



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 544 OF 2011

IN THE MATTER OF THE ESTATE OF MAVUA MUTUA (DECEASED)

JOSEPH MAITHA MAVUA.....1ST PETITIONER/APPLICANT

NDUKU NZIVO MAVUA.....3RD PETITIONER/APPLICANT

IDA MALINDA MUTUNGA.....4TH PETITIONER/APPLICANT

V E R S U S

SIMEON MUSYOKA MAVUA.....RESPONDENT

RULING

1. The Succession Cause was first filed on 01.7.2011 by Ngula and Maitha Mavua, the initial Petitioners (now deceased) and Letters of Administration were later issued on 19.6.2015 to Joseph Maitha Mavua, Simeon Musyoka Mavua, Nduku Nzivo Mavua and Ida Malinda Mutunga. The petitioner had listed two properties as comprising the net estate of the deceased that is:

1. Mitaboni/Mutituni/1780 and 1784

2. Mitaboni/Mutituni/1499

2. Before the grant could be confirmed, an affidavit of protest was filed by the 2nd Petitioner/ Respondent/ Protestor. The protest is yet to be heard on merits and that the grant is yet to be confirmed. The distribution of the estate has not been done as well.

3. The applicants Joseph Maitha Mavua, Nduku Nzivo Mavua and Ida Malinda Mutunga named as petitioners filed an application dated 23.10.2018 against Simeon Musyoka Mavua, the 2nd petitioner/respondent. In the application the applicants were seeking orders that the certificate of title for the whole of the property known as land parcel Number Mitaboni/ Mutituni/1780 registered in the names of Fredrick Mavua Musyoka be cancelled and upon cancellation a fresh title be issued in the names of Mavua Mutua.

4. In the affidavit in support of the application, Joseph Maitha Mavua deponed that land parcel No. Mitaboni/ Mutituni/1780 was one of the subject matters in the estate of the deceased in the Succession Cause and it belonged to the deceased and that the deceased never initiated a transfer of the same but however the Respondent herein transferred the property to his son, Fredrick Mavua Musyoka as per the certificate of official search annexed. The deponent averred that the ownership of the said land parcel Number Mitaboni/ Mutituni/1780 is the subject of the succession cause that is to be heard via viva voce evidence and in any event the actions of the Respondent in interfering in land parcel Number Mitaboni/Mutituni/1780 amounts to intermeddling as per Section 45 of the Law of Succession Act.

5. In reply to the application, the deponent averred that **Machakos ELC 16 of 2009** is in existence and the same will determine the ownership of the land parcel Number Mitaboni/Mutituni/1780 and therefore the probate and administration court should not be drawn into the issues that ought to be determined by the land court. Further that the instant application is incompetent and improper before the court.

6. This court on 1.11.2018 directed that the status quo be maintained and that the instant application be canvassed via written submissions.

7. Learned Counsel B.M. Mungata and Company Advocates for the applicants vide submissions dated 21st January, 2019 submitted that land parcel Number Mitaboni/ Mutituni/1780 is part of the assets of the deceased and a mode of distribution is yet to be agreed upon and therefore

the act of transferring the same is an act of intermeddling. Learned counsel submitted that in terms of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, the court has powers to order cancellation and reissue of a fresh title. Counsel cited the case of **Munyasya Mulili & 3 Others v Sammy Muteti Mulili (2017) eKLR** where the court found that the impugned sale and registration in the names of third parties was illegal, null and void and therefore it shall be in order for the court to grant the orders sought.

8. In reply to the application, learned counsel L M Wambua and CO Advocates for the 2nd Petitioner/ Respondent submitted that after the determination in **Machakos ELC 16 of 2009** that is a dispute over land parcel Number Mitaboni/Mutituni/1780 then the probate court can be called upon to distribute the suit property, for in the terms of the Land Registration Act, and Section 26 thereto, the title deed is indefeasible evidence of ownership of the suit land and thus the application be dismissed.

9. Two issues arise in this application. These are:

- ***Jurisdiction to hear the application***
- ***Whether the court can order cancellation of title***

deed and re issue of the title deed.

10. On jurisdiction, the respondent avers that the dispute as to ownership is in the ELC Court. The Appellant avers that the actions of transfer amount to intermeddling and Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules grant the court powers to entertain the instant matter.

11. The jurisdiction of the courts in succession matters is provided under **Section 47 of the Law of Succession Act** that provides.

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

12. This succession cause was filed in the court and in light of the provision of the law, I am of the view that the court is clothed with the requisite jurisdiction to entertain the application. There is an allegation that there is a pending ELC matter. However nothing has been placed before the court to demonstrate that the succession cause had been stayed by the said ELC Court. The court cannot make any assumption in the absence of tangible evidence and in this regard the application has merits and I shall proceed to hear the same on its merits.

13. The Applicant seeks cancellation of registration and in response the respondent has not demonstrated how the registration was effected even in the absence of a confirmed grant in his names. The current registered owner is not even a party to the proceedings and therefore I can safely conclude that there is no plausible explanation for the impugned registration of the said property to the third party.

14. What is before this court is a Succession Cause and as a succession court, there is a duty to preserve the assets of the deceased from wasting and to ensure that the same is distributed in accordance with the law and therefore under **Section 47 of the Law of Succession Act** and **Rule 73 of the Probate and Administration Rules** the court has wide powers to make appropriate orders deemed appropriate in the interest of justice and for preservation of the deceased’s estate.

15. **Section 45 of the Law of Succession Act** outlaws intermeddling with the estate of a deceased person. It provides:

“Expect as, far as expressed authorized by this Act or by any other written Law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person. Any person who contravenes the provision of this section shall be guilty of an offence and liable to a fine not exceeding Ten Thousand Shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration.”

16. In **Mombasa High Court Succession Cause No. 367/2006, Khairu Mohamed v Shumi Ali Mustafa** the court held that, **“the transfer of the property known as Lamu/Block/1/582 Hasuni Alawi Husuni Mohamed be and is hereby revoked. The property is restored to the estate of the deceased”**.

17. In the instant case, there is application to revoke a transfer of property that was part of the estate of the deceased which was transferred to a 3rd party and it is not clear how the title came about to be issued to him. Therefore for all intents and purposes the court is satisfied that there has been intermeddling in the estate of the deceased person. The respondent has imputed that the pending matter in the ELC court clips the wings of the court to cancel the certificate of title that has been issued in the names of Fredrick Mavua Musyoka. However Rule 73 of the Probate and Administration rules provides:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of Justice or to prevent abuse of the process of the court.”

18. Because the subject property was a subject matter of the estate of the deceased, the grant that had been issued had not been confirmed no such transfer could be effected before the grant is confirmed and the shares of the beneficiaries identified, and no title can be issued in the names of any person until the said grant is confirmed.

19. In **the Matter of the estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** the Court stated:

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

20. In **Santuzza Bilioti alias Mei Santuzza (deceased) v Giancarlo Falasconi (2014) eKLR** the court held:

“.. the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

21. From the evidence on record, at the time of filing the succession cause, the subject property was in the name of the deceased. It has transpired that while the **ELC Case No. 16 of 2009** was pending determination, the 2nd Petitioner/Respondent herein caused the transfer of the suit property in the name of a third party so as to defeat justice. This court will not sit and watch without acting in the best interest of justice and to protect and preserve the estate of the deceased pending the determination of the protest and the summons for confirmation. According to my above finding that the registration of the title in the names of Fredrick Mavua Musyoka amounted to intermeddling with the estate of the deceased before the succession cause was finalized and the same is not explained by the respondent, I allow the application in terms of prayers 2 and 3 and I order that:

a) The certificate of title for the whole of the property known as land parcel Number Mitaboni/ Mutituni/1780 registered in the names of Fredrick Mavua Musyoka be cancelled and the property revert back in the names of the deceased Mavua Mutua.

b) A fresh title be issued in the names of Mavua Mutua.

c) The matter be fixed speedily for hearing and determination of the protest and confirmation of the grant.

d) There will be no order as to costs.

It is so ordered

Dated and delivered at Machakos this 8th day of May, 2019.

D.K. KEMEI

JUDGE