



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 16 OF 1990

IN THE MATTER OF THE ESTATE OF STEPHEN NZOMO MWATU (DECEASED)

TERESIA MUKUI NZOMO.....APPLICANT

-VERSUS-

ANN SYOKWIA NZOMO.....1ST RESPONDENT

EMILY MUTILE NZOMO.....2ND RESPONDENT

RULING

1. By Summons dated 12th July, 2019, the 3rd June, 2019 the applicant herein, **Teresia Mukui Nzomo**, seeks orders that the grant of letters of administration issued to the petitioners and confirmed on 25th September, 2006 be revoked and/or annulled.
2. According to the applicant, she is a daughter of the deceased herein while the Petitioners/Respondents are her sisters. It was her deposition that the said Petitioners failed to disclose that their deceased father had 8 children whose names she disclosed. It was also her case that the Petitioners never disclosed to her and the other beneficiaries that they had petitioned for the letters of administration and were never informed to attend court when the summons for confirmation was coming up. In the affidavit sworn on 19th September, 2006, the Petitioner stated that the deceased died leaving only two beneficiaries, the two Respondents. It was her case that the court record does not show that all the beneficiaries were present in court during confirmation. Further the process of confirmation was suspect as their deceased mother, **Esther Koki Nzomo**, could not rectify the grant to the estate of the deceased after distribution of the estate.
3. According to the applicant, whereas, the affidavit marked ASN6A was allegedly sworn on 22nd March, 1996 by their mother, the said mother died on 18th September, 2005 while the grant was confirmed on 25th September, 2006.
4. The applicant averred that the deceased's properties were not included in the petition. According to the applicant, the deceased was a member of Lukenya Ranching and Farming Co-operative Society Ltd, being member no. 21 and was the allottee of plot nos. 15, 520 and 205. According to her plot no. 520 translated to Land Title No. Mavoko Town Block 3/936 while plot no. 205 translated to Land Title No. Mavoko Town Block 3/2721 and she annexed documents to that effect. Further, the deceased was also a member of Kenya Co-Operations Ltd being member no. 108 with 82 shares.
5. It was her averment that the 1st Petitioner caused all these properties to be registered in her name hence the distribution was not properly done as she was not provided for. She was apprehensive that the petitioners were in the process of selling some land.
6. Contrary to what the petitioner averred, it was deposed by the applicant that her mother never bought for her a plot. To her, the agreement exhibited by the petitioners was between the 1st Respondent and one **Shadrack Musyoki** though she contended that the said agreement was suspect as the amount stated therein, Kshs 41,000/=, is less than what the 1st Respondent paid which was Kshs 55,000/-. She wondered why the said land was never transferred since the date of the alleged purchase in 1998.
7. The applicant contended that the plot at Kenya Israel being Land Title No. Iveti/Kiandani/96 could not be sold by their mother and be in the names of the then 1st Respondent. It was therefore her position that the 1st Respondent unlawfully and without her knowledge used the grant and transferred her deceased father's shares at Lukenya Ranching into her names after the said shares were transferred into land.
8. The applicant denied that the properties of the estate have been sold and transferred to third parties as alleged by the petitioners.
9. The applicant's application was therefore hinged on the ground that the grant was fraudulently obtained for the purposes of disinheriting

her and the other 6 beneficiaries. Further, the proceedings herein were defective in that the grant was obtained without the consent of the beneficiaries.

10. In response to the application, the Respondents filed a replying affidavit sworn by **Anne Syokwia Nzomo**, one of the administratrix herein and a beneficiary of the estate of the late **Stephen Nzomo Mwatu**. According to her, the applicant has not demonstrated any authority or consent from any other beneficiary or daughter of the deceased to file this application. Further, there is no any such confirmed grant issued on the said date and none has been exhibited to support its existence.

11. It was deposed that the Deceased having passed away in 1977, before the commencement of the Act, the administration of the Estate cannot be governed by the provisions of the **Law Succession Act** and ought to be governed by the Kamba Customary Law. Accordingly, the applicant's application being made 42 years after is a mere afterthought. It was deposed that their mother used Kamba Customary Law to distribute her estate and her action is well grounded in Section 2(1) of the **Law of Succession Act**, which provides that:

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

12. According to the deponent, the estate of the deceased devolved to his wife who was their mother one **Esther Koki Nzomo** who petitioned for letters of administration sometimes on 14th February 1990 and letters of administration issued to her widow on 30th April 1990. She averred that the application for the grant of the estate of the late **Stephen Nzomo Mwatu** was duly advertised in the **Kenya Gazette** on the 30th of March 1990 and none of the daughter of the deceased objected to the same nor did any of the daughters including the applicant herein object to the mother inheriting all the assets of her late husband. Accordingly, the Grant was subsequently confirmed on 23rd October 1991 and since the said widow of the late **Stephen Nzomo Mwatu** was the sole administrator and beneficiary of her late husband's estate as confirmed by the said confirmed grant, there are therefore no any free assets of the late **Stephen Nzomo Mwatu** as all assets were inherited and vested in their mother without any objection from any one of them.

13. It was averred that their said mother distributed her estate sometimes in April 1996 when she applied for a rectification of her confirmed grant. She did all this before her death and distributed her estate through Succession Cause No. HCC 16 of 1990 and her property was bequeathed to the beneficiaries in accordance to her confirmed grant dated 22nd April 1996. In order to affect her distribution and in view of her old age, the said widow in addition to herself also appointed her daughters namely **Emily Mutile Nzomo and Anne Syokwia Nzomo** as co-administrators of the estate and had the same distributed further in terms of the confirmed grant dated 25th September 2006. From the said distribution, it was contended that the deceased did not bequeath her estate to the 1st respondent as alleged but also distributed the same to **Josephine Symbua Nzomo, Anne Syokwia Nzomo, Emily Mutile Nzomo and Regina Beth Makau**.

14. It was averred that the said widow during her lifetime not only distributed all her estate but also made sure that the applicant herein was given a portion of land where she lives to date which fact she has not disclosed. The applicant was duly considered after she separated with her first husband and second husband and their late mother bought her a parcel of land through the deponent known as plot No 109 KathekaKai Vota measuring about 5 Acres. However, the property was bought for the applicant by their mother through the deponent on 10th January 1998 and was registered in the deponent's name at the request of their mother who was afraid that the applicant would sell it off. The deponent disclose that she has been willing and ready to transfer the same to the applicant whenever she is ready and that the applicant has been living on the said parcel known as plot No 109 KathekaKai Vota measuring about 5 Acres since the same was bought way back on 31st January 1998.

15. It was the deponent's averment that the applicant got more as most of what their mother gave them were plots unlike the applicant who got 5 acres of farm land. In addition, the deponent personally at the request of their mother went ahead and built a house for the applicant on the said plot No 109 KathekaKai Vota measuring about 5 Acres to ensure the applicant had a home after she separated with her husband. It was therefore the deponent's view that since their mother had distributed all the other assets, it is quite unfortunate, untrue and a failure to disclose the truth and material facts for the applicant to allege she was not given anything. The applicant, it was deposed, has not disclosed that their mother sold two parcels of land at Katelembu in Machakos as well as Kenya Israel Plot No 96 so as to raise money to buy the applicant the said parcel of land known as No 109 KathekaKai Vota measuring about 5 Acres.

16. It was averred that their mother also took into account that the applicant was a troublesome person and that is why she ensured in her lifetime that the applicant was not only settled but a house was built for her away from the others for peace to prevail. According to the deponent, the applicant cannot now be heard to purport after all these years that the distribution of the estate was not properly done and she was not provided for. This is further confirmed by the minutes dated 2nd November 2006 where the Aombe Clan wrote to the family were applicant was married known as the Amuuti clan and warned them that they should warn their daughter in law (the applicant) not to interfere with the assets of their late father **Stephen Nzomo** and late **Ether Koki Nzomo**.

17. It was deposed that the applicant's allegation that some assets of the deceased were left and in particular the Lukenya Ranching and farming cooperative society shares is not true. This is because sometimes in 1972 when their late father **Stephen Nzomo Mwatu** was very ill and wanted medical attention, he gave the deponent all the Lukenya shares which had not even been paid for and the deponent settled all his medical bills and paid for the said shares and she has continued to pay for the same as well as any payments required by the ranch from time to time. Therefore, the said Lukenya shares referred by the applicant do not there belong to nor form part of the estate of the deceased and this explains why their mother did not mention the same as she knew they belonged to her.

18. It was noted that the applicant did not filed any objection to their mothers said grant of letters of administration issued sometimes on 30th April 1990 and subsequently confirmed on 23rd October 1991 nor the subsequent distributions. Their mother later died on 18th September 2005 and at the time of her death, she had already bequeathed all her assets to the beneficiaries and there were no any free assets of the estate. She also in her lifetime ensured she has settled the applicant whom she knew as troublesome and warned her not to seek for any of her assets.

19. It was disclosed that the children of the deceased including herself and her other sisters have also dealt with most of the said assets given to them by their mother some of which have already been sold to 3rd parties hence not available as part of the estate while others have also been bequeathed to their children and grandchildren. Further, the applicant has not notified nor joined all affected 3rd parties who have acquired proprietries through sell or otherwise as parties to this proceeding.

20. The deponent's view was that the applicant is guilty of laches and inordinate delay as the deceased died way back in 1977 and it is now forty-two (42) years since his demise and she has not given any explanation or justifiable reason to justify why it has taken her 42 years from the death of our father and 23 years from the death of our mother to challenge the distribution of the assets. Due to this lapse in time, it was averred that it is in the interest of justice that this court does not interfere with estate and the status quo as left and distribution as done by the deceased should remain. It was contended that since the applicant did not at all challenge the said confirmed Grant and as none of the children of the deceased had a problem with their mother being the sole beneficiary, it is afterthought for the applicant to now allege that the consent of all beneficiaries of the estate of the deceased was never sought. He accused the applicant of being guilty of non-disclosure of material facts by the making of a false statement or by the concealment from the court of something material to the case; and that the application to annul the grant is being sought by means of an untrue allegation of a fact and ought to be dismissed with costs.

21. According to the deponent, the deceased freely exercised her role and right to distribute her estate in her lifetime to avoid any controversies when she is gone which the sisters have all along respected for all the years hence the reason why this application is being brought too late in the day as an afterthought.

Determination

22. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

23. The instant application is expressed to be brought pursuant to section 76 of the **Law of Succession Act**, Cap 160 and rule 44(1) of the **Probate and Administration Rules**. However, Section 2(1) of the **Law of Succession Act**, provides that:

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

24. In **Wambui Ngatia vs. Lydia Muthoni Nyeri HCCA No. 84 of 2008, Makhandia, J** (as he then was) noted that:

“...section 2(2) of the Law of Succession Act specifically provides that the estate of persons dying before the commencement of the Act are subject to the written laws and customs applying at the time of death but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with the Act...The succession cause herein had been commenced in 1979 before the Law of Succession Act had been operationalised. However, since the matter was concluded when the Law of Succession Act was in force, it could only proceed so far as possible in accordance with the same.”

25. Similarly, in this case the Deceased passed away in 1977 while the Act came into force on the 1st July, 1981. While the administration of the deceased's estate herein could proceed so far as possible in accordance with the Act, the law governing the administration of the deceased's estate had to be the written laws and customs applying at the time of death.

26. In this case, it has not been disclosed what the then existing law and custom was and whether the deceased's estate was distributed in accordance with the same.

27. Based on that ground, I find no merit in the Summons dated 12th July, 2019 which I hereby dismiss but with no order as to costs.

28. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 23rd day of February, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Munyalo for the Petitioner.

CA Geoffrey