



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 194 OF 2015

IN THE MATTER OF THE ESTATE OF MATUKU KITHIA (DECEASED)

JACOB MUTUA MATUKU.....APPLICANT

VERSUS

TITUS PETER NDANA.....RESPONDENT

RULING

1. **Jacob Mutua Matuku**, the Applicant approached this Court on the **26th day of February, 2009** seeking an order that the Grant of Letters of Administration made to **Titus Peter Ndana** on the **25th June, 2004**, and confirmed on **2nd March, 2005** in the **Senior Resident Magistrate's Court at Kitui** in his **Succession Cause No. 33 of 2004** be revoked and/or annulled. The Application is premised on the grounds that:

- (i) The Grant was obtained by the making of a false statement and/or concealment from the Court of something material to the case and/or,
- (ii) 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.
- (iii) It is in the interest of justice to have the Grant revoked and/or annulled.

2. The Application is supported by an affidavit sworn by the Applicant where he deposes that he is the son of **Matuku Kithiia Nduu**, the Deceased, and so are his brothers **Kavindya Matuku** and **Musyoki Matuku**. That his father died on **25th March, 1996** and at the time he was the registered sole proprietor of all the parcel of land known as **Mutonguni/Nzala/382**; After the demise of his father the Respondent sued him and his two (2) brothers in **Kitui SRMCC No. 381 of 1999** claiming an order of injunction and general damages in respect of **10 acres** of land being part of the entire parcel that measured **6.7 Hectares**, a suit that was withdrawn on the **13th July, 2006**.

3. That he petitioned for Letters of Administration in **SRM Succession Cause No. 163 of 2006**, and a Grant was issued to him on **30th November, 2007** and at the point of hearing summons for confirmation of the grant he was directed to avail a Search Certificate for the sole asset of the Deceased, being Land No. **Mutonguni/Nzala/382** and on conducting the search it turned out that the land had been transferred and/or registered in the name of the Respondent. He enquired further and discovered that the Respondent filed a **Succession Cause Kitui SRMCC No. 33 of 2004** in respect of his father, a grant was issued on the **25th June, 2004** and confirmed on the **2nd March, 2005**. Consequently he was registered as the Proprietor of the land by way of transmission and a title issued. That it was indicated that the Respondent petitioned for Letters of Administration as a grandson of the Deceased. That he (Applicant) and his brothers were entitled to the grant of representation to the Estate in priority to the Respondent or any other person as their mother had pre-deceased their father.

4. Further, he averred that the Respondent was on a deliberate mission to grab their father's land as his actions were fraudulent. In that he never disclosed to the Court that there were other persons entitled to the grant of representation to the Deceased in priority to him; he never issued, served and/or prosecuted a citation to accept or refuse Letters of Administration against them; he knew his claim was only a portion of the land, (a fact denied) yet he proceeded to have the entire parcel of land transferred and/or registered in his name; And as a result they have been disinherited.

5. In response, the Respondent opposed the Application. He filed an affidavit in reply where he deposed that the Deceased was his maternal grandfather. That his grandfather had three (3) sons, the Applicant being the third born. That his grandfather had several parcels of undemarcated land in **Mutonguni** which after declaration of adjudication sections were given plot numbers thus:

- (i) **Plot No. 549, Nzala Adjudication Section.**

- (ii) *Plot No. 550, Nzalae Adjudication Section.*
- (iii) *Plot No. 417, Nzalae Adjudication Section.*
- (iv) *Plot No. 418, Nzalae Adjudication Section.*
- (v) *Plot No. 3433, Kaimu Adjudication Section.*
- (vi) *Plot No. 382, Nzalae Adjudication Section.*
- (vii) *Plot No. 549, Nzalae Adjudication Section.*

6. That the homestead of his grandfather stood on **Parcel No. 549 Nzalae Adjudication Section** where he was buried with his wife. That his grandfather distributed his parcels of land to himself and three (3) sons thus:

- (i) *To Jacob Mutua Matuku, Plot No. 549, Nzalae Adjudication Section.*
- (ii) *To Jacob Mutua Matuku, Plot No. 417, Nzalae Adjudication Section.*
- (iii) *To Musyoki Matuku Kithiia, Plot No. 418, Nzalae Adjudication Section.*
- (iv) *To Musyoki Matuku Kithiia, Plot No. 550, Nzalae Adjudication Section.*
- (v) *To Kavindya Matuku Kithiia, Plot No. 3433, Kaimu Adjudication Section.*
- (vi) *To himself, Plot No. 382, Nzalae Adjudication Section.*

That his grandfather's **Plot No. 382 Nzalae Adjudication Section** was situated in **Kasakini Sub-Location, Plot No. 3433 Kaimu Adjudication Section** is in **Kivani Sub-Location**, while the other parcels **Plot Nos 549, 550, 417 and 418 Nzalae Adjudication Section** were situated in **Nzalae Sub-Location**.

Initially his grandfather had allowed his uncle-in-law **John Kitheka Nzina** to cultivate a portion of **Plot No. 382 Nzalae Adjudication Section**. On **30th December, 1989**, his grandfather sold the plot to his mother **Kakunu Ndana** who purchased it for him. When he became of age, his grandfather entered into a formal agreement of sale with him on **20th April, 1995** which was witnessed by the Applicant and **John Kitheka** on the part of his grandfather while his witnesses were **Mwaniki Ndana, Munyao Muatha** and **Kakunu Ndana**, an agreement that was executed before **Kinyua Musyoki, Advocate**. His grandfather died on **25th March, 1996** before the adjudication register was closed to enable him transfer title to land to him and at the close of the Adjudication Register and subsequent registration of the parcel of land, parcels of land were registered as follows:

- (i) *Nzalae/Mutonguni/549*
- (ii) *Nzalae/Mutonguni/550*
- (iii) *Nzalae/Mutonguni/417*
- (iv) *Nzalae/Mutonguni/418*
- (v) *NzalaeMutonguni/382*
- (vi) *Mutonguni/Kaimu/3433*
- (vii) *Nzalae/Mutonguni/549*

7. That at the time of death his grandfather had distributed his Estate such that the only parcel of land which was in his name was **Nzalae/Mutonguni/382** and it was within the knowledge of the Applicant that the property was not available for distribution.

8. He denied the allegations of fraud on his part and stated that he withdrew the Civil Suit and duly filed a **Succession Cause No. 33 of 2004** where the grant was issued and confirmed and the parcel of land that he had purchased was decreed to him.

9. Directions in the matter were given where the Application was to be canvassed by way of written submissions but both parties filed submissions out of time without leave of the Court. However, affidavit evidence being on record, this Court would still determine the Application on merit.

10. Circumstances under which a grant of representation may be revoked are provided for in **Section 76** of the **Law of Succession Act** that provides thus:

“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;

(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; 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 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.”

11. It has been alleged that the Respondent herein acted fraudulently by concealing material facts to the Court at the point of obtaining the grant that resulted into a parcel of land being transmitted to him. The elementary principle of law is that he who alleges must prove. **(See Section 107 of the Evidence Act).**

12. In petitioning for Letters of Administration the Respondent did so in his capacity as the grandson of the Deceased. He disclosed the names of the beneficiaries of the Deceased, his sons and daughters who had survived him, the Applicant inclusive. The learned trial Magistrate failed to enquire whether these individuals had consented to the Respondent taking out Letters of Administration in respect of the Estate of the Deceased. In as much as the Court is seized of the final discretion as to the persons to whom a Grant of Letters of Administration should issue, it ought to be guided by an order of preference. In a case like the instant one where the Deceased was not survived by a spouse, looking at the order or priority, the Applicant and his siblings should have been considered to administer the Estate of the Deceased for they had priority over the Respondent who is a grandson of the Deceased **(See Section 66 of the Law of Succession Act).**

13. At the hearing of the Application for confirmation of a grant a Court is supposed to interrogate the information on record and satisfy itself as to the expediency of confirming the Applicant as the holder of the grant, and in doing so it must also look at the interest of persons beneficially entitled to the assets belonging to the Estate of the Deceased **(See Rule 41(2) of the Probate and Administration Rules).**

14. This is a matter where the Respondent disclosed existence of the children of the Deceased in Paragraph 2 of the affidavit in support of summons for confirmation of grant, and in paragraph 5 it was stated that he was to inherit the asset that belonged to the Estate of the Deceased absolutely. The averment was not supported by any consent from the beneficiaries of the Estate.

15. At the hearing of the Confirmation of the Grant only the Respondent appeared. It was urged that no objection had been raised. On that basis the grant was confirmed.

16. The Applicant has stated that he also obtained a grant in respect of the same property, but when he filed an Application for confirmation it was discovered that the title **Mutonguni/Nzala/382** was in fact in the name of the Respondent.

17. It is however argued by the Respondent that prior to the demise of the Deceased he had sold the Land Parcel Number **Nzala/Mutonguni/382** to him (the Respondent) while under adjudication which vested the proprietary interest therein in him, a transaction that the Applicant witnessed. That the Deceased distributed his Estate to all his three (3) sons their respective parcels of land and entered into a formal agreement with him (Respondent). The copy of Sale Agreement was annexed to his affidavit. In annexure **JMM1‘b’** to the Applicant’s affidavit, a defence they had filed in Court, it was averred that the sale transaction was not enforceable in law. What is evident is also the fact that they dispute the fact of the Respondent having purchased the whole parcel of land as opposed to only **ten (10) acres** of land out of the **6.7 Hectares**.

18. It is therefore apparent that at the point of filing the **Probate and Administration Cause**, the Respondent was aware of the dispute that existed between him and his three (3) maternal uncles over the portion of land an asset that formed the Estate of the Deceased. This material fact should have been disclosed to the Court. It would have been imperative for the Court to hear the beneficiaries of the Estate of the Deceased prior to issuance of the grant and/or confirming it. Therefore the Application herein meets the threshold of granting the order sought.

19. In the premises, I grant orders as follows:

(i) The Grant of Letters of Administration Intestate to the Estate of **Matuku Kithiia** issued herein and confirmed on the **2nd March, 2005** be and is hereby revoked.

(ii) The title deed issued shall be cancelled.

(iii) Parties are directed to start the process afresh.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of February, 2019.

L. N. MUTENDE

JUDGE