



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 51 OF 2017**

**(FORMERLY NAIROBI SUCCESSION CAUSE NO. 667 OF 1984)**

**IN THE MATTER OF THE ESTATE OF PAUL MUTHIANI MUSAU (DECEASED)**

**PETER MWAKA MUTHIANI.....APPLICANT**

**VERSUS**

**BENJAMIN WAMBUA JAMES.....1<sup>ST</sup> RESPONDENT**

**JOSEPH KAWINZI MUTHIANI.....2<sup>ND</sup> RESPONDENT**

**ANTHONY MUSAU MUTHUSI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The ruling relates to the application dated 25<sup>th</sup> September, 2017 and is brought under Sections 1, 1A, 1B and 3A of the Civil Procedure Act, Order 37 of the Civil Procedure Rules and Rule 49, 76 and 83 of the Law of Succession Act seeking that the Respondents sign the necessary consents for the purposes of distributing the estate of the deceased as ordered by the Honourable Lady Justice R.N. Nambuye on 21<sup>st</sup> September 2012 and the following orders;

- a. **THAT** upon failure of any of them, the Deputy Registrar be directed to sign the requisite consent for any of those who would not have complied as ordered by the court.
- b. **THAT** the said estate be wound up and each beneficiary to get his own share within 60 days.
- c. **THAT** the administrators named above do furnish the quarterly reports as ordered by the court.
- d. **THAT** the court do direct the court registrar to execute and issue a decree on the said judgement issued on 21<sup>st</sup> September, 2012.
- e. **THAT** the county police commander Machakos be ordered to ensure that the OCPD Matungulu complies with the court orders.
- f. **THAT** costs of this application be provided for.

2. The application is grounded on the following grounds; that the applicant herein obtained judgment against the respondents on 21<sup>st</sup> September, 2012 and no decree was issued. That the court directed that 4 parcels of land, that is **Machakos/ Nguluni 774, Matungulu/ Sengani /1158, Plot Nos.15A and B Tala Market and Plot at Katine Section, Tala** be surveyed however respondents have failed to execute the application for consents of the Land Board hence frustrating the compliance with the court orders that were issued on 21<sup>st</sup> September, 2012.

3. The application is opposed vide replying affidavit deponed by Benjamin Wambua James, the 1<sup>st</sup> Respondent who averred that the instant application is baseless; that the surveyor who was brought by the applicant subdivided the land without considering the buildings and developments in the land and that the applicant has unjustifiable desires with regard to the land and in addition the applicant sold a portion of land that had been allocated to Esther Mutindi Muthiani. Further that the respondents have been sued in **ELC 222 of 2017** because the applicant had refused to give title deeds to purchasers of land that he sold to and who have extensively developed the land. It was further

averred that there was an initial survey that was done and no one had objected to the same, however the applicant at one time attempted to sell the land belonging to other beneficiaries and if the instant application is allowed then the beneficiaries of the estate of the late Paul Muthiani Musau and other innocent third parties shall suffer hence the application ought to be dismissed as it shall serve no useful purpose.

4. The application was canvassed vide viva voce evidence. Pw1 was the applicant who testified that he is the 4<sup>th</sup> administrator of the estate of the deceased and that the court had directed that the distribution of the estate be carried out and the estate be shared equally between the 4 houses. It was his testimony that he was not on talking terms with the other three co-administrators hence this application so that title deeds are issued. On cross-examination, he testified that he was the son to an iweto because his mother Esther Mutindi who was the 3<sup>rd</sup> wife of the deceased had no child and had to marry another woman. He told the court that the deceased was his grandfather and who had 4 parcels of land that were to be shared equally in three portions. He testified that he sold his portion of land from parcel 774 and that he was aware that there are purchasers who erected permanent structures on some of the lands. He told the court that he was one of the defendants in Machakos ELC 222 of 2017. On re-examination, he told the court that since he came on board as an administrator in 2012 the estate had never been distributed.

5. Pw2 was Alexander Muoki Nyumu who stated that the surveyor could not complete the subdivision of the property because of the obstruction by the administrators and now seeks that the surveyors be sent so that the land is subdivided as per the application by the 4<sup>th</sup> administrator. On cross-examination, he testified that he wanted all the administrators removed and new ones appointed and that there are permanent structures on plot 774. He stated that he wanted the beneficiaries who benefited from the 1<sup>st</sup> grant to be removed. The applicant closed his case and the Respondents presented their evidence.

6. Rw1 was Benjamin Wambua James who stated that there are three houses and that the property in parcel 774 was distributed according to the three houses and everybody was satisfied. He told the court that the applicant sold other portions of the land without consulting the respondents as administrators and that he did not understand the applicant's complaint on portion 774 yet he got his share. It was his testimony that the Applicant brought a surveyor without involving the respondents and yet the land had already been divided as a family and he added that portion 774 could only be divided into three portions and not nine as now proposed by the applicant and that he had no problem if the parcel 774 is divided into three portions. On cross examination, he testified that the property had been subdivided in the earlier grant, and the grant was what was used to obtain the title deed. It was his testimony that the new grant was issued in 2012 when the subdivision had already been done. It was his testimony that he was not able to agree with the 4<sup>th</sup> Administrator over the administration of the estate and as far as he is concerned, he completed his work and everybody was satisfied and that since the distribution was completed, it should not be repeated. It was his testimony that he was sued in the ELC Court as administrators of the estate and that the title to parcel 774 is not in the names of the deceased.

7. Rw2 was Kawinzi Paul Muthiani who testified that he is the 2<sup>nd</sup> administrator and that the distribution of parcel 774 was completed. However before they could embark on the other parcels, complaints arose from the applicant and since the time he came on board they have not been able to relate well with him. It was his testimony that the redistribution of parcel 774 should not be done. On cross-examination, he told the court that he could not remember that the initial grant was revoked and that since the distribution was done, it cannot be started again. He told the court that the title to parcel 774 is still in the names of the deceased because the 4<sup>th</sup> administrator blocked the process and that he was not agreeable to the redistribution of parcel 774 but had not appealed against the order for distribution of parcel 1158, 15A and 15B. On re-examination, he told the court that if parcel 774 was to be distributed then it should be divided into three and not nine portions and that it should be according to the earlier agreement.

8. Pw3 was Anthony Musau Muthusi who told the court that repeating distribution of parcel 774 will cause chaos. On cross examination, he told the court that he was charged with forgery of title but was acquitted of the charges and that he did not recall going to court in 2014 where subdivision was agreed by consent.

9. The application was canvassed vide written submissions and on record are submissions dated 28<sup>th</sup> June, 2019 that have been filed by Ayora Magaty & Co. Advocates and the same urged that the application should be allowed. Attached to the submissions are a ruling in ELC 222 of 2017 where orders similar to the ones sought in the instant application were sought against the respondents and which application was dismissed.

10. In reply to the application, counsel for the respondents submitted that the orders sought should not be granted but that the court do grant orders that will ensure that justice prevails.

11. The issue for determination is whether the court should grant the orders sought. The evidence on record shows that vide judgement that was issued on 21<sup>st</sup> September, 2012 the court on its own motion revoked the grant that was issued on 9<sup>th</sup> November, 2004 because the grant became inoperative hence the family members were to sit and agree on the distribution of the estate. It was directed that the properties of the deceased are LR 774 Komarock, Katunguni kwa Katuku1158, Plot 15 at Tala Market and Plot at Katina Section behind plot 15 Tala Market and that the same be distributed in three equal parts.

12. The judgment of the court was clear on the distribution of the estate and that the same need not be disturbed as alleged by the applicant as there was no appeal preferred against the judgment. On the other hand, this application raises a serious question on a point of law as to whether the facts of the claim by the applicant and the evidence meets the threshold of the doctrine of constructive trust. The law as to the principles to be applied regarding when a court should infer a constructive trust are now well settled. In **Willy Kintai Kitilit V Michael Kibet (2018) EKL**R the court of appeal reviewing preceding authorities on the same doctrine pronounced itself as follows:

“Thus since the current constitution has by virtue of Article 10 (2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle amongst others, It follows that equitable doctrine of constructive trust and proprietary estoppels are applicable to and supersede the Land control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the land control board. In essence lack of the consent of land control board does not preclude the court from giving effect to equitable principles in particular the doctrine of

constructive trust."

See also the holding in the case of **Macharia Mwangi Maina and 87 others V Davidson Kagiri 2014 ECLR**.

13. In addition to the above decision the case of **Fotos Korkontzikas Panagio and Olympia Town Properties V Nick Soulos (1997) 2 R.C.S** the court made exposition of the law on constructive trust in the following passage and stated inter alia as follows.;

“Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment constructive trusts may be imposed on either ground. The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed.(1) The defendant must have been under an equitable obligation in relation to the activities giving rise to assets in his hands(2)The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff(3)The plaintiff must show a legitimate reason for seeking a proprietary remedy either personal or related to the need to ensure that others like the defendant remain faithful to their duties.(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.”

14. There is also a decision by **Sir William Deane in Muschinski v Dodd (1985) CLR 160** while dealing with the application on the concept of constructive trust stated as follows. “Viewed in the modern context, the constructive trust can properly be described as a remedial institution when equity imposes regardless of actual or presumed agreement or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.”

15. The evidence on record is rather scanty though it can be inferred that a constructive trust in respect of some portions of the suit land could have arisen. This is because it is alleged by the respondents that parcel 774 was distributed and there are structures on it notwithstanding the revocation of the grant that permitted the same. There would be need to protect the beneficiaries of the estate of the deceased as was directed by the court vide the judgement that was issued on 21<sup>st</sup> September, 2012. I find that the applicant’s claim to subdivide the parcel 774 into nine portions is a clever way of getting another judgement out of the court. Altering what is on the ground and what was accomplished by the previous grant is not a wise move and would occasion injustice. Therefore there will be no need to allow the 4<sup>th</sup> administrator/applicant’s application dated 25<sup>th</sup> September, 2017 as it would cause untold suffering to some of the beneficiaries. The applicant seems to be cunningly redistributing the estate not as per the earlier grant. In any event following the revocation of the grant there is no evidence that the applicant was made the sole administrator. A pragmatic move would be to have the surveyors report indicating the portions of land that are occupied and inform the court together with an inventory of what actions were taken by the respondents in the previous grant. It is also only fair that the status quo prevailing on the suit land be maintained so that the character of the suit land is not altered to the detriment of the beneficiaries. As the grant made on 9.11.2004 was revoked on 21.9.2012 it is appropriate to issue a fresh grant by court’s own motion so as to ensure that the estate is protected. The said grant will be issued in the names of the applicant and the respondents.

16. I find it rather mischievous of the applicant to seek grant of consent in respect of what does not fall within the original judgment. The applicant seems out to bulldoze his way in the matter despite the majority views of his fellow administrators. The estate of the deceased will be adequately taken care of by the joint efforts of all the administrators and hence the lone ranger tactics will not be helpful in the long run. It is a rule that all administrators must consult and engage each other knowing that their role is fiduciary in nature and calls for accountability and integrity to the beneficiaries and the court. I must add that following the revocation of grant on the 21.9.2012 the estate was left without any administrators and no wonder the total confusion now witnessed. Even the applicant herein had no locus standi to file the present application as he had not been reappointed by either the beneficiaries or the court and hence his application is a non- starter and is for dismissal. There is thus urgent need to appoint administrators who will finalize the administration of the estate. The family has had plenty of time since 21.9.2012 to pick administrators but they haven’t done so as it seems they have been wrangling without any tangible outcome. The court must now rise to the occasion and appoint the administrators. My considered view is that the applicant and respondents herein can be reappointed and given a chance to acquit themselves by now being serious and to properly administer the estate either on the earlier schedule or as directed by the court vide the judgment dated 21.9.2012.

17. In the result it is my finding that the 4<sup>th</sup> Administrator’s application dated 25.9.2017 lacks merit and is dismissed with no order as to costs. This court proceeds to issue the following orders namely:

**1. A fresh grant be and is hereby issued in the names of Benjamin Wambua James, Joseph Kawinzi Muthiani, Anthony Musau Muthusi and Peter Mwaka Muthiani.**

**2. The administrators do agree on a mode of distribution of the remaining unutilized land and file an application in that regard detailing the mode of distribution within 60 days from the date hereof failing which the court shall adopt the mode in the judgement issued on 21<sup>st</sup> September, 2012.**

**3. The administrators are ordered to avail to court a report and inventory of their activities as per the provisions of section 83 of the Law of Succession Act within sixty (60) days from the date hereof.**

**4.The status quo prevailing on the properties of the deceased namely L.R No.774 Komarock, L.R No.1158 Katunguni Kwa Katuku, Plot No.15 at Tala Market, Plot No. Katine section behind plot No.15 Tala Market be maintained pending final distribution thereof so as to ensure that the character of the properties is not altered to the detriment of the beneficiaries.**

It is so ordered.

Ruling Read, Signed and Delivered in open court at **Machakos** this 5<sup>th</sup> day of **November, 2019**.

**D. K. Kemei**

**Judge**