



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 681 OF 2013

IN THE MATTER OF THE ESTATE OF MAKOSO NGALAKA (DECEASED)

DANIEL KIOKO MAKOSO.....PETITIONER

VERSUS

MUENI MAKOSO.....OBJECTOR

RULING

1. A summons for confirmation of grant dated 16/1/2017 has been filed by the 2nd Petitioner/Administrator herein Daniel Kioko Makoso seeking for an order that the grant of letters of Administration issued to both petitioners on the 19/07/2016 be confirmed and that the only property of the deceased namely **MASII/KITHANGAINI/645** be registered in the names of the Administrators herein.
2. The application is supported by the annexed affidavit of Daniel Kioko Makoso together with a consent of the beneficiaries two of whom did not sign the said consent.
3. The 1st petitioner herein Mueni Makoso filed an affidavit of protest to the confirmation sworn on the 20/02/2017 in which she deposed inter alia that the deceased had prior to his death sold four (4) acres of land to one Kimatu Mbatha which should be excised from parcel **Masii/Kithangaini/645**; that the 2nd Petitioner and other children of the deceased had abandoned and neglected the deceased and protestor to hunger and disease forcing the deceased to sell part of the land for sustenance; that the deceased together with the clan elders in the presence of the deceased's children okayed the said sale which should now be factored during the distribution of the deceased's only property to the beneficiaries.
4. A further affidavit in support of the protest was filed by Benard Mangeli Nthenge sworn on 9/5/2017 and who deposed inter alia that he was the secretary and took minutes of New Ethanga Mbaa Nthii clan when the deceased herein sold four (4) acres to one Kimatu Mbatha.
5. The protest was opposed by the second Petitioner Daniel Kioko Makoso who filed a replying affidavit in which he deposed inter alia that the deceased did not sell land to the said Kimatu Mbatha; that the purported clan deliberations which purported to sell land on behalf of the deceased was irregular and unlawful since the deceased never signed any sale agreement; that the clan had no capacity to sell land belonging to the deceased; that there is no evidence that the deceased received the alleged purchase price of Kshs.160,000/=; that the purchaser should pursue the persons who allegedly sold land to him.
6. Parties agreed to canvass the protest by way of written submissions.

Objector's submissions

7. It was submitted for the objector that the proposed mode of distribution by the co-petitioner herein is not acceptable in view of the fact that the deceased had already sold four (4) acres to one Kimatu Mbatha who should be given the said four acres. It was also submitted that the Applicant herein had been aware of the said sale by the deceased and that his latest turnaround is but a vile attempt to deny the purchaser the portion sold to him and further intended to tarnish the purchaser's name in the area. It was finally submitted that the court should take judicial notice of customary practises particularly roles and functions of clans in dispute resolution and disposition of property and therefore this court should give effect to the wishes of the deceased and disregard the avarice of his sons. Once the 4 acres are excised, then the remainder of the property ought to be registered in the joint names of the Applicant and Objector.

Petitioner's submissions

8. It was submitted for the petitioner that the deceased and objector did not participate in the alleged sale which was conducted by the said

Kimatu Mbatha in collaboration with the clan elders and area chief. It was also submitted that the deceased and his wife did not sign the alleged sale agreement and which cannot be enforced against the estate of the deceased.

It was further submitted that the clan had no capacity to sell land and that there was neither a family consent nor Land Control Board Consent. Further, it was submitted that the purported minutes prepared by the clan members cannot amount to sale agreement as there is no evidence that the deceased ever received the alleged purchase price of Kshs.160,000/=. It was finally submitted that the grant be confirmed as proposed in the affidavit of the Petitioner and the beneficiaries and that the purchaser should pursue his monies from the person who received them and leave their family alone. The petitioner maintains the alleged purchaser is taking advantage of the petitioner's mother who is quite old.

9. I have considered the Petitioner's summons for confirmation of grant and the objectors protest as well as the submissions of their learned counsels. I find the only issue for determination is whether or not the objector has presented sufficient reasons for this court not to confirm the grant as proposed by the petitioner.

To begin with, it is noted that both the petitioner and the objector are joint administrators having been appointed vide the grant dated 19/07/2016. The petitioner has proposed that the only property of deceased namely MASII/KITHANGAINI/645 be registered in the joint names of both the petitioner and the objector as agreed upon by a majority of the beneficiaries. On the other hand the objector proposes that 4 acres be hived off from the land parcel aforesaid and be registered in the name of Kimatu Mbatha a purchaser and the remainder be distributed as proposed by the petitioner. This then seems to be the point of disagreement between the two administrators.

10. The objector has presented minutes conducted by the New Enthanga Mbaanthi Clan which showed that one Kimatu Mbatha had purchased 4 acres from the deceased herein at a cost of Kshs.160,000/=. As far as the objector is concerned, the said 4 acres should be excised from the deceased's land and the remainder to be distributed as proposed by the Petitioner. On the other hand, the petitioner denies the existence of a sale agreement on the ground that the deceased or the objector did not sign the same and as far as he is concerned, the alleged sale has been forced upon them by the alleged purchaser who is working in cahoots with the area chief and partisan clan elders.

I have carefully perused the minutes which were taken by one Benard Mangeli Nthenge and who swore a supporting affidavit of protest and note that the name of the deceased together with his signature is missing. Likewise there is no signature by the purchaser Kimatu Mbatha. There are two witnesses for each of the seller and purchaser. It is quite intriguing to note that witnesses purport to sign against their names yet the proper persons in the sale transaction namely seller and purchaser are not captured at all in the document alleged to be a sale agreement. The Law of Contract Act provides that contracts for the sale of land or any interest in them must be in writing and signed by the parties to the agreement and witnessed. Looking at the minutes by the clan members, there is no evidence that the deceased or the purchaser signed any sale agreement. In the absence of signatures by the seller and purchaser, I find the deliberations captured in form of minutes did not meet the threshold of a contract of sale of land. The said clan minutes indicate that the family members of the deceased were present but none of them signed against their names so as to indicate that indeed they participated in the deliberations. Merely indicating the names is not enough. It was necessary for all those present to sign against their names so as to signify truly that they were present and participated in the deliberations. The objector being the wife of the deceased is also not indicated as having been present during the said clan meeting. Even if the deceased might have been absent during the meeting, there is no evidence that he had signed a power of attorney in favour of any person to transact his business on his behalf.

Another glaring issue in the objector's protest is to do with the failure by the purchaser Kimatu Mbatha to come out clearly by even swearing an affidavit stating how he had purchased 4 acres of land from the deceased. It was not enough for him to just rely on the clan minutes and the objector yet there is no evidence of a sale agreement entered into between him and the deceased as required by the Law of Contract Act. He is the one who is aggrieved over the issue of the 4 acres of land he claims to have bought from the deceased and therefore he should have been on the forefront by filing a protest to the summons for confirmation in a bid to protect his interests. His failure to do so is rather baffling and seems to lend credence to the petitioner's claim that the alleged purchaser is using the clan and the area chief plus the elderly objector to acquire the deceased's land irregularly. The petitioner has further claimed that the clan had no capacity to sell the land belonging to the deceased as the deceased should have done it himself by signing the agreement and confirming receipt of purchase price and then have the clan members to witness the same. The petitioner in his further affidavit maintains that the alleged purchaser has been using the clan members to harass and threaten him and family members to succumb and agree to the alleged sale and he annexed a copy of a P.3 form showing that the clan members had assaulted the petitioner over the land issue. It seems to me that the purchaser has opted to use and rely on the clan members in his quest to obtain four acres from the estate of the deceased. The learned counsel for the objector has urged this court to take judicial notice of customary practises on the roles and functions of clans in dispute resolution and disposition of property. Whereas that might be the case in certain circumstances, if permitted by Article 159(2)(c) of the Constitution regarding the application of traditional dispute resolution mechanisms, I am not persuaded that those circumstances were obtaining in regard to this matter. First and foremost, none of the deceased and purchaser signed any sale agreement over the 4 acres of land as the minutes availed do not disclose the same. Again, the sale of the land required the same to be in writing pursuant to the provisions of the Law of Contract Act. That being the case, I find the purported use of the area clan members was contrary to the written laws and hence I am unable to agree to the Objector's suggestion that the clan minutes were indeed a sale agreement. Even if for argument's sake that the deceased had given the said Kimatu Mbatha 4 acres of his land which act would translate to a gift intervivos, then the evidence of the objector and the clan member that the deceased had sold the land to Kimatu Mbatha wholly negates the aspect of a gift intervivos. As the issue of the sale agreement has not been proved by the objector, I find the protest lacks merit.

11. As the objector has not convinced this court that the land parcel belonging to the deceased should be excised to cater for the alleged purchaser, I find the petitioner's proposal to have the property registered in joint names of the objector and petitioner in trust for all the beneficiaries appropriate and acceptable. A majority of the beneficiaries had duly signed the consent to confirmation and distribution. None of the beneficiaries would be prejudiced since the property in issue shall be held by the two administrators herein in trust for all of them.

12. Consequently the objectors protest is dismissed. The summons for confirmation dated 16/1/2017 is allowed with an order that the grant made on the 19/07/2016 to both objectors and petitioner is confirmed as proposed in the affidavit of Daniel Kioko Makoso namely that the only property of the deceased namely **MASII/KITHANGAINI/645** shall be registered in the joint names of **MUENI MAKOSO** and **DANIEL KIOKO MAKOSO** to hold in trust for all the beneficiaries. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 19th day of July, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Masika - for the Petitioner

Musya - for the objectors

Josephine - Court Assistant