



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K. Kemei, J)

SUCCESSION CAUSE NO. 437 OF 2015

GERALD KIOKO NZOMO.....1ST ADMINISTRATOR/RESPONDENT

MARTIN MUSEMBI NZOMO.....2ND ADMINISTRATOR/RESPONDENT

FIDELIS MUASA NZOMO.....3RD ADMINISTRATOR/RESPONDENT

VERSUS

SYOMBUA MUTHAMA MWAVU.....BENEFICIARY/APPLICANT

RULING

1. By a Chamber Summons dated 23rd March 2020 filed under Certificate of Urgency, the Applicant seeks the following orders:-

1. Spent

2. THAT the Certificate of Confirmation of the Grant issued to GERALD KIOKO NZOMO, MARTIN MUSEMBI NZOMO and FIDELIS MUASA NZOMO on 17.12.2019 be revoked.

3. THAT pending the hearing and determination of this Summons, the Intended sub-division and/or distribution of the deceased's estate pursuant to the Certificate of Confirmation of Grant issued on 17.12.2019 be stayed and/or suspended.

4. THAT the costs of this application be borne by the Respondents herein.

2. The Chamber Summons is supported by the supporting affidavit of the applicant. She deponed that she is a biological daughter of Nzomo Nzioki Isua the deceased herein while the 1st to 3rd Respondents who are the administrators of the estate are her brothers. According to the applicant, the respondents petitioned for the grant of letters of administration intestate secretly and without her consent and thus are guilty of concealment of material facts to the court since they didn't disclose to court that consent had not been obtained from her hence the proceedings to obtain the grant were defective in substance. She averred that consent filed on 2nd August 2019 was procured through deceit, lies, duress and undue influence all of which were perpetrated by the 3rd Respondent. A copy of the consent was attached and marked as 'SMM1'. According to the applicant, the 3rd Respondents took advantage of her diabetic and hypertensive medical condition by making her sign a document whose content she didn't fathom. According to her, she is entitled to a share in the deceased's estate. She has urged the court to revoke the certificate of confirmation of grant issued on 17th December 2019 and suspend and/or stay execution of the same pending the hearing and determination of her application.

3. In opposition to the chamber summons, the 3rd Respondent swore a replying affidavit on 4th June 2020 with the authority of the 2nd Respondent. It was averred that they never took out the letters of administration secretly since the applicant was all along aware of the suit in 1997. According to him, the applicant executed documents in support of the suit. According to the 3rd Respondent, all beneficiaries were indicated in the Amended Summons for Confirmation of Grant attached and marked as 'FMN 1'. He averred that the Applicant signed the consent in the presence of her daughter Beth Kaveki Muthama who did translate the content of the consent to her and hence the applicant was never misled. The applicant signed an affidavit sworn on 22.7.2019 where all the properties and proposed mode of distribution were indicated in addition to the consent. The affidavit is attached and marked as 'FMN2'. She averred that further in the affidavit, the Applicant relinquished the right to inherit from the estate and supported the distribution and confirmation of grant and appended her signature. According to the 3rd Respondent, the Applicant is of sound mind with no mental incapacity as no evidence has been provided or adduced in court hence no advantage was taken by the 3rd Respondent of her ill health. The 3rd Applicant averred that the chamber summons herein is baseless and should be dismissed with costs.

4. On 11th June 2020, the court gave directions that the chamber summons be heard *viva voce*. On 12th March 2021, the applicant testified. She stated that she was an objector. She stated that the deceased herein was her father. She stated that she was ready to say all that was deposed in her affidavit. In cross-examination by Kavita, she stated that the deceased was her father. She averred that the administrators had not told her for how long they had done that. She maintained that she was not aware of any concealment of material facts. According to her, she did not want any share of the assets of the deceased. She maintained that she did not want anything from the deceased and the property be shared among the three administrators. In re-examination by Musya, she stated that she does not know about the matters over the deceased herein. She was not seeking for any share of the estate and it is up to the administrators to decide on how to share the property among them. According to her, it is Ngolya and Kioko who brought to her documents to sign yet she had not spoken with them. She was alone when the two placed her thumb print on the documents whose contents she did not know. According to her, she does not lay any claim in the estate of the deceased. In re-examination by Ngolya, she stated that it was Ngolya and Kioko who held her hand and thumb which made the mark on the documents. According to her, the two had not talked to her. They got hold of her hand and placed it on the document. She stated that the administrators are her younger brothers. According to her, she did not send Victoria to Ngolya's office. It was Kioko and Victoria who know about the Identity card. She maintained that she was not interested on a share in the estate of the deceased.

5. I have considered the chamber summons, rival affidavits and the applicant's *viva voce* evidence.

6. Based on the Applicant's oral evidence it is needless for the court to delve into the merits of the application herein for the reason that the Applicant's oral evidence is the opposite of her averments in her supporting affidavit. It is clear from her oral evidence that she does not want any share in the estate of the deceased yet in her supporting affidavit she averred that she is daughter of the deceased hence entitled to a share in the estate. According to the Applicant, she was made to sign documents which she does not understand. In her oral evidence she stated that she does not know any concealment of material facts. She stated that the property should be shared among the administrator. She has sought to set the record straight by claiming that she had been duped by her daughter as well as the 1st administrator and her counsel Mr. Ngolya to place her thumb print on the documents yet she had no objection to the administrators sharing the properties among themselves. During her evidence in chief and cross examination as well as reexamination, she came out as a candid woman who had been forced into the proceedings as an objector against her wishes. It is clear that all these had been the antics of the 1st administrator who had been an objector whose objection was dismissed. Upon the dismissal of the objection, the said 1st administrator must have decided to have a second bite at the cherry by bringing in another objection through the present applicant. There was spirited attempts at cajoling the applicant into supporting the application but all came a cropper when the applicant made it clear that she did not file an objection and that she was not opposed to the administrators sharing the properties among themselves. The applicant's sentiments seem to have been backed up by the female children of the deceased who signed consent to distribution and also renounced their interests to the estate. Consequently, the applicant's averments thus put paid to the summons dated 23/3/2020. In my view the Applicant is not an objector and hence the application is an abuse of the court process.

7. Accordingly, the summons dated 23rd March, 2020 fails and is dismissed

8. It is trite that costs follow the event. The successful party will ordinarily be awarded with costs. However the conduct of a party is a factor to consider by court as held by *Mativo J* in *Orix (K) Limited vs Paul Kabeu & 2 others*[2014]eKLR where it was held *inter alia*:-

“...the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

9. As the parties are members of one family, there will be no order as to costs.

It is so ordered

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE