



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.654 OF 2012

IN THE MATTER OF THE ESTATE OF KATHEKE KAVILA (DECEASED)

KANINI KAVILA MUMEEBENEFICIARY/APPLICANT

VERSUS

KIOKO MUSYASYAADMINISTRATOR/1ST RESPONDENT

PETER MUEKEADMINISTRATOR/2ND RESPONDENT

MUTUKU KIOKO3RD RESPONDENT

RULING OF THE COURT

1. The Beneficiary/Applicant has filed an Application dated 18/10/2016 pursuant to Section 45, 47 and 76 of the land of Succession Act, Rule 44, 49 and 73 of the Probate and Administration Rules and seeks for the following prayers:-

1. That pending the hearing and determination of this Cause an order do issue restraining the Respondents from constructing on, disposing off, alienating, selling or dealing in any other manner that is prejudicial to the interests of the Applicants and other beneficiaries of all that property known as MITABONI/MUTITUINI/ 2298.

2. The grant of letters of administration intestate issued to the Administrators on 10/12/2012 herein be revoked and or annulled and or in the alternative the Applicant be included as a co-administrator of the estate of the late KATHEKE KAVILA.

3. That cost of the Application be paid for by the Respondents.

The Application is supported by Affidavits of the Applicant sworn on 18/10/2016 and 10/11/2016 and further on the following grounds:-

1. That the grant herein was obtained through secrecy and concealment of material facts.

2. That the Applicant was a co-wife to the deceased herein.

3. That the deceased herein and the Applicant jointly owned in equal shares all that property known as MITABONI/MUTITUNI/2298 the only property comprising of the deceased estate.

4. That the administrators when seeking for the grant herein failed to disclose to the court that

the Applicant was also a beneficiary of the only property of the deceased herein.

5. That the administrators have been disposing of portions of the said land without due regard to the portion of land belonging to the Applicant despite a clear and distinct boundary having been placed by the clan distinguishing the two portions of land.

6. That early this month the administrators who are the grand children to the deceased herein illegally sold to one MUTUKU KIOKO the 3rd Respondent a portion of the land MITABONI/MUTITUNI/2298 from the side allocated to the Applicant herein and the 3rd Respondent is now putting up an illegal construction thereon.

7. That the administrators have illegally disposed several other portions of land from the said land ordinarily in use and ownership of the Applicant and her children in total disregard of her claim and right to owning half of the said land and if this is allowed to continue the Applicant shall suffer irreparably.

8. That despite several demands to the Respondents to cease the trespass, the illegal disposing and construction of buildings on the portion of land belonging to the Applicant, the Respondents have dismissed the Applicant's claims and totally ignored her pleas.

9. That it is in the interest of justice to stop any further disposing, sale or construction of the buildings on this land until the matter is heard and determined.

10. That the Applicant shall suffer irreparably if the orders sought are not granted.

2. The application is opposed. The 1st Respondent swore two Replying Affidavits dated 4/11/2016 and 24/11/2016 and raised the following grounds of objections:-

a. That the Applicant had been divorced by the 1st Respondent's grandfather one KAVILA MUMEE under Kamba Customary law and thus was not entitled to petition for letters of administration.

b. That the Applicant upon being divorced got married to one KASINZIA MATHENDU.

c. That the land was registered in the names of the Respondent's grandmother.

d. That the Respondents duly petitioned for letters of grant and a grant was issued on 17/1/2013.

e. That the Applicant fraudulently obtained registration of parcel Number MITABONI/MUTITUNI/2298 as a co-share with Respondent's grandmother upon her demise despite the fact that the Applicant had been evicted from the said parcel of land.

f. That the Applicant has blocked a road of access to the suit land.

g. That the land is subject to a Civil suit No.736 of 2015 which is still pending on an injunction Application.

h. That the Respondents had planned to apply for confirmation of the grant but are unable to do so.

With the leave of the court, parties filed written submissions which I have carefully considered. The following issues are necessary for determination:-

1. Whether the grant issued on 10/12/2012 and dated on 17/1/2013 should be revoked and or annulled.

2. Whether an order of injunction should be issued to restrain the Respondents from interfering with land Reference MITABONI/ MUTITUNI/2298 in a manner prejudicial to the Applicant and other beneficiaries.

3. Whether the Applicants Advocates M/s Gladys Gichuki & Co. Advocates are properly on record.

4. As regards the first issue, it is noted that the Applicant's Applications is hinged on the provisions of Section 76 (b) of Law of Succession Act which provides as follows:-

“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”.

The Applicant had stated that she has been married to the late KAVILA MUMEE and was a co-wife to KATHEKE KAVILA. She further averred that upon the demise of their husband KAVILA MUMEE she and her co-wife KATHEKE KAVILA registered the family land MITABONI/MUTITUNI/2298 in joint names of herself and her co-wife with each owning a half share. She has annexed a copy of an official search showing the said entries on the register at the Lands Offices were made on the 20/08/1984. The Applicant maintains that she and her children have been occupying half of the land reference MITABONI/MUTITUNI/2298 and that she was surprised to discover that the Respondents who are grandchildren of her deceased co-wife had secretly petitioned for letters of grant without involving her yet she was a wife to the original owner and further that the land had subsequently been registered jointly on her names and her co-wife who is a grandmother to the Respondents. The Respondents have claimed that the Applicant had been divorced by her later husband KAVILA MUMEE and she had been re-married by one KASINZIA MATHENDU who later paid dowry to her parents. The Applicant has vehemently denied the allegation and maintains that she does not know the alleged KASINZIA MATHENDU. It was also claimed by the Respondents that the Applicant and her children had been evicted from the said land vide a court order in Machakos CMCC No.736 of 2015 but however the particular property is not indicated and proof that indeed she had been evicted from such land since the Applicant maintains she is still resident on the land and her children. The Respondent attached a copy of acknowledgement of dowry from one MATHENDU but there is no evidence that indeed such dowry was ever received by one MASILA since the alleged receipt is not witnessed. Indeed issues of dowry in traditional African Societies involve elaborate ceremonies attended by several persons from both families. The acknowledgement of the alleged dowry is neither signed nor even witnessed. The Applicant has vehemently denied being divorced and remarrying as claimed by the Respondents. The Respondents are out to disinherit her and her children from the property of her late husband and which was later registered jointly in her names and those of the Respondent's grandmother. Indeed the copy of the search certificate showed that the joint registration was made on 20/08/1984. That being the position it follows that the Applicants half share ownership in parcel MITABONI/MUTITUNI/2298 is legally protected in law and therefore upon the demise of her co-wife KATHEKE KAVILA the consent of the Applicant was required for any disposition, dealing and or transaction involving the said parcel of land. It is therefore unbelievable for the Respondents to proceed to file for petition for grant to allege fraud on the Applicant yet they (Respondents) were supposed to have conducted a search of the property intended to be listed as asset for distribution in the estate of KATHEKE KAVILA. Had the Respondents conducted a search they would have established that the property was registered in the joint names of KATHEKE KAVILA and KANINI KAVILA and would therefore have involved her in the Succession Cause herein. It is clear from the material presented in the rival affidavits that indeed the Respondent had been aware of the Applicant's claim to part of the land parcel MITABONI/MUTITUNI/2298 and that the filing of this Succession Petition without consulting her implied that the Respondents had concealed some material facts from the court. A perusal of the Respondent's Form P&A 5 reveals that the portion meant for listing of assets and liabilities was deliberately not filled yet a certain sum of Kshs.400,000/= is indicated as the total estimated value. The Respondents knew that they were obliged to disclose all the properties of the deceased so as to administer the same upon obtaining the grant. They cannot now turn around and attempt to purport to administer property namely MITABONI/MUTITUNI/2298 yet they had deliberately omitted to list it as part of the properties of the deceased. Their conduct therefore shows that they had knowledge the property was registered in the names of their grandmother and the Applicant herein each

owning half share but they had deliberately withheld such information from the court when filing for Grant of Administration intestate. Such material non-disclosure warrants this court to order for the revocation/annulment of the grant issued to the Respondents.

5. As regards the second issue and as observed above that the property namely MITABONI/MUTITUNI/2298 had been jointly registered in the names of KATHEKE KAVILA and the Applicant herein, it is only fair and just that the same should not be interfered with and or meddled as it is part of property of a deceased. The same should be protected by an order of injunction so as to preserve the same until the time of distribution once a grant is confirmed. Hence an order of injunction is merited to restrain the Respondents from dealing with the suit property in a manner that is prejudicial to the interest of the Applicant and other beneficiaries.

6. As regards the third issue it is noted that a Notice of Appointment was duly filed by the firm of Gladys Gichuki & Associates Advocates prior to the filing of the present Application on the 10/10/2016. Hence I find the Applicant's advocates were and are properly on record for the Applicant. The said counsel has been in conduct of the proceedings on behalf of the Applicants all through and at no time has the objection been raised. In fact the court had allowed subsequent further affidavits as deemed properly on record. Even though the Notice of Appointment may not have been served upon counsel for the Respondents, counsel was subsequently served with the Application that had been prepared by the said counsel for the Applicant and thus Respondent's counsel is deemed to know that the Applicant was being represented by counsel and hence the service of process upon the said firm of Advocates.

7. In the result and for the foregoing observations, it is the finding of this court that the Applicant's Application dated 18/10/2016 has merit. The same is granted in terms of prayers 3 and 4 thereof. The costs shall be in the cause.

Dated, signed and delivered at Machakos this 25th day of **APRIL** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Muumbi for Gichuki for the Applicant.....

Mukula for Respondent

C/A: Kituva.....