



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.33 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN NTHALE KYULI OF (DECEASED)

ANNE AMANGA NTHALE1ST APPLICANT

DAVID KYULI NTHALE2ND APPLICANT

VERSUS

ELIZABETH NDINDA NTHALEPROTESTOR

RULING OF THE COURT

1. The Protestor herein **ELIZABETH NDINDA NTHALE** has filed summons for revocation or annulment of grant dated **11th March, 2014** on the following grounds:-

- (a) That the grant was obtained fraudulently by making of a false statement.*
- (b) That the grant was obtained through concealment of material facts from the Court.*
- (c) That the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant.*
- (d) The Administrators did not include Protestor as a beneficiary and further did not include her in the mode of distribution of the estate of the deceased NTHALE KYULI.*
- (e) The Administrators did not have legal capacity to dispose properties and that grant should not be confirmed pending the hearing and determination of the ELC Number 56 of 2014 at Nairobi.*

2. The Protestor's Application was strenuously opposed by the Administrators on the following grounds:

- (a) That the Protestor herein had been included as one of the beneficiaries.*
- (b) That the Protestor has been involved in all decisions but she has shunned the Administrators.*
- (c) That the Protestor had all along been consulted but she has deliberately refused to give her consent to the mode of distribution of the estate.*
- (d) That the Protestor can be included as a co- administrator if that is her desire so as to speed up the confirmation of the grant.*

3. Parties herein took directions to have the summons for confirmation of grant canvassed by way of viva voce evidence.

4. The Protestor's case

The Protestor testified that the Petitioners did not consult her during the sale of one of the properties and also in the Application for confirmation of grant although she has no problem to the mode of distribution of the estate as proposed by Petitioners vide paragraph 5 of the Affidavit in support of confirmation of grant. The Protestor on being cross-examined by the Petitioners counsel admitted that the properties should be divided among seven beneficiaries and she confirmed having received her share from the Petitioners from the sale of a Plot within Kirinyaga road Nairobi.

5. Petitioner's case:

The 1st Petitioner testified that she has not locked out the Protestor at all as she included her as one of the beneficiaries to the estate. She further stated that she sold a plot within Nairobi Kirinyaga area for Kshs.25 million and the proceeds shared equally between seven beneficiaries who include the Protestor herein. The 1st Petitioner feels that the Protestor is being used as a hired gun by her brother in laws to frustrate and derail the confirmation process. The second Petitioner reiterated the averments of the 1st Petitioner and sought for confirmation of grant.

6. Parties were directed to file written submissions. However it is only the Counsel for the Protestor who filed submissions which I have carefully considered. I have also considered the evidence of both the Protestor and the two administrators. It is not in dispute that the parties entered a consent whereby the Protestor herein Elizabeth Ndinda Nthale was allowed to come on board as a co-administrator and therefore the Protestor's Application dated 11/3/2014 was thus marked as settled. It is also not in dispute that there exists a pending **Succession Cause Number 3403 of 2005 Nairobi** involving the estate of one David Kyuli Kaindi who apparently was the father of the deceased in these proceedings and in which the deceased had been bequeathed some properties by his late father David Kyuli Kaindi. It is also not in dispute that the two (2) administrators herein have since sold some property which forms part of the estate in **Nairobi P&A 3403 of 2005**. It is also not in dispute that the proceeds of the said sale have already been shared by the two administrators herein and the Protestor. The issue for determination is whether or not the Administrators summons for confirmation dated 28/02/2014 should be allowed as requested.

First and foremost it transpired from the evidence of the parties herein that the Protestor had not been consulted when the summons for confirmation was being filed by the Petitioners herein yet the Protestor had been a legitimate beneficiary of the estate of the deceased. Now that the parties have agreed to have the Protestor brought on board, it is appropriate to defer the summons to a later date to allow the reissuance of a new grant in the names of the three (3) administrators before they embark on the task of confirmation of grant.

Secondly, it transpired that the Petitioners had sold some half share of land parcel **number L. R 209/136/13** which is part of the estate in **Nairobi High Court Succession Cause No.3403 of 2005** which is still pending for determination and is yet to be confirmed. It was therefore quite improper for the Petitioners to have embarked on an exercise of selling property of a deceased's estate before the grant was confirmed. This was in violation of the provisions of Section 82 (b) (ii) of the law of Succession Act which forbids the sale of immovable property before confirmation of grant. Even though the Petitioners have claimed that it was due to need for school fees for children, no such excuse would be allowed in complete violation of the law. Again pursuant to the alleged sale, a civil suit being Nairobi **ELC. NO. 56 OF 2014** has been filed wherein the 1st Petitioner herein has been sued following the irregular sale of one of the properties which form part of the deceased's estate in **Nairobi Succession No. 3403 of 2005** in which an order revoking grant of probate had been issued.

Thirdly it is noted that the shares of the deceased herein **John Nthale Kyuli** are yet to be ascertained in the **Nairobi Succession Cause No. 3403 of 2005** and therefore it follows that an Application for confirmation of grant herein would be improper and premature at best.

Fourthly, the conduct of the 1st Petitioner in engaging in sale transaction of some of the properties of a deceased person in **Nairobi Succession No. 3403 of 2005** before the grant is confirmed amounts to intermeddling under Section 45 (1) and (2) of the law of Succession and ought to be punished accordingly. The said Section provides as follows:-

Section 45(1)

Except so far as authorized by the Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person....”

Section 45 (2)

Any person who contravenes the provisions of this Section shall:-

(b) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

Since the property involved is part of the estate in **Nairobi Succession 3403 of 2005** I find the said court is best placed to cite the 1st Petitioner for the appropriate punishment. In any case the 1st Petitioner actions appear to have crystallized into a case now pending for determination being **Nairobi ELC No. 56 of 2016**.

7. In the result, it is the finding of this court that the summons for confirmation dated 28/2/2014 is premature. The same is ordered postponed pending the hearing and final determination of the **Nairobi Succession Cause No. 3403 of 2005**. Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this 31st day of **JULY** 2017

D. K. KEMEI

JUDGE

In the presence of:-

Mutua for Kingoo for Applicants

C/A: Kituva