



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO.1182 OF 2012

IN THE MATTER OF THE ESTATE OF WILSON NZIUKO KINYAO (DECEASED)

IDA MARGARET NDUMBA..1ST ADMINISTRATOR/RESPONDENT

JOHN M. KATUMO.....2ND RESPONDENT

-VERSUS-

MAGDALENE KAMENE NZIUKO.....1ST APPLICANT

THOMAS CLEOPHAS MUNYASYA.....2ND APPLICANT

VICTORIA KENSLY MUOTI MUIA.....3RD APPLICANT

VERONICAH VIVIEN MAKANA MUIA.....4TH APPLICANT

ALPHONSE MAKITIA MUIA.....5TH APPLICANT

FREDRICK FINTAN MBISA.....6TH APPLICANT

RULING

1. By Summons for Revocation of Grant dated 2nd August, 2019, the Applicants herein seek the following orders:

a. Spent.

b. THAT interim preservatory and protection order do issue restraining the Respondents whether by themselves or through their servants, agents and/or employees or any other person whomever claiming under them or through them from selling, transferring, retransferring and/or otherwise intermeddling or interfering in any way with all the assets of the deceased herein and in particular parcels of land and shares vide membership numbers:-

i) Machakos Konza North Block 1/580

ii) Kiu Ranch 960 Membership No. 563

iii) Commercial Plot in Konza

iv) Kalama/ Muumandu/407

v) Konza Ranch Plot No. 590

vi) Konza Ranch Membership No. 357

vii) Commercial Plot No. 244-Malili

viii) Malili Ranch Agricultural Plot No. 1762; and any other assets belong to the estate of the deceased herein or from doing any other prejudicial act pending the hearing and determination of this Application.

c. THAT the grant of Letters of Administration (letter 41) issued on the 27/5/2013 together with the Certificate of confirmation of grant issued on 17/01/2014 and dated 21/11/2014 to Ida Margaret Ndumba be revoked and/or annulled and a fresh grant of letters of Administration intestate be issued in the name of Magdalene Kamene Nziuko.

d. THAT the court do revoke, annul, nullify and/or cancel any and all registrations, sales, transfers, dispositions, charges, leases or any other transactions made by the Respondents or any person whomever with regard to all the assets of the deceased herein in reliance to the confirmed grant herein or otherwise and the same be reverted to the name of the deceased herein.

e. THAT the name of Ida Margaret Ndumba be removed from the list of beneficiaries and the following beneficiaries be included in the list of beneficiaries of the deceased.

i. Magdalene Kamene Nziuko

ii. Thomas Cleophas Munyasia

iii. Victoria Kensly Muoti Muia

iv. Veronica Vivian Makana Muia

v. Alphonse Makitia Muia

vi. Fredrick Fintan Mbisa

f. THAT the costs of this Application be provided for.

2. The facts of the case as narrated by the Applicant were that the 1st applicant got married to the late **Jonathan Muia Nziuko** on 20th December, 1975 in a monogamous marriage under the then African Christian Marriage and Divorce Act at African Inland Church Bomani in Machakos and remained his wife till his demise. It was averred by the 1st Applicant that her late husband was the only child of the deceased herein, **Wilson Nziuko Kinyao** alias **Wilson Nzioka Kinyao** hence the 1st applicant and her co-applicants are rightful heirs to the estate of the deceased.

3. The applicants therefore urged this court to revoke the letters of administration issued herein on 27th May, 2013 together with the Certificate of Confirmation of Grant issued herein on 17th January, 2014 since these proceedings were undertaken behind their backs and without their consent. According to the 1st applicant, she only became aware of these proceedings when she accompanied her son, **Thomas Cleophas Munyasia**, to Machakos Police Station on or about 14th May, 2019 over the property of the deceased herein.

4. The 1st applicant also learnt that prior to filing the instant cause, the 2nd Respondents filed Machakos High Court Succession Cause (Citation) Number 968 of 2012 citing only **Ida Margaret Ndumba Nziuko** (the 1st Respondent) and **Munyasia Nziuko** which citation was dismissed on 28th June, 2017 for want of prosecution. That, according to the information received by the 1st Applicant from the 2nd Applicant herein, **Thomas Cleophas Munyasia**, was not served on the latter hence the purported appointment of the advocate by the 1st and respondent and the 2nd Applicant was a mere charade as the 2nd Applicant never gave such instructions.

5. It was disclosed that in the said citation, the 2nd Respondents annexed a letter by the assistant chief in which it was purported that the 1st Applicant's co-applicants, who are her children, were the 2nd Respondent's. In the said proceedings, the 1st Respondent also annexed a document purporting to be a Will made by the 1st Applicant's late husband which was a sham.

6. The 1st applicant averred that she was yet to file succession cause in respect of her late husband's estate hence any such cause if filed was done behind her back and ought to be annulled. It was her averment that to date her matrimonial home is that of her late husband and the deceased herein's homestead at Muumandu on plot no. Kalama/Muumandu/407.

7. The Applicants were therefore apprehensive that unless the deceased's estate is preserved and protected and the grant revoked, the deceased's estate risks being wasted and/or disposed of by the respondent to their detriment. Further, they risked being disinherited and rendered homeless hence suffering irreparable loss.

8. In opposing the summons, the 1st Respondent averred that she got married to the late **Jonathan Muia Nziuko**, the only son to the deceased herein, **Wilson Nziuko Kinyao**, in the year 1973 under the Kamba Customary Law with the consent of both parents and were blessed with 2 sons and one daughter namely **Michael Maithya**, **Catherine Mwendu Nziuko** and **Stephen Muthiani Nziuko**. According to her, they lived together as a happy family with her late husband and her father-in-law. She disclosed that the 1st Applicant herein was also married to **Jonathan Muia Nziuko** as the 2nd wife in the year 1975 but they parted ways in the year 1978 and until his demise in 2011, the 1st Applicant had never set her foot on her late husband's home. The 1st Applicant, it was averred, only resurfaced after the demise of her husband with her children and threatened to take over the 1st Respondent's matrimonial home and since the 1st Respondent was not ready for such threats, she moved from their matrimonial home after the demise of both her father-in-law and her husband respectively. Following the

death of her father-in-law, the 1st Respondent averred that she petitioned for Letters of Administration as required by the law and the same was gazetted vide gazette legal notice volume CXV. No. 8 and the same was never disputed. To that extent, the 1st Respondent refuted the contention that these proceedings were undertaken behind the 1st Applicant's back.

9. It was her case that the properties named in the cause belong to her father in law whose estate is the subject of this succession cause and not that of their late husband hence the 1st Applicant's case has no merit and amounts to an abuse of the court process.

10. It was averred that the deceased herein died in 2009 while their late husband died in 2011 and posed the question where the 1st Applicant was all along for close to 10 years before petitioning for the grant.

11. The 1st Respondent insisted that she was the rightful person to apply for the grant since she had lived with the deceased, nursed him when he was sick until his demise in 2009.

12. It was averred that the late **Jonathan Muia Nziuko**, their husband, had no known assets in his names, a fact well known to the 1st applicant. The 1st Respondent deposed that prior to his death, the deceased herein disclosed to her all the whereabouts of his properties and how the same ought to have been distributed and safeguarded after his demise.

13. Based on the foregoing the 1st Respondent urged this Court to dismiss the summons.

14. In opposing the Summons, the 2nd Respondent herein, **John Mumba Katumo**, averred that the Deceased herein owned *inter alia* an Agricultural Plot NO. 1762 and a Commercial Plot No. 244, Malili Ranch Ltd. On 14th October, 2008 the Deceased herein sold the aforementioned Agricultural Plot NO. 1762 to **John Mutiso Mbwii** at a Purchase Price of Kshs. 3,200,000.00 who was unable to honour the aforesaid Agreement owing to financial constraints. Thereafter on 10th January, 2009 the Deceased sold to him the same Agricultural Plot NO. 1762 and Commercial Plot NO. 244 at a total Purchase Price of Kshs. 6,000,000/= which he paid fully. However, the Deceased herein passed away on 14th June, 2009 before transferring the said Plots to his name.

15. The 2nd Respondent averred that on 19th September, 2012 through his Advocates on record, he extracted a Citation against the Administrator/1st Respondent and the 2nd Applicant herein vide Machakos High Court Succession Cause No. 968 of 2012 to which the 1st Respondent and 2nd Applicant herein entered Appearance vide a Notice of Appointment of Advocate dated 7th November, 2012 and filed on 8th November, 2012. Consequently, on 15th November, 2012 the Administrator/1st Respondent herein Petitioned for Letters of Administration Intestate pertaining the Estate of the Deceased herein.

16. He deposed that on 27th May, 2013 the 1st Respondent herein was issued with a Grant of Letters of Administration Intestate and the same was confirmed on 17th January, 2014 and that from the said Certificate of Confirmation of Grant, the Commercial Plot No. 244 & Agricultural Plot No. 1762 Malili Ranch were to be registered in his names. Thereafter on 28th February, 2014 and 3rd March, 2014 he duly paid the transfer fees for the aforementioned Agricultural and Commercial Plot respectively.

17. It was therefore contended by the 2nd Respondent that the Applicants are simply economical with the truth and that it is crystal clear that it is the Applicants who have not only concealed but also suppressed material facts from the Court.

18. He averred that in May, 2012, he was informed that some people were digging and fencing the said Commercial Plot, a fact which he confirmed and reported the matter at Machakos Police Station and on 19th August, 2012 upon which an Officer from DCIO Machakos visited the scene, did investigations and took the evidence to Machakos Police Station. Based on the foregoing, the 2nd Applicant herein was arrested and released on Police Bond and the matter is still pending. He disclosed that on 18th March, 2018 he recorded his statement at Machakos Police Station regarding the above mentioned complaint.

19. According to the 2nd Respondent, on 13th May, 2019 he paid a visit to Malili Ranch Ltd and discovered that the 2nd Applicant herein had fraudulently transferred the said Agricultural Plot No. 1762 unto himself and further that he had fraudulently transferred the said Agricultural Plot to a Chinese by the name **Jin Cook Choi**. Based on the foregoing, the 2nd Respondent went to Machakos Police Station and recorded a Further Statement in respect to the aforementioned issue. However, on 13th May, 2019 he did a search on the said Plot and I established that the said Commercial Plot NO. 244 is in his name.

20. It was therefore his case that the Applicants' Application dated 2nd August, 2019 is destitute of merit hence should be dismissed with Costs.

21. In her further affidavit, the 1st Applicant reiterated her earlier averments that she was the only lawfully wedded wife to the late husband till his demise hence it is only her and her children who are ranking in priority to the letters of administration herein. She further disputed the legality of the sale transaction between the deceased herein and the 2nd Respondent.

22. In their submissions, the Applicants reiterated their averments made in the affidavits sworn in support of their Summons herein.

23. On her part, the 1st Respondent similarly submitted on the line of her averments made in her replying affidavit.

24. The 2nd Respondent, on his part submitted that that this Court lacks jurisdiction to cancel and/or revoke the titles herein based on Article 162 (2) (b) of the Constitution as read with Section 13 of the **Environment and Land Court Act** as well as the decision in **Re Estate of**

Makai Kaluti Ndunda (Deceased) [2018] eKLR. Reliance was similarly placed on Section 93(1) of the *Law of Succession Act*.

25. According to the 2nd Respondent, since Commercial Plot No. 244 Malili Ranch Ltd was transferred to the 2nd Respondent after Confirmation of the Grant, the said transfer and the subsequent instrument are valid and thus this Court cannot cancel the same because it is devoid of jurisdiction.

26. The Court was therefore urge to dismiss the Application dated 2nd August, 2019 with Costs to the 2nd Respondent.

Determination

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

28. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

29. According to the 1st Applicant she is a daughter in law to the deceased's only son, the late **Jonathan Muia Nziuko**, having gotten married to him on 20th December, 1975 in a monogamous marriage under the then *African Christian Marriage and Divorce Act*. The 1st Respondent on the other hand claims that she got married to the said **Jonathan Muia Nziuko** in the year 1973 under the Kamba Customary Law with the consent of both parents and were blessed with 2 sons and one daughter namely **Michael Maithya, Catherine Mwendu Nziuko** and **Stephen Muthiani Nziuko**.

30. It is therefore clear that while the marriage of the 1st Applicant to the said **Jonathan Muia Nziuko** not disputed, that of the 1st Respondent is disputed by the 1st Applicant. The matter before me however is not the determination of the validity of the marriage between the said **Jonathan Muia Nziuko** and the 1st Respondent.

31. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

a. surviving spouse or spouses, with or without association of other beneficiaries;

b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

32. Section 39 of the said Act which falls in Part V thereof provides that:

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none Powers of spouse during life interest. 8 of 1976, s. 9. Where intestate has left a surviving child or children but no spouse. Where intestate has left no surviving spouse or children.

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

33. Assuming that the 1st Respondent's contention that she was lawfully married to **Jonathan Muia Nziuko** is right, it would follow that she would rank in priority with the 1st Applicant in so far as the administration of the Estate of the deceased herein is concerned since they both would only be entitled to the estate of the deceased herein through the said **Jonathan Muia Nziuko**.

34. It therefore follows that both the 1st Applicant and the 1st Respondent, if the 1st Respondent is to be believed, are daughter in law to the deceased. They do not therefore fall within the ambit of section 29 in order to be considered as dependants. They may well have been able to put forward a case had they put brought their claim on behalf of the said **Jonathan Muia Nziuko**, who was a son to the deceased. It is in light of that, I agree with the decision in **Nahashon Karungu Macharia vs. Rosemary Kahura Njoroge (2016) eKLR** where the Court while holding that a daughter-in-law of a predeceased son is a beneficiary of the estate of the latter deceased parent-in-law stated thus: -

“The Deceased was survived by the said Administrator and another son, Patrick Muthemba Macharia. He was also survived by a daughter-in-law called Rosemary Kahura Njoroge (a widow of another son, now deceased, James Njoroge). There had been yet another son, John Kimani, who died after the Deceased. It is common ground that he died without wife or issue. So, in effect there are only three beneficiaries to the estate of the Deceased – his two surviving sons and the widow of another son, since deceased.”

35. In my view a daughter in law may lay a claim as a beneficiary not in her own right but as a legal representative of a deceased son. In other words, the legal representatives of a deceased's dependants may properly stake a claim to the estate of a deceased person on behalf of legally recognized dependants. However, that is not the claim by the 1st Applicant and the 1st Respondent herein in these proceedings. My view is reinforced by the decision in the case of **Re Estate of Munyua Mbeke (Deceased) [2015]** where it was held that:

“The clear wording of Section 29 of the Act does not include daughters-in-law of the deceased. Daughters-in-law are not children of the deceased, and therefore they do not fall within the category of the children of the deceased. They therefore cannot mount an application under Section 26 of the Act as the applicant has done in this case.”

36. The same view was expressed in **Re Estate of Cecilia Wanjiru Kibiche (Deceased) [2016] eKLR** where the Court expressed the view that:

“...a daughter-in-law is not listed in section 29(b) of the Act as being among persons who may move the court under section 26 for reasonable provision and who the court may declare to be a dependant.”

37. As regards the 1st Applicant's children, it is clear that they were grandchildren of the deceased. They therefore fall within section 29(b) of the Act.

38. Part VI Rule 26(1) of the **Probate and Administration Rules** provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

39. There is however no evidence that any of the Applicants were notified as required in Part VI Rule 26(1) of the **Probate and Administration Rules** despite the fact that the other Applicants were entitled in their capacities as the grand children of the deceased.

40. It is therefore clear that the proceedings to obtain the grant herein were defective in substance.

41. As regards the revocation of titles, the 2nd Respondent contends that he acquired his interest in the deceased's estate directly from the deceased only that transfer was not effected during the lifetime of the deceased. He has since gotten himself registered as the proprietor of at least one of the properties. In those circumstances, I agree that these are not the appropriate proceedings to canvass and determine the particular issue.

42. In the premises while declining to revoke the titles issued to the 2nd Respondent I hereby direct that the grant of Letters of Administration (letter 41) issued on the 27th May, 2013 together with the Certificate of confirmation of grant issued on 17th January, 2014 and dated 21st November, 2014 to **Ida Margaret Ndumba** be and is hereby revoked and/or annulled and a fresh grant of letters of Administration intestate be issued in the joint names of **Magdalene Kamene Nziuko** and **Ida Margaret Ndumba**.

43. This matter is hereby referred to mediation for the purposes of distribution of the deceased's estate.

44. There will be no order as to the costs of this application and it is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF JUNE, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kituku for the Applicant

Miss Otieno for the 1st Administrator/Respondent

Mr Mukula for the interested party

CA Geoffrey