



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.64 OF 2014

THE MATTER OF THE ESTATE OF JOSEPH NTHIWA NTHUKU (DECEASED)

JOSEPHINE NDUKU NTHIWA

DANIEL MUTISO NTHIWA.....PETITIONERS

-VERSUS-

PETER MUSYOKA KITUKU.....PROTESTOR

RULING

1. The Protestor herein has filed a protest dated 23rd November 2015 whereby he claims that the land Plot no 2964 Mbee Adjudication Section does not belong to the deceased and should not be included in the assets for distribution since the said property is registered in the names of the objector.

2. The specific facts as contained in the affidavit in protest dated **23rd November, 2015** are that he only leased out the said plot to the deceased for a period of 3 years that ended in 2013 as per the agreement annexed to the protest and therefore the same is not part of the estate of the deceased and that the same has wrongfully been included as forming part of the estate of the deceased. He went on to add that the dispute in respect of the same is the subject of Machakos CMCC number 80 of 2014 as per the annexed pleadings.

3. There is a reply to the application by the 1st petitioner who deponed that the deceased purchased the suit land from the objector as per the terms of a sale agreement in Kikamba language and the translation by Sila Advocate that is annexed to her affidavit. The 1st petitioner avers that upon the death of her husband, the objector using his brothers have attempted to grab the said land and even filed Civil Suit namely **Machakos Cmcc number 80 of 2014** whereupon she filed a defence and counterclaim as per the attached pleadings and maintains that she is entitled to include the same in the estate of the deceased.

4. The protestor has on record two witness statements, one by himself and the other by Faith Mbatha. **The** protestor stated that he was the absolute owner of the suit land and has never sold it to anyone. He maintains that the alleged agreements are a forgery because the signature is not his and further that the plot number is undisclosed and the agreement has inconsistencies.

5. Faith Mbatha in her undated statement filed on 17.5.2017 stated that she has never been privy to an agreement between her husband and the deceased and that the signatures in the agreements are not hers.

6. In reply to the protest, **Josephine Nduku Nthiwa** and **Dennis Kakui Muthengi** filed statements on 17.5.2017. Josephine stated that in the year 2000, the objector approached her husband and agreed to sell the suit plot whereupon a consideration of Kshs 12,000/- as agreed was paid and now the objector seeks to grab the land and has forged documents to look as if the land was leased to the deceased and including Dennis Kakui Muthengi as a witness. She sought that the court grant an order that the objector transfers the suit land to her names since the land was paid for and she is the administrator of the estate of her late husband.

7. Dennis Kakui Muthengi stated that on 23.9.2009, the deceased and the 1st petitioner informed him that they sought to purchase the suit land and after agreeing on a purchase price, he was asked to witness the sale and thus he appended his signature to the agreement.

8. The protest was canvassed via submissions. Learned counsel for the petitioner vide written submissions filed on 01.3.2019 submitted that confirmation of the grant is awaiting the outcome of civil suit number 80 of 2014 and hence the application lacks merit.

9. Learned Counsel for the protestor has not filed any submissions.

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

12. Since the claim by the protestor is based on an alleged purchaser/seller interest that is pending the outcome of a civil case and that he is in fact not a dependent of the deceased, then I find that his claim is properly in the civil court vide the pending civil case number 80 of 2014 . His claim therefore cannot be litigated in this succession cause. Hence the confirmation in respect of the said property is subject to the outcome of the said civil case. The protestor and the 1st petitioner have already filed their respective claims in the civil court over the said parcel of land and hence the petitioners herein must be allowed to proceed with the confirmation of the grant regarding the remaining undisputed properties. The presence of the protestor is therefore not required in the confirmation exercise since the property in question has been isolated.

13. In applying the above test, the protest by the protestor fails and is dismissed.

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 the court on a date to be appointed for purposes of confirmation of grant. However confirmation in respect of Plot number 2964 Mbee Adjudication Section is hereby stayed pending the determination of ownership in the **Machakos Cmcc number 80 of 2014.**

15. Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 6th day of June, 2019.

D.K. KEMEI

JUDGE