



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 621 OF 2014

IN THE MATTER OF THE ESTATE OF MUSAU KITOO KING'UTA (DECEASED)

JACOB KILONZOOBJECTOR/APPLICANT

AND

MULE KITOO KING'UTAADMINISTRATOR/RESPONDENT

RULING OF THE COURT

1. The Objector/Applicant has filed an Application dated 1st September, 2016 pursuant to the Provisions of Section 76 of the Law of Succession Act and Rule 44 of The Probate and Administration Rules for the following prayers namely:

(1) THAT the Certificate of Confirmation of a grant and Schedule of distribution of property scheduled for determination on 11/10/2016 in favour of Mule Kitoo King'uta who is the Respondent herein be revoked.

(2) THAT the administrator be directed to enjoin the Objector/Applicant as a co-administrator and/or consider the Objector/Applicant as dependant and the beneficiary thereof.

(3) That the costs of the Application be borne by the Respondent.

The Application is grounded upon the annexed affidavit of the Applicant sworn on even date and further on the following grounds:-

(a) The proceedings to obtain the certificate of confirmation of the grant were defective in substance ab initio.

(b) The certificate of confirmation of the grant and schedule of distribution of the property scheduled for confirmation on 11/10/2016 is based on fraudulent information by making of a false statement or by concealment from the court of some material facts.

(c) The certificate of confirmation of the grant is premised by means of untrue allegation of fact essential in point of law to justify the grant.

(d) The proposed schedule of distribution of property is based on dishonest and fraudulent information through misrepresentation of facts by the Administrator to court.

2. The Applicant's case is that the deceased herein Musau Kitoo King'uta had sold to him a portion of

plot **Number 869 Uvuu land Adjudication Section** and that the Respondent has secretly proceeded with the process of administering the estate without involving him and other family members. The Applicant maintains the deceased was his uncle and as such he should be included by virtue of Kamba customary law as deceased died without a spouse or children and thus all family members were to share his property. The Applicant further avers that the Respondent intends to transfer the property to third parties and further intends to evict him from land he has been utilizing since 1988.

3. The Application is opposed. The Respondent filed a Replying Affidavit dated 11/10/2016 in which he raised the following grounds of opposition:-

(a) That the Respondent is one of the proprietors in common in Plot No.869 Uvuu Adjudication Section as per the land Adjudication Register.

(b) That the Respondent is the only surviving beneficiary of the estate of the deceased.

(c) That the Applicant herein is an intermeddler to the estate as he does not have any legal nor beneficial interest to the estate.

(d) That the Applicant has not adduced any document in support of the purported sale between him and the deceased and could thus not be listed as a liability to the estate.

(e) That the Application is intended to delay the distribution of the estate and ought to be dismissed with costs.

4. Parties filed written submissions which I have considered. I have also considered the summons for revocation of grant together with the supporting affidavit and replying affidavit plus annexures thereto, I find the following issues necessary for determination:-

(i) Whether the grant issued to the Respondent should be revoked.

(ii) Whether the Applicant should be enjoined as an administrator of the estate of Musau Kitoo King'uta.

As regards the first issue the Applicant has cited the Provisions of Section 76 (b) and (c) of the Law of Succession Act which provides 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)

(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”.

The Applicant has averred that the Respondent who is his uncle deliberately concealed a material fact namely that the Applicant had bought part of the deceased land **parcel number 869 Uvuu Adjudication Section** and further that he was a nephew to the deceased and thus entitled to a share of the estate and also to be a co-administrator. The Applicant also cited Kamba customary laws as entitling him to a share of the deceased's estate by virtue of him being a relative to the deceased. The Respondent has vehemently denied the Applicant's assertions and raised two very fundamental issues namely that the property in issue namely **plot No.869** was jointly owned by himself and the deceased as joint proprietors.

Secondly, that there is no sale agreement exhibited by the Applicant and that the only thing that he has shown is an agreement whereby he (Applicant) was a witness to a sale agreement between the Respondent and one Abednego Katelu Kyau. There is a letter dated 7/05/2012 from the Makueni Land Adjudication which clearly indicated the **parcel number 869** is recorded in the names of the deceased and Respondent. Again a copy of an official search dated 18/12/2015 and annexed to Respondent's replying affidavit indicates that land reference number **Makueni/Uvuu/869** is registered in the joint names of the deceased and Respondent. The Respondent's names are captured as Mulwa Kitoo King'uta and he has sworn an affidavit explaining the discrepancy in his names. If it is true that the Respondent and deceased were registered as joint proprietors then they were joint tenants over parcel **Makueni/Uvuu/869** and that the interest of a deceased joint tenant passes to the surviving joint tenant. The certificate of death shows that the deceased died on 30/06/1999 and it therefore follows that subsequently thereafter the Respondent being the surviving joint tenant became the absolute owner of the property. Moreover the deceased died without a wife and children. Hence at the time the Respondent was selling part of the land to one Abednego Katelu Kyau he had assumed legal ownership of the entire parcel of land. The Respondent further has indicated that he is also the surviving brother of the deceased who had no wife or children. The Applicant who is a nephew is rather distant in the family tree and if there was any claim then he could do so through his father but not the deceased. Hence the Respondent was under no obligation to include the Applicant as a beneficiary or co-administrator of the estate of the deceased and as such he is not guilty of any material non disclosure during the filing of Petition for grant. As regards the Applicant's claim to have purchased a portion of land from the deceased, I find the same not plausible because there was no sale agreement evidenced and neither was there a supporting affidavit of any witness. The sale agreement alluded to involve the Respondent and a buyer by the name Abednego Katelu Kyau while the Applicant is indicated as a witness. There is nowhere in the document is he being described as a buyer of the deceased's land. Not even a single witness has sworn an affidavit or recorded a statement confirming the existence of any such a sale agreement entered into by Applicant and deceased. As no such evidence has been presented by the Applicant, then it follows that his claim that the Respondent concealed material facts is not convincing.

As regards the second issue, it is noted that the Applicant herein has not managed to establish that he has indeed purchased land from the deceased. If there would have been such sale, then the Respondent would have been involved or even made aware since the property had been jointly owned and or registered in joint names of the Respondent and the deceased as joint tenants. Further the Applicant has indicated that he is a nephew of the deceased whereas the Respondent is a brother to the deceased. The Applicant has not availed evidence to the effect that he was a dependant of the deceased. The Applicant's major grouse with the Respondent is that the (Applicant) should benefit from the estate by virtue of the fact that he is one of the family members and the Respondent should not be allowed to benefit alone. The Applicant's grievances are not supported by any evidence in that the Respondent and deceased had been joint tenants on parcel **Makueni/Uvuu/869** and upon the death of the deceased, the sole ownership reverted to the Respondent. I find the Applicant has failed to establish that he has some proprietary or beneficial interest on the deceased's parcel number 869. Hence he is not eligible to be made a co-administrator as claimed.

The upshot of the foregoing observations is that I find the Applicant's Application dated 1/09/2016 lacks merit. The same is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Machakos this **13TH** day of **APRIL** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

C /A: Kituva.....