



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 865 OF 2013

IN THE MATTER OF THE ESTATE OF JOSEPH MUTUA MUNGUTI (DECEASED)

FREDERICK SILA MUSEMBIOBJECTOR

AND

JUDITH WANZA DAVID

STELLAH MWELU MUTHIANI

MAGDALENE CHEPKIRWOK

(The Registered Officials Of

Syoks Golden Sisters).....CREDITORS

VERSUS

MATHAR NDILA MUTUA..... 1ST PETITIONER

ROBERT MUNGUTI MUTUA.....2ND PETITIONER

RULING

A grant of letters of administration intestate was made on 30th July 2014 to the Petitioners herein with respect to the estate of Joseph Mutua Munguti, and the said Petitioners subsequently filed a Summons for Confirmation of grant on 22nd January 2015. The Objector herein then filed a summons for revocation of grant dated 18th March 2015 seeking orders that the grant issued herein on 30th July 2014 be revoked as it was obtained fraudulently by making false statements, or by the concealment from court or something material and by means of untrue allegations of a fact essential in point of law.

The main ground for the application is that the Petitioners did not disclose that the deceased sold to the Objector a portion of land measuring 7 acres from land known as Plot No. 2510 located at Lukenya, which forms part of the deceased's estate, and have not included the Objector as one of the beneficiaries. The Objector attached the sale agreement entered into with the deceased to his supporting affidavit sworn on 18th March 2015.

P.M. Mutuku Advocates, the learned counsel for the Objector, reiterated that the objector has an interest in the estate of the deceased arising from the sale agreement and payment of purchase price, in submissions he filed dated 24th March 2016. He relied on the provisions of Rule 76(c) of the Law of

Succession Act for the prayer for revocation of grant arising from this non-disclosure by the Petitioners.

The Creditors herein also filed an application by way of a Notice of Motion dated 20th March 2015, seeking orders that their interests over property known as Mavoko Town Block 3/ 29483 (part of land parcel formerly known as Mavoko Town Block 3/ 2510) be factored in the distribution of the deceased's estate upon confirmation of grant, and that the same be confirmed in favour of the said Creditors. The Creditors in the said application and supporting affidavit sworn by the 1st Creditor, state that they bought 5 acres of a land parcel then known as Mavoko Town Block 3/ 2510 from the deceased for the sum of Kshs.3 million which they paid in full, and that the said parcel was subdivided creating a new a title number Mavoko Town Block 3/29483 measuring five (5) acres which was to be transferred to the Creditors.

However, that the deceased died soon after receiving the agreed purchase price and signing the transfers, and that though the Creditors paid the stamp duty, the said transfer could not be registered due to a caution placed on against title number Mavoko Town Block 3/ 29483 by the 2nd Petitioner. The Creditors attached copies of the sale agreement entered with the deceased, and of the payments they made.

The Creditors' Advocates, Odero-Olonde & Company Advocates detailed out the processes and payments undertaken by the Creditors pursuant to the sale agreement entered with the deceased in submissions he filed in Court dated 19th May 2016. It was submitted therein that the transaction between the Creditors and the deceased was a *bona fide* sale transaction and it is in the interest of justice that the Creditors' interests as interests of purchasers for value be factored before distribution, and that the 2nd Respondent be ordered to withdraw the caution.

The Creditor's opinion is that the Objector's application for revocation of grant is surfeit and unnecessary, as there is clear evidence that the deceased was subdividing his land to transfer 5 acres to the Creditors and 7 acres to the Objector, and the rest be left for the benefit of the deceased's estate. Further, that the proper application in the circumstances would be for rectification of the grant to include the interests of the Creditors and the Objector, and that the remainder of the estate be distributed as per the wishes of the beneficiaries of the said estate.

The Response

The 1st Petitioner admitted that the deceased sold 7 acres of land to the Objector and 5 acres of land to the Creditors before his death, in a replying affidavit she swore on 24th March 2015 in response to the Objectors and Creditors' applications. The 1st Petitioner's learned counsel, D.M. Mutinda & Company confirmed in submissions dated 9th February 2016 that the 1st Petitioner has no objection to the parcels of land being transferred to the parties who bought from her late husband and for the court to confirm the remaining estate to herself and her co- Administrator to hold the same on trust of other family beneficiaries.

It was however submitted that the 1st Petitioner is opposed to the revocation of grant as there are no sufficient reasons to warrant the said revocation, since she legally obtained the said grant through the proper channel as envisaged in the law of Succession Act, and the Objector's Summons do not meet the yardstick in section 76 of Law of Succession Act . The 1st Petitioner submitted that she is agreeable to enjoining the Objector as a beneficiary so that he can rightfully get his portion of land which he bought from the deceased.

The 2nd Petitioner on his part in a replying affidavit he swore on 20th January 2016 contested that the Creditors are beneficiaries of the estate of the deceased, and cannot purport to make any claim against deceased's estate. Further, that annexures by the Creditors only demonstrate that the amount paid to the deceased as Kshs.1,500,000/= leaving outstanding balance of Kshs.1,500,000/= has never been paid, and that the deceased did not append his signature, hence he was not party to the said agreement.

The 2nd Petitioner in submissions dated 8th September 2016 contended that the reason why the 1st Petitioner is conceding to the applications by the Objector and Creditors and urging this court to confirm

the grant, is because she was the beneficiary of the money paid to the deceased for the land and that the deceased's second family were absolutely disadvantaged. Further, that as a matter of natural justice, as the rightful owners of the deceased they should not be denied the right to rightfully inherit what belonged to their late father.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the grant issued to the Petitioners should be revoked, and if not the directions that should be given with respect to the Petitioner's summons for confirmation of grant.

The Objector asks for revocation of the grant on account of having not been included as a purchaser of a portion of land measuring 7 acres from land known as Plot No. 2510 from the deceased. Revocation of a grant is provided in section 76 of the Law of Succession 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 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.”

While the Objector may have not been disclosed as a purchaser in the proceedings leading to the issue of the grant to the Petitioners as conceded by the 1st Petitioner, it is my view that revocation of grant is not the appropriate remedy in the circumstances of the applications herein, as the Petitioners have priority over the Objector and Creditors as administrators of the estate of the deceased's estate under section 66 of the Law of Succession Act, being the widow and son of the deceased respectively.

Section 66 provides as follows in this regard:

“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 ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the order of priority set out under section 39 of the Law of Succession Act. It is notable in this regard that the Objector comes last in priority as a creditor, and therefore even if the grant of administration were to be revoked, he would not be a suitable candidate for the same.

The concerns raised by the Objectors and Interested Party as regards their interest in the deceased's estate can in my view be more appropriately and adequately 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 Objector and Creditors therefore still have the opportunity to prove their claims and interests over the deceased's estate during the confirmation proceedings by using the above-cited provisions. Likewise, the opposition by the 2nd Petitioner to the Objector and Creditors' claims will also be adequately addressed in the confirmation proceedings.

The prayers sought in the Objector's summons for revocation of grant dated 18th March 2015 and Creditors' Notice of Motion dated 20th March 2015 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 22nd January 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 30th day of January 2017.

P. NYAMWEYA

JUDGE