



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 595 OF 2008

IN THE MATTER OF THE ESTATE OF MULE KITAVI (DECEASED)

DAVID MULE KITAVI PETITIONER/APPLICANT

VERSUS

PAUL MUSEMBI MWANIKI OBJECTOR/RESPONDENT

RULING

1. The application dated 3/12/2011 is brought under **section 45 and 47** of the **Law of Succession Act Cap 160 Laws of Kenya**.

The application seeks the following orders:-

- i. **“THAT the Respondent by himself, his agents and/or servants be restrained by orders of this court from taking possession, disposing, intermeddling with and/or using by cultivating or otherwise land parcel No. Mbooni/Iiani/428 till the summons for revocation and/or annulment of grant dated 2nd December 2010 is determined or the matter is fully settled.**
- ii. **THAT the land sale agreement or transaction between the Respondent and Mbola Mutava be declared illegal, null and void.**
- iii. **THAT costs of this application be provided for.”**

2. The application is supported by the affidavit of the Applicant, Paul Musembi Mwaniki. The Applicant has a pending application for revocation/annulment of grant issued to the Respondent, David Mule Kitavi on 1/11/2008 and confirmed on 12/3/2010.
3. According to the Applicant, the parcel of land known as **Mbooni/Iiani/424** was part of the estate of the deceased, **Mule Kitavi**. The Applicant’s complaint is that the Respondent **Paul Musembi Mwaniki** has without any colour of right sold the said parcel of land to one **Mbula Mutava** whose family has taken possession of the land and cultivating the same. According to the Applicant, the Respondent was not beneficially entitled to the estate of the deceased. The Applicant’s contention is that the Respondent’s mother was once married to the deceased but they divorced and the mother to the Respondent thereafter got married to another man. However, according to the Applicant, the deceased had no children and the beneficiaries to the estate of the deceased are the Applicant and his mother and brothers. The Applicant further contended that the Respondent petitioned this court for the grant of Letters of Administration using documents that were fraudulently obtained.
4. In opposition to the application, the Respondent **David Mule Kitavi** swore a replying affidavit on 2/5/2013. The Respondent has described himself as the biological son of the deceased, **Mule Kitavi** and the only beneficiary to the said estate. According to the Respondent, the Applicant has no rights to the estate of the deceased. The Respondent denied the allegations of fraud made by

the Applicant and stated that he had the land parcel the subject of these proceedings transferred to his name after the grant was confirmed then sold the land to one **Jackson Munandu** who has since taken possession of the same.

5. The Respondent further averred that the Applicant is a distant relative and has his own land and that this application has no chances of success.
6. It is not in dispute that the land the subject matter herein formed part of the estate of the deceased. It is also not in dispute that the subject land has been sold and the purchaser taken possession of the same.
7. According to the Respondent, he sold the land on 11/10/10 and subsequently signed the transfer forms. The grant herein was confirmed on 12/3/2010. **Section 93 (1)** therefore comes into play. The same states:-

“A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

8. The purchaser is not a party to these proceedings, yet both the Applicant and the Respondent are in agreement that the purchaser has taken possession of the land and it is being cultivated by his family.
9. The Application has not met the threshold for the grant of the orders sought. Consequently, I dismiss the application with costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 13th day of February 2014.

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JUDGE