hills/134 which is not the subject of these proceedings.

18. According to the petitioners, the Protestors' submission on the lack of proposed distribution is completely misconceived in that the confirmation is sought to substitute a party but not to distribute property.

19. As regards the Protestors' submission that **Rose Kakii** does not appear in "KMM-6" (the title deed) it was submitted that such a submission is misleading as indeed **Rose Kakii** is one and the same person as **Muthike Mulungu** as demonstrated in the proposed amendment to Form P & A 5 filed herein. It was therefore the applicant's case that the names **Rose Kakii Mulungu** and **Muthike Mulungu** refer to one and the same person; the deceased hence it was fair and just that the grant of letters of administration issued be rectified to reflect that **Rose Kakii Mulungu** was also known as **Muthike Mulungu**.

20. It was reiterated that the Protestors have no role in this Succession Cause as their expressed interest lies in Succession Cause No.597 of 2005 the subject matter of which is title No. Machakos/Mua Hills/134 and that should the Protestors feel that they have a claim of title No. Machakos/Mua Hills/134 then they can proceed to the Environment and Land Court and canvas their claim there. However, blocking the substitution of the ceased joint proprietor may even jeopardize their perceived claim.

21. The Petitioners therefore submitted that the Protestors' objection lacks merit and therefore ought to be dismissed with costs to the Petitioners.

**Determination**

22. I have considered the applications, the affidavits both in support of and in opposition to the applications.

23. Starting with the application for rectification, it is clear that there is no serious objection, if at all, raised by the protestors to the same. Accordingly, I have no hesitation in granting the prayers sought therein.

24. As regards the summons for confirmation, the main issue for determination here is whether the Petitioners have included as part of the deceased's estate some properties which do not belong thereto in particular Land Parcel No. Machakos/Mua Hills/684.

25. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during her lifetime and in which by the time of her death, interests had not been terminated.

26. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that:

**"This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are**

**assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.”**

27. It is therefore clear that any property which the deceased was not legally competent freely to dispose during her lifetime, and in respect of which her interest had been terminated by her death cannot form part of her estate and cannot be the subject of an application for grant or confirmation thereof.

28. The Petitioners have exhibited both copies of the title and the certificate of search for Land Parcel No. Machakos/Mua Hills/684 which show that the same is registered in the joint names of **David Musau Mulungu, Joseph Wambua Mulungu, Kasia Mulungu and Muthike Mulungu**. The Protestors however allege that the deceased's interest in the said property was terminated after the same was sold to them by the deceased's mother and brothers. However, the said parcel still shows that it is, *inter alia*, in the names of the brothers who allegedly sold the same to the protestors. It is however the protestors' case that at the time they purchased the suit parcel, there was only one title being Land Parcel No. Machakos/Mua Hills/134 and that the suit parcel is an offshoot from the subdivision of the mother title. It is however not contended that the protestors bought the whole land comprising of the mother title. The protestors however contend that the administrators of the estate of **Nthenya Mulungu**, the deceased mother of the current registered proprietors of Land Parcel No. Machakos/Mua Hills/684 proceeded to fraudulently subdivide title No. 134 into three parcels namely Machakos/Mua Hills/684, Machakos/Mua Hills/685 and Machakos/Mua Hills/686 and that during subdivision and registration of title the Applicants herein connived and fraudulently ignored all the other third party purchasers currently present and residing in Machakos/Mua Hills/684 and consequently apportioned land to themselves, land which had been already sold off.

29. Assuming that position is correct, it is clear that land parcel no. Machakos/Mua Hills/134 no longer exists in the same status it was at the time the protestors allegedly bought their parcels. Since the Protestors allege fraud, they will have to institute appropriate legal proceedings in which the issue may be resolved. Fraud as a process leading to grant of letters of administration or confirmation thereof, which can be properly dealt with in Succession Causes must be distinguished from fraud which allegedly occurs independently of the succession proceedings. In the latter, I associate myself with the position of **Nyamu, J** (as he then was) in **Stephen Waitaha Gatumbi vs. Frumence Kariuki Murui Nairobi HCCC No. 1757 of 2001** where he held that issues of fraud and forgery cannot in law be raised in a succession cause.

30. In this case the deceased is a joint the registered proprietor of Land Parcel Machakos/Mua Hills/684 whether rightly or not. The Petitioners are the legal representatives of her estate. As correctly submitted by the Petitioners, the protestors may not commence legal proceedings for the protection of their rights unless the register is rectified to reflect that position.

31. It therefore follows that there is no hindrance to the grant of Summons for confirmation of grant dated 30<sup>th</sup> April, 2014. Accordingly, the name of the deceased, **Muthike Mulungu**, as one of the joint proprietors of Land Parcel No. Machakos/Mua Hills/684 is hereby substituted with that of **Richard Mulungu Kakii** and the register is to be rectified accordingly.

32. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 8<sup>th</sup> day of March, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Kyalo for Mr Mulwa for the Petitioners**

**Protestors present in persons**

**CA Geoffrey**