



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 641 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE MBONDO USWII (DECEASED)

RUTH MWELU KIILU.....APPLICANT

VERSUS

MUSA MBONDO.....1ST RESPONDENT/PETITIONER

JULIUS USWII MUTUA.....2ND RESPONDENT/PETITIONER

AND

TITUS MWANGI MBATIA.....1ST INTERESTED PARTY

MOSES KARUGA.....2ND INTERESTED PARTY

CHRISTOPHER W. WACHIRA.....3RD INTERESTED PARTY

LOICE MONYENCHE OGEMBO.....4TH INTERESTED PARTY

R U L I N G

1. This ruling relates to three applications dated 26-8-2015, 22-7-2016 and 15-12-2016 by the objector, petitioners and interested parties respectively. The estate relates to one **Mbondo Uswii** who died on the 2-8-1998 and that a grant of letters of administration was issued to the petitioners herein on 27-2-2007 and which was confirmed on 30-6-2010.

Objector's application dated 26-8-2015

2. The main prayer sought by the objector herein is that the grant issued to the petitioners on 27-2-2007 and confirmed on 30-6-2010 be revoked and/or annulled on several grounds inter alia; that the grant was based on a forged letter dated 27-11-2006; consent by all the beneficiaries had not been obtained; that the petitioners are grandchildren of the deceased and who do not qualify to directly inherit their grandfather's estate; that the grant did not provide for all the beneficiaries of the estate; that the applicant was not provided for at all through her late husband; that the petitioners have threatened her with eviction from her matrimonial home; that the petitioners have abused the grant; that some properties of the deceased have not been included. The application is supported by the affidavit of the objector sworn on even date.

3. The application was strongly opposed by the petitioner herein. The 1st petitioner swore an affidavit dated 30-9-2015 in which he averred inter alia; that the objector's application lodged nine years after the issuance of the grant is an afterthought meant to frustrate the petitioners from holding the properties in trust for the beneficiaries; that the letter from the assistant chief is not a forgery as the said chief participated in signing the surety forms used in filing the petition for letters of grant intestate; that the objector had been allocated three properties which she had sold to the detriment of her own children; that there is no law barring the 2nd petitioner who is a grandson of the deceased from being appointed an administrator as long as the family have no problem with it; that the objector is now working in cahoots with the area chief and purported interested parties with a view to wreaking havoc on the estate.

Petitioner's application dated 22-7-2016

4. The main prayer sought by the petitioners herein is for an order of review of the orders confirming the grant of letters of administration

contained in the certificate of confirmation of grant dated 5-7-2010 on the grounds inter alia; that names of other beneficiaries were inadvertently omitted in the schedule of distribution; that the beneficiaries have now agreed on the mode of distribution of the assets; that it is in the interest of justice that the review sought is granted. The application appears unopposed as the objector has not filed a response thereto. The reason for her failure might be explained from the fact that she duly signed a consent to the mode of distribution of the assets once the review application sails through.

Interested Parties applications dated 15-12-2016 and 20-7-2016

5. The first three interested parties filed the above application seeking to be enjoined into the proceedings as parties to the suit. The 4th interested party later filed a similar application. Other than seeking to be made parties, the said four interested parties seek for the revocation of the confirmed grant dated 5-7-2010 and for an order directing the petitioner to execute all transfer documents in respect of parcels of land the interested parties had purchased from the estate. All the four interested parties swore affidavits in support of their claims. The 1st – 3rd interested parties maintain that they had purchased their properties from Mbukoni Holdings Ltd while the 4th interested party claims to have bought from two sons of the deceased who apparently are not administrators of the estate. The applications were vehemently opposed by the petitioners who averred that the proposed intended parties have never been beneficiaries of the estate of the deceased and that the family of the deceased had not sanctioned anyone to purport to sell properties as alleged. Further, they averred that the 1st – 3rd interested parties should pursue their claims from Mbukoni Holdings Limited and not the deceased who was already dead at the time of the alleged sale and that there is no nexus between the deceased and Mbukoni Holding Limited. It was finally averred that the interested parties herein are intermeddlers in the estate of the deceased since the deceased did not sell the properties to them and hence the application should be dismissed.

6. Parties agreed to canvass the applications vide written submissions. Submissions by counsel for the 1st – 3rd interested parties are dated 30-5-2019 while those by counsel for 4th interested party is dated 7-11-2019 and that those by counsel for the petitioners are dated 4-11-2019. I have considered the said submissions as well as the rival affidavits and the pleadings and/or documents of the parties. It is not in dispute that the names of beneficiaries were not indicated in the certificate of confirmation of grant issued on 30-6-2010 and dated 5-7-2010. It is also not in dispute that the objector herein signed a consent to a proposed mode of distribution of the estate vide the petitioner's application for review dated 22-7-2016. It is also not in dispute that the objector had earlier on 16-5-2016 filed a notice of withdrawal of her objection which was witnessed by seven family members. It is also not in dispute that the alleged sale by properties of the deceased as contended by the interested parties took place after the death of the deceased. It is also not in dispute that counsel for the 1st – 3rd interested parties in his submissions has no objection to the request for review of the orders confirming the grant issued on 30-6-2010. That being the position I find the following issues necessary for determination namely:

- i) Whether the grant made on 27-2-2007 and confirmed on 30-6-2010 should be revoked and or annulled.**
- ii) Whether the orders confirming the grant dated 20-6-2010 should be reviewed.**
- iii) Whether the interested parties have established their claims against the estate of the deceased.**
- iv) What orders can the court grant?**

7. As regards the first issue, Section 76 of the Law of Succession Act provides for the revocation of grants 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 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 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 order or allow; or**
 - ii) To proceed diligently with the administration of the estate;**
 - iii) To produce to the court within the time prescribed, any such inventory or account of administration as is required by the provision of paragraph (e) and (g) of Section 83 or had produced any such inventory or account which is false in any material particular.**
- e) That the grant has become useless and inoperative through subsequent circumstance....”**

The objector vide her affidavit in support of the summons for revocation of grant has made a raft of accusations against the petitioners.

However, the petitioners appear to have substantially responded to all the accusations levelled against them in the replying affidavit. A perusal of the objector's affidavit as well as her notice of withdrawal including a consent to the mode of contribution annexed to the application for review by the petitioners appear to depict the objector as a person who blows cold and hot at the same time. The objector is noted to have filed a notice of withdrawal of the objection together with an agreement reached with some family members dated 16-5-2016. To date the said consent is still on record and has not been expunged at all by the said objector. Again despite filing the present objection, she seems to have reached an agreement with the petitioners when she agreed to sign a consent to distribution of the estate which has been filed in support of the petitioner's review application dated 22-7-2016. This appears to me to lend credence that the objector has since changed her goal post from being an objector to a supporter of the petitioners' quest for review of the orders made on 30-6-2010 since her concerns appears to have been addressed. Suffice to add that she had not filed any opposition to the review application. However, that notwithstanding", I find the petitioners have substantially responded to the objector's allegations. On the issue of forgery of a chief's letter dated 27-11-2006, the petitioners have countered it by averring that the said chief had in fact participated in the lodging of the petition for letters of administration wherein he had signed an affidavit of justification of proposed sureties. The said chief has not denied this fact. There is a claim that the said letter in question is a subject of police investigations but so far no outcome has been availed. The allegation by the objector and the said chief ought to be properly proved. In any event the objector and the chief had been aware of this matter all along and only raised it after a lapse of nine years. Learned counsel for the petitioners has submitted that the objector and the said chief are estopped from disowning the said letter. I must agree with the said submission in that unless the investigations are finalised the said letter which was used in the proceedings leading to the issuance of granted and confirmation of the same ought to be maintained. The petitioners claim that the said chief has been compromised by the objector to deny the contents of the letter for ulterior motives is not farfetched.

The petitioners have also countered the objector's claim that all the family members have not been named and that the appointment of the 2nd petitioner was flawed by averring that the two households of the deceased have been disclosed and that the appointment of the second petitioner was duly sanctioned by a family meeting. They added that even though the 2nd petitioner is a grandson of the deceased he remains a legitimate beneficiary through his late father who was a son to the deceased. The 2nd petitioner being a beneficiary is a good candidate for appointment as an administrator vide the provisions of Section 66 of the law of Succession Act. In any event the court has discretion to appoint administrators of the estate of deceased persons without following any order of preference as long as the justice of the case demands and in order to meet the ends of justice. As the appointment of the 2nd petitioner was sanctioned by the family members vide a meeting dated 14-2-2005 I am unable to fault the said process since he had the family's blessing. Even though the objector has her own misgivings about the appointment, I find her opinion cannot override the decision of the majority of the family members.

As regards the objectors claim that her family has not been catered for, the petitioners have countered this by indicating that the objector already is in possession of three properties which she uses for herself and her children though she is said to have disposed some substantial portions to the detriment of her children as seen by copies of sale agreements annexed to the petitioners replying affidavit. If this is the position, then the objector's assertion that she has been left without any property sounds hollow and unbelievable. Hence the petitioners' assertion that the objector is motivated by nothing other than greed for more land is not farfetched. Suffice to add here that the objector appears to have teamed up with the interested parties herein as she has sworn affidavits in support of their claims against the estate yet the said interested parties are not beneficiaries of the estate of the deceased. It is therefore obvious that the objector does not have the best interest of the estate and hence the present application is in bad faith and meant to throw a spanner in the works of the estate. The objector's express conduct in agreeing to the petitioners' orders dated 30-6-2010 put the present application into doubt and hence the same is for all intents and purposes an abuse of the court process. I find no good reasons have been furnished by the object to warrant revocation of the grant made on 27-2-2007 and confirmed on 31-6-2010. In any case the petitioners' application dated 22-7-2016 which incidentally is supported by the objector properly takes care of her concerns and thus the revocation will not serve any practical and useful purposes in the circumstances since the beneficiaries are anxiously waiting for their entitlements under the estate. Revoking the grant will rewind the clock backwards and will lead to delay yet this is fairly a very old matter that should be brought to a conclusion.

8. As regards the second issue, I note that the grant herein was issued to the petitioners on the 27-2-2007 and confirmed on 30-6-2010. The petitioners have averred that some names of beneficiaries had been inadvertently omitted in the schedule of distribution and are now seeking for a review of the orders on the confirmation so as to include the names of the beneficiaries left out in the confirmed grant. I have perused the said application dated 22-7-2016 and note that there is a consent of all beneficiaries including the objector herein to the mode of distribution of the estate. It is also noted that the objector has not filed any objection to the said application which remains unopposed. Under the provisions of Rule 63 (1) of the Probate and Administration Rules the application of Order 45 of the Civil Procedure Rules 2010 to proceedings initiated under the Probate and Administration Rules is as follows:

“Save as is in the Act or in these Rules otherwise provided and subject to any order of the court or a registration in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Order 5 Rule 2 to 34 and Orders 11, 16, 19, 26, 40 and 50 (Cap 21, sub leg) together with the High Court (Practise and Procedure) Rules (Cap 8 sub leg) shall apply so far as relevant to proceedings under these Rules....”

An applicant is always at liberty to approach a court that had made or issued orders for a review of those orders upon the applicant satisfying certain conditions. Review is in Order 45 (1) (b) of the Civil Procedure Rules 2010 which provides as follows:

“...Any person considering himself aggrieved by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be provided by him at the time when the decree was passed or the order made, or an account of some mistake or error on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay...”

The petitioners have averred that the omission of the names of the beneficiaries in the schedule of distribution was by an honest mistake since they had assumed that the administrators could hold the properties in trust for all beneficiaries of the estate. They have now realized the mistake of failing to list the names of the beneficiaries for whom they now hold the properties in trust. Indeed the petitioners were jolted into action by the objector herein who had filed summons for revocation of grant on that ground. The said objector appears not to oppose the present application as she has duly signed a consent to the mode of distribution of the estate. I am satisfied by the petitioners' explanation

that they had made a genuine error or mistake. Indeed it is common knowledge that most administrators usually take for granted the responsibility bestowed upon them by taking upon themselves the task of running the estates on behalf of the beneficiaries some of whom are not even listed. As the petitioners have beseeched this court for review of the earlier orders made on 30-6-2010', I find the application dated 22-7-2016 has merit. The said application has been supported by a consent duly signed by all the family members including the objector herein. It is therefore just and fair to allow the application so as to enable the petitioners an opportunity to put their house in order and to ensure that all the beneficiaries of the estate are listed in the schedule to be filed. The application being unopposed the same is allowed.

9. As regards the third issue, it is noted that the 1st – 3rd interested parties filed an application dated 15-12-2026 while the 4th interested party filed her application dated 20-7-7-2016 all claiming purchaser's interest in the properties of the deceased. The 1st – 3rd interested parties claim that they had purchased several plots from an entity called Mbukoni Holdings Limited and were issued with share certificates between the years 2000 – 2008 while the 4th interested party claims to have purchased LR No. Mavoko Town Block 12/800 in 2013. It transpired from the copies of the sale agreement that the same were being conducted after the demise of the deceased herein who died on 2-8-1998. The alleged purchasers are said to be sons of the deceased herein but who were not the administrators of the estate and even before a grant of letters of administration intestate were issued. The area chief Johnson Mbaduka Mukia (J.N. Mukio) in his letter dated 31-8-1999 indicates two sons of the deceased Mutua Mbondo and Mukuta Mbondo as administrators of the estate yet that was not the case since the administrators who have been granted letters of administration are different persons. It follows therefore that the purported purchases were done before a grant was issued and thus they amounted to intermeddling in the estate of the deceased. Indeed vide Section 55 of the Law of Succession Act, no distribution or division of property of a deceased person is allowed before a grant of representation is confirmed. In fact Section 45 of the said Act puts it in black and white about the seriousness of intermeddling with the property of a deceased person as follows:

“ (1) Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall; -

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration...”

The purported sale transactions which have been exhibited by the interested parties herein leave no doubt that the same amounted to intermeddling with the estate of the late Mbondo Uswii as they were done before confirmation of grant and by strangers to the estate. Those who purported to be the sellers clearly masqueraded since the genuine administrators were not at all involved. The masqueraders might have roped in the Kambusu sub location assistant chief Johnson Mbaluka Mukio (J.N. Mukio) in order to dupe the interested parties into the transaction. It is rather telling that the interested parties have not involved the alleged sellers to even say something through an affidavit or otherwise concerning the said transactions in answer to the petitioners claim that the sales were clearly unlawful and cannot stand as they were not for the benefit of the estate of the deceased. Hence the actions of the interested parties and the purported sellers amounted to intermeddling of the estate of the deceased. I wish to associate myself with the reasoning of Musyoka- J in the case of Estate of Veronichah Njoki Wakagoto [2013] eKLR where the learned Judge had this to say;

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorised to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and it makes it a criminal offence...”

It is quite clear that the conduct of the interested parties and the purported sellers was in contravention of the provisions of the law and the same being unlawful should not be allowed to stand at all. The purported sellers had no authority to transact any business over the estate of the deceased since they were not administrators. That being the position, I find the interested parties herein are not direct creditors of the deceased within the ambit of Section 66 of the Laws of Succession Act. The interested parties recourse is to pursue any of the beneficiaries who had sold the properties to them once the distribution of the estate is finalised. Suffice to add here that the 1st -3rd interested parties have not seen it fit to involve officials of Mbukoni Holdings Ltd so as to shed light on the nexus between the said entity and the deceased. Further, the said 1st -3rd interested parties have not availed any documents such as sale agreements either involving them and the deceased or any of the beneficiaries. They have only presented share certificates plus beacon certificates issued to them by Mbukoni Holdings Ltd but have deliberately omitted to present the sale agreements. A feeble attempt was made through the presentation of the area assistant chief's letter dated 3-8-1999 that indicated that two sons of the deceased were desirous of selling some properties to satisfy some commitments. This is not enough as the same only entailed an intention to sell assets but no sale agreement was produced so as to prove that indeed the 1st – 3rd interested parties purchased the alleged properties. In any case the said alleged sellers were not the administrators of the estate of the deceased. As they have failed to do so, then the only option is for them to pursue the alleged sellers for redress in any forum deemed appropriate. I wish to associate myself with the learned Justice Makau in the case of **Muriuki Musa Hassan –VS- Rose Kanyua Musa & 4 Others [2-14]** eKLR when he stated as follows:

“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of such land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and the distribution is to file suit against the said Muriuki Musa Hassan. That in any event Muriuki Musa Hassan is entitled to a share of the deceased's estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties...”

Being guided by the above, I find that the appropriate remedy for the interested parties is to pursue the concerned beneficiaries who had duped them for redress if need be once the distribution of the estate is finalised. I note that the objector herein together with the concerned assistant chief of Kambusu sub location have teamed up with the interested parties herein and are relentlessly pursuing the petitioners herein for consideration during the distribution of the estate. However, I must point out that such efforts will eventually turn out to be fruitless as pointed in the above analysis since the only remedy available to the interested parties is to pursue the concerned beneficiaries who purportedly sold properties to them for redress if need be once the distribution of the estate is finalised. They should now leave the administrators to continue with the task of administering the estate for the benefit of the beneficiaries. It is my finding that the interested parties have not established their claims against the estate of the deceased and hence their applications must fail.

10. In the result and in view of the foregoing observations I proceed to make the following orders namely:

a) The objector's application dated 26-8-2015 lacks merit and is dismissed.

b) The petitioner's application dated 22-7-2016 has merit and is allowed in terms of prayer (1) and that a rectified certificate of confirmation of grant is to issue as proposed vide the schedule of distribution annexed to the supporting affidavit.

c) The interested parties application dated 15-12-2016 and 20-7-2016 are dismissed.

d) Each party to bear their own costs.

Dated and delivered at Machakos this 22nd day of April, 2020.

D.K. Kemei

Judge