



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 448 OF 2011**  
**N THE MATTER OF THE ESTATE OF KITOO MBIVYE KAIYA (DECEASED)**  
**FRANCIS MUSYIMI KITOO**  
**STEPHEN MUSYOKA KITOO.....ADMINISTRATORS**  
**VERSUS**  
**ISIKA MBIVYE KAIYA.....PROTESTOR**  
**RULING**

**The Objection**

A grant of letters of administration intestate was issued to the Administrators herein on 5th July 2012 with respect to the estate of Kitoo Mbivye Kaiya, who died on 22nd February 2007 (hereinafter referred to as “the Deceased”). On 30th November 2015 the administrators filed summons for rectification and confirmation of grant, whereupon the Protestor herein then filed an affidavit of protest to the proposed confirmation on 11th December 2015 sworn on the same date.

The gist of the protest by the Protestor is that he is a brother of the Deceased, and that he has an interest in the Deceased’s estate and in particular land parcels Numbers MUPUTI/KIIMA KIMWE/1381 and MUPUTI /KIIMA KIMWE/353 which were registered in the Deceased’s name in trust for the Protestor. Further, that during the lifetime of the Deceased a determination of the trust was dealt with by their clan which decided that the Deceased should transfer part of the above named parcels to the Protestor, and that Machakos Land Dispute Tribunal in Cases Nos 90,91 ,and 92 of 2006 ruled in favor of the Protestor on 23rd June 2008 in the presence of the 1st Petitioner. The Protestor annexed a copy of the clan deliberations dated the 2fih day of September 2006 and translated in English language and a copy of the said Tribunal ruling.

These facts were reiterated by the Protestor’s Advocate, P.N. Musila &Co Advocates in submissions dated 9th January 2017 filed in Court, wherein it was submitted that the 1st administrator was party of the clan deliberations which commenced in the year 2006 during the life time of the deceased and which clearly showed that the Protester had an interest in the estate of the deceased as the portions claimed were held by the deceased in trust. Further, that the non-inclusion of the Protester’s name in the list of beneficiaries by the local administration does not in law exclude him from entitlement to the estate of the deceased, and that the court should accordingly accord the Protestor his rightful share

**The Response**

The Administrators in a replying affidavit filed on 4th February 2016 by the 1st Administrator stated that

they are sons of the deceased, and denied that that there were any deliberations between the Deceased and the Protestor over parcels of land belonging to the Deceased's Estate, and that even if such alleged deliberations occurred, the annexures by the Protestor show that they occurred in 2008 while the deceased passed away in 2007, and that on that date none of his beneficiaries had been appointed by the Court to be his legal representative to act on behalf of the deceased in any legal matter.

Furthermore, that the Machakos Land Dispute Tribunal did not have the jurisdiction to award any costs to the Protestor, and that the said Protestor comes from their home area and is well known to the local administration and therefore, if he had any rightful claim to the estate of the Deceased, he would have been included as a beneficiary by the chief's letter confirming the death of the deceased but he was not. The Administrators attached a copy of the said chief's letter dated 29th April, 2011.

The Administrators' Advocate, J.A. Makau & Company Advocates, filed submissions dated 7th March 2017, wherein it was urged that the protest by the objector has no basis as it is based on Land Tribunal Cases No 90, 91 and 92 which on 21/5/2010 were declared a nullity in Judicial Review No 195 of 2008 by Lenaola J.(as he then was) which ruling has to date never been appealed. Therefore, that the administrators were proper to say that the protestor was and is not a beneficiary to the deceased estate.

Further, that under the land laws for a trust to be confirmed it has to be proved, and the entries in the lands register and title deed must indicate land as held in trust. The protestor hasn't done so and the title deeds to Muvuti/Kiimo Kimwe/ 1381, Muvuti/Kiimo Kirnwe/1872, Muvuti/Kiimo Kimwe/353 do not refer to any trust but are the sole property of the deceased.

### **The Determination**

I have read and carefully considered the pleadings and submissions filed by the Administrators and Protestor. This Court on 20<sup>th</sup> December 2016 gave directions that the issue of whether there was a valid and legal decision as to whether the Protestor had an interest in the Deceased's estate be canvassed by way of affidavit evidence. The issue to be decided therefore is whether the Protestor's interest in the deceased land or otherwise has been determined by a competent Court with jurisdiction.

I have in this regard perused the ruling dated 21<sup>st</sup> May 2010 made in **R vs The Chairman, Machakos Central Divisional Land Dispute Tribunal and Others, Machakos H.C. Misc. Civil Application No 195 of 2008** that was availed by the Administrators' Advocate. The ruling was on an application made to quash the decisions in Machakos Land Disputes Tribunal in Cass 90, 91 and 92 of 2006. The Court found that the Tribunal exceeded its mandate conferred by section 3 of the Land Disputes Tribunals Act No. 81 Of 1991 as regards determination of ownership of registered land, and by entering into issues of refund of money under contract. The Court also noted that matters of succession and probate are to be handled within the provisions of the Law of Succession Act and not by the Tribunal.

The ruling therefore did not address the substantive issue of the Protestor's interest or claim on the deceased's estate, and by quashing the Tribunal's decision, merely took the parties to the position they were before the said Tribunal's decision. The Protestor's protest shall accordingly proceed to hearing on merit by way of *viva voce* evidence with all the parties shall file and serve their respective witnesses affidavits and/or statements being relied on within sixty (60) days of the date of this ruling.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 13<sup>th</sup> day of June 2017.

**P. NYAMWEYA**

**JUDGE**