



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 150 OF 2010

IN THE MATTER OF ESTATE OF PAUL MUHANA AGONYA

alias AKONYA.....DECEASED

AND IN THE MATTER OF

JOHN MUREMI MUHANDA.....PETITIONER

VERSUS

ELIAS MOARD MATEGWA.....OBJECTOR

RULING

Introduction

1. The deceased herein PAUL MUHANDA AGONYA died on the 01/09/2008 and grant of letters of Administration issued to the Petitioner JOHN MUREMI MUHANDA on the 5/07/2012. On the 13/07/2012 the Objector herein Elias Moard Mategwa filed an affidavit of protest wherein he claimed to have bought a portion of the deceased's land being Isukha/Kambiri/1631 measuring 32X19 meters and annexed thereto a sale agreement (Annexure "MME1") which was allegedly signed by the deceased and witnessed by his (deceased's) wife and daughter. The Objector claimed that prior to purchasing a portion of the said land from the deceased, the deceased had sold the same to another purchaser in 1983 but the said purchaser had failed to pay the full purchase price. That after purchasing it, the objector paid the deceased the full purchase price from which the deceased refunded kshs.4,000/= to the widow of the 1st purchaser. See annexure "MME 2".

2. That unfortunately before the transfer to the objector could be effected the deceased person died. The objector states that his name was included as a beneficiary of the deceased's estate by the area chief. See annexure "MME 3". He claims that the petitioner did not include all beneficiaries to the estate of the deceased while filing the petition. The petitioner filed an application for confirmation of grant on the 21/11/2012 and again the objector objected and filed a replying affidavit opposing the confirmation. The affidavit was sworn on 03/01/2013. He set out more grounds in opposing the confirmation. In response to the said affidavit the petitioner filed a reply sworn on 18/03/2013.

3. It is this protest by the objector that this court is tasked to determine. This cause was first heard by Justice Chitembwe before he was transferred to Malindi. Thereafter parties agreed that the same should proceed from where it had reached before Justice Chitembwe. It is also important to note that at the hearing hereof the objector was the plaintiff and the petitioner the defendant.

The Plaintiff's Case

4. The plaintiff called five (5) witnesses. PW1 explained how he got to purchase a portion of the deceased parcel of land for kshs.70,000/= after consulting with the area District Officer sometime in 2008. He further explained that the deceased showed him the plot in the presence of the Area Assistant Chief. The Area Assistant chief noted that the said parcel had been sold to someone else and since that person did not express any interest in the same his widow was refunded the purchase price of kshs.4,000/= as per the sale agreement dated 20/05/2008. After the deceased showed him the land the plaintiff fenced it off, but later learnt that the defendant was ploughing it. He informed the area D.O who summoned the defendant though the Defendant was never taken to Court. The Court has taken note of all the exhibits produced by the plaintiff, namely PEX 1 to 4. The plaintiff registered the sale agreement in Nairobi but admittedly, he was never taken to the Land Control Board by the deceased for consent.

5. PW2 claims to have witnessed the sale between the deceased and the plaintiff on 20/5/2008 and that he saw Kshs.70,000/= being exchanged. PW3 told the court that the deceased had five daughters and that the defendant was the only son.

6. PW4 the Area Assistant Chief confirmed having written three (3) letters at different times. He claims to have been given instructions by the area chief to write the letters. According to his evidence PW1 bought land from the deceased who had a second wife by the name Joyce, a son and five daughters.

7. PW4 also stated that since he knew PW1 had bought land from the deceased he included him as a beneficiary. To support his evidence, the objector produced the letters which he wrote these being are PEXH 4(a) – (d). On cross-examination PW4 testified that he did not write the letters to the defendant but to his mother Joyce. He further claims that Joyce was chased away from the deceased's home two weeks after her husband's death.

8. PW5 also claimed to have purchased land from the deceased. He testified that thereafter his land had been ploughed and the fence removed prompting him to report to the District Officer Kambiri. He met PW1 at the District Officers Office who had a similar complaint. The D.O sent his officers/security to the site and the defendant was arrested and locked up in the cells at the D.O's office only to be released the next day after undertaking to undo the portion he had ploughed. The plaintiff closed his case after the testimony of PW5.

Defence case

9. The defendant was the only one who testified in defence. He is the son to the deceased herein. He explained how he applied for and was issued with the grant of letters of administration for the deceased's estate. He denied the claim that the plaintiff bought a portion of the deceased's land. He claimed that he never saw the agreement referred to by the plaintiff which he said he saw for the first time in court. He however admitted to have been arrested but alleged that he was forced to sign an undertaking dated 23.2.2010. He testified that he is the one who lives in the plot allegedly bought by the plaintiff as the plaintiff lives on his own parcel of land. He asked this court to help him proceed with the distribution of the deceased's estate by dismissing the objector's claim.

10. On cross-examination the Defendant claimed that he was given the green light to apply for the grant of Letters of Administration Intestate by his family but did not produce a copy of the said consent. He further claimed that the deceased was survived by him alone and that there were no other children and that the deceased had only one wife, the Objector's mother. He maintained that his father gave him the whole parcel of land where he stays with his family and that he never knew that his father sold any portion of the land to the objector.

The submissions

11. Both parties filed their written submissions. The protestor's (plaintiff's) submissions are dated 09/06/2016 and filed in court on the same day. The plaintiff submits that the defendant's submissions are

a distortion of the facts and the law and further that the defendant has completely failed to address the issues in controversy. The plaintiff framed 5 issues on which he has made submissions to the effect that the defendant signed an agreement before the D.O of Ileho and agreed to give to the plaintiff the portion of land he bought from the deceased. The plaintiff alleges that the sale agreement between himself and the deceased was witnessed by some members of the deceased's family, namely Joyce Musiyile (widow) and Diphina Khatondi Muhanda sister to defendant.

12. While admitting that he did not obtain the land Control Board consent for the transfer of the purchased portion the plaintiff alleges that he was not locked out by the 6 months limitation period because by the time the deceased died, the 6 months were still running. The plaintiff concludes by saying that in petitioning for the grant of Letters of Administration to the estate of the deceased, the defendant was in contravention of sections 40,51(g) and (h) and 52 of the Law of Succession Act and Rule 40 3(a) and (b) of the Probate and Administration Rules. He prays that he be granted the orders sought

13. On his part, the defendant submits that the plaintiff is not a liability to the estate of the deceased for the simple reason that his claim is over plot number 137 and not LR. No. Isukha/Kambiri/1631 from which he (plaintiff) alleges to have bought a portion measuring 32 X 19 metres. The defendant also contends that since the plaintiff did not obtain Land Control Board consent for the transfer of the alleged plot, then clearly he is excluded from making any claims as a liability. In this regard, reliance was placed on the case of **Re Estate of Mangee [2002] KLR 399** where it was held by Khamoni Judge at holding number 4 thereof that "since the application for the consent of the land Control Board to the sale had not been presented to the board, and thus the consent of the board had not been obtained, the sale could not be enforceable to the administrator as the application for consent became void upon the lapse of six months before presentation to the board."

14. The defendant also submits that the dispute between the plaintiff and the defendant falls squarely under the docket of the Environment and Land Court as prescribed under Article 162(2)(b) of the Constitution of Kenya 2010 and as further provided under Section 4 of the Environment and Land Court Act No. 12A of 2012 (Revised 2015). Section 4 of the Environment and Land Court Act establishes the Environment and Land Court as a superior Court of record under the Act. The Act, No. 12A of 2012 was enacted "As an Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes."

15. The Defendant's argument is that the plaintiff should file his case against the defendant before the Environment and Land Court and not mar these Succession proceedings with such a claim and especially so when plot No. 137 is not part of the estate of the deceased. The defendant has also faulted the plaintiffs attempt to litigate on behalf of third parties who are neither parties to these succession proceedings nor have they raised any objection against the defendant. In the view of the defendant, the plaintiff is simply malicious and envious of the plaintiff. The plaintiff urges this Court to dismiss the protest with costs.

Issues for Determination and Determination thereof.

16. From the evidence and the submissions, there are only two issues for determination by this court:-

Whether the plaintiff is a liability to the estate of the deceased; and

Whether the plaintiff's claim is properly before this court.

17. Regarding issue (a) there is need to go back into a brief history of the plaintiff's claim. After the defendant filed summons for confirmation of the grant issued to him, and upon service of summons upon the plaintiff, the plaintiff filed an affidavit of protest sworn on 03/01/2013/ in which he laid his claim as canvassed herein. There is also a further affidavit of protest filed on 13/07/2012. The defendant responded to the affidavits of protest vide his replying affidavit dated 18/03/2013 and filed in Court on

20/03/2013.

18. As rightly submitted by the defendant's Counsel the plaintiff is not a liability to the estate of the deceased for two reasons;- (i) the plot No. 137 which the plaintiff claims to have bought from the deceased is not part of the estate of the deceased. The plaintiff's own affidavit evidence as per paragraphs 1 – 4 of his affidavit sworn on 13/07/2012 militates against the plaintiff making such a claim. According to form P&A 5 filed in Court on 09.03.2010, the only asset comprising the estate is of the deceased LR No. Isukha/Kambiri/1631. It is to be noted that form P&A 5 is not dated.

19. Secondly, the plaintiff is barred from laying a claim on the estate of the deceased by virtue of the holding in the case of **Re Estate of Mangee** (above), so that even if it may be true that the plaintiff bought a portion of the land known as Isukha/Kambiri/1631, he has not laid evidence before this court demonstrating that he applied for and obtained the requisite land control board consent to facilitate the transfer.

20. Thirdly, it is clear from the evidence that the plaintiff's claim against the defendant touches on title and use of the alleged purchased portion of land by the plaintiff, whether the same was purchased out of plot 137 or LR. Isukha/Kambiri/1631. That being the case, this court is devoid of jurisdiction to hear and determine such dispute. The dispute must therefore be filed before the court clothed with the jurisdiction to hear and determine it. That court is the Environment and Land Court as established under Section 4 of the Environment and Land Court Act, No. 12A of 2012 pursuant to the provisions of Article 162(2) (b) of the Constitution of Kenya 2010.

21. In the case of **Re Estate of Kariuki**[2002]2KLR 172, it was held by Khamoni – Judge, that a purchaser of the free property of a deceased person acquires no interest in the asset unless he buys it from the administrators, and he has no protection of the law unless he is a purchaser for value without notice. Looking at the facts the pleadings and the submissions in the instant case, the plaintiff is neither a purchaser for value without notice nor did he buy the alleged portion from the administrator of the estate of the deceased. There is clear evidence that even when the plaintiff allegedly bought the portion in dispute, he was aware that the deceased had sold the same portion of land to another. For the above reasons, the plaintiff's claim falls flat on its face. The plaintiff did not produce any title in respect of plot 137.

Conclusion

22. For the above reasons, and in so far as the plaintiff's claim touches on the estate of the deceased, I find and hold that the plaintiff has not proved his claim on a balance of probability. A closer look at the plaintiff's case is that he tried to use the provincial administration and the criminal process to intimidate the defendant to give him land. This is a court of equity and he who wants equity must do equity. If the plaintiff is still interested in pursuing the defendant for a share of the deceased's estate, he ought to take the dispute before the Environment and Land Court for hearing and determination.

23. Before I conclude this ruling, there are a number of pertinent issues that have come to light from the papers filed by the petitioner. I have seen filed in court Notice of Appearance and Affidavit of Protest by Diphina Khatonde Muhanda and Getrude Achisa Muhanda in which they refer to the entry of appearance dated 12/04/2016 and filed in court on the same day, and the Affidavit of Protest filed under Rules 40(6) and 60 of the Probate and Administration Rules. As the affidavit of Protest dated 12/06/2016 raises some critical issues, the two protestors are at liberty to pursue their claims against the petitioner.

24. It is also noted from the Petition papers that the petitioner listed himself as the only surviving child of the deceased, but the two protestors have alleged that they are daughters of the deceased. It also appears from the petition papers that the petitioner did not obtain consent from other beneficiaries of the estate of the deceased before he filed the papers. There is also the question of the deceased's Death Certificate which was used to obtain the Grant of Letters of Administration Intestate. Infact there are 2 certificates of death, one dated 11.11.2008 and another dated 04.12.2008. The question that comes to mind is; - why the two certificates of death if there was no mischief on the part of the petitioner?

25. It is also clear from the petition papers that the Petitioner makes no mention of the fact that the deceased had more than one wife as per the joint affidavit sworn by Diphina Khatonde Muhanda and Getrude Achitsa Muhanda on 12/04/2016. The two protestors also state that the deceased also left behind LP Nos. Isukha/Kambiri/1328, 1947 and 1327. These are matters that need to be interrogated by the court before the Grant issued to the Petitioner can be confirmed. This court is a court of equity before which all parties who have or may have an interest in the estate of a deceased person ought to have a fair hearing.

26. In view of the foregoing, it is imperative that Diphina Khatonde Muhanda and Getrude Achitsa Muhanda be given a hearing in this matter concerning the proposed distribution of the deceased's estate. The Petitioner shall, within 30 days from the date of this ruling, and with notice to Diphina and Getrude, fix this matter for mention for purposes of giving appropriate directions, without which this matter shall not proceed any further.

Orders accordingly.

Ruling delivered, dated and signed in open court today at Kakamega this 15th day of September 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....Present in person.....For Plaintiff

.....Mr. Shivega (present).....for Defendant

.....Mr. Lagat.....Court Assistant