



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 840 OF 2010**

**IN THE MATTER OF THE ESTATE OF NZIOKI MWATU (DECEASED)**

**VERONICA MUTUNGA.....APPLICANT**

**VERSUS**

**TIMOTHY NZIOKA KATUTO**

**VERONICAH MUMBUA MUSYOKA.....RESPONDENTS**

**RULING**

1. By summons dated 4<sup>th</sup> February, 2019, the Applicant herein seeks leave to come on record of these proceedings as an interested party to these succession proceedings. According to the applicant, he entered into several sale agreements with a beneficiary of the estate of the deceased, **Francis Nzioki Mutune**, for sale of a portion of land which was hived off from land known as Muthetheni/Kinyweni/76. It was therefore his case that he has a beneficial and/or purchaser's interest in the said property which forms part of the estate of the deceased. According to the applicant, the said **Francis Nzioki Mutune** sold his beneficial interest in the said property to him thus conferring upon the applicant a beneficial and/or purchaser's right in the same and he ought to be joined to these succession proceedings in order for him to canvass and safeguard his interest. According to the applicant, the purchase price was paid on the strength of a representation given by the said **Francis Nzioki Mutune** that upon the filing of the succession cause, he would cause his share in the deceased's estate to be transferred to the applicant.

2. In support of the application, the applicant relied on **In the Matter of the Estate of Nelson Wambua Masila (Deceased) Malindi HCSC No. 3 of 2009** and **In the Matter of the Estate of Francis Muruiki Muchira Kerugoya HCSC No. 489 of 2014** and **Skov Estate Limited & 5 Others vs. Agricultural Development Corporation & Another [2015] KLR.**

3. The application was however opposed by the objector herein, **Nicholas Mutune**, a son to **Francis Nzioki Mutune** (also deceased). According to him, the said **Francis Nzioki Mutune** never sold any property to the applicant at any given time. It was deposed that at the time of the alleged sale agreement, the said land was in the name of **Nzioki Mwatu** who was deceased hence the land could not be the subject of any agreement for sale. Accordingly, the said **Francis Nzioki Mutune** had no right and capacity to sell or dispose of the said property. To the Objector, the applicant confirms that he was an intermeddler under section 45 of The **Law of Succession Act** hence any agreement entered into was null and void. It was disclosed that the applicant has, in a different forum, raised the claim which has been opposed. Since the applicant did not purchase the property from the deceased, it was contended that the applicant has no proprietary interest in the said land.

4. In support of his case the Objector relied on **Boniface Munyao Muinde vs. Mutinda Muindi & 2 Others [2016] eKLR.**

**Determination**

5. I have considered the application, the affidavits both in support of and in opposition to the application herein and the submissions made.

6. With respect to the prayer for joinder of the interested parties, I associate myself with the opinion of the Supreme Court decision in the case of **Francis Kariuki Muruatetu & Another vs. Republic & 5 Others [2016] eKLR** that:

**“...These legal provisions have been considered by the Court in *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others*, Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that [paragraphs 13-15]:**

“[13] While the Rules have a definition of who an amicus is, there is no definition attributed to ‘Intervener’ or ‘Interested Party’. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.

“[14] Black’s Law Dictionary, 9<sup>th</sup> Edition, defines “intervener” (at page 897) thus:

“One who voluntarily enters a pending lawsuit because of a personal stake in it”

and defines ‘Interested Party’ (at p.1232) thus:

“A party who has a recognizable stake (and therefore standing) in a matter”.

“[15] On the other hand, an amicus is defined in Black’s Law Dictionary thus:

“A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter’.”

[34] With that definition of “interested party,” the Court proceeded to hold further [paragraphs 17-18]:

“[17] Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

[35] This Supreme Court decision was cited by the High Court in *Judicial Service Commission v. Speaker of The National Assembly & 8 Others*, [2014] eKLR. The High Court also cited the definition of ‘interested party’ in: *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereafter the “Mutunga Rules”) thus:

“Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”

[36] Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

7. I agree with the position of Munyao, J in *Skov Estate Limited & 5 Others vs. Agricultural Development Corporation & Another* [2015] eKLR that:

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the

questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than “*merely being affected*” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.

8. In this case the applicants’ case is that he entered into a sale agreement with a beneficiary of the estate of the deceased for the sale of a property forming part of the estate of the deceased, a property which in his view the person selling to him would be entitled upon the succession proceedings being determined. In other words, the applicant admits that the interest in the property in question was yet to pass to the said seller and had not crystallised in him.

9. Section 45 of the *Law of Succession Act* provide as follows:

*(1) Except so far as expressly 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.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) 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*

*(b) 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 the due course of administration.*

10. It follows that any action taken by a person whose effect would be to interfere with a property of a deceased intestate without being authorised to do so by the court amounts to intermeddling with the estate under section 45 of the *Law of Succession Act*. Absence an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

11. From the applicant’s own deposition, he fits in the shoes of an intermeddler. He entered into an agreement whose effect was to encumber the free property of the deceased without any lawful authority.

12. I associate myself with the opinion of Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR that:

**“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised 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.”**

13. I also agree with the position in re Estate of M’Ngarithi M’Miriti [2017] eKLR that:

**“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”**

14. Section 79 of the same Act, on the other hand provides that:

***The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.***

15. In addition, if indeed the said property was owned by the deceased at the time of the sale, section 55 of the *Law of Succession Act* provides that:

***“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to***

*make any division of property, unless and until the grant has been confirmed as provided in section 71.*

*(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”*

16. In Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 others [2014] eKLR, Makau, J held that:

“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court’s decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.”

17. In Re Estate of John Gakunga Njoroge (Deceased) [2015] eKLR Muriithi, J was of the view that:

“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act...For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

*(ii) no immovable property shall be sold before confirmation of the grant.*

The persuasive authority of Wakiaga J. in *Stephen Waweru Ng’ang’a v. Kimani Ng’ang’a*, Nyeri HC P&A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”

18. In the same vein, Gikonyo, J in Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another [2017] eKLR held that:

“I see the claim by the Protestors is that of a purchaser and is based on a sale of land agreement with the widow of the deceased. Doubtless, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be tried in a succession cause...As the protestors are not beneficially interested in the estate, their 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. Given the circumstances of the case and the fact that the sale of the land violated the Law of Succession Act, the court cannot draw from its inherent jurisdiction to assist an unlawful transaction. I do not, however, wish to say much about the legality or otherwise of such transaction or the validity and enforcement of the agreement in question in order to avoid any prejudice to any future litigation on it. There are, however, ample judicial decisions on the matter and I do not wish to rehash them.”

19. In arriving at the said decision, the learned judge cited the decision of 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.”

20. I associate myself with the decision of Nyamweya, J in Boniface Munyao Muinde vs. Mutinda Muindi & 2 Others [2016] eKLR in which the learned judge expressed herself as hereunder:

“The Citor did not bring any evidence that Kaesa Muindi, with whom he entered into a sale agreement, had a confirmed grant of representation with respect to the Deceased’s estate at the time of the alleged sale of the land known as WOTE/IIANI/415 on 5<sup>th</sup> September 2009. It is thus my finding that a portion of the said parcel of land could not have been legally sold to the Citor by the said Kaesa Muindi, and any purported sale of the said land is thus of no legal effect. The Citor therefore does not qualify to be a creditor of the deceased within the meaning of the section 66 of the Law of Succession Act, as he did not purchase the said portion of the deceased’s land from the deceased, or a person authorized to sell the said property, and on the contrary actually intermeddled with the estate of the deceased contrary to section 45 of the Law of Succession Act. He therefore has no interest in the estate of the deceased to entitle him to cite the Citees, and his Citation dated 9<sup>th</sup> September 2013 is thereby dismissed with costs to the Citees.”

21. Just like my learned brothers and sister above, I find that a beneficiary of a deceased qua beneficiary, has no powers to dispose of the deceased’s properties when he clearly is not the administrator and in any event before the grant was confirmed. In this case, **Francis Nzioki Mutune** had no interest in the suit land. He had no authority to purport to dispose of the deceased’s property particularly land since section 82(b)(ii) of the *Law of Succession Act* provides that no immovable property shall be sold before confirmation of the grant. If **Francis Nzioki**

**Mutune** had no interest in the said land, it follows that the applicant herein who purports to have derived his interest from the said person cannot have any interest therein since a person cannot confer on a third party a better title than one he himself has.

22. While a purchaser from a deceased during the lifetime of a deceased person may claim a purchaser's interest in the deceased's estate, a person who purports to have purchased a deceased's property from a purported beneficiary before grant is issued acquires no interest in the estate of the deceased since he is neither a beneficiary nor a creditor of the deceased. He is a creditor of the beneficiary and can only lay his claim against the said beneficiary or the beneficiary's estate. As was appreciated by **Gikonyo, J** in **Paul Gituma Kiogora vs. Doris Mukiri Magiri & Another** (supra) that:

**“The protestors are not left without remedy or recourse as they are at liberty to pursue their claim in the appropriate court. I note the protestors’ action may have been a legitimate quest for justice albeit filed in the wrong court. I also take into account the conduct of the Petitioner and the widow in entering into the kind of agreement I have seen without proper authority of the law. On that basis I will not condemn the protestors to costs. The order I make is that each party shall bear own costs of the protest.”**

23. Apart from that it is my view that a person whose act is expressly criminalised by law cannot, based on such an act, seek to be allowed to safeguard his interest in the matter.

24. In the premises this application fails and is dismissed but with no order as to costs.

25. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 5<sup>th</sup> day of November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Mutinda Kimeu for D M Mutinda for the Objector**

**Mr Muniyao for Mr Kisongo for the Petitioner**

**CA Geoffrey**