



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

P&A CAUSE NO. 608 OF 2006

IN THE ESTATE OF THE LATE SAMSON MUTUKU MBITHI (DECEASED)

RULING

1. The deceased, **Samson Mutuku Mbithi**, passed away on 20th April, 1993. By a petition filed on 30th November 2006, **Richard Mulei Mutuku, Daniel Kingi Mutuku** and **Peter Mulinge Mutuku** sons of the deceased petitioned for grant of letters of administration intestate for the estate of the deceased. On 13th May, 2008, this court issues a Grant of Letters of Administration Intestate in respect of the deceased's estate to the said **Richard Mulei Mutuku, Peter Mulinge Mutuku** and **Daniel Kingi Mutuku**. The said Grant was subsequently confirmed on 14th July, 2008.
2. On 22nd October, 2008, the Objector herein, **W Kyalo Joshua**, filed an affidavit of protest in which he stated that he is a purchaser for value of a portion of 6.7 acres in respect of part of the deceased's estate namely Masii/Embui/94 from **Peter Mulinge Mutuku**, one of the administrators of the estate of the deceased at Kshs 105,000/= which he fully paid in the presence of the deceased's wife and other administrators.
3. The Protestor further deposed that on 20th September, 1998, he purchased a portion of land measuring 2.27 acres in respect of the same land from **Abednego Mweu Mutuku**, a son and beneficiary of the estate of the deceased who was allocated 5.9 acres in the presence of **Priscilla Mutuku** the deceased's wife an amount which he fully paid. In addition, on 6th April, 1999 the Protestor averred that he purchased a portion measuring 2.2 acres from **Peter Mulinge Mutuku** at a total consideration of Kshs 240,000/= which was similarly to be excised from the same land, an amount he fully paid.
4. The Protestor further disclosed that on 6th January, 2003, he entered into an agreement with the same **Peter Mulinge** which agreement was superseded by another agreement dated 2nd March, 2003.
5. The Protestor therefore stated that in all he purchased 6.7 acres which was to be excised from the said Land Parcel No. Masii/Embui/94 for which he paid a total of Kshs 960,000/= hence he is entitled to the same from the estate of the deceased.
6. It was disclosed that on 11th December, 2005, one of the administrators, **Peter Mulinge Mutuku** together with the said **Abednego Mweu Mutuku** and the deceased's wife sat and agreed that the Protestor had purchased a portion of the deceased's land and a vacant possession was to be given within a certain specified period in the agreement.
7. In response to the protest, the Petitioners filed an affidavit sworn by **Peter Mulinge Mutuku** in which it was deposed that the objector is not a purchaser for value of a portion of 6.7 acres in the part of the deceased estate from any of the administrators as the grant was issued on 12th May, 200-6 while the agreement was drawn on 14th March, 1998, 20th September, 1998 and 6th April, 1999 before the grant when the purported sellers had no capacity to sell and/or dispose of any property. According to the deponent, the agreement dated 14th March, 1998 is vague and incomplete and describes the vendor as himself and being an agricultural land for which consent of the Land Control Board was and is necessary for its validity, the same has since 15th September, 1998 become null and void for want of the consent and hence unenforceable hence the Objector can only seek for the refunds of the purchase price if any from whoever received the same.
8. It was therefore contended that the agreements relied upon by the Objector are null and void and are of no legal consequences.
9. It was disclosed that the agreement relied upon by the Objector is the subject of Machakos CMCC No. 1061 of 2006 in which the Objector is claiming recovery of the purchase price and in which the deponent has counterclaimed for a declaration that the said agreements are a nullity. It was therefore averred that the Objector should not raise a protest in these proceedings as his interest shall be determined in the said case.

10. According to the deponent, the agreement of 11th December, 2005 was made through duress and he immediately objected to the same through several letters on the ground that there was no voluntary discussion and agreement and that even if there was such an agreement it was not binding. To the deponent, the Objector should not benefit from the deceased estate as he is neither a creditor nor a beneficiary of the estate of the deceased.

11. In his evidence, the Protestor relied on his statement in which he stated that he purchased the land from **Peter Mulinge Mutuku** with the full knowledge and support of his family members including his mother and brothers who confirmed that the parcel that was being sold belonged to Peter's by inheritance from their later father and that they would ensure that the land was transferred to him during the succession proceedings. It was stated that the said **Peter Mulinge** also exchanged his land with **Abenego Mweu Mutuku** so that the Protestor could own the entire land that belonged to Peter as Peter indicated to him that he was relocating to Yatta where he owned another piece of land.

12. After he paid **Peter** the money, the Objector stated that **Peter** became hostile and turned against him and revealed that he had colluded with his mother and brothers to cheat the Protestor and defraud him. Instead Peter started approaching other people to sell them the same land. As a result, the Protestor stated that he pressed criminal charges for fraud against Peter and his family but no action was taken by the police.

13. In his evidence before this court, the Protestor relied on his affidavit of protest filed in court on 22nd October 2008 and the documents attached to it which he produced as exhibits.

14. In cross-examination the Protestor admitted that the subject land was registered in the name of the deceased **Mutuku Mbithi** and stated that to the best of his knowledge there has been no transmission of the land of the deceased to any beneficiary. He however never knew the said **Mutuku Mbithi** and never had any transaction with him directly. He admitted that he filed a suit No.1061 of 2006 in the Magistrate's court for a refund of a portion of the land which suit was still pending determination. However, when referred to the order in the said suit he confirmed that the case was dismissed. While he stated that he was aware that there were procedures to be followed before the land was to be sold to him, it was his evidence that efforts were made to comply but not all procedures were followed and that the transaction were not valid in law.

15. In re-examination he stated that in the suit No.1061 of 2006 after he bought the 6.7 Acres of land, **Mulinge Mutuku** was to vacate but he resisted, and in that suit he was claiming for KShs. 370,000/= for 2 acres that **Peter Mulinge Mutuku** was not willing to vacate and was resisting to vacate after many efforts. He however stated that the suit was reinstated and is pending. According to him, before they entered the agreement, he was approached and persuaded by the administrators of the estate of **Mulinge Mutuku** to buy the land as they had no letters of administration. The understanding was that the family came together and they all signed the documents that they would sell to him and go through the processes of administration since they relied on the same joint lawyer who filed a succession cause.

16. According to him, they also went to the land control board for consent and **Peter Mulinge Mutuku** and him shared a lawyer. The Protestor asserted that he had a stake in this estate because of the transaction with the family and beneficiaries of the estate were wilful and legal – as they were declared as administrators. According to him, he was not seeking refund of the purchase price of the land as it will not adequately compensate him for the costs he had incurred and that the land was sold over 20 years ago and he has incurred travel costs coming to court hence his claim for the land.

17. According to the Protestor, he had every reason to believe that the administrators were genuine and committed to transfer the land to him and that they undertook due diligence and went through all the processes. It was his evidence that he has been in possession of $\frac{3}{4}$ of the land bought while **Peter Mulinge** has been residing on the other portion. According to the court documents the land has been sold to someone else, **Peter Mulei Ngumbi**, which the petitioners want the land I bought to be transferred to. It was however his prayer that since it has been nearly 20 years, and he has incurred legal and travel costs and made efforts to get his land back, he ought to be considered as a beneficiary and liability on the estate and the land be transferred to him.

18. In support of his case the Protestor called **Felix Sila Muasya** as his witness. According to his statement, he was aware of the sale agreement between the said Peter and the Protestor herein and he witnessed Peter selling the land with the knowledge of his family members who were witnesses.

19. In his evidence before court the said witness testified that the land is Embui/Masii/94 and that the total acreage of the land bought was 6.7 acres and that he was a witness in several occasions when **Peter Mulinge** was paid money for the land by **Kyallo** and he signed on some occasions as a witness. According to him, **Mulinge** and his brother **Abenego Mweu Mutuku** were the ones who sold **Kyallo** the land. When **Mulinge** sold the land, he told **Kyallo** he needed money to move and the witness saw **Mulinge** being given 40,000/= but did not move as he is still staying on the land.

20. In cross-examination the witness stated that he was not aware about the succession cause.

21. The fact of the existence of the agreement between **Peter Mulinge** and the Protestor herein was confirmed by three other witnesses, **Anthony Uhuru Muthiani** and **Winfred M. Muasya**.

22. On the part of the Petitioners, **Peter Mulinge Mutuku** testified that he was a son of **Samson Mutuku Mbithi** who died on 20th April, 1993 and on 30th November, 2006 he and his brothers petitioned for grant of letters of administration intestate for his estate. According to him the petition is in respect of Land Parcel Numbers Masii/Mithini/489 and Masii/Embui/94. After the issuance of the grant the Protestor herein filed a protest objecting to the confirmation of the grant based on an agreement dated 2nd May, 2003 in which it was recognised that the subject land was and is still registered in the name of **Mutuku Mbithi** and that in the event that the sale would not go through the money paid would be refunded with interest. According to him, the sale was subject to the completion of the succession and determination of his share in the estate but the succession is yet to be completed due to the objection.

23. It was his position that in order to legalise the agreement the completion of the succession cause and the consent of the land control board are necessary. It was disclosed that the Objector has filed a Civil Suit being CMCC No. 1061 of 2006 which case was subsequently dismissed on 18th December, 2006 for non-attendance. He also produced the documents filed herein as exhibit.

24. In cross-examination he stated that he consulted his brothers who knew about the transaction and as a result his brother Abednego exchanged his land. He acknowledged that it was agreed that upon the completion of the succession cause, they would transfer the land to the Protestor. He admitted that the succession was successful. According to him, the Protestor entered the land in 2006 after facilitating his arrest and is still on the said land. He denied that they have sold the said land to anyone else. He however stated that he cannot transfer the land to the Protestor because the Protestor has breached the agreement by facilitating his arrest. It was however his evidence that the Protestor gave him a total of Kshs 770,000/= and not the claimed Kshs 960,000/=.

25. It was submitted on behalf of the Protestor that his interest in the estate of **Samson Mutuku Mbithi**, is the 6.7 acres, as a purchaser, having bought the land 21 years ago. Again having been in occupation of the land, since, then, though the administrator, **Peter Mulinge Mutuku**, during cross-examination stated that the protestor has been in the land since 2006, making it 16 years of occupation, which occupation is adverse to the beneficiaries of the estate of the late **Samson Mutuku Mbithi**. In this respect the Protestor relied on section 38 of the **Limitation of Actions Act**, Cap 22 of the Laws of Kenya. It was however submitted that if this court does not grant the Protestor's plea that he has an interest transferable to him by the estate of the late **Samson Mutuku Mbithi**, then the protestor shall lodge a suit in the Environment and Land Court, for registration as the owner of 6.7 acres in the estate of the late **Samson Mutuku Mbithi** by way of adverse possession.

26. The Court was therefore urged to remove the property from among those to be distributed amongst the beneficiaries of the late **Samson Mutuku Mbithi**. Or and in the alternative, pending the determination the case to be filed in the Environment and Land Court at Machakos be distributed to the administrators to hold in trust pending outcome of the suit, otherwise the protestor will stand prejudiced should be property be distributed and the protestor succeed in the case.

27. On behalf of the Petitioners, it was submitted that it is common ground that the land the subject of the protest is part of title No. Masii/Embui/94 registered in the name of the late **Samson Mutuku Mbithi** whose estate these proceedings relate. The protest is based on the alleged purchase of part of the land registered in the name of the deceased and the Protestor avers to have purchased the same from **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** an administrator and beneficiary respectively.

28. It is not alleged that during his lifetime the deceased had anything to do with the purported sale of land registered in his name. It was submitted that it is trite that no sale of the property of the deceased could be valid if in violation of section 45 of the **Law of Succession Act**. According to the Petitioners, there is no exception to the foregoing provision and in any event a dispute which relates to sale and purchase of land ought to be in the domain of the Environment and Land Court which simply means that this court lacks the necessary jurisdiction to entertain the protest in so far as it relates to a dispute of sale and purchase of land. Therefore the Protestor should have proceeded to the Environment and Land Court to canvas his perceived claim there. Blocking the confirmation of the grant through the protest will certainly jeopardize his perceived right as the purported Vendor will not have his share of the estate ascertained.

29. In the Protestor's submissions it is indeed intimated that a case in the Environment and Land Court is contemplated. In my view the issues raised before this court ought to be determined in that court and after the Vendors' interest in the estate (if any) will have been ascertained.

30. With regard to the Magistrate's case No. 1061 of 2006, it was submitted that it matters not that the same was dismissed for want of prosecution. What matters is that the Protestor herein had filed the case in appreciation that his cause of action was in the refund of the money he had paid but was not in land. It was submitted that since the entire arguments advanced by Counsel for the Protestor just like the evidence adduced point to a land dispute as opposed to a succession matter, the protest must fail and accordingly the Protestor be condemned with costs to all the Petitioners as the Protestor has engaged all the Petitioners unnecessarily.

Determination

31. I have considered the issues raised in this application. The issue for determination herein is whether there was a sale of part of title No. Masii/Embui/94 registered in the name of the late **Samson Mutuku Mbithi** whose estate these proceedings relate to the Protestor herein by **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** an administrator and beneficiary respectively; if so whether that sale was valid; and whether the Protestor is entitled to the said property.

32. As regards the first issue, it is clear from the evidence adduced by both parties that there indeed was an agreement for sale of part of title No. Masii/Embui/94 registered in the name of the late **Samson Mutuku Mbithi** to the Protestor herein by the said **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku**.

33. As regards the second issue, from the evidence adduced by the parties, the Protestor entered into a sale agreement with the said **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** after the deceased's death but before the grant of representation was issued to them hence they were not the administrators of the estate of the deceased. In fact, the agreement was entered into in anticipation that in the course of the succession proceedings, the said **Peter Mulinge Mutuku** would be entitled to the portion of land forming the subject of the said agreement.

34. 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.

35. 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*. Absent an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

36. From the Protestor's own evidence, 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.

37. 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.”

38. 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.”

39. 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.

40. In addition, since the subject property was owned by the deceased at the time of the alleged 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.”

41. 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.”

42. 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.”

43. 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.”

44. 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.”

45. 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 5th 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 9th September 2013 is thereby dismissed with costs to the Citees.”

46. 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, the said **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** or any other members of the deceased’s family had no interest in the suit land at the time they purported to enter into an agreement for sale thereof to the Protestor. They had no authority to purport to dispose of the deceased 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 the said **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** had no interest in the said land, it follows that the Protestor herein who purports to have derived his interest from the said persons cannot have any interest therein since a person cannot confer on a third party a better title than one he himself has.

47. 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 or the person with whom he entered into a sale agreement and can only lay his claim against the said beneficiary or the beneficiary’s estate. He must therefore wait until the interest of that beneficiary in the estate crystallises before moving in to lay his claim as against his entitlement. That however does not bar him from suing the said person for refund of his money as well as damages. 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.”

48. 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.

49. Since the entitlement of the said the said **Peter Mulinge Mutuku** and **Abednego Mweu Mutuku** to the estate of the deceased, if any at all, is yet to be determined, it would be preposterous for this court to order that such part as belongs to them be kept in trust for the Protestor. What the Protestor ought to do is to keep tab of the Succession proceedings and as soon as the distribution is done, lay his claim to what the

said persons are entitled to.

50. As for adverse possession, this is not the correct forum and the procedure to make that claim.

51. In the premises this application fails and is dismissed but with no order as to costs as the conduct of the petitioners is clearly deplorable.

52. It is so ordered.

Read, signed and delivered in open Court at Machakos this 5th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mbulo for the Protestor

Mr Munyao for F M Mulwa for the Petitioner

CA Geoffrey