



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 237 OF 2002

IN THE MATTER OF THE ESTATE OF MBULI – DECEASED

BETWEEN

ROBERT MUANGE KILONZO

STEPHEN MUTISO KILONZO.....PETITIONERS/RESPONDENTS

VERSUS

BENEDICT JOEL NGANDA.....INTERESTED PARTY/APPLICANT

RULING

1. By Summons for Revocation or Annulment of Grant dated 9th June, 2017, the Interested Party/Applicant herein seeks in substance an order that the grant of letters of Administration issued on 2nd December, 2005 and rectified on 15th March, 2013, to the Respondents herein be revoked and/or annulled and that the interested party/applicant be included in the list of beneficiaries of the estate of **Mbuli Mutua** (deceased).
2. According to the Applicant, the estate the subject of these proceedings belongs to his grandmother, **Mbuli Mutua** who was the original shareholder of certificate No. 168 in Katheka Kai. According to the applicant, the petitioners herein failed to list his name in the list of beneficiaries of the estate of the deceased in place of his mother who predeceased her mother. It was further disclosed that the petitioner concealed the fact that there was an award by the Land Tribunal No. 163 of 2002 which was adopted in CM Misc No. 8 of 2003 which held that the petitioner/respondent's father **Jackson Kilonzo** (now deceased) was to hold the property in trust for the other beneficiaries. The petitioners/respondents being dissatisfied with the award filed judicial review proceedings in HC Misc No. 22 of 2006 in which the Court upheld the decision of the Tribunal.
3. It was further averred by the applicant that Katheka Kai Co-operative effected transfer of 15½ acres in Katheka Kai Block 4/66 and 1 acre of coffee in Block D-9 was affected by Katheka Kai from the original share holder to the applicant's name making him the sole legal owner. It was the applicant's case that the Respondents herein concealed to this Court the existence of the Tribunal award as well as the High Court judgement, and knowingly and deliberately left out the name of the applicant as a beneficiary of the estate.
4. The applicant averred that unless the grant is revoked and/or annulled and he is listed as a beneficiary to the estate of the deceased, he stands to suffer irreparably.
5. In response to the summons the petitioners averred that they together with the applicant are grandsons of the deceased. They averred that in the confirmed grant issued in December, 2005 by the High Court at Machakos, both petitioners are jointly holding the properties on their behalf and in trust for the other beneficiaries and they do not intend to disinherit the applicant herein. Based on legal advice, they averred that neither of them can deal with any of the properties listed therein without the consent/involvement of all other beneficiaries.
6. As regards the Tribunal's award, the petitioners averred that the same which was later confirmed on 18th October, 2005 by the Chief Magistrates Court at Machakos in Misc. No. 8 of 2015, is disputed as the same was confirmed after the death of their father, **Jackson Kilonzo**.
7. The petitioners therefore contended that the allegations made by the applicant are untrue and founded on mischief and deceit. According to them, the applicant has not been co-operative as he solely and secretly filed transfer documents and had three properties transferred in his name. He further crafted a transfer instrument in a manner that reflected that the deceased herein signed them in 2005 yet the deceased died way back in 1997.

8. The petitioners contended that the applicant had concealed from this Court the fact that he already had official documents acknowledging him as the registered owner of three properties listed in the grant. According to the petitioners, they have not disinherited the applicant as he already has properties in his name without the involvement of the petitioners and is merely attempting to taint the names of the petitioners. The petitioners therefore urged the Court to dismiss the application.

Determination

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

10. 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;

11. In this case the applicant's case seems to be based on grounds (b) and (c) above. His contention is that the petitioners did not disclose the fact that he is a beneficiary of the estate of the deceased. It is not denied that the applicant and the petitioners are grandchildren of the deceased. It is also clear that the petitioners did not disclose the applicant as a beneficiary of the estate of the deceased. The petitioners however contend that the application ought not to be allowed because the properties forming the estate of the deceased were registered in the names of the petitioners to hold in trust for all the beneficiaries of the estate and that the applicant is one of them. They therefore were of the view that the prudent decision to make is to have the grant rectified to include the applicant's name as a beneficiary. In my view, all things being equal, that would have been the prudent action to take. I gather support from the decision in **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, where 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.”

12. However in this case, the applicant contends that some of the properties listed as being part of the estate do not belong to the estate and that the same are in fact his properties. Whereas, the petitioners contend that the said properties were registered in the names of the applicants through fraud, this Court in these proceedings cannot determine that issue. That, in my view, is not an issue for the Succession Court but one that ought to be determined by the Environment and Land Court. This was the position of **Nyamu, J** (as he then was) in **Stephen Waitthaka Gatumbi vs. Frumence Kariuki Murui Nairobi HCCC No. 1757 of 2001** where he held that issues of fraud and forgery cannot in law be raised in a succession cause.

13. Depending on the outcome of the land case, the Succession Court would be able to determine the issue of distribution and whether the fact of acquisition by the applicant of the properties of the deceased ought to be taken into account in distributing the estate.

14. What is however clear to this Court is that the applicant's name was omitted from the list of the beneficiaries of the estate of the deceased and some disputed properties were included as forming part of the estate of the deceased.

15. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same 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.

16. In the premises the summons for revocation of grant succeeds and I hereby revoke the grant issued herein. I however direct that the status in respect of the estate of the deceased be maintained unless otherwise directed by this Court or the ELC.

17. There will be no order as to costs.

18. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of September, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nzilani for Mr Makundi for the Interested Party/Applicant

CA Geoffrey