



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.991 OF 2012**

**IN THE MATTER OF THE ESTATE OF MULWA MUIWA (DECEASED)**

**COSMAS KILYUNGI MULWA.....PETITIONER**

**-VERSUS-**

**BENJAMIN MULWA WAMBUA.....PROTESTOR**

**RULING**

1. The Protestor claims that he purchased 15 acres of the land Masii/ Embui/399 from the deceased.
2. The specific facts as contained in the affidavit in protest dated **22<sup>nd</sup> June, 2017** are that the protestor purchased the subject land and had been in occupation since 1974 and even cultivated and planted trees as well as put up permanent developments on the suit land hence the confirmation should not be granted as prayed.
3. In reply to the protest is a replying affidavit deponed by the administrator who avers that the protestor wanted to grab the suit land. On record is a supplementary affidavit by the administrator who attached a copy of the search indicating that the suit land measured 6.8 hectares and is in the names of the deceased. There is also his witness statement where he stated that the deceased was his father and that the concerns of the protestor should be ventilated in the ELC court.
4. The protest was heard vide oral evidence and OB Pw1 was the protestor who told the court that he purchased 15 acres of the land in 1973 from the deceased and that he should be given his share. On cross examination, he stated that the sale agreement he had did not indicate the acreage or the plot reference number.
5. The petitioner testified that the title in respect of the suit property was issued on 15.5.1972 and his father died in 2005 and that he was not aware of the protestor's purchase of the suit land. On cross examination, he stated that his father did not leave him with the sale agreements in respect of the land.
6. The court directed that the protest be canvassed vide written submissions. Learned counsel for objector submitted that the grant as it is cannot be confirmed without the interest of the purchasers being taken into account.
7. Learned Counsel for the respondent submitted that the protestor had no locus to file the protest and that his interests could be catered for in the ELC court. He urged the court to dismiss the protest.
8. 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 he obtain before this court?
9. 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.”**

10. Since the claim by the protestor is that of an alleged purchaser and not a dependant, he is not a beneficiary of the estate and his claim should not be tried in a succession cause. His 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.”**

11. Applying the above legal test, the protest by the protestor fails and is dismissed. I find that the question in issue to be decided is not about succession or administration of the estate of the deceased but ownership of the suit property. The protestor’s claim may have been a legitimate quest for justice albeit filed in the wrong court. I note that the application for confirmation has indicated that the suit land be registered in the names of the petitioner in trust for beneficiaries including the protestor hence it is for the protestor to decide if he is agreeable to this arrangement.

12. 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 if the protestor still is not agreeable to the proposal by the petitioner, then confirmation shall be stayed pending the determination of ownership in the appropriate court. The protestor shall be given Thirty (30) days to file the said suit, failing which confirmation in respect of the suit land shall proceed. This matter shall be mentioned in Thirty (30) days for further directions. Each party to bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 6<sup>th</sup> day of November, 2019.**

**D.K.Kemei**

**Judge**