



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 26 OF 2006**

**IN THE MATTER OF THE ESTATE OF THE LATE PHILIP MUTULILI WAMBUA – (DECEASED)**

**BETWEEN**

**PRISCILLA NTHOKI MUTULILI.....PETITIONER/RESPONDENT**

**VERSUS**

**SAMUEL MUTUKU MWIKYA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. By Summons for Confirmation of Grant dated 28<sup>th</sup> November, 2018, the Applicant herein seeks an order that the grant of letters of administration intestate issued to **Priscilla Nthoki** and **Joshua Kioko Mutulili** on 26<sup>th</sup> April, 2006 be confirmed in terms of the annexed schedule. According to the summons, the deceased's surviving beneficiaries were Priscilla Nthoki Mutulili (widow), Samson Muniwoki Mutulili (son), John Wambua Mutulili (son), Joshua Kioko Mutulili (son) Gedion Manthi Mutulili (son), Peter Kimeu Mutulili (son), Anna Mbithe Mutulili (daughter) and Faith Mbithe Mulwa (daughter in law).

2. It was averred that on 26<sup>th</sup> September, 2018, this court revoked the grant of letters of administration dated 4<sup>th</sup> July, 2016 for failing to include Samuel Mutuku Mwikya as a liability/creditor of the estate of the deceased which ruling according to the petitioners was in conformity with the existing Minister's decision in Kawatheji Adjudication Appeal Case No. 366 of 1966 in which the said Creditor was issued with almost half of the portion of land hived from Kawatheji Land Adjudication Plot No. 1984.

3. According to the Petitioners, the deceased's assets were Kawatheji Land Adjudication Plot Nos. 781, 1787, 1825, 1984, 1514, 2227, 1810, 1780, 3208; Drumvale Farmers' Co-operative Society Ltd share No. 337; Land Parcel No. Kangundo/Isinga/ 1980; Tala Housing Co-operative Society Ltd shares Nos. 3873 and 3882; East African Breweries Ltd 57 ordinary shares; and Matungulu Farmers' Cooperative Society 1 share.

4. It was averred that the identification and shares of all persons beneficially entitled to the said estate had been ascertained as indicated in the schedule. In the said schedule it was proposed that apart from almost half of Kawatheji Land Adjudication Plot No. 1984 which was to be confirmed to Samuel Mutuku Mwikya, the rest of the properties were to be confirmed in the names of the Petitioners on behalf of all the beneficiaries.

5. On 1<sup>st</sup> April, 2019, the said Samuel Mutuku Mwikya filed an affidavit of protest in which he claimed that the property known as Kangundo/Kawatheji/1984 referred to in the summons as Kawatheji Land Adjudication Plot No. 1984 be wholly given to him on the ground that he purchased the same from the deceased in 1984 at a consideration of Kshs 100,000/- and paid Kshs 52,830/- and settled the balance by giving the deceased his parcel of land being Kangundo/Kawetheji/1963. It was averred that the petitioner herein was a witness to the said agreement and that he constructed his home in the said land and has been cultivating the same having also interred his wife therein. According to him none of these activities were opposed by the beneficiaries herein though the deceased's family has tried to severally evict him from the said land. According to him, Muniwoki Mutulili, a son of the deceased sold the said Kangundo/Kawetheji/1963 to Benedict Muema. He therefore prayed that the court finds that he is entitled to the whole of Kawatheji Land Adjudication Plot No. 1984. It was however his prayer that in the event that the court finds that he is only entitled to half of the said property then he ought to be given the other half and the same be subtracted from the share of Samson Muniwoki Mutulili who sold Kangundo/Kawetheji/1963.

6. In reply to the protest, Priscilla Nthoki Mutulili swore an affidavit in which she stated that the present claim by the interested party is an afterthought and a purported appeal from the decision of the Minister in the aforesaid appeal. While acknowledging the existence of an agreement dated 12<sup>th</sup> April, 1984 between the interested party and the deceased, it was averred that the interested party did not honour the agreement as he never transferred Kangundo/Kawetheji/1963 but fraudulently pushed for the ownership of Kangundo/ Kawatheji/1984 and that the issue had been resolved in the said appeal.

**Determination**

7. I have considered the issues raised herein. The interested party's claim is based on the allegation that he entered into an agreement with the deceased for the purchase of the parcel of land now known as Kangundo/ Kawathei/1984 then known as Kawathei Land Adjudication Plot No. 1984 for the sum of Kshs 100,000/- which he partly paid for in cash of Kshs 52,830/- and settled the balance by giving the deceased his parcel of land being Kangundo/Kawethei/1963. If that is the position, then the said land parcel No. Kangundo/ Kawathei/1984 also known as Kawathei Land Adjudication Plot No. 1984 became part of the deceased's estate. However, by an agreement dated 2n September, 2012 made between one Samson Munyoki Mutitlili and one Benedict Muema Muia, land parcel No. Kangundo/Kawethei/1963 was sold to Benedict Muema Muia. The said agreement was witnessed by the interested party herein. By the time of the said agreement, the deceased was long dead and the administrators of his estate had been appointed.

8. It is also not in dispute that the Ministry of Lands and Settlement heard the dispute in Kawethei Adjudication Section Appeal Case No. 366 of 1996 in respect of Parcel No. 1984 and it was directed that the Applicant should get about half of the land in dispute for the money he had paid, Kshs. 48,000/= which was about half the total amount of Kshs 100,000.00. The Ministry further ordered that the plot that was to be given in exchange to clear the balance be disregarded or left to be claimed back by the interested party. It is contended which contention is not denied that there was no appeal against the said decision. In fact it was on the basis of the said decision that this court on 26<sup>th</sup> day of September, expressed itself as hereunder:

**“The Applicant however avers the Respondent's son, Munywoki Mutulili, has purported to sell the said property to one Benedict Muema, a transaction which the Respondent contends she was unaware of. What is however intriguing is that one of the persons indicated as a witness to the said transaction is one Sammy Mutuku, who the Respondent contends is the Applicant herein. If the Applicant's case is that the effect of their agreement with the deceased was that the property known as Kangundo/Kawethei/1963 had already been taken by the Deceased while he had taken over Land Parcel No. Kangundo/Kawethei/1984, then the question would be why was he a party to a transaction which in effect amounted to a negation of the decision by the Ministry that the same land reverts back to him. In fact it is this conduct that the Respondent contends amounts to intermeddling with the estate the deceased. However that is a matter for another day.”**

9. I agree with the Petitioner that the decision in the said appeal cannot be in effect overturned in these proceedings. If the interested party is interested in claiming the said land parcel No. Kangundo/Kawethei/1963 pursuant to the decision in the said Minister's Appeal, he is at liberty to institute appropriate proceedings in the appropriate forum.

10. In the premises I find no merit in this protest which I hereby dismiss. Accordingly, I allow the Summons for Confirmation of Grant dated 28<sup>th</sup> November, 2018 as prayed.

11. There will be no order as to the costs of this protest.

12. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 7<sup>th</sup> day of November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**

**CA Geoffrey**