



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO.764 OF 2013**

**IN THE MATTER OF THE ESTATE OF ONESMUS NZIOKA NDOLO (DECEASED)**

**SIMON WAMBUA NZIOKA.....1<sup>ST</sup> PETITIONER**

**JOSEPH MUSEMBI NZIOKA .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**GABRIEL GITHUA NDUNGU.....1<sup>ST</sup> OBJECTOR**

**DESERT SPRINGS LTD .....2<sup>ND</sup> OBJECTOR**

**RULING OF THE COURT**

1. The Administrators of the estate of the late **ONESMUS NZIOKA NDOLO** filed a summons for confirmation of grant dated 15<sup>th</sup> June, 2016 pursuant to this Courts order dated 14h March, 2016.
2. Pursuant to the filing of the summons for confirmation aforesaid, **Gabriel Githua Ndungu** filed an affidavit of protest dated 3/10/2016 in which he objected to the confirmation of grant on the ground that the administrators had not included him in the schedule for the list of those to benefit from the estate of the deceased yet he had purchased two (2) acres of land from the deceased way back in the year 1997 before he died.
3. There was also another affidavit of protest filed by one of the directors of Desert springs limited **James Gathecha Muhuyu** dated 11<sup>th</sup> October, 2016 in which he deposed that his Company had also purchased six (6) acres of land from three other persons who had purchased it from the administrators herein and in which the administrators had witnessed the sale transaction and undertook to transfer title to the 2<sup>nd</sup> Objector upon confirmation of grant. The 2<sup>nd</sup> Objector feels that it has been shortchanged in the distribution of the estate as they have been left out.
4. The hearing of the Summons for Confirmation of grant and affidavits of protest had been ordered to proceed by way of viva voce evidence (see ruling dated 14<sup>th</sup> March 2016).
5. It is only the 1<sup>st</sup> Objector herein **Gabriel Githua Ndungu** who presented oral evidence while the 2<sup>nd</sup> Objector and Petitioners opted not to tender any evidence.
6. The 1<sup>st</sup> Objector's case is that he had purchased two acres from the deceased herein Onesmus Nzioka Ndolo which was to be excised from **NDONYO SABUK/KOMAROCK BLOCK 1/9224**. He further averred that the sale was witnessed by the deceased's wife and two other persons. He stated that after the

deceased died the 2<sup>nd</sup> administrator herein sought for more money and that he gave him the sum of Kshs.10,000/=. He went on to state that sometimes in 2014 the two administrators gave him a letter in which the two undertook to include him as a beneficiary of the estate during the distribution. The 1<sup>st</sup> Objector further stated that he bought the land on the 29/10/1997 and that he and the deceased proceeded to the Land Control Board for consent on sub-division which was duly approved but that the deceased died on 29/09/2001 without effecting transfer of ownership of the land. He finally averred that he was compelled to put a caveat on the land to protect his interest and now wants to be included as one of the beneficiaries of the estate of the deceased.

## **7. Parties filed Submissions:**

### **1<sup>st</sup> Objector's Submissions:**

The 1<sup>st</sup> Objector submitted that he genuinely purchased two acres of land from the deceased on 29/10/1997 and which comprised of land parcel Number **DONYO SABUK/KOMAROCK BLOCK 1/9224** and that the transaction was duly witnessed by the deceased's wife and two other persons. The 1<sup>st</sup> Objector further submitted that the two (2) Administrators herein vide a letter dated 15/12/2014 agreed to include him as part of the beneficiaries. The 1<sup>st</sup> Objector submitted that the sale transaction was procedurally done and he should be entitled to the two acres of land.

### **2<sup>ND</sup> Objector's Submissions:**

It was submitted for the 2<sup>nd</sup> Objectors that the 2<sup>nd</sup> Objector reads mischief in the way the administrators have presented the summons for confirmation of grant since the specific shares of each beneficiary have not been indicated in the schedule of distribution. It was further submitted that the administrators had duly consented the purchase of six (6) acres by the 2<sup>nd</sup> Objector from three (3) others who had earlier bought the same and which had been demarcated on the ground and marked as reserved for one Peter Nyangrooh. It is the contention of the 2<sup>nd</sup> Objector that if the grant is confirmed before identification of shares of each person entitled to share in the estate the 2<sup>nd</sup> Objector stands to be prejudiced since the 6 acres purchased has not been indicated at all in the schedule of distribution.

### **Petitioner's submissions:**

It was submitted for the Petitioners that the 1<sup>st</sup> Objector has not proved that he had bought two acres from the deceased since he did not call the persons who witnessed to testify and further the purported sale agreement entered on 29/10/1997 does not meet the threshold of a legally valid agreement. It was further submitted that the agreement did not specify or identify the parcel of land being sold and further the Land Control Board documents availed had several discrepancies and further there was no proof that the deceased had transferred land to the 1<sup>st</sup> Objector. It was contended for the Petitioner's that the 1<sup>st</sup> Objector is out to deprive the rightful heirs and beneficiaries of their just share in the estate and therefore the objection should be dismissed and the grant be confirmed as sought.

8. I have considered the pleadings of both Objectors and the Petitioners Application as well as the evidence of the 1<sup>st</sup> Objector. I have also considered the submissions presented by learned Counsels and on behalf of the parties herein. I find it is not in dispute that the 1<sup>st</sup> Objector's sale agreement over part of the property of the deceased was entered into during the lifetime of the deceased whereas the 2<sup>nd</sup> Objector sale agreement was entered into after the death of the deceased as it was conducted between the Petitioners and the 2<sup>nd</sup> Objector long after the death of the deceased. It is also not in dispute that both the Objectors who have laid claim to a share in the estate of the deceased are for all intents and purposes creditors to the estate of the deceased pursuant to Section 66 of the Law of Succession Act and that their interests are to be determined at this stage of the distribution of the estate. That being the position, the issue for determination is whether or not the objections as raised by the 1<sup>st</sup> and 2<sup>nd</sup> Objectors have merit.

9. Starting with the first Objector, it is noted that he duly presented himself to this court and prosecuted his objection. From the viva voce evidence given before court, it left no doubt that he had indeed entered into a sale agreement with the deceased. The sale agreement is dated 29/10/1997. Even though the Petitioner's counsel has urged this court to disregard the same, this court is inclined to agree with the 1<sup>st</sup> Objector's claim. First the 1<sup>st</sup> Objector availed other documents such as Application to the Matungulu Land Control Board and Consent to subdivisions of the deceased's parcel of land. Again there is a letter from Komarock Location Chief which confirms that indeed the first Objector did purchase land from the deceased. Further the 1<sup>st</sup> Objector presented a letter dated 15/11/2014 signed by the two Petitioners/Applicants agreeing to include the 1<sup>st</sup> Objector in the distribution of the estate of the deceased. Despite the spirited attempts by the Petitioner's Counsel to depict the 1<sup>st</sup> Objector as a fortune seeker, I find the 1<sup>st</sup> Objector has proved that indeed he had entered into an agreement with the deceased over part of the land now due for distribution. Suffice here to add that the Petitioners themselves opted not to appear in court to give their part of their views and hence the 1<sup>st</sup> Objector's evidence was uncontroverted. It was quite telling that the two (2) Petitioners opted not to appear in court and tender contrary evidence as regards the contents for their joint letter dated 15/11/2014 in which they had agreed to include the 1<sup>st</sup> Objector as one of the beneficiaries of the estate of the deceased. The Petitioners therefore cannot turn around and deny that they do not know the 1<sup>st</sup> Objector. Indeed the Petitioners have not presented a schedule of the distribution of the estate of the deceased. In fact the contents of the affidavit in support of the Summons for Confirmation of grant reveal that the property of the estate is yet to be subjected to survey so as to establish the exact size of land due to beneficiaries and creditors. The Petitioners have also deliberately omitted to indicate the interest or claim of the 1<sup>st</sup> Objector who is a creditor to the estate. As the administrators, the Petitioners are under a duty to ensure that not only the beneficiaries interests are catered for but also to sort out creditors of the estate as well. All this militate against the Petitioners Application for confirmation of grant. The Petitioners can only move the court after they have done the needful and since they have not done so, I find the 1<sup>st</sup> Objector has convinced this court that it would not be appropriate to allow the Application for confirmation of grant. The Petitioners will therefore have to go back to the drawing board and do the correct thing as is required of them. The 1<sup>st</sup> Objector's claim is found to be merited.

10. As regards the 2<sup>nd</sup> Objector herein, it is noted that it only filed an affidavit of protest on the grounds that it had entered into a sale agreement with the administrators herein for the purchase of part for the land belonging to the estate and more specifically six (6) acres thereof. The agreement was entered on 18/12/2015 implying that the transaction was entered after the death of the deceased. The deceased is said to have died on 29/09/2001 and therefore as at 18/12/2015 the Petitioners herein had not yet obtained a certificate of confirmation of grant and therefore *ipso facto* they had no *locus standi* to purport to sell the deceased's property or pass or transfer any interest thereof to the 2<sup>nd</sup> Objectors. The conduct of the Petitioners amounts to meddling in the property or affairs of a deceased person which is detrimental to the rightful beneficiaries. Indeed under Section 82 (b) (ii) of the Law of Succession Act no immovable property shall be sold before confirmation of grant. The grant of letters of administration interstate was issued to the Petitioners on 5<sup>th</sup> February, 2014 and by the time of the purported sale of part of the deceased's land, the same had not been confirmed and which position still holds to date. The Petitioners therefore had no capacity to enter into a sale agreement with the 2<sup>nd</sup> Objector over part of the deceased's land. They could only do so after confirmation of the grant when all the net estate of the deceased has been gathered and distributed to the rightful beneficiaries and that thereafter each beneficiary was at liberty to dispose his or her share as they deem fit once they obtain the requisite ownership. Hence the 2<sup>nd</sup> Objector has not shown that it was a creditor to the estate prior to the death of the deceased unlike the 1<sup>st</sup> Objector and hence I find the 2<sup>nd</sup> Objector has not established a legitimate claim against the estate of the deceased. The 2<sup>nd</sup> Objector shall have no option but to wait to pursue the vendors in their own individual capacity after confirmation of the grant and distribution of the estate to the beneficiaries of the deceased.

11. In view of the following observations, I make the following orders:-

***(1) The Petitioners Summons for confirmation dated 15<sup>th</sup> June, 2016 is declined. The Petitioner to file a fresh summons for confirmation of grant within 90 days from the date hereof and ensure all the shares of the individual beneficiaries are indicated as well as ensure the interest of the 1<sup>st</sup> Objector herein for 2 acres is factored in the distribution.***

***(2) The 2<sup>nd</sup> Objector shall have to wait and pursue its claim from the individual beneficiaries (Petitioners herein) once distribution is completed.***

***(3) The status quo obtaining as at the date of this ruling with respect to the occupation and possession of the properties belonging to the estate of the deceased Onesmus Nzioka Ndolo shall continue to obtain and be maintained pending the confirmation of the grant. There shall be no further transfer of the properties and or further destruction, wastage and or developments on the same by the Administrators or their agents or servants pending the filing and hearing and determination of fresh summons for confirmation of grant.***

***(4) Costs shall be in the cause.***

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **18<sup>TH</sup>** day of **JULY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Muthama for Ndeto for Petitioner

Gabriel Githua - 1<sup>st</sup> Objector

C/A: Kituva