



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 397 OF 2015

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO. 655 OF 2013)

IN THE MATTER OF THE ESTATE OF FRANCIS NTWIKI MUKUI (DECEASED)

AND

ANN NTWIKI.....PETITIONER

VERSUS

JANET KANYUA RWANDA.....OBJECTOR

R U L I N G

1. This cause relates to the estate of the late **FRANCIS NTWIKI MUKUI** who died intestate on 4th May, 2013 domiciled in Tunyai Sub-Location. He was a polygamous man. This court on 20th September, 2018 appointed the two widows Ann Ntwiki and Janet Kanyua Rwanda as the administratrix of the estate of the deceased. On 16th October, 2018 on the basis of leave granted by this court to apply for confirmation of grant before expiry of statutory period, the 1st administratrix, Ann Ntwiki applied for confirmation of grant and this court on 3rd December, 2018 allowed the application and endorsed the distribution of the estate as per paragraph 11 of the affidavit in support of the confirmation of grant.

2. The 2nd administratrix, Janet Kanyua has now brought an application dated 18th December, 2018 seeking for the following prayers;-

a. That this honourable court be pleased to stay execution of its orders of 3rd December, 2018.

b. That this honourable court be pleased to review, vary, vacate and/or set aside orders of 3rd December, 2018 rectifying the grant issued on 18th September, 2014 and extend time to the applicant to file a protest to the application for confirmation of grant dated 16th October, 2018 and reinstate the application for hearing.

c. That in the alternative the court be pleased to revoke the grant issued on 3rd December, 2018.

e. That the honourable court be pleased to order the Respondent to disclose all details pertaining properties of the deceased situated in Isiolo County.

3. The grounds upon which this application has been brought are as follows:

(i) That the applicant and respondent are both wives of the deceased with applicant being the 2nd wife.

(ii) That the Respondent filed Summons for Confirmation of Grant dated 16th October, 2018 which were fixed for mention on 3rd December, 2018 to confirm filing of a protest but instead the application was allowed rectifying the grant confirmed on 16th September, 2014.

(iii) That the rectified grant includes one Patrick Muthamia Mbaya who is according to her a stranger to the estate but received 18 acres while the applicant got 2 acres.

(iv) That the applicant failed to file protest on time as she was trying to find some properties owned by the deceased in Isiolo which are under exclusive use of the Respondent who did not disclose them.

(v) That applicant has minor children who are under her care and she exclusively fends for them from parcel No.763 and none of them have been catered for including Winfred Gatwiri Ntwiki who is now 18 years old.

(vi) That the sale to Patrick Muthaura Mbaya is illegal and was done without the consent of the applicant or leave of the court.

(vii) That unless stay is granted the children of the 2nd wife will be greatly prejudiced as the Respondent enjoys prime properties and is trying to evict the applicant and her children in collusion with the stranger.

4. The Respondent (Ann Ntwiki) is opposed to the application and has relied on the Replying Affidavit sworn on 7th January, 2019. The Respondent states that the applicant was granted ample time from 5th November, 2018 to file protest but failed to file any despite having been served on 19th October, 2019 with Summons for Confirmation of Grant.

5. The Respondent contends that the applicant's explanations for failure to file protest do not hold any water. She denies that a stranger benefited from the estate stating that this court had determined that the interests of Patrick Muthaura Mbaya be determined during the distribution of the estate.

6. The Respondent further denies holding any other properties forming the estate asserting that the applicant is only out to delay the distribution of the estate so that she continues holding a bigger part of the estate to the detriment of others.

7. In her oral submissions through counsel, the Respondent faulted the document dated 21st June, 2010 exhibited by the applicant as proof of existence of other properties stating that the document is unreliable. It is further contended that existence of other properties is not a ground to nullify a grant.

8. This court shall first consider and determine this application before considering the application dated 7th January, 2019 which was canvassed contemporaneously with this application dated 18th December, 2018.

9. Looking at the prayers in the application dated 18th December, 2018, it seeks to set aside orders issued on 3rd December, 2018 purporting to have rectified a grant issued on 16th September, 2014. This is misleading and erroneous because the orders given on 3rd December, 2018 was confirmation of a grant issued on 20th September, 2018. This court confirmed the grant in terms of paragraph 11 of the Supporting Affidavit of the Respondent sworn on 16th October 2018. The Summons for Confirmation of Grant was dated 16th October, 2018 and it was seeking to confirm the grant issued on 20th September, 2018. The issue of rectification of grant issued on 16th September, 2014 therefore does not arise.

10. The main gist of the applicant's contention is that she was not able to file protest on time and she appears to have taken issue with this court for confirming a grant on a date slated for mention to find out if a protest had been filed. It must be noted that under **Section 47 of Law of Succession Act** and **Rule 73** of the Probate and Administration Rules gives this court inherent powers to pronounce such decrees or make any orders that may be expedient and that meet the interest of justice. It therefore matters little whether a matter is slated for a mention, hearing or for any other purpose, this court sitting as a probate court is not limited on what it can order. Having set out the position in law, a look at the facts or the proceedings herein reveals that on 5th November, 2018, the applicant attended this court and confirmed that she had been served with Summons for Confirmation of Grant dated 16th October, 2018. She requested for two weeks to file a protest and this court granted her her request and fixed the matter for mention on 3rd December, 2018 to find out if any protest would have been filed. Come the 3rd December, 2018, the intended protestor had not filed any protest and the reasons given for the default was that she was still tracing some of the purported properties comprising the estate. There was no mention of a stranger or anything to do with fairness on the question of distribution of what had been listed as properties comprising the estate at that stage. In any event the suggested mode of distribution appeared equitable to both houses of the deceased and hence the basis upon which this court determined that the grant be confirmed as per the suggested mode. This is further directed that if there are other properties that might be discovered later the same would be subject of review or rectification.

11. This court has now been shown a copy of consent from County Council of Isiolo in regard to plot No. 1475 Bulapesa but this court finds the document is unreliable to determine ownership because besides being a copy whose authenticity is difficult to verify, some writings on the foot of the letter indicates that the property was sold in 2005. This court therefore cannot be moved to vary or review a grant on the basis of such a document.

12. On the question of whether Patrick Muthaura Mbaya is a stranger to the estate or not, this court finds that the said Patrick Muthaura Mbaya is not a stranger to both parties in this cause. He is the one who rescued the estate from being auctioned by a creditor KIE (Kenya Industrial Estate). He entered into a sale agreement with the Respondent for 18 acres out of South Tharaka/Tunyai A/763 on 18th December, 2014 after the grant had been confirmed on 16th September, 2014. He was a purchaser for value and despite revocation of that grant by this court on 20th September 2018, the purchaser's interests were protected under **Section 93 of the Law of Succession Act** and that is why this court directed in its ruling that the legitimate interests of the purchaser be determined during the distribution of the estate. This court therefore finds the applicant's claims that Patrick Muthaura Mbaya be treated like a stranger to be without any basis. His purchase of part of the estate was valid and legitimate. There is no evidence laid before me to find the transaction that gave rise to his interest illegal or fraudulent.

13. This court pronounced itself on the question of more time requested by the applicant to search for other properties that may be part of the estate of the deceased. The same reason cannot be revisited again by the applicant and expect a diversion of the directions given. For purposes of clarity, this court confirmed the grant as per what the Respondent listed as comprising the estate and the distribution thereof. The applicant was and is still advised that if she can trace any other property belonging to the deceased, she can move this court to review

its order and distribute whatever else was left out. This court must however be convinced that such property (properties) belong to the deceased before issuing any other orders(s) .

14. I do not find any basis to direct the Respondent any less than the applicant to disclose other properties belonging to the deceased. Both parties are equal administratrixes and therefore what the applicant can do can be done by the Respondent as well. This court can only be moved on the basis of evidence and the law but not on speculations.

15. Turning to the application dated 7th January, 2019, the applicant, Ann Ntwiki is basically asking this court for orders to the OCS to assist in implementing the grant confirmed on 3rd October, 2018. She has deposed that the Respondent Janet Kanyua violently chased away the surveyor when he went to the ground to carry out survey work.

16. This court has considered the response made by the Respondent whose only ground to oppose the application is that she is still contesting the distribution adopted by this court. This court having made a finding in the application dated 18th December, 2018 which could have been the only impediment in this application, there is only way the application dated 7th January, 2019 can go. The same should be allowed in order to bring this matter to an end.

In conclusion, this court finds no merit in the application dated 18th December, 2018 for the aforesaid reasons. The application is dismissed with costs. On the other hand the application dated 7th January, 2019 is merited and is hereby allowed in terms of prayer 1 in order to finalize the distribution and administration of the estate and to bring this matter to a close.

Dated, signed and delivered at Chuka this 26th day of February, 2019.

R.K. LIMO

JUDGE

26/2/2018

Ruling signed, dated and delivered in the open court in presence of Kariuki for 1st administratrix and Kijaru holding brief for Mutegi for 2nd administratrix.A

R.K. LIMO

JUDGE

26/2/2019