



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 160 OF 2015

IN THE MATTER OF THE ESTATE OF MWANZIA NDONYI (DECEASED)

KITHEKA MWONGELA.....PROTESTOR

VERSUS

DAVID MWANZIA

MUTUA MWANZIA.....PETITIONERS

RULING OF THE COURT

1. The Petitioners herein **David Mwanzia** and **Mutua Mwanzia** filed summons for confirmation of grant dated 6/12/2016 and sought for the following orders:-

(a) That the grant issued on 16/07/2015 issued to the Petitioners be confirmed.

(b) That Kitheka Mwangela a son of Mwangela Mwanzia be ordered to vacate from plot Number 289 Kaluva Adjudication and go back to land parcel Nzambani/ Ithumula/1130 or Nzambani/Ithumula/1124 being the lands given to his father Mwangela Mwanzia by the deceased herein.

(c) That the costs of the application be in the cause.

2. The Application was supported by the Affidavit of David Mwanzia sworn on even date and who raised the following issues:-

(i) That the deceased herein had married three (3) wives which comprised of three (3) houses.

(ii) That the deceased owned three (3) parcels which he distributed to the three (3) houses and left a portion to himself which he later bequeathed to the Petitioners.

(iii) That the Respondent herein who is a son to the petitioner's step brother Mwangela Mwanzia has refused to move out of one of the parcels namely 289 Kaluva Adjudication Section and occupy the portion belonging to his father Mwangela Mwanzia.

(iv) That all the respective houses have their parcels of land as given out by the deceased and that the only remaining parcel number 289 Kaluva Adjudication Section should be registered in the names of the Petitioners herein as per the wishes of deceased vide a letter dated 20/09/1984.

3. The Respondent herein Kitheka Mwangela filed an affidavit of protest dated 21/04/2017 whereby he sought for the revocation of the grant issued in favour of the Petitioners and further sought for an order that he be included as a co-administrator. He raised the following issues in support of this protest:-

(a) That the protestor is a grandson to the deceased as he is a son to Mwangela Mwanzia (deceased) who was a son of the deceased herein and the only son from the first house.

(b) That the Petitioners have concealed material facts to the court in the summons for confirmation of grant.

(c) That the deceased had three wives yet the Petitioners are both from the second house and should have included the other two families in the succession as administrators.

(d) That plot 289 Kaluva Adjudication Section had not been allocated to the Protestors as claimed since the Protestor's father Mwangela Mwanzia lived on the land and had permanent structures and that the protestors parents have been buried on the said land long before the filing of this succession cause.

(e) That the deceased had sub-divided the parcel 289 Kaluva Adjudication Section between the first and second houses and therefore the Petitioners claim that the Protestor vacates the land is made in bad faith and goes against the Akitutu clan deliberations held on 12/11/1996 and 1/4/2017.

4. Learned counsels for the parties herein agreed to dispose of the protest by way of affidavit evidence and that written submissions were to be filed. The Protestor's submissions are dated 13/11/2017 while those of the Petitioners are likewise dated 13/11/2017.

5. It was submitted for the Protestor that the Petitioners had filed letters of administration secretly without involving the family members from the 1st and 3rd wives and further concealed and left out some names of beneficiaries of the estate. It was further submitted that the Petitioners are not truthful in their claim that parcel 289 Kaluva Adjudication Section had been bequeathed to them by the deceased yet the true position is that the deceased had subdivided the land between the 1st and 2nd wives and the Protestor and his family have been residing on their rightful portion and even erected permanent structures and that the position has even been confirmed by the clan elders vide meetings held on 12/11/1996 and 1/4/2017. It was finally submitted that the Protestor herein should be included as a co-administrator to represent the interests of the 1st wife and that in the event of confirmation of grant, parcel 289 should be shared between the 1st and 2nd wives (houses) as had been directed by the deceased).

6. It was submitted for the Petitioners that the Protestor's claim to parcel 289 Kaluva Adjudication Section is improper and he should vacate the same since his family had already been allocated a separate parcel of land by the deceased. It was finally submitted that the protest should be dismissed and the grant be confirmed.

7. I have considered the rival affidavits of the Petitioners and the Protestor as well as the submissions of their learned Counsels. The issue for determination is whether the Protestor has raised sufficient reasons to warrant the revocation of the grant issued to the Petitioners.

Revocation or annulment of grant is provided for under Section 76 of the Law of Succession Act which provides as follows:-

"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 the 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;....."

8. The Protestor in his affidavit of protest has averred that the Petitioner herein concealed material facts to the court in the summons for confirmation of grant by failing to involve all the family members of the deceased and further denying the fact that the Protestor and his family have been residing on part of parcel 289 Kaluva Adjudication Section that the deceased had allocated them. The Protestor attached copies of clan deliberations indicating that indeed the parcel of land in question had been allocated to the 1st and 2nd houses of the deceased. I have perused the initial probate and administration forms filed initially and find that indeed the names of the deceased's family members had been indicated on form P&A 5. However, I note that the Petitioners have not filed any consent signed by the beneficiaries to the summons for confirmation of grant yet this was quite crucial. The failure to file the said consent appears to bolster the protestor's claim that the Petitioners have indeed concealed certain material facts from the court. Indeed the father to the protestor was an only son from the first wife and since he is noted to be deceased, then it follows that the protestor ought to have been involved and included by the Petitioners so as to take care of the interests of the first wife. Again it is noted that there is no representative from the third wife's house. The Petitioners representing only the second wife's house to the exclusion of the rest of the houses in the administration of the estate raised some suspicion on their part. It could have been appropriate to have at least one member from the other houses to be part of the administrators of the estate.

9. The deliberations of the clan as seen in the annexed proceedings clearly indicated that the deceased had given the 1st wife and 2nd wife parcel number 289 Kaluva Adjudication Section. The Protestor has averred and even annexed photographs showing that he and his family have been residing on the portion of land allocated to them by the deceased. He has even gone ahead to state that his late parents were buried on the portion of land without any protestation from the Petitioners since the boundaries had been clearly marked.

10. I find from the explanation of the protestor, the Petitioners are out to disinherit the Protestor and probably other family members from the estate of the deceased. The failure by the Petitioners to secure a consent to confirmation and distribution is one such scheme. Hence the request by the Protestor to be made a co-administrator has some basis in order to protect the interest of the first wife's family members. It is also premature for the Petitioners to seek to have the protestor vacate the portion he currently occupies before the distribution of the properties of the deceased are agreed upon by all the family members.

11. In the result it is the finding of this court that the protest by the Protestor has merit. The same is allowed in the following terms:

(1) The grant made to the Petitioners on the 16/07/2015 is hereby ordered revoked.

(2) The Protestor herein Kitheka Mwangela is ordered to be a co-administrator.

(3) A fresh grant be issued in the names of David Mwanzia, Mutua Mwanzia and Kitheka Mwangela.

(4) The three (3) administrators do proceed to file summons for confirmation within the next sixty (60) days.

(5) The status quo on plot number 289 Kaluva Adjudication Section be maintained pending confirmation of grant.

(6) There will be no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 24th day of May, 2018.

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D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Mutinda - for the Protestor

Kyalo for Sila - for the Petitioners

Josephine - Court Assistant