



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

SUCCESSION CAUSE NO. 306 OF 2015

IN THE MATTER OF THE ESTATE OF TERESIA NZILANI KISUMO (DECEASED)

PETER MICHAEL KISUMO

BENRODGERS MUIA KISUMO.....PROTESTORS/APPLICANTS

MIRIAM KANINI KISUMO

VERSUS

FRED MUASA KISUMO

BERNARD KIIO KISUMO... ..PETITIONERS/RESPONDENTS

RULING

1. The Protestors/Applicants filed a summons for revocation of grant dated 1/08/2019 seeking two main prayers namely: *that the certificate of confirmation of grant issued to the administrators herein be revoked and that the Applicants be appointed Administrators of the estate of the deceased.* The application was supported by an affidavit of the Applicant sworn on even date the gist of which is that the administrators caused themselves to be registered as owners of plot number **Mavoko Town Block 3/2653, 2942, 112 and 754** that emanated from some share in the name of the Applicant's deceased grandfather **Kisumo Mbithi** and in which they had been held in trust for them as beneficiaries. The Applicants maintained that the grant had been obtained by the making of a false statement or concealment from the court of something material to the case. The Applicants also seek to be made administrators of the estate of the deceased herein.

2. The application is opposed by the administrators vide a replying affidavit dated 23/08/2019 sworn by the 1st Administrator wherein it was averred *inter alia: that no evidence has been tendered to show that the properties in dispute emanate from share certificate No. 723 Lukenya Ranching and Farming Co-operative Society or that the deceased herein had engaged in unlawful activities in registering herself as proprietor of the suit lands; that there is no customary trust in existence over the assets of the deceased; that each of the Applicants households had their share of the grandfather's property in their names and which they have disposed of; that the Applicants lack locus standi to file the present application and that they have come to court with unclean hands.*

3. Parties agreed to dispose of the application *via viva voce* evidence. Parties thereafter filed and exchanged list of documents and witness statements.

4. The hearing kicked off in earnest on the 10/03/2021. The protestors/applicants called two witnesses while the Administrators called one witness.

5. **Peter Michael Kisumo (Protestors PW.1)** sought to adopt his witness statement dated 16/12/2019 and filed on 7/01/2020. He testified that the administrators are his cousins since their mother is his aunt. He stated that the three parcels of land namely **Mavoko Town Block 3/2653, 2942, 112 and 754** belonged to his grandfather **Kisumo Mbithi** who was a member of Lukenya Ranching Co-operative Society. He averred that the deceased herein who was a daughter of his grandfather acquired the assets illegally and that he has already lodged a suit at the ELC being **Civil Suit No. 102 of 2019** which is pending determination. He urged the court to order the properties to revert to the name of his late grandfather **Kisumo Mbithi**.

On cross-examination, he confirmed that the Lukenya Ranching Co-operative Society membership number is 723 but that he has not availed the relevant documents to that effect. He also maintained that after the demise of his grandfather the membership shifted to his grandmother

but he had no documentary proof. He confirmed that he has acquired his own properties and that he does not reside on the Lukenya land. On re-examination, he confirmed that the Plaintiff in the **ELC Case No. 102/2019** is his father Paul Kisumo who is a brother to the deceased the subject of these proceedings.

6. **BenRodgers Muia Kisumo (Protestor PW.2)** sought to rely on his witness statement dated 16/12/20219 and filed on 7/01/2020. He testified that they have lodged objection to the administrators for taking over the four properties which belonged to their grandfather *Kisumo Mbithi* who was a shareholder in Lukenya Ranching Company Limited. He maintained that they have been using the Lukenya Properties for over twenty (20) years and that the deceased herein obtained the said parcel of land fraudulently. He averred that they have already lodged a suit at the ELC led by Michael Paul Kisumo. He finally claimed that the four properties should revert back in the name of their grandfather so that the family can share.

On cross-examination, he confirmed that his grandfather was a member number 723 at Lukenya Ranching Co-operative Limited but however did not have the documentary proof. He also admitted that he did not have the green cards showing ownership of the four parcels by his grandfather. He also admitted that he has never sued or reported a complaint against the deceased herein. He also confirmed that he does not reside on the properties in question.

7. **Benard Kiio Kisumo (Petitioners Pw.1)** is the 2nd administrator he sought to rely on his witness statement dated 19/12/2019. He testified that the properties in question belonged to the deceased herein who is their late mother and further averred that the protestors had been aware all along about the ownership of the properties by the deceased herein during her lifetime. He added that it is mischievous of the protestors not to sue the deceased during her lifetime but now raise claims after her demise.

On cross – examination, he confirmed residing on the disputed lands. He averred that the four parcels of land belonged to the deceased herein who was his mother and who used to work with Machakos County Government and had money with which to buy lands. He admitted that he had no evidence showing this his mother worked with Machakos County Government. He denied knowledge of whether his mother had been a member of Lukenya Ranching Co-operative limited. He averred that the protestors knew about the filing of this cause since they all reside in Kasinga.

On re-examination, he stated that his grandfather owned Kasinga farm and not the four disputed properties.

8. Learned counsels for the parties filed and exchanged written submissions. The Protestors submissions are dated 27/05/2021 while those of the Administrators are dated 29/07/2021.

9. **Mr. Musyimi** for the Applicants submitted that the Applicants grandfather one *Kisumo Mbithi* was a shareholder number 723 at Lukenya Ranching Co-operative Society Limited and that out of the said share the three suit properties emanated which were fraudulently registered in the name of the deceased herein in which the administrators have already distributed among themselves to the exclusion of the Applicants. It was the contention by counsel that the deceased had held the four properties in trust for the whole family of the late *Kisumo Mbithi* and that the filing of this cause without involving the Applicants was fraudulent and hence the need to revoke the grant pursuant to the provisions of section 76 of the Law of Succession Act. Finally, it was submitted that as the administrators failed to include all the beneficiaries or file a consent to confirmation and distribution, the application should be allowed as prayed. Reliance was placed in the case of **Ibrahim Hassan & Charles Kimenyi Macharia, interested party [2019] eKLR**.

10. Mr. Nzioka for the administrator submitted that the Protesters have failed to prove their claims on balance of probabilities more specifically that the properties targeted emanated from their grandfather's shareholding in Lukenya Ranching & Co-operative Society limited whose membership number was 723. It was also pointed out that the Applicants failed to produce any documents in that regard or call officials of Lukenya Farming and Ranching Co-operative Society to shed light on whether or not the four properties emanated from the membership number 723 in the name of *Kisumo Mbithi* who was the Protestors grandfather. Learned counsel urged the court to dismiss the application with costs.

11. I have considered the oral evidence tendered herein as well as the submissions filed. It is not in dispute that the administrators herein have since had the grant confirmed and are in possession of a certificate of confirmation of grant. It is also not in dispute that the protestors herein are not children of the deceased herein but are grandchildren of one *Kisumo Mbithi* who incidentally was the father to the deceased herein and who is mother to the administrators. It is also not in dispute that the four parcels of land targeted by the protestors are all registered in the name of the deceased herein *Teresia Nzilani Kisumo*. The issue for determination is whether the protestors have furnished sufficient provisions to warrant for the revocation of grant.

12. Revocation or annulment of grant is provided for under section 76 of the Law of Succession Act as follows:-

“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 on 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of the section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

13. It is noted that the Protestors sought to have the grant revoked on the basis that the Administrators went against the provisions of the Law of Succession Act. Since the protestors are the ones making the allegations, the burden of proof lay squarely on their shoulders to prove as provided for under sections 107 and 108 of the Evidence Act as follows:

107(i) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

107(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

108 the burden of proof in a suit or proceedings lies on that person who will fail if no evidence at all were given on either side.

The Protestors gravamen as contained in the evidence of their two witnesses is that the four suit properties namely **Mavoko Town Block 3/2653, 2942, 112 and 754** emanated from their grandfather's membership number **723** in Lukenya Farmers and Ranching Co-operative Society Limited and that the same should be shared by all the family members and not to be selfishly owned by the Administrators family only. The Protestors have also complained that the Administrators did not involve them during the filing of this Probate Cause and further failed to include them as beneficiaries. The Administrators on their part have contended this by asserting that the properties are registered in the names of the deceased herein *Teresia Nzilani Kisumo* who is their mother and who is a daughter of the late *Kisumo Mbithi*. I have perused the copies of the title deeds and note that they are in one name of the deceased herein and not *Kisumo Mbithi*. Again, the protestors claim that the properties changed hands from the late *Kisumo Mbithi* to his wife *Syongombe Kisumo* before finding their way into the hands of the deceased herein has not been established by any iota of evidence. It is instructive that the Protestors failed to provide the thread of evidence showing that their grandfather's membership number **723** at Lukenya Farmers and Ranching Co-Operative Society Limited generated the four (4) properties as no copy of the membership share certificate was produced and further none of the officials of the said co-operative society were called to give evidence and thereby back the protestors claim herein. I am inclined to believe the version of the Administrators that their late mother *Teresia Nzilani Kisumo* had lawfully acquired the said properties as it emerged from the evidence that she used to work as an employee of Municipal Council of Machakos. There is a payslip for March, 2013 in the name of *Teresia N. Kisumo* personal number **K041** and further there is a copy of allotment letter for agricultural *plot number 31 Kyanzavi Farmers Co-operative limited* which leaves no doubt that the deceased herein was an industrious woman who acquired properties in her own right and which now form part of her estate and have been distributed to her children who include the Administrators herein. No evidence has been shown to the effect that the properties form part of the estate of the Protestors grandfather. The protestors failed to prove that the acquisition of the subject properties by the deceased was fraudulent. It transpired from the evidence that the Protestors family has already lodged a civil suit vide **Machakos ELC No. 102 of 2019** over the subject properties and which is pending determination. The Protestors should therefore ventilate their grievances if any before that court. It seems the protestors and their family have waged a two pronged assault against the administrators in this cause as well as in the ELC over the suit properties. As the Protestors have claimed that the aforesaid properties were held in trust by the deceased then the proper forum to agitate the claim is the ELC where they have already filed suit against the administrators herein. Hence, the present application in my view is a long shot by the Protestors aimed at harassing the administrators for no good cause. I am satisfied that the Protestors have not managed to prove their case beyond the threshold of proof.

14. The Protestors have sought to be appointed as administrators of the estate of the deceased herein. It has since transpired that the Protestors are neither children or dependants of the deceased herein *Teresia Nzilani Kisumo* and hence they do not come under the provision of section 66 of the Law of Succession Act and cannot therefore take up letters of grant of administration of the estate of their late aunt when in fact the said aunt has her own family who should rank higher in the family tree. Again, the Protestors claims that they were kept in the dark while this cause was lodged must be rejected out rightly for the simple reason that the cause was duly filed and gazetted leading to the issuance of grant and which was subsequently confirmed. None of the deceased's family members were left out as alleged. The Protestors had the opportunity to lodge the requisite objection to the making of a grant but they did not do so. Hence, the allegation that the grant was obtained through fraud, concealment of material facts or mis-representation is not factual at all. There is no reason why the grant should be revoked.

15. Finally, it transpired from the evidence that the protestors are actually grandchildren of the late *Kisumo Mbithi* and that they are not children of the deceased herein. They claimed that the deceased herein was their aunt who was a sister to their father. If that is the position, then *ipso facto* the Protestors have no *locus standi* to file the present application and claim to be beneficiaries of their late grandfather since they can only claim under their father. The Protestors admitted that their father *Michael Paul Kisumo* is still alive and is the Plaintiff in the **ELC No. 102/2019** that they have filed against the administrators herein. Protestors have not given reasons why their father has not lodged a claim in these succession proceedings if indeed the alleged properties belonged to their grandfather. The protestors have not presented evidence showing that their father has given them a power of attorney to file the present application on his behalf. It seems to me that the Protestors father who is the plaintiff in the **ELC No. 102/2019** has deliberately kept off these proceedings in the hope that his sons could manage to forestall the exercise of administration of the estate of his late sister. The Protestors have not shown that they are beneficiaries or dependants of the deceased herein *Teresia Nzilani Kisumo* and hence I agree with the administrators arguments that they have no business involving themselves in the succession proceedings of the estate of the administrators mother.

16. In light of the foregoing observation, it is my finding that the Protestors application dated 1st August, 2019 lacks merit. The same is

dismissed with costs.

It is so ordered.

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

D. K. KEMEI

JUDGE