



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 39 OF 2008

**IN THE MATTER OF THE ESTATE OF MBUI MUTARI ALIAS MBUI MWITARI -
(DECEASED)**

1. ESTHER KIBOBORI MBUI

2. JULIA KANYUA MBUI...APPLICANTS

RULING

1. Mbui Mutari alias M'Mbui M'Mwitari (hereinafter "the deceased") passed away on 15th February, 1996 leaving behind the following surviving him:-

- (a) Janet Kiende - Daughter-in-law
- (b) Julia Kanyua - Daughter
- (c) Esther Kibobori - Daughter
- (d) William Kimathi - Son
- (e) Robert Mbaya - Son
- (f) Raymond Mwiti - Son

He left the property known as Ntima/Ntakira/174 measuring 1.476 as the only asset belonging to the estate.

2. On 6th February, 2008, William Kimathi Mbui (hereinafter "the Petitioner") petitioned for letters of administration intestate. The same were granted to him on 3rd April, 2008 and was confirmed on 15th October, 2009 whereby the only asset of the estate, Ntima/Ntakira/174 was distributed equally amongst the three sons of the deceased and Janet Kiende Nturibi.

3. On 17th November, 2010, Esther Kibobori Mbui and Julia Kanyua Mbui (hereinafter "the Objectors") applied for the revocation of the said grant and for the estate to be redistributed afresh. The grounds upon which the application was made was that; the Petitioner did not involve the Objectors in lodging the Cause; the signatures of the Objectors in the consent to the making of the grant were forged; the Objectors did not consent to the confirmation of grant and that the Objectors had been discriminated upon by the said distribution on the basis of being daughters. The application was ordered to be heard through viva voce evidence.

4. OW₁ was the 1st Objector, Esther Kibobori. She told the Court that she and the 2nd Objector were daughters of the deceased; that she had gone to the Chief initially with the rest of the family members to agree on the lodging of the Succession Cause but the Petitioner did not notify her when he finally lodged the Cause; that she was married in 1982 to one Onyango Nathan with whom she lived at Nyakach but left after the 2007 post-election violence; that when the estate was distributed, she and her sister the 2nd Objector, were not considered as it was divided into four portions; Ntima/Ntakira/4279, 4280, 4281 and 4282, respectively. In cross-examination, she stated that her signature in the consents in this Cause were forged and that she was not out to destabilize the family.

5. OW₂ was Julia Kanyua Mbui, the 2nd Objector. She told the Court that she was a sister to the 1st Objector and the Petitioner; that all the family members had agreed that the Petitioner do apply for the letters of administration, but however, the Petitioner did not advise them at the time of filing the Petition. She denied having signed any of the consents on record and insisted that she had been discriminated upon during the distribution of the estate. In cross-examination, she admitted that she is married but still insisted that she wanted her share in the estate of her late father. Raymond Mwiti Mbui (OW₃) told the Court that he is a brother to both the Objectors and the Petitioner. He denied having signed the consents on record. He stated that the estate should be redistributed to all the children of the deceased. In cross examination, he stated that the estate had not been distributed as had been agreed upon and that all the beneficiaries had contributed to the filing of the Cause by selling a tree.

6. OW₄ was Janet Manyara, a daughter-in-law to the deceased. She denied signing any document relating to the Succession Cause. She supported the Objectors' contention that they were entitled to a share in the estate. In cross examination, she denied there having been any agreement on the sharing of the estate.

7. After OW₁ had testified, the Court ordered the District Criminal Investigations Officer (DCIO) Meru Central, to investigate Form Nos. 37 and 38 in this Cause which contained the signatures that the witnesses had disclaimed. By a report presented in Court on 13th May, 2015 by Corporal Benson Shindani as Exhibit 5, the document examiner confirmed that the signatures appearing in Form Nos. 37 and 38 in this Cause did not belong to the witnesses who had testified.

8. When the matter came up before me for hearing on 17th January, 2017, the Counsels agreed that they make submissions on the evidence already on record and the Court do make a ruling on the application for revocation on behalf of the Objectors, Ms Kiome submitted that the evidence on record had showed that the Petitioner had committed a fraud. She urged the Court to find that there were sufficient grounds to revoke the grant.

9. Mr. Karuti, Learned Counsel for the Petitioner submitted that the application was incompetent due to its vagueness. That the application had sought both the revocation and annulment of the grant when it is common ground that the grounds for revocation are different from that of annulment. Counsel further submitted that the application was for provision for a dependant under Section 26 disguised as an application for revocation; that it had been made so late in the day; that there was no secrecy in applying for the grant as all the children of the deceased attended the Chief's office for that purpose. Counsel observed that the report of the DCIO was inconclusive as there were further investigations that were yet to be undertaken.

10. In rejoinder, Ms. Kiome submitted that the application was not vague as it had been brought properly under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya ("the LSA"). That in the event the application was vague, it was curable under Rule 73 of the Probate and Administration Rules and Article 159 of the Constitution of Kenya. She urged the Court to find for the Objectors.

11. I have carefully considered the Affidavits on record, the testimonies of witnesses and the submissions of Counsel. The following are the issues for determination: Whether the application for revocation is fatally defective? Whether the application was being made after undue delay? And, whether there were any grounds to revoke the grant?

12. The first attack by Mr. Karuti on the application was that the same was fatally defective as it was vague. That it sought the revocation and annulment of the grant at the same time yet there are different grounds for the two. Sections 76 of the LSA and Rule 44 (1) of the Probate and Administration Rules were relied on. A reading of the Summons under consideration shows that Prayer 1 was made in the alternative. It reads:-

“THAT the grant of letters of administration to William Kimathi Mbui herein be revoked or annulled and the title No. Ntima/Ntakira/4279, 4280,4281 and 4282 be cancelled to enable redistribution of the estate.”

The summons then proceeds on its body to give the grounds upon which it was predicated upon.

13. The thrust of Mr. Karuti’s argument, if I understood it well, was that an applicant under Section 76 of the LSA is put on election by the use of the term “or” in that section immediately after the words “be revoked”. In my understanding, Section 76 gives the jurisdiction or right to apply for either revocation or annulment of a grant on any of the grounds set out there under whilst Rule 44 of the Probate and Administration Rules sets out the procedure for making such an application. To my mind, since neither Section 76 nor Rule 44 aforesaid makes the distinction nor bars the making of the application as the Objectors did in this case, I see no defect whatsoever in the application before me. What the Objectors did was to give the Court the leeway to choose either to revoke the grant or annul it on the grounds pleaded.

14. In any event, I see no prejudice suffered by the Petitioner by the wording of prayer 1. To my mind, to rule otherwise would be to be too technical in applying the law which is frowned upon by Article 159 (2) (d) of the Constitution of Kenya. In my view, since both the Petitioner and the Court were able to decipher the grounds for which the Objectors needed either of the two (2) remedies, I see no justification to reject the application on the ground of vagueness. I reject that Objection.

15. The next attack was that the application was made after an undue delay; that it was an application by a dependant for provision under Section 26 but disguised as an application under Section 76 of the LSA in order to avoid the bar contained in Section 30 of the Act for such applications.

16. It is true that an application by a dependant for provision under Section 26 of the LSA has a time bar under Section 30 of that Act. Such an application cannot be made after a grant has been confirmed under Section 71 of LSA. I have looked at the application by the Objectors, their deposition and their testimonies in Court. They were categorical that they are daughters of the deceased. They admitted that they had been married way before the deceased passed on. They further admitted that they were not dependent on him as at the time of his demise. Their testimonies were to the effect that, their contention was that they were entitled to share in the estate of the deceased on the basis that they are daughters of the deceased.

17. In the view of this Court, an application for provision by a dependant under Sections 26 through 29 of the LSA, is meant to provide for such dependant before distribution. It is to caution a dependant who is entitled to provision from the estate from the harshness arising from the sudden death of the deceased. Such provision cannot be made once the estate has been distributed after the grant has been confirmed. In this regard, considering the testimonies of the Objectors, their claim is based on their being beneficiaries under Section 38 of the LSA and not as dependants. The Objectors were alive that they want the grant revoked and the estate redistributed afresh. They never sought provision as dependants. The Court cannot assume or box them into that corner if that was not the remedy they were seeking. The delay in filing the application was explained to be the failure by the Petitioner to notify the Objectors of his lodging this Cause. The Petitioner cannot rely on his wrong to prejudice the Objectors. I reject that contention.

18. The 3rd issue is whether the Objectors have established any ground for the grant to be revoked. The grounds for the application were that the Objectors were not involved in the lodging of the Cause; that the signatures in the consents in this Cause were forged and that the Objectors had not been catered for

yet they are lawful beneficiaries to the estate. The objection to the application by the Petitioner as contained in his Replying Affidavit sworn on 25th July, 2012 was that the application was being made so late in the day after distribution; that the Objectors were involved in the Succession Cause and that the Objectors were married women who had no claim whatsoever in the estate of the deceased.

19. As regards whether the Objectors were involved in the lodgment of the Cause, the testimonies of OW₁, OW₂ and OW₃ was clear. They all went to the area Chief where it was agreed that the Petitioner should be the one to apply for the Letters of Administration. OW₃ told the Court that they were involved in the filing of the Cause as they contributed the monies for filing of the Cause from the proceeds of a tree that had been sold for that purpose. To my mind, that ground was not proved and it is rejected.

20. The other issue is that of the consents. The Objectors contended that they had not signed the consents for either the filing of the Petition or for confirmation of grant. I have looked at both Forms 37 and 38 in this Petition. Both are duly signed by all the beneficiaries. The Objectors were extensively cross examined but their denial of having signed the said forms remained unshaken. Indeed, the report that was produced as Exhibit 5 by the DCIO, Meru Central confirmed that neither the Objectors nor OW₃ and OW₄ signed any of the said Forms.

21. Mr. Karuta submitted that the said report cannot be relied upon as it was inconclusive as there were further investigations to be undertaken. I have looked at the said report. It was firm that the signatures appearing in the said Forms against the names of the Objectors and OW₃ and OW₄ were not theirs. That corroborated the denials of the said witnesses. The said forms were presented in this Court by the Petitioner as having been duly signed by the said witnesses. It has turned otherwise. To my mind, that report is conclusive as to the fact that the Objectors and the other witnesses in this Court did not sign the subject consents. The Petitioner had hoodwinked the Court to believe that all the beneficiaries had consented to his actions including distribution. It turned out to be a fraud. The further investigations alluded to therein was to establish who signed them. That is not for this Court. This Court is satisfied that the Petitioner perpetrated a fraud; that this Court was hoodwinked that all the beneficiaries had given their consents for the issuing of the grant and the confirmation thereof.

22. Finally, the Objectors testified that as daughters of the deceased, they were entitled to share in the estate. There is no dispute that the Objectors are daughters of the deceased. As such daughters, they are entitled to a share in the estate as much as the sons are. It does not matter that they are daughters or that they are married. To the extent that the estate was distributed excluding them, that cannot stand. The distribution was in breach of Article 27 of the Constitution of Kenya and Section 38 of the LSA. The delay in applying for evocation must have been because of the stealth way the Petitioner pursued the Cause without informing the Objectors. That cannot be held against the Objectors.

23. Accordingly, I find the application to be meritorious and I allow the same. As per the consent of Learned Counsel recorded on 17th January, 2017, that in the event the ruling is in favour of the Objectors, the Petitioner and the 1st Objector be appointed joint administrators, I make the following orders:-

(a) The grant issued on 3rd April, 2008 is hereby revoked.

(b) Consequently, the Certificate of Confirmation of Grant made on 15th October, 2009 is hereby set aside.

(c) Title Numbers Ntima/Ntakira/4279, 4280, 4281 and 4282 are hereby cancelled and the title reverts back to the original Ntima/Ntakira/174 in the name of the deceased.

(d) A fresh grant is hereby issued to William Kimathi Mbui and Esther Kibobori Mbui as joint administrators.

(e) This matter now do proceed on the issue of distribution on a date to be agreed.

It is so ordered.

DATED AND DELIVERED AT MERU THIS 30TH DAY OF MARCH, 2017.

A. MABEYA

JUDGE

30/3/2017