



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO.1027 OF 2011**

**IN THE MATTER OF THE ESTATE OF DOMINIC KASONA KALELI (DECEASED)**

**LYDIA NDULU KASONA**

**FESTUS MUSILA KASONA.....PETITIONERS**

**-VERSUS-**

**MUTANU NGUMI.....PROTESTOR**

**RULING**

1. The Protestor claims that the land **Muputi/ Kiima Kimwe/2591** does not belong to the deceased but to her late husband one **Muindi Ngumi**.
2. The specific facts as contained in the affidavit in protest dated **10<sup>th</sup> November, 2017** are that Muputi/Kiima Kimwe/2591 was a result of the subdivision of Muputi/Kiima Kimwe/2311 and after subdivision came parcels 2591 and 2592 and whereas 2592 was transferred to her step son by the deceased so as to defeat her claim, 2591 has been included as part of the deceased's estate and this should not be the case for the same was illegally transferred into the names of the deceased. She has annexed a copy of the search certificate for Parcel 2311 and a transfer from her late husband to the deceased herein.
3. **There** is no indication of a reply by any of the petitioners, however there are witness statements filed by them.
4. **The protestor** has on record two witness statements, one by herself and the other by Amos Kimote. The protestor stated that her late husband was the owner of Muputi/ Kiima Kimwe/633 that was sold to the deceased hence causing the land to be subdivided into parcels 2289 that was registered in the names of her late husband and 2290 that was registered in the names of the deceased. She further stated that parcel 2289 was subdivided into parcels 2311 that was registered in the name of her husband and 2312 sold to another person. She stated that 2311 was subdivided and resulted in two parcels namely 2591 that has been included as the asset of the deceased and 2592 that was **transferred by the deceased** to her step son. Her prayer is that the court finds that her husband is the proprietor of parcel 2591 and it should be registered in her name.
5. **Amos Kimote** in his statement dated 18<sup>th</sup> June, 2018 stated that as the chairman of the Atangwa Clan, he sat in a clan committee meeting that was held on 18.9.2007 concerning the parcel 633 that belonged to the late Muindi Ngumi and the family members informed him that after a series of subdivisions of parcel 633 there was plot 2311 that was left out. He stated that plot 2311 was to be subdivided amongst Muindi's three wives but the deceased herein caused the land to be subdivided and transferred into his names resulting in plots 2591 and 2592.
6. In reply to the protest, **Festus Musila Kasona** and **Lydia Ndulu Kasona** filed statements. Festus Musila Kasona stated that the protestor is using a succession cause to circumvent a matter that ought to be in the ELC Court.
7. **Lydia Ndulu Kasona** stated that she is the wife to the deceased and the protestor is not a dependant of the deceased. She also challenged the locus of the clan to make a determination on family property.
8. Learned counsel for the petitioner vide written submissions filed on 29.1.2019 submitted that the protestor is not a dependant of the deceased and therefore is not entitled to a share in his estate. He cited the case of **Dr. Leonard Kimeu Mwanthi v Rukaria M'twerandu M'Iruingi, Civil Appeal No 28 of 2011** and submitted that the protestor's claim is best addressed in the ELC or a Civil Court and not a Succession Court.

9. Learned Counsel for the Respondent submitted that the deceased herein had illegally and unprocedurally subdivided **Parcel No. Muputi/Kiima Kimwe/2311** and transferred one portion to one Simon Kimuyu Muindi and the other portion to himself and thereby denied the Protestor her entitlement to the estate of her late husband Muindi Ngumi. It was further submitted that **Parcel number Muputi/Kiima Kimwe/2591** does not belong to the estate of the deceased and should not form part of the estate and that an order should be made to the effect that the same do revert to the estate of Muindi Ngumi or be transferred to the Protestor.

10. I am faced with two competing claims, that of the protestor, and that of the family of the deceased. The issue I have to determine is; what is the status of the protestor in this succession cause? What remedies can she obtain before this court.

11. 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 protestor is that of the widow to someone who was known to the deceased and not a dependant, as such she is not a beneficiary of the estate and her claim should not be tried in a succession cause. Her 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. For purposes of directing the protestor 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.”**

12. Applying the above legal test, the protest by the interested party lacks merit and must be dismissed.

13. I note the protestor’s claim may have been a legitimate quest for justice albeit filed in the wrong court. On that basis I will not condemn her to costs.

14. The protest having been determined, the court should now consider confirmation of the grant. Towards that end, I direct that all beneficiaries to appear before me on a date I will appoint for purposes of confirmation of grant. However in order not to prejudice the protestors’ claim herein, I order that confirmation in respect of **Muputi/Kiima Kimwe 2591** is stayed pending the determination of ownership in the appropriate court. The Protestor is given **60 days** from the date hereof to file the said suit, failing which confirmation in respect of the same shall proceed. Each party to bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 4<sup>th</sup> day of April, 2019.**

**D.K. KEMEI**

**JUDGE**