



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 836 OF 2009

IN THE MATTER OF THE ESTATE OF LABAN MUTUA MULWA (DECEASED)

- 1. NGONYO LABAN MUTUA**
- 2. FREDRICK MWAKAVI MUTUA**
- 3. RICHARD MUTHUI MUTUA.....PETITIONERS**

VERSUS

- 1. MAGDALENE MWENDE MUTUA**
- 2. BENEDICT MBITHI MUTUA**
- 3. WINFRED NDUKU NZAU.....OBJECTORS**

RULING

The Summons

Ngonyo Laban Mutua, the 1st Petitioner herein, is the second wife of the late Laban Mutua Mulwa (hereinafter referred to as “the Deceased”), while Fredrick Mwakavi Mutua (the 2nd Petitioner) is her son with the Deceased. Richard Muthai Mutua, the 3rd Petitioner, is also a son of the Deceased but with the first wife, who is also deceased. The Objectors are children and a grandchild of the 1st Petitioner respectively. The 2nd Petitioner died in the course of these succession proceedings.

The above mentioned Petitioners were issued with a grant of letters of administration intestate on 30th November 2009 with respect to the estate of the Deceased, which grant was confirmed on 14th October 2010. The Objectors thereupon filed a summons for revocation of the grant dated 7th May 2014 as amended on 6th April 2016, seeking the following orders:

1. The Grant of letters of Administration issued to Ngonyo Laban Mutua, Fredrick Mwakavi Mutua and Richard Muthai Mutua and confirmed on 14th October 2010 be revoked or annulled.
2. That pending the hearing and disposal of the application an order to issue suspending any transaction including sale and transfer that have been commenced by use of the grant herein.
3. That an order do issue prohibiting any transaction that may be commenced by use of the grant herein and or disposal of any of the properties to the estate.
4. That all title deeds and transfers effected by use of the said grant confirmed on 18th January 2013 be recalled and cancelled.

The grounds for the Objection as set out in the said application and a supporting affidavit sworn on the same date by the 1st Objector, are that the grant was obtained through concealment of material facts; that the interests of the Objectors and other beneficiaries have not been taken care of in the said grant, and they were not involved in the succession cause; and that the Objectors, being persons of prior or equal rights, did not consent to the said grant or renounce their rights prior to the issuance of the letters of administration.

According to the 1st Objector, the Deceased had two wives, and the first wife Wayua Mutua is deceased and she had four sons one of whom is deceased. The second wife is the 1st Petitioner who has nine children including the Objectors, and two of whom are deceased, including the 2nd Petitioner. She reiterated that the grant with respect to the estate of the Deceased was made to the Petitioners secretly and without the

consent of the Objectors, and that the assets of the estate are at risk of being alienated by use of the said grant.

The 3rd Petitioner filed an affidavit in reply that he swore on 11th July 2014 and in which he stated that the Objectors have not disclosed the facts they allege were concealed, and that they were aware of all the processes touching on this succession cause. Further, that the grant issued to the Petitioners was properly issued, in that the Petitioners were not divested of capacity to apply for the grant. Lastly, that the estate was distributed and there is nothing remaining and capable of being sold or distributed, and that the Objectors are only out to frustrate the 1st Petitioner who is their biological mother.

The 1st Objector consequently filed a supplementary affidavit she swore on 18th November 2014 in which she contended that the Objectors and their siblings were not aware of the existence of this succession cause and were never called to attend Court. Further, that the signatures appearing in the Petition documents filed in court purporting to be their signatures were forgeries and were made by one hand. She attached copies of their identity cards as proof of the forgery and to show the different signatures therein.

The 1st Objector listed the Deceased's assets as follows:

- a) Misakwani/Iveti/829
- b) Misakwani/Iveti/823
- c) Mavoko Town Block 3/2652
- d) Mavoko Town Block 3/1047
- e) Plot No. 519 at Lukenya

She contended that the confirmed grant had disinherited the children of the 1st house, and blamed the 3rd Petitioner for their plight for reasons that the 2nd Petitioner is deceased, and the 1st Petitioner is illiterate and of advanced age. Further, that the 3rd Petitioner has been conspiring with the 1st Petitioner to dispose of several properties of the Deceased.

On 5th February 2015 this Court directed that the summons for revocation of grant be heard by way of *viva voce* evidence. The Objectors called four witnesses including the three Objectors to give evidence, while the 3rd Petitioner testified on behalf of the Petitioners.

The Evidence

The first witness called by the Objectors (PW1) was Winfred Mwikali, who informed the Court that the 2nd Petitioner was her father and he is deceased, after which her grandmother who is the 1st Petitioner in conjunction with the 3rd Petitioner sold all the properties which had been given to their father from the Estate. She told the Court that she was entitled to her father's share of the Deceased's property.

PW2 and PW3, Magdalene Mwendu Mutua and Benedict Mutua respectively, in turn testified that they are a daughter and son of the Deceased, but they were not involved in the processes and proceedings to obtain the grant neither in its confirmation. Their testimony was that they have never signed any consent to either make grant or to have it confirmed. That they only came to know that there was a grant when people claiming to be purchasers came to evict them from the deceased's land where they call home.

It was the further evidence of PW2 and PW3 that the three Petitioners gave themselves all the properties of the Deceased absolutely, without giving them any single portion. Further, that although the chief's letter indicated Nzilani Mutua as a beneficiary, her name was not included in the petition for grant of letter of Administration yet she was alive.

The last witness called by the Objectors was Mutuku Muteti (PW4), who testified that he is a son of Nzilani Mutua who died in 2010. That when the petition in this cause was filed in 2009, their mother was alive, yet she was not included in the consent to making of grant by the Petitioners. Further, that the Petitioners have since sub-divided the Deceased's land and sold some sub-divisions to third parties.

The Petitioners called one witness, Richard Muthei, the 3rd Petitioner, who testified that the Objectors were aware of the succession proceedings and signed the consents. However, on cross examination, he stated that he has never seen them signed any consent, and that it was the 2nd Petitioner who took the consents to the Objectors to sign.

On cross examination, the 3rd Petitioner admitted that although Nzilani Mutua is a daughter of the Deceased, and although her name was in Chief's letter, she was not included in both the petition and consents to making of grant and confirmation of grant, and that it was an oversight. He also confirmed that all the family members had a meeting at the area Chief's office where they all agreed to equally share the estate.

The Issues and Determination

The parties were directed to canvass the legal arguments by way of written submissions. B.M. Mung'ata & Company Advocates for the Objector filed submissions dated 2nd October 2017, while the Petitioners' Advocates, L.N. Ngolya & Company Advocates filed submissions dated 28th September 2017. The counsel reiterated the arguments made in the pleadings and evidence by the witnesses.

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. It is not disputed that the Objectors are children and grandchild of the Deceased. The issues therefore to be decided are firstly, whether the Petitioners are culpable of non-disclosure of material fact; and secondly whether the Petitioner's confirmed grant of letters of administration should be revoked.

Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) provides as follows in this regard:

“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 has ordered or allowed; 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.”

A perusal of the Petition for Letters of Administration Intestate filed by the Petitioner on 7th October 2009 and the affidavit in support shows that the beneficiaries of the Deceased were disclosed save for Nzilani Mutua, and the said beneficiaries were alleged to have signed the consent. The Objectors deny having signed the consent and allege that their signatures were forgeries. However, they did not bring any forensic evidence as to such forgery and asked this Court to compare the signatures in the Petition and their identity cards.

This Court in this regard is mindful of the fact that forgery is a criminal offence and needs to be proved by the Objector beyond reasonable doubt, and this Court cannot thus rely on its own observation to make such finding as it is being requested to do, without any cogent proof. It is thus not evident that there was material and substantial disclosure on the part of the Petitioners.

In addition, this Court is mindful that the law prioritizes the persons who can be administrators of a Deceased's estate, and as between the Objectors and 1st Petitioner, the Petitioner who is wife of the Deceased, and mother and grandmother respectively of the Objectors, would have priority in a contest as to who should be the administrator of the estate of the Deceased. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased as follows-

“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;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

The Deceased had two wives, and the house of the Objectors is adequately represented in the administration of his estate by the 1st Petitioner. This Court in this regard notes that the Objectors did not bring any evidence to show the 1st Petitioner's incapacity in this regard. As the other wife of the Deceased is also since deceased, the 3rd Petitioner, who is a son of the deceased wife, thus has priority over the Objectors in representing the house of the deceased wife.

I therefore find that the grant of representation with respect to the Deceased's estate issued to the 1st and 3rd Petitioners was properly issued,

and this Court will not interfere with the same save to the extent of regularizing the same as the 2nd Petitioner has since died.

Furthermore, it appears that the real dispute before the court is one of the alleged disinheritance of the Objectors, and on which it seems from the evidence of DW1 there had been an agreement on the respective beneficiaries' shares. This dispute is one that can be resolved in fresh confirmation proceedings.

On the other orders sought by the Objectors, the sale and transfers of the Deceased's properties was made to third parties on various dates in 2011, after the certificate of confirmation of grant had been issued to the Petitioners, as shown by the certificates of official searches produced as evidence by the Objectors. In addition, the affected third parties have not been joined in these proceedings to defend themselves, and in any event the titles sought to be cancelled are also not specified. This Court will therefore not issue the orders sought as regards cancellation of title, and any of the Deceased's properties that have been sold or transferred will be accounted for in the fresh confirmation proceedings.

In the circumstances it is only the confirmation of grant that is liable to revocation, and the Objectors and Petitioners will have the opportunity to state their respective cases in fresh confirmation proceedings. There will thus also be a need in the circumstances to preserve the remainder of the Deceased's estate.

The prayers in the Objector's Summons for Revocation of Grant dated 7th May 2014 as amended on 6th April 2016, are therefore allowed only to the extent of the following orders:

1. The grant of letters of Administration issued to Ngonyo Laban Mutua, Fredrick Mwakavi Mutua and Richard Muthai Mutua with respect to the estate of Laban Mutua Mulwa be and is hereby revoked, and a fresh grant of letters of administration shall issue to Ngonyo Laban Mutua and Richard Muthai Mutua with respect to the said estate.
2. The certificate of Confirmation of Grant issued herein to Ngonyo Laban Mutua, Fredrick Mwakavi Mutua and Richard Muthai Mutua on 14th October 2010 with respect to the estate of Laban Mutua Mulwa (Deceased) be and is hereby revoked.
3. The Petitioners shall file and serve the Objectors with fresh Summons for Confirmation of Grant within 60 days of the date of this ruling.
4. The Objectors shall be at liberty to file and serve and Affidavit of Protest within 30 days of service of the said Summons for Confirmation of Grant.
5. Pending the confirmation of grant, the *status quo* that shall obtain as regards all the properties and assets remaining in the estate of the Deceased, including the Deceased's properties since registered in the Petitioners' names, shall be that the Petitioners Objectors and Beneficiaries of the Deceased's estate shall continue to be in possession and occupation of the properties and assets they currently occupy as at the date of this ruling, and the PetitionerS, Objectors and Beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets.
6. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of March 2018.

P. NYAMWEYA

JUDGE