



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.372 OF 2000

IN THE MATTER OF THE ESTATE OF MAILU NTHAKYO *alias* THOMAS MAILU NTHYAKYO (DECEASED)

GEORGE MUINDE MAILUOBJECTOR

VERSUS

1. STANSLAUS MUIA MAILU

2. KASIA MAILU

3. KILONZO MAILU

4. MBITHI KILONZO

5. LEONARD KIAMBAPETITIONERS/RESPONDENTS

RULING

1. Mr. Kitheka learned counsel for the Petitioners/Respondents has urged this court to give directions on this matter. He submitted that the matter had substantially been dealt with by this court when it rejected the Protestor's protest and that confirmation was to proceed as proposed by the Petitioners. Counsel further noted that the protestor is coming up again with the same protest that had already been dealt with and which according to him is wrong. Finally he submitted that the ruling of this court has not been appealed against and parties cannot go back the same route again.

2. Mr. Kamolo learned counsel for the Protestor submitted that the Protestor is not satisfied with the mode of distribution and has now filed a protest. He submitted that the earlier protest related to an objection and not on proposed mode of distribution. Counsel urged the court to give directions on the protest dated 17/05/2019 filed in response to the summons for confirmation of grant dated 20/3/2019 since his client is entitled to give his views on the latest mode of distribution.

3. I have noted the oral submissions of the learned counsels for the parties herein. It is not in dispute that the Petitioners/Respondents had filed an amended summons for confirmation of grant dated 24/07/2002 and filed on 29/08/2002 to which the protestor filed affidavits of protest dated 25/07/2002 and 8/10/2002. It is not in dispute that the said summons and protest was heard via viva voce evidence and that a ruling thereon was delivered by this court on 19/12/2018 in which the protest was dismissed and the petitioners/respondents allowed to proceed with the confirmation since the proposed mode of distribution by the petitioners was in tandem with the provisions of Section 38 of the Law of Succession Act. It is not in dispute that the Petitioners/Respondents have filed another summons for confirmation of grant dated 20/03/2019 to which the Protestor has filed an affidavit of protest dated 17/05/2019. It is therefore clear that the direction this matter is taking is likely to lead to another hearing of the protest afresh yet the same had been heard and a determination thereon made. This explains the confusion and dilemma the parties now find themselves in and hence the need for fresh directions to be made. From the look of things there is need to interfere with the earlier directions made on 4/04/2019 and 3/07/2019. This court has inherent powers to make such orders as are appropriate in the circumstances of this case. Starting with the petitioners/respondents, I note that they have filed a fresh summons for confirmation dated 20/03/2019 wherein only one property namely **plot No.37 Kitanga Settlement Scheme** is proposed for distribution. The other two properties have been left out. This is a departure from the earlier summons which formed the basis of the protest which has been finalized. The Petitioners must stick with the earlier amended summons dated 24/07/2002 and filed on 29/08/2002. The present application ought not to have been filed and must be struck out. As for the Objector it is noted that the protest has since been dismissed and hence the present protest dated 17/05/2019 is aimed at getting a second bite at the cherry which is untenable. The objector cannot be allowed to swing back the clock by seeking this court to conduct another hearing of the protest. This matter had been in court since the year 2000 and it is only fair and just that the same be brought to a closure. In any event the ruling dated 19.12.2018 has not been appealed against. Hence the Objector's protest dated 17/05/2019 must also be struck out. I do not see how the objector will be prejudiced as he will get an equal share of the estate as proposed in the amended summons for confirmation of grant dated 24.7.2002 and filed on 29.8.2002.. Under the Provisions of Rule 73 of the Probate and Administration Rules, the court has inherent power to make such orders as are expedient to meet the ends of justice. The same provides as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

4. The import of the ruling dated 19/12/2018 is that the petitioners were to proceed with the confirmation of the grant pursuant to the amended summons for confirmation of grant dated 24/07/20102 and filed on 29/08/2002. They were not to file a fresh application. There was a genuine error which this court of its own motion (suo motto) can step in to rectify the situation by issuing fresh directions as now sought by the parties herein. I have perused the record and note that the grant issued to the four administrators is missing and thus the need to issue a fresh one for record purposes. I also note that the petitioners in the latest application seek to introduce a purchaser who is to benefit from the estate yet the purchase was made between the beneficiaries and the purchaser yet the grant had not been confirmed. The said purchaser did not file a protest and which could not even have succeeded as he is not a creditor to the estate. The said purchaser has to wait and to pursue the sellers after confirmation. Consequently, I now proceed to issue the following directions:-

(a) The earlier directions made on 4/4/2019 and 3/7/2019 are hereby set aside and/or vacated.

(b) The summons for confirmation of grant dated 20/03/2019 and the affidavit of protest dated 17/05/2019 are hereby struck out.

(c) The summons for confirmation of grant dated 24/07/2002 and filed on 29/08/2002 is allowed as prayed with the following orders:-

(i) A grant be and is hereby issued in the names of KASIA MAILU NTHAKYO, KILONZO MAILU NTHAKYO, GEORGE MUIINDE MAILU and STANISLAUS MUIA MAILU.

(ii) A certificate of confirmation of grant is to issue and the estate be distributed as proposed vide paragraph 6 of the Affidavit of Kasia Mailu sworn on 24/07/2002.

(d) Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **November, 2019**.

D. K. Kemei

Judge