



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Succession Cause No. 375 Of 2008**

**IN THE MATTER OF THE ESTATE OF NDAMBUKI SOMBA (DECEASED)**

**SUSAN KATINDA NDAMBUKI.....PETITIONER**

**VERSUS**

**ROSE KATINDA.....OBJECTOR**

**AND**

**PETER MAKAU MULWA.....INTERESTED PARTY**

**RULING**

**The Objection**

A grant of letters of administration intestate was issued to Susan Katinda Lewa and Andrew Nzioka Ndambuki on 26th September 2008 with respect to the estate of Ndambuki Somba, who died on 10th January 1992 (hereinafter referred to as “the Deceased”). On 19th March 2015 the administrators filed summons for confirmation of grant dated 16th March 2015, whereupon the 1st Objector filed an affidavit of objection to confirmation sworn on 21st July 2015.

The gist of the Objection by the 1st Objector in her affidavit is that she is a daughter-in-law of the deceased, and that some of the beneficiaries have sold most of the deceased’s land and have not catered for her and other beneficiaries in the proposed distribution of the remaining land. According to the 1st Objector, one of the beneficiaries who is also one of the Administrators, namely Andrew Nzioka and his mother sold parcel No. LR.N.O Makindu/Kalu/960 belonging to the deceased without the consent of the beneficiaries, while LR. NO. Makaindu/Kalu/849 was sold by the entire family. Further, that in the year 2006 the family clan shared parcel No . L.R Mbitini/Iteta/347 among the two wives of the deceased namely Kasiva Ndambuki and Muthembwa Ndambuki equally, and each took possession of her share with their children . The Objector claims that she bore the expense of the clan meeting which was over Kshs.200,000/= and for which she should be compensated. The Objector in particular sought her share of parcel No . Makindu/Kalu/960 that was sold by Andrew Nzioka.

It was further submitted by the Objector’s counsel Paul Kisongoa & Advocates Advocates, in submissions dated 26th September 2016, that the Objector's complaint and main ground of objection is that the creditors of the Estate and herself were not summoned for a meeting to establish their claims in the Estate, and that the Mode of Distribution has been decided by the Petitioner alone and he has not involved the rest of the beneficiaries and therefore it is defective . Further, that the description of the beneficiaries is not clear particularly when it comes to the grandsons. Therefore that all the beneficiaries particularly those who are entitled under the law should consent to the mode of distribution as required

under the Jaw.

The Interested Party on his part in his affidavit sworn on 21st July 2015 claims to have been sold part of Mbitini/Iteta/347 belonging to the deceased by Muthembwa Ndambuki and Andrew Nzioka while not having known that there was a succession cause concerning the land, and that it was registered in the name of the deceased. He averred that he would like his interests protected during the distribution of the estate.

### **The Response**

The Petitioner in her replying affidavit sworn on 29th October 2015 stated that the Objector has refused to cooperate in distribution of the estate and has sold part of the estate particularly land parcel no. Makindu/Kalu/849 and Mbitini/Iteta/347. Further, that the objection is made in bad faith since all parcels of land including the ones sold by the Objector have been included in the distribution. The Petitioner also denied that the Objector spent Kshs. 200,000/- as clan fees or on account of the estate, and asked that the grant should be confirmed as proposed in paragraph 5 of the supplementary affidavit and schedule of distribution. It was also contended that the Objector should file her own schedule of distribution.

The Petitioner's learned counsel, Kamolo & Associates, filed submissions dated 12th October 2016 wherein it was urged that the Objection was bad in law and incompetent, as the Law of Succession Act only anticipates that an objection can only be made to issuance of a grant under Rules 17 (1), and no objection can be made to confirmation of grant. Further, that the Law of Succession Act and Rules only provides for an affidavit of protest under Rule 40 (6). It was also alleged that the objection is premised on the basis that the Objector has sold part of the estate and wants the purchasers be taken as beneficiaries of the estate. Therefore, that the objector by her objection wants to validate an illegal activity as any sale of the estate before confirmation of grant amounts to intermeddling and is illegal.

Lastly, it was contended that all beneficiaries participated in the distribution of the estate except the Objector who refused to endorse her signature on the consent, since the persons she had sold to land parcel no. Mbitini/Iteta/347 had not be included in the estate as beneficiaries . It was submitted that the estate of the deceased has been distributed equally and legally to all beneficiaries in the two houses, and purchasers from beneficiaries cannot be included in the distribution.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed by the Petitioner, Objector and Interested Party. The issues to be decided are firstly, whether the objection is competently before this court; and secondly if so whether the summons for confirmation of grant filed by the Petitioner should be struck out.

On the first issue I am in agreement with the Petitioner's submissions that an objection cannot be validly made at this stage of the proceedings. The provisions on the making of an objection are in sections 67 to 69 of the Law of Succession Act as follows:

#### **“67. Notice of application for grant**

**(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.**

**(2) A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.**

#### **68. Objections to application**

**(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.**

**(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross application within a specified period.**

#### **69. Procedure after notice and objections**

**(1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.**

**(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”**

Rule 17(1) of the Probate and Administration Rules also provides as follows in this regard:

*“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”.*

In addition, Rule 17 subrule 11 provides that so long as an objection which has been lodged has not been withdrawn, no grant shall be made by any registry to the estate of the deceased, prior to the expiration of the period for the filing by the objector of an answer and cross-application specified by the court under section 68 of the Act. Further, that no registrar shall make a grant if he has knowledge of the existence of an effective objection lodged in any registry in respect of the estate of the deceased.

It is evident from the above provisions that an objection can only be competently made before the issue of a grant and within the time limits set out in the published notice of an application. In the present case, the Objectors filed their affidavit of Objection to confirmation on 10<sup>th</sup> March 2014, almost two years after the grant had been issued to the Applicant on 18<sup>th</sup> July 2012. Objections proceedings are meant to deal with preliminary issues at the stage of an application of grant such as the validity of a will, and right to administration or entitlement to a grant. If an Objection is brought after the making of a grant, such objection proceedings will be incompetent as held in **Re Estate of Mangece (2002) 2 KLR 399**.

As regards the application made by the Interested Party, It is also noted by the Court that if indeed the property in which he seeks an interest was owned by the deceased at the time of the sale as he alleges, the law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

**“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.**

**(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”**

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property

shall be sold before confirmation of the grant.

In conclusion, the issues raised by the Objectors and Interested Party can only be properly addressed during confirmation proceedings by way of affidavit of protests, as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, which is the appropriate procedure when one is contesting distribution proposals made in a summons for confirmation of grant. Rule 40(6) (7) and (8) of the Probate and Administration Rules provide as follows in this respect:

**“(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.**

**(7) The registrar shall without delay forward to the applicant a copy of each protest filed in the cause under subrule (5) or (6).**

**(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”**

The prayers sought in the affidavits by the Objector and Interested Parties are accordingly denied for the foregoing reasons. The Objector and Interested Party are however at liberty to file and serve affidavits of protest to the summons for confirmation of grant filed by the administrators on March 2015 within 60 days of the date of this ruling.

There shall be no order as to costs.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 31<sup>st</sup> day of January 2017.**

**P. NYAMWEYA**

**JUDGE**