



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 218 OF 2007

IN THE MATTER OF THE ESTATE OF KYATHI NGOLOLO (DECEASED)

MUTUNE KYATHI NGOLOLO.....PETITIONER

-VERSUS-

MUSAU KATHUNGU

WILSON MUTUNE KYATHI

NTHAKYO KYATHI.....OBJECTORS/APPLICANTS

RULING

1. This is a ruling on the Objector's application for revocation of Grant dated 1/4/15 supported by Affidavit of one of the objector's Musau Kathungu. It is opposed by the Petitioner who has filed a Replying Affidavit as further Affidavit in response, respectively on 11/6/15 and 9/7/15.
2. Grounds for the revocation of the Grant of Letters of Administration granted on 13/7/2007 is that the Grant was obtained without disclosing material facts and, therefore, fraudulent.
3. The Grant to the petitioner with respect to the estate asset was already confirmed on the 24/6/08. The issue is whether or not the deceased had given the estate asset land parcel Mbiuni/Katitu/636 to the petitioner following his successful oversight of the litigation relating to the property.
4. A collateral issue is whether the properties, Katitu/Mbiuni/493,495,496 498 were purchased by the petitioner from their respective owners and, therefore, not part of the estate of the deceased.
5. As regards Mbiuni/Katitu/520, an issue arose whether the property which was alleged to have been subject of court determination as to ownership may be open to succession proceedings at the behest of the unsuccessful litigant's interest.
6. The petitioner accuses the applicant/objector of lack of candour in the application in failing to disclose that one parcel of land belongs to the petitioner and another inherited from the deceased.
7. Although the petitioner has denied knowledge of existence of a confirmed Grant dated 16/2/09 in respect of parcel Mbiuni/Katitu/636, 520, 493, 144 and 289, the same is on the court file duly signed by Lenaola J. (as he then was) and receipt whereof is acknowledged by Simon Muoki Mutiso ID 1474279 on behalf of the petitioner Mutune Kyathi Ngololo ID 1475273. In addition, paragraph 5 of the petitioner's Affidavit sworn on 1/2/2008 in support of the application for confirmation of Grant listed the 5 plots as Mbiuni/Katitu/636, 520, 493, 144 and 289 as assets of the estate to be registered in the names of Mutune Kyathi Ngololo but the last 3 in different type print from the first 2 properties.
8. Whereas, the petitioner has listed himself, his brother Katungu Kyathi and Sister Mulunde Kituku as beneficiaries, the applicants attached a letter from the relevant area chief indicating that the deceased had 2 houses and several beneficiaries listed in the letter of 19/3/15 by Assistant Chief Muthwani Sub-location.
9. I have noted that although the petitioner claimed to have obtained suit plots 493 by purchase from one Kitonyi Kakuli, the Green Card register shows the plot to have been registered in the name of the deceased and later transferred to the petitioner on 29/6/2010 way after the deceased's death on 6/3/1971 without any reference to succession proceedings. Property No. 520 which the petitioner claim to have "acquired" through litigation in which the 3rd objector Nthakyo Kyathi was an adversary's witness against the petitioner is on the Green Card register shown as having been registered in the name of the deceased on 26/11/76 and later into the petitioner's name on 21/4/2011 by order

in the Succession Case no. 218 of 2007 hereof.

10. After determination of the question of the extent of the estate, the question of the beneficiaries of the deceased arises in view of the allegations of 2 households with the two wives having biological sons for the first wife and adopted sons by the “*woman to woman*” marriage (Iweto) of the 2nd wife. This matter is important because the applicable succession law to his Cause is the Kamba Customary Law the deceased having died in (1971) before the coming into effect of the Law of Succession Act on 1/7/1981.

Determination

11. It is clear that the dispute before the court requires the taking of oral evidence to establish the truth of the counter-allegation of the parties with respect to the assets of the Estate of the deceased and inheritance in accordance with other applicable Customary Law and their respective shares. The determination cannot be made on disputed affidavits because of the need to test with accuracy the cogency of the evidence relied on by the parties.

12. The proper cause in the matter, in the respectful view of this court, is the revocation of the 2 Confirmed Grants which have been shown to exist in respect of the Estate, respectively dated 24/6/2008 and 16/2/2009, both signed by Lenaola, J. (as he then was) although only a letter exists on court file, and determination of the dispute before the court by evidence *viva voce*.

13. In the meantime, the court shall appoint 3 persons as administrators to be agreed between the parties and in default appointed by court, to represent the 3 sets of beneficiaries to the estate, that is to say, the petitioner’s family, the family of the petitioner’s late brother Katungu Kyathi and the family of the 2nd wife Nduku Kyathi, as shown on the Area Chief’s letter of 19/3/2015.

14. In order not to prejudice the oral hearing of the dispute, this court does not make a determination as to issue of fraud raised by the application for revocation.

Orders

15. Accordingly, for the reasons set out above, the court revokes the Grant of Letters of Administration Intestate dated 24/6/2008 and 16/2/2009 and directs the nomination of 3 persons to be agreed between the parties for appointment as Administrators, in default of which the court shall appoint suitable Administrators, pending the hearing and determination of the dispute as to Estate assets and rightful beneficiaries.

16. Costs in the cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF OCTOBER 2018.

G.V. ODUNGA

JUDGE

Appearances: -

M/s Kiarie, Joshua & Co., Advocates for the Petitioner.

M/s F.M Mulwa, Advocates for the Objectors.