



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 245 OF 2008

In The Matter of the Estate of M'Ikiome M'Itwerandu alias M'Ikiome M'twerandu (Deceased)

JOHN MWITI 1ST PETITIONER

PAUL NTEERE M'IKIOME 2ND PETITIONER

-Versus-

STANLEY KIUGU 1ST OBJECTOR

ISAAC KIRIMI 2ND OBJECTOR

JUDGMENT

[1] **M'IKIOME M'ITWERANDU** alias **M'IKIOME M'TWERANDU** ("the deceased") to whom this succession cause relates died on 26th April 2008. The petitioners petitioned for grant of letters of administration where they stated that the deceased was survived by:

1. Elizabeth Churubi - **Widow**
2. Mary Mbuthu Nkoroi - **Daughter**
3. Jane Gaceri Mwongera - **Daughter**
4. Grace Kinanu Njue - **Daughter**
5. William Kimonye M'Ikiome - **Son**
6. Paul Nteere M'Ikiome - **Son**
7. John Mwiti M'Ikiome - **Son**
8. Stanley Kiugu - **Son**
9. Janet Karwitha - **Daughter**
10. Edward Mugambi - **Daughter**
11. Mary Mumbi Wachira - **Daughter**

His asset was listed as **L. R. ABOTHUGUCHI/GITHONGO/111** (hereinafter '*the Suit Land*'). On 28th April 2009 the petitioners were issued with grant of letters of administration intestate which were confirmed on 2nd July 2009.

[2] The objectors filed a summons dated 18th November 2011 pursuant to **Section 76 of the Law of Succession Act CAP 160, Rule 44 (1) of the Probate and Administration Rules** and **Section 128 of the Registered Land Act** seeking *inter alia* revocation and or annulment of the grant herein. The grounds upon which the application is premised are set out in the application and the supporting and supplementary affidavit of Stanley Kiugu sworn on 18th November 2011 and 10th May 2012, respectively. It is contended that their father bequeathed them 2 acres of the Suit Land but to be held by their uncle, the deceased, in trust for them until they became of age.

[3] They supplied the facts to be that, in 1963 the deceased had the Suit Land registered in his name. When they became of age they claimed the 2 acres. This prompted the deceased to file suit CMCC No. 430 of 1984 seeking their eviction from the land. The suit was referred to the elders. They applied for review of the referral order but the request was declined by the magistrate. The decision provoked an appeal in Meru High Court Appeal No. 111 of 1999 in which the High Court directed that the matter be heard in court. But the deceased passed away before the matter was determined.

[4] The application was opposed vide the replying and further replying affidavit of Paul Nteere M'Ikiome sworn on 6th March and 5th June 2012, respectively. He deposed that the cause was not filed secretly and he did not conceal anything material. He denied that the objectors are beneficiaries or dependants but mere trespassers on the Suit Land occupying a small portion of it. According to the deponent, the father of the objector had been given a small portion of the estate as temporary shelter as he gets land elsewhere. He got and moved to land parcel No. NTIRIMITI SETTLEMENT SCHEME/14 measuring more than 5 acres.

Testimonies

[5] Viva voce evidence was adduced. **OW1 Stanley M'Kiugu M'Kirigia** testified by reiterating what he had stated in his filings. He added that his father owns NTIRIMITI SCHEME PLOT NO. 14 measuring five acres. Three of his brothers live on the said land together with their families. Their father went to live with them and they remained on the Suit Land which was left to them.

[6] **OW2 Peter M'Muguuna M'Imanyara** adopted his statement filed on 5th September 2016 as his evidence in chief. He testified that the objectors are children of his uncle and that the Suit Land is family land. M'Kiirigia, the objectors' father was left the land by his grandfather. The deceased was given the Suit Land because M'Kirigia was in jail. Consequently, the objectors should be allowed to occupy their respective portions since the elders had decided so in 1984.

[7] After the close of their case, the petitioners submitted the affidavits of Paul M'Ikiome dated 6th March and 5th June 2012 and also three statements dated 24th October 2018 in evidence before closing their case.

Submissions

[8] This matter was canvassed by way of written submissions. The objectors submitted that their occupation on the land and that land is ancestral land has not been disputed. Consequently, they urged the court to allow their application.

[9] The petitioners submitted that the objectors are not beneficiaries and heirs of the estate and do not stand in the same degree with or in priority to the petitioners. Hence, the petitioners did not owe them any legal obligation to inform or seek their consent. The argued that they have no right to inherit through this succession suit as the deceased died trying to evict the objectors from his land. For that reason, the court should dismiss the applications. According to them, the objectors have failed to demonstrate why the grant should be revoked.

ANALYSIS AND DETERMINATION

[10] Mine is to determine whether there are grounds to revoke and or annul the grant herein.

[11] **Section 76 of the Law of Succession Act** sets out the grounds on which a grant may be revoked and or annulled. In this cause the objectors claimed that; (1) the cause was filed secretly; (2) the grant was obtained fraudulently by concealment of material facts; and (3) and by making of false statements to the court.

[12] A scene visit was carried out and it was concluded from the report thereto that both the objectors and petitioners have been and are in occupancy of the Suit Land and each has developed their respective portions substantially. The report does not however state the actual acreage of the portion occupied by each person. The parties have thrown spanners to the works; the objectors claim to be occupying 2 acres while the petitioners claim the objectors occupy just a small portion.

[13] The foregoing notwithstanding, I note that the objectors allege that the deceased held 2 acres in trust for them. Yet, according to the plaint filed by the deceased, the objectors were trespassers and so he sought for their eviction. By the order of court in High Court in HCCA No. 111 of 1999 the case was referred back and was to be heard by the court. It appears that the said case is still pending before the court and no determination of the issues therein has been made. I will juxtapose the purport of the said case against the objector's claim; that is, the deceased held two acres of the suit land in trust for them. The claim throws me to Rule 41 of the Probate and Administration Rules.

[14] **Rule 41 (3) of the Probate and Administration Rules** states that:

“(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

[15] In the case of **In re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** it was held:

“27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the

survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

...

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table.”

[16] Following the reasoning stated in the case above, I take the view that the claim by the objectors is founded on customary trust. They are claiming to be beneficially interested in a share in the estate property. According to me, such claims cannot be conveniently determined in this cause. I will give ample reasons for this.

[17] I hold the view that claim of customary trust in land should be decided by the Environment and Land Court (hereafter ELC); and any decree arising therefrom shall be presented to the probate court and be given effect. But, before a declaration of a trust, such claims cannot be a basis for revocation of grant. In other words, a grant should not be revoked merely because a person is making a claim of trust in the estate property. The trust must be established and declared by a competent court especially now that the grant has been confirmed. In the circumstances of these proceedings, the objectors have not proved to be beneficiaries of the estate of the deceased or persons whose consent was necessary before filing of proceedings. They have therefore not established grounds for revocation of grant.

[18] In passing, unless the pending suit has abated and cannot be revived, it should be able to resolve the issue in controversy. However, the objectors being the claimants should explore the best way of having their claim resolved in ELC. I cannot even set aside the portion in issue under rule 41 because the grant has already been confirmed. In view of the claims made, only and order of competent court will be given effect by this court. Again, absence of any active but appropriate proceedings on the issues in controversy lessens the weight of the objectors claim.

[19] In the upshot, I dismiss the application for revocation of grant. I make no orders as to costs.

Dated, signed and delivered in open court on 30th May, 2019

F. GIKONYO

JUDGE

In presence of

Ann for petitioner

M/s Rimita for Kiautha for objector

F. GIKONYO

JUDGE