



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PROBATE AND ADMINISTRATION CAUSE NO. 76 OF 2004

IN THE MATTER OF THE ESTATE OF MUOKI MUASYA (DECEASED).

MBWELE MUOKI.....1ST PETITIONER/RESPONDENT

DENNIS MUOKI.....2ND PETITIONER/RESPONDENT

VERSUS

MARY NZILANI MUOKI.....APPLICANT

RULING

1. By Summons dated 19th October, 2018, the Applicant herein, **Mary Nzilani Muoki**, seeks the following orders:

- 1) That this honourable court reopen this matter Succession Cause No. 76 of 2004 that was closed vide Court order dated 1-9-2016 by Hon. Justice E. Ogola.**
- 2) That this honourable court revokes the Grant of Letters of Administration issued to Mbwele Muoki & Dennis Muoki dated 30-11-2009 on 1-9-2016.**
- 3) That this honourable court issue order s allowing the Applicant to file and petition this Court for Grant of Letter of Administration Ad litem in respect of the above named Muoki Muasya (Deceased) be issued to Mary Nzilani Muoki for the purposes of suing Mbwele Muoki on the grounds that the grant used to transfer the Deceased's Land Parcel No. Makueni/Uno/a/58 to Mbwele Muoki & Dennis Muoki was obtained fraudulently by making false statement and by means of untrue allegation of facts essential in point of law to justify the grant and the transfers.**
- 4) A declaration that Mary Nzilani Muoki is also one of the beneficiaries of the Estate of Muoki Muasya (Deceased) by virtue of being his biological daughter and was not involved in the entire succession process.**
- 5) That pending the hearing and determination of this application the Grant of Letters of Administration in custody of Mbwele Muoki & Dennis Muoki (Deceased) be restrained and/or withdrawn from the Petitioners herein from using the same in any other manner and dealings at the detriment of the Applicant.**

6) The costs for this application be borne by the Respondent herein.

2. According to the applicant, she is a daughter of the deceased herein, **Muoki Muasya**, hence one of the beneficiaries of the estate of the deceased while the 2nd petitioner herein, **Dennis Muoki**, was her biological brother but is now deceased. It was the applicant's case that the petition herein was fraudulently made by making of a false statement to the court to wit that the 1st petitioner herein, **Mbwele Muoki**, was married to the deceased and therefore had priority in terms of petitioning for the said grant. In addition, the fact that the applicant was a biological daughter of the deceased and therefore a beneficiary of his estate was similarly concealed from the court and her consent was never sought before the petition was filed and though she was listed in the list of the beneficiaries of the estate, she was unaware of the petition never signed.

3. According to the applicant, the deceased was only married to one wife who was her late mother. Therefore, the relationship between the deceased herein and the 1st petitioner, if any, did not qualify as a marriage because at the time of his death the deceased was not married. The applicant complained that her name was omitted in the certificate of title for land parcel no. Makueni/Unoa/58 in order to enable her inherit the same. According to the applicant she only came to realise the existence of the petition in September, 2018 when one **Justus Mutie**, who purchased the said property from the family disclosed to her that the 1st petitioner had obtained a judgement against him and there was an intention to evict him from the said property. It was then that the said **Justus Mutie** informed her that the petitioners had petitioned for letters of administration in 2004 and obtained certificate of confirmation of grant dated 30th November, 2009 but which was revoked by an order dated 1st September, 2016.

4. The applicant therefore sought an order for revocation of the grant to enable her apply for limited letters of administration *ad litem* for the purposes of suing the 1st petitioner for cancellation of the certificate of title to the said parcel of land in the ELC Suit No. 60 of 2010. She proposed that after the said revocation, the estate of the deceased be administered by her as the only surviving daughter and child of the deceased as the deceased died without a spouse.

5. In her submissions the applicant reiterated the foregoing and relied on section 76 of the **Law of Succession Act** and Rule 26 of the **Probate & Administration Rules**. as well as **Re Estate of Wahome Mwenje Ngonoro Deceased [2016] KLR**. It was submitted that when this court revoked the grant of letters of administration issued to **Mbwele Muoki** and **Dennis Muoki** on 30th November, 2009 on 1st September, 2016 the 1st petitioner/Respondent was stripped of her power to act or continue act in as the legal representative in this cause hence there is a need for the applicant to obtain the special limited grant sought herein.

6. The summons was opposed by the 1st petitioner. According to her, she is a widow of the deceased herein. The deceased had two wives namely **Mbwele Muoki**, herself and **Kalekye Muoki** who is deceased. According to the 1st Petitioner, the petition was filed by herself and a member of the house of the said **Kalekye Muoki**, **Dennis Muoki**, and a grant was jointly made to them and has long been confirmed. She confirmed that the applicant herein is a sister to the said **Dennis Muoki** and that the only asset of the deceased's estate, land parcel no. Makueni/Unoa/58 has long been registered in the names of both herself and the said **Dennis Muoki**, the applicant's brother, to hold in trust for their benefit and the benefit of the other beneficiaries of the estate of the deceased.

7. The said land, she averred, is currently unlawfully occupied by one **Justus Mutie Kioko** who alleges to have bought the same from one of the deceased's children long after the deceased's death and before the grant herein was issued. It was averred that on 9th October, 2009, this court made a finding that the said person had no interest on the deceased's said land. As a result, the petitioners herein sued him in Machakos ELC Case No. 60 of 2010 which court decreed on 4th May, 2018 that the said person vacates the said land. However, the said person has now teamed up with the applicant in order to attempt to get the deceased's said land through the applicant. It was disclosed that the said person is represented in the said ELC suit by the applicant's advocates herein.

8. According to the 1st petitioner, the administration process herein has long been finalised hence the application is made in bad faith and is a clear abuse of the court and ought to fail.

9. On behalf of the 1st Petitioner, it was submitted that the grant of letters of administration of the deceased's estate issued to **Mbwele Muoki and Dennis Muoki** was duly confirmed by this Honourable Court, and the only property of the deceased's estate (Land Parcel No. Makueni/Unoa/58) was ordered "to be registered in the joint names of **Mbwele Muoki** and **Dennis Muoki** and in trust of the other beneficiaries". Hence **Nzilani Muoki's** (the applicant's) interest in the deceased's aforesaid property/parcel of land is thus secured. The deceased's aforesaid land (No. Makueni/Unoa/58) has since been transmitted to, and registered in the joint names of the two (2) named administrators, **Dennis Muoki** and **Mbwele Muoki** and the title deed issued to the aforesaid two (2) administrators reads (in the proprietorship section) as "joint and in trust of other beneficiaries". The administration herein has thus been completed in accordance with the law.

10. It was submitted that the applicant (**Nzilani Muoki**) has not told this Honourable Court that the administrators/trustees or either of them has done anything that would threaten her (the applicant's) interest in the aforesaid property of the estate. Indeed, the 1st petitioner/respondent has stated in her aforesaid Replying Affidavit that the said land is, and has for some time been, unlawfully occupied by one **Justus Mutie Kioko**, against whom the administrators herein have successfully litigated vide Machakos ELC Case No. 60 of 2010, which the said ELC Court has heard and determined, and decreed that the aforesaid person vacates the aforesaid land. Further, this Court has made a similar finding regarding the aforesaid person (**Justus Mutie Kioko**) vis-à-vis the deceased's said parcel of land vide its ruling herein dated 9th October, 2009.

11. In the aforesaid application, it was submitted that the application herein has no merit and should be dismissed with costs since there must be an end to court proceedings, at some stage.

Determination

12. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

13. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

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;

14. In this case the applicants' contention is that though she is a daughter of the deceased herein, her consent was never sought when the petition was being filed by her late brother and the 1st petitioner who purported to be a wife of the deceased yet she was not. It is noteworthy that this petition was filed by the 1st petitioner who was indicated as the surviving wife of the deceased and the late 2nd petitioner who was a blood brother of the applicant herein. In the letter from the chief dated 8th April, 2004, the 1st petitioner was expressly acknowledged as a widow of the deceased and the applicant was similarly identified as one of the daughters of the deceased. The applicant has not taken any issue with the contents of this letter. Based on that letter and the fact that none of the deceased's family members has sworn any affidavit supporting the applicant's contention more so as the 1st petitioner's co-administrator was the applicant's

blood brother, the material placed before me is insufficient to dislodge the 1st petitioner's contention that she was a widow of the deceased.

15. As regards rule 26 of the *Probate and Administration Rules*, the same states that;

(1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the Applicant.

(2) An Application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation or written consent in form 38 or 39 by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.

16. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

17. In the absence of satisfactory evidence that the 1st petitioner is not a widow of the deceased, it follows that the applicant herein would not rank in the same degree as the 1st petitioner. Accordingly, there would be no requirement that her consent be sought before the petitioner is filed.

18. In this petition, the parties contend that the only property that belonged to the estate of the deceased was Land Parcel No. Makueni/Unoa/58. According to the applicant, the said property had been sold by the family to one **Justus Mutie**. The applicant however insists that she is entitled to the estate of the deceased being a beneficiary. It is clear that in her application, the applicant is blowing hot and cold. On one hand she contends that the said property belongs to the said **Justus Mutie** notwithstanding the fact that **Justus Mutie's** interest therein has been found by the court to be non-existent. On the other hand, the applicant contends that she has an interest in the same property. In light of such contradictions, the 1st petitioner's contention that the applicant is just a proxy for the said **Justus Mutie** and that she is being used as a conduit by the said **Justus Mutie** to acquire the suit parcel of land cannot be entirely without substance.

19. Having found that there is no substance in the applicant's contention that the 1st petitioner is not a widow of the deceased, the remaining dispute would with respect to the distribution of the estate rather than its administration. It does not however, necessarily follow that in that event the grant and certificate of confirmation must be revoked or annulled. In **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance.”

20. As appreciated by **Khamoni, J** in **Re Estate of Gitau (Deceased) [2002] 2 KLR 430:**

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

21. In the premises, since the applicant’s interests is sufficiently protected in the manner in which the grant was confirmed, I find no merit in this summons which I hereby dismiss but with no order as to costs.

22. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 27th day of November, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Nzei for the Respondent

CA Geoffrey