



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO.323 OF 1999**

**IN THE MATTER OF THE ESTATE OF TIMOTHY MULEI KITONGA (DECEASED)**

**PHILIP KITONGA MULEI**

**JOHN MUTINDA MULEI**

**CAROL MWENDE MULEI.....ADMINISTRATORS/RESPONDENTS**

**VERSUS**

**JUSTUS MUSYOKI MANG'UL.....APPLICANT/OBJECTOR**

**RULING**

1. The ruling relates to the application dated 27.11.2016 for revocation of grant that was issued on 23.10.2002. The grant was confirmed on 19.6.2006 and rectified on 3.2.2012. The applicant claimed that the land parcel number Katelembo Plot 2294 is now referred to as Machakos Town Block 3/624 had been allocated to Charles Muli Mulei and the same was sold to him hence he claims purchasers' interest and possessors' interest in respect of the suit property. The applicant also sought that a prohibition be registered on the suit land.
2. The application is not opposed as there is no indication of any reply by the respondents.
3. The court directed that the application could be canvassed vide written submissions. Learned counsel for the applicant vide submissions dated 13.5.2019 placed reliance on the case of **In Re Estate of Ernest Kerry Komo (Deceased) (2016) eKLR** where it was observed that once the grant was confirmed, the court became functus officio and that the property ceased to be estate property for the same is no longer vested in the administrators. Counsel submitted that the application be allowed.
4. There are no submissions on record by the respondents.
5. The issue I have to determine is; what is the status of the applicant in this succession cause? Is this matter in the requisite forum? Does this court have the requisite jurisdiction to entertain the instant application?
6. 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.”**

7. A perusal of the pleadings by the applicant is that of a purchaser and is based on a purchase agreement with one of the sons of the deceased. The said applicant has not been listed as a beneficiary of the estate and his claim cannot be tried in a succession cause. In this regard 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.”**

8. The applicant's action may have been a legitimate quest for justice albeit filed in the wrong court. This I say so because the dispute relates to ownership of land and Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

### ***13 Jurisdiction of the Court***

**1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-**

**a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.**

**b) relating to compulsory acquisition of land;**

**c) relating to land administration and management;**

**d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and**

**e) any other dispute relating to environment and land.**

**3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.**

**4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court**

**5) Deleted by Act No. 12 of 2012**

**6) Deleted by Act No. 12 of 2012**

**7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-**

**a) interim or permanent preservation orders including injunctions;**

**b) prerogative orders;**

**c) award of damages;**

**d) compensation;**

**e) specific performance;**

**f) restitution; or**

**g) declaration; or**

**h) costs**

9. The record reveals that the objector herein was not among the beneficiaries of the deceased and neither was he a creditor to the estate of the deceased. During the confirmation of grant as well as rectification of grant the objector did not feature anywhere. Had he been such then this court could have intervened. The objector appears to have bought land from one of the beneficiaries after the confirmation of grant and in fact took up possession of the land that he bought. If the status of the land has since changed then he has a right to pursue the seller in a civil court in this case the Environment and Land Court where he can claim ownership of the land. He will then sue the seller as well as the

administrators over the land in question. The court vested with jurisdiction to address the concerns of the objector is the environment and land court. The applicant is free to pursue an action for recovery of land to assert his rights if any to the subject land. He shall present evidence on ownership before the requisite court which shall make a determination. All the properties of the deceased had been distributed among the beneficiaries and hence the court became functus officio. If the administrators or beneficiaries have later resorted to reverting one of the properties of the deceased that had already been shared out then the objector herein can properly engage them in the ELC which has jurisdiction to deal with all the issues before it.

10. In the result I find the application dated 27.11.2016 lacks merit and is dismissed. As the application was not opposed there will be no order as to costs.

It is so ordered.

**Dated and delivered at Machakos this 5<sup>th</sup> day of December, 2019.**

**D. K. Kemei**

**Judge**