



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC SUCC NO. 48 OF 2017

IN THE MATTER OF THE ESTATE

OF TABITHA NDOTI MUSOMBA (DECEASED)

-VERSUS-

DANIEL MUTUSE WAITA 1ST PETITIONER

JUSTUS KILILI MUSOMBA 2ND PETITIONER

JUDGMENT

INTRODUCTION

1. The records show that there were two applications for confirmation of grant namely one dated 28/11/2003 and another one dated 04/11/2004.
2. Grants were confirmed on 20/2/2014. On 26/03/2014 the same grants were revoked by consent and a joint grant was issued to the two parties; petitioner and Justus Kitili Musomba. LR. No. 712 Kalembweni and Ngambia Farmers Limited and two shares at Kalembweni and Ngambia Farmers Limited owned by deceased were included in estate of the deceased. The certificate was cancelled.
3. Directions were given on 10/06/2005 for matter to proceed by way of viva voce evidence.
4. 17/07/2006, the directions indicated that the application dated 26/03/2004 for confirmation of grant to proceed for hearing but there was no such an application but one on 28/01/2003 and 04/11/2004 for confirmation of grant both made by Daniel Mutuse Waita.
5. However, the matter proceeded for hearing with the contest being focused on sharing of Makueni Konza South Block 1 (Marwa) 92 which is registered in names of Tabitha Ndoti deceased and Waita Musomba (her step son).
6. In application dated 04/11/2004 sought confirmation of grants of 26/03/2004 which appointed Justus Mutuse Waita and Justus Kitili Musomba as joint administrators.

The first administrator - Daniel Mutuse Waita Case

7. PW1 Nthiani Mulandi Ambua – Clan Chairman testified that the deceased Tabitha Ndoti paid Kshs.125/= and her step son Waita Musomba Kshs.800/= towards the purchase of the disputed land.
8. The said two purchasers had disputes in sharing same thus in 1982, there was a clan meeting where deceased asked clan to subdivide the same he says that, the deceased said that she paid Kshs.125/= and Waita Musomba Kshs.900/=, then Kshs.600/= plus Kshs.440 total Kshs.2,260/=. They then subdivided the land vide exhibit T.
9. On cross examination, he said that in the meeting they decided the piece of land belonged to both disputants. They subdivided and both signed.
10. PW2 was the Petitioner Administrator No.1. He testified that his name is Daniel Mutuse Waita. He is son of Waita Musomba. Justus Kitili Musomba is son of Tabitha Ndoti deceased. He testified that on 08/07/1999, Justus Kitili Musomba sold him one acre of Makueni-Konza South Block (Marwa) 92 subject of dispute herein. He bought same at Kshs.36,000/=. The land belonged to his mother (deceased) but she had died.

11. He produced exhibit 2 the agreement for sale of same. Justus needed money to clear his mother's bill. The land ad been bought by Justus mother and his father but his father contributed more. Deceased contributed Kshs.125/= and deceased Kshs.900/= + Kshs.320/= + Kshs.600/= + Kshs.440/= total Kshs.2,260/=.
12. He said that, the clan divided land according to contribution with his father getting 10.0 ha. And deceased one acre. This is the acre he bought from Justus. However, the land was registered in names of Tabitha Ndoti and Waita Musomba as co-owners. Exh. 3 was copy of title deed.
13. On cross examination, he said he was only interested with the acre he bought. He bought the one acre in 1999. After death of the deceased, she died on 07/06/1999 but he bought on 15/06/1999. Deceased had other children.
14. Justus had no letters of administration for his mother's estate. There was no LCB consent. The land is still in names of his father and deceased. He said joint registration meant the two owned the land but no shares were shown. He said according to the search dated 08/06/2005 the two owned land in half share.
15. He denied the land was jointly and equally owned by two. He conceded the land he bought (1) acre belonged to Justus's mother (the deceased)
16. PW3 George Kyeze Nzoka confirmed of the sale transaction of one acre between the two administrators. He signed same as a witness. Kshs. 36,000/= was the consideration.
17. On cross examination, he stated that he was secretary to the meeting of 1982. The two co-owners bought the land in dispute.
18. The title was issued in 1992. The clan decided the shares will be according to the contribution. He said they did not measure the land.
19. After their decision, they took the same to allocation committee but he didn't know what they decided. Deceased did not sign Exh. 1 (clan decision).
20. PW4 Milliam Katunga Evoi says he was committee member of Kieni Mundu organization. He said each of buyer was to pay Kshs.2,415/= by installment.
21. 1st installment was in July Kshs.1,975/=. He later came to know plot 92 belonged to both Ndoti and Waita. The shares were not shown.
22. On cross examination he said he became committee member in 1976. Committee was recovering money when Ndoti and Waita paid money.
23. PW5 Waita Musomba stated that he said the deceased Ndoti Musomba was her step mother. He contributed Kshs.20,415/= and her only Kshs.125/=.
24. He said he may have forgotten the actual figure. He said that he had dispute over land between him and Ndoti. The clan was called and subdivided land according to the contribution. By then she was alive. He claimed both of them signed Exh. 1 on subdivision, his son was Mutuse Daniel and her son Kitili.
25. After signing agreement the boundaries were marked. Ndoti was given one acre. He stepped down and recalled later.
26. He further testified that, the deceased paid Kshs. 125/= and himself Kshs.2,290/=. He asked court to rectify title deed for deceased to have one acre. He said after Ndoti died her son Kitili sold one acre to enable pay her bills. (Mortuary).
27. Thus Ndoti share should go to the person who bought it.
28. On cross examination, he said, he bought land in 1920. He paid for it but receipts were in Ndoti's name. Later others were issued in his name. That is in 1998. He said title has their two names: his and Ndoti but no shares are shown. He said he contributed more than Ndoti. He said they bought before titles were issued and after issuance of the same he never complained or even go to court or committee over co-ownership.
29. Her son sold land one acre. He had married sisters. He said Ndoti died before talking to him over land. Thus his protest.
30. PW6 Christopher Mutie Ndula a pastor Baptist Church said that he was called by Waita and Ndoti to resolve land dispute. He was clan secretary. The issue was on subdivision. Ndoti was said to have paid Kshs.125/= and Waita Kshs.2,260/=. He said they drew sketch which all parties signed that is Exh.4. She is only entitled to one acre.
31. On cross examination, he said the signatures are on page 2 out of four pages. Page 2 was before subdivision. Signatures were put on 07/12/1990. On proceedings there were no signatures. On re-examination he said proceedings were done on 07/12/1999 and stamped, affixed on 28/12/1999. It was necessary to have parties sign.

THE SECOND ADMINISTRATOR JUSTUS KITILI MUSOMBA CASE.

32. DW1 Muniyao Mutemwa says he was secretary to Kieni Ngundu Company, which was formed to buy land and subdivide to members. He kept records. Ndoti was a member she paid Kshs.1,950/= to purchase land vide DExh. 1. He kept first of people who balloted on 02/07/1973. She picked No.23 survey had been done. Titles were issued in 1997 or 1998. Makueni South Block1/Marwa/92 was issued. Additional of Waita name was un-procedural and unlawful. He was with register of survey fee and construction of cattle dip.

33. Ndoti paid the same. Ndoti made payment personally to PW6. The land thus belonged to her alone.

34. On cross examination, he said that he never saw Waita pay any money. All receipts were in Ndoti's name. He said he did not know whether Waita gave Ndoti money to pay for the land. Ndoti paid between 03/04/1970 to 31/05/1970. They were for land survey and cattle dip.

35. DW2 is Justus Kitili is stated that he is son of Ndoti who died in 1999. Daniel Mutuse Waita is his nephew being son of his step brother. He said he agreed with Mutuse that after he gets his share of land, he would give him one acre. He acknowledged agreement Exh.2.

36. He could not give one acre as he had no authority. The land is owned equally (half share between Ndoti and Waita. He produced Exh.5. He said the search certificate showed Ndoti and Waita each had half share of the land. He also produced green cards showing same information. He said he sold one acre of the same land to Mutuse to cater for his mother's funeral expenses. One acre sold was not only his mother's share. He said he had sisters but he did not consult them.

37. His mother had died a month before the sale of the land which is still in his mother's name. He was to give one acre after he got his share. He sought to get his mother's share of the land. On cross examination he said that he sold one acre but will give after it moves to his name.

38. Waita is half owner. Exh. 5 shows shares at 50:50. The green card does not show the shares. There was a meeting where clan gave Waita all land vide Pexh. 4. Minutes of 07/12/1990. It shows Ndoti share as 1 acre and Waita to get the balance. He was shown same which said there were signatures of Ndoti and Waita as they were in the meeting.

39. On 10/07/1982, Ndoti stated that money she contributed and so is Waita. There is no record showing Ndoti added money to equal the shares.

40. In sketch PExh 4. Ndoti was given one acre and Waita balance. There is no evidence we opposed the decision in 1999. The acre I sold was not only his mother's share and does not agree with Exh. 2 which shows same.

41. On cross examination, he said DW2 showed receipts of her mother's payment of the land. The title was issued in 1998/1999. This was long after clan meeting yet title came in two names and Waita never objected.

42. He never said Ndoti's share was one acre. Thus he opposes clan decision.

43. The case was closed and parties put their submissions and exchanged same.

OBJECTOR/SECONDADMINISTRATOR'S SUBMISSIONS

44. The objector submits that, the deceased person (Tabitha Ndoti Musomba) died on 7th June 1999. The petitioner thereafter applied for letters of administration of her estate, which were granted. The objector herein, (Justus Kitili Musomba) and who is the only son of the deceased person was not aware when letters of administration were applied for and granted. Indeed, he only learned about the letters of administration after confirmation.

45. Upon learning of the developments on the estate of his deceased's mother, the objector herein applied for revocation of the grants issued to Daniel Mutuse Waita. At the hearing of the said application, it was directed that objector be made a petitioner.

46. It was further directed that the objection by Justus Kitili Musomba be heard by way of viva voce evidence. The petitioner called a total of six (6) witnesses and the objector called two (2) witnesses.

EVIDENCE

47. The gist of the petitioner's case is two – fold:-

i. Daniel Mutuse Waita claims that he purchased one (1) acre of land to be excised from the property known as Makueni/South Konza Block 1 (Marwa)/92 from Justus Kitili Musomba (objector). He produced a sale agreement signed by the parties. The property Makueni/South Konza Block 1 (Marwa)/92 is registered in the joint name of Tabitha Ndoti Musomba (deceased and Waita Musomba. According to the petitioner, he wanted the portion of one (1) acre transferred to him by virtue of the sale agreement and the remaining portion to remain in the name of Waita Musomba.

ii. Waita Musomba (PW 5) swore an affidavit claiming that he owned the remaining portion of the land as he allegedly paid a higher share of the money which was initially used to purchase the parcel of land in issue. It was alleged that shares were initially being bought the allocation of the piece of land was done according to the shares so bought. Several witnesses were called in support of this allegation; PW1, PW3, PW4 and PW6. The gist of their evidence is that they (witnesses) were clan elders who were on various occasions called to resolve disputes between Tabitha Ndoti Musomba (deceased) and Waita Musomba over the land known as

Makueni/south Konza Block 1 (Marwa)/92. All these witnesses testified that they calculated the amounts paid by each party and found that Waita Musomba had paid the bulk of it and was therefore entitled to the largest portion of the land, translating to 21.5 acres as opposed to Ndoti's one (1) acre. The minutes of the clan meetings were produced before this court as exhibits.

48. He sets out the following issues;

- i. The legal capacity of a beneficiary to sign a sale agreement.
- ii. The legal force of the decision of clan elders on land disputes.
- iii. The legal force of a title deed.

49. He submits that, it is trite law that a beneficiary of the estate of a deceased person has no legal capacity whatsoever to transact on the property of such an estate unless and until that person is issued with confirmed letters of administration by a court of competent jurisdiction. Section 45 of the Law of Succession act provides:-

“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.”

50. While commenting on the legal consequences of this section, in the matter of the estate of Veronica Njoki Wakagoto (deceased) (2013)eKLR Justice Musyoka had the following to say:-

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

51. The Petitioner submits that, the panel of clan elders is a body unknown to any law in Kenya and its powers or responsibilities are not defined in any known law in Kenya. Nonetheless, the role of clans and clan elders in the society cannot be under-estimated. While deliberating on the role of clan elders, Justice J.K. Serگون. **In Re Estate of Alexander Mathenge Njeru (deceased) (2010) eKLR had the following to say:-**

“The elders’ decision is like a gentleman’s agreement. It has no backing of law. Perhaps parliament should be provoked to reconsider amending the Law of Succession act so that clan elders can be given a role to play in determining such disputes in future. It is sad in this case because the clan elders spent a considerable number of hours trying to solve the dispute between the children of the deceased. Those children participated and bound themselves to respect the elders’ decision. But the petitioner has denounced those deliberations though they were assisted by the elders to reach at an amicable settlement. I agree with the petitioner that the elders’ input cannot override the provisions of the act.”

52. The upshot of the foregoing is that the decision of the elders void and has no legal force. It cannot bind or be considered by this court in deciding the ownership of the disputed parcel of land.

53. It is submitted further that, the title land to the disputed parcel of land was issued in joint names of Waita Musomba and Ndoti Musomba in the year 1998. A copy of the official search (DEX-5) clearly shows that each of the joint owners owns one half of the parcel of land. Indeed, section 26 of the Land Registration Act, 2012 captures this position clearly. It states:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except – (a) on the ground of fraud or misrepresentation to which the person is proved to be a party: or (b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

54. No evidence whatsoever has been adduced to challenge the title to the parcel of land. In the circumstances, the only correct finding that this Honourable Court can make in relation to the disputed parcel of land is that, it is jointly and in equal shares owned by Waita Musomba and Ndoti Musomba. Any other proposition would be inviting the court to start speculating on whether the joint owners paid equal shares towards the acquisition of the parcel of land. The court has no duty whatsoever to speculate but rather deal with evidence and reach its conclusion.

FIRST ADMINISTRATORS’ SUBMISSIONS

55. He submits that, the Petitioner has a duty to prove that any grounds set out in section 76 of the law of succession act before the grant issued is revoked.

56. The gravamen of the objector’s case is that the grant was fraudulently obtained to the detriment of the family of the late Tabitha Ndoti Musomba.

57. He contends that Petitioner obtained the grant of letters of administration by failing to disclose the other properties owned by the deceased. It is imperative at this stage to note that the objector did not furnish the court with any additional property other than the one in question herein that comprised the estate of the deceased herein and therefore did not prosecute this ground.

58. The only issue for determination here would be whether the letters of administration were fraudulently obtained and whether the objector was disinherited as the only beneficiary/heir to the deceased herein.

59. He does further submit that no grounds whatsoever have been pleaded and or alluded to in evidence to support the allegation of fraud in obtaining the letters of administration. He wishes to bring the court's attention to the fact that this matter was instituted as a citation. The applicant herein was the citee and the respondent the citor. The applicant failed to take out letters of administration leading to the order of 04/10/2002 vide which the respondent was granted leave to file this cause.

60. The petition for letters of administration dated 17th October 2002 equally name the applicant as a beneficiary to the estate.

61. Having failed to participate in the proceedings, especially after the citation, no possible consent was reasonably expected from the applicant.

62. The affidavit in support of the application for confirmation of grant similarly at paragraph No. 4 disclose the applicant as a surviving beneficiary to the estate. The allegation therefore that there was fraud or mental non-disclosure on the part of the respondent herein in relation to these proceedings is therefore not only farfetched but also untrue.

63. In **Embu Succession Cause No. 509 of 2002 Re Estate of Joel Waweru Mwaura – Deceased [2014] eKLR** the court declined to revoke a grant for the failure by the applicant to satisfy the grounds set out under Section 76 of the Act.

64. The Petitioner produced the sale agreement and the same was not disputed. The objector conceded to the fact that in deed he sold the land belonging to his deceased mother. His assertion that he has therefore been disinherited cannot hold water having voluntarily sold what would have been his share of the deceased's estate. The applicant only seeks to delay the conclusion of a matter that is more than 15 years old in court but as is trite and was held in **re estate of Karanja Karemo – Deceased [2017] eKLR** that litigation must come to an end.

ISSUES, ANALYSIS AND DETERMINATION

65. After going through the evidence and proceedings, I find the issues are:-

- **Whether the shares of disputed land are equal joint ownership or common ownership with shares as per contribution of co-owners?**
- **Whether the sale of one acre from disputed land by 2nd administrator is valid?**
- **What is the final distribution of the estate?**
- **What are the orders as to costs?**

66. On the first issue, the court notes that the searches and green card produced do show the entry as to ownership of the suit land is in names of Ndoti Musomba and Waita Musomba.

67. The shares are not disclosed in the title documents. Mr Waita Musomba claims a bigger share while Ndoti Musomba side claims 50:50 share. The Waita claim is based on allegation that he contributed more into purchase of land than Ndoti Musomba deceased.

68. PW1 says Waita paid Kshs.900/= + Kshs.320/= + Kshs.600/= + Kshs.1820/= + Kshs.440/= total would be Kshs.4, 080/= not Kshs.2,260/= stated in his testimony.

69. PW2 says contribution by his father was Kshs.900/= + Kshs. 320/= + Kshs. 600/= + Kshs.440/= total Kshs.2,260/=.

70. PW3 says Waita contributed Kshs.2,660/=.

71. PW5 Waita Musomba says he contributed Kshs.20,415/=. When PW5 was recalled, he said he contributed Kshs.2,290/=.

72. PW6 said Waita contributed Kshs.2,260/=. None of the Waita's witnesses witnessed him contribute the figures they are giving in court. It is not stated whether same was paid to the vendor or Ndoti.

73. DW1 was the keeper of records of the land buying company Kieni Ngundu Company which was receiving money from buyers including Ndoti. She paid him Kshs.1,950/= directly and receipts were issued in her names. **Exhibits 1, 2, 3a and b and 4** are for payments for land, survey and cattle dip.

74. He never received any payment from Waita Musomba. However, he never knew whether Waita gave money to Ndoti to pay.

75. It is only at the instant of the clan intervention that it is recorded that Ndoti conceded that she paid Kshs.125/= and Waita Kshs.900/=.

There is no evidence that she signed an agreement to that effect.

76. The search certificate dated 08/06/2005 showed Waita and Ndoti held equal shares on the suit land though the title and green card do not show the parties shares.

77. Waita never moved court for intervention to rectify the title during Ndoti's lifetime. The clan's verdict/decision has no legal force and cannot alter what is validly recorded in the land registry.

78. See **Re Estate of Alexander Mathenge Njeru (deceased (2010) eKLR** where the court held that, the panel of clan elders is a body unknown to any law in Kenya and its powers or responsibilities are not defined in any known law in Kenya.

79. **Section 26 of the Land Registration Act, 2012** captures this position clearly. It states:-

The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except – (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.

80. The court therefore finds that in absence of cogent evidence to the contrary, the suit land is co-owned by the Waita Musomba and Ndoti Musomba in equal shares.

81. The court makes a finding that, Ndoti received contribution from Waita, thus she never complained of co-ownership in register. In any case second administrator claims the same.

82. The court thus finds that the estate of Ndoti Musomba is entitled to 50% of the suit land.

83. On the allegation of Mutuse buying one acre of the suit land from the second administrator, I find same null and void ab initial and tantamount to intermeddling of the estate of Ndoti Musomba. This is so because the sale was purportedly of one acre of Ndoti Musomba who was dead by then and seller had no letters of administration.

84. Under the provisions of **Section 45 of the Law of Succession act** provides:

“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.”

85. While commenting on the legal consequences of this section, in the matter of the **Estate of Veronica Njoki Wakagoto (deceased) (2013)eKLR Justice Musyoka** had the following to say:-

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

86. The facts that he promised to give same acre upon getting his share of his mother's estate, does not validate a nullity. It will be upon him and Mutuse to transact afresh after the distribution and transfer of share to the seller.

87. As of now the court will confirm the grants and direct that:-

i. Suit land shall be shared equally between administrator no. 2 Justus Kitili Musomba and Waita Musomba.

ii. Justus Kitili Musomba shall hold in trust the same for and on behalf of himself and his siblings together with other properties which were included by order of 26/03/2004.

iii. After transferring to himself above properties, he will distribute same via the court to his siblings equally subject to approval by the court within 6 months.

iv. No orders as to costs.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 10TH DAY OF MAY, 2018 IN OPEN COURT.

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C. KARIUKI,

JUDGE