



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PROBATE AND ADMINISTRATION

SUCCESSION CAUSE NO. 368 OF 2008

IN THE MATTER OF THE ESTATE OF SERAH MUNEE MUTULA (DECEASED)

BENSON KYALO MUTUL.....PETITIONER/RESPONDENT

VERSUS

1. MARGARET MWONGELI KIMEU

2. JOYCE MUTHOKI KIOKO

3. IRENE NTHENYA NDUVA

4. JOSEPHINE MWELU MUTUA.....RESPONDENTS/OBJECTORS

RULING OF THE COURT

1. Before this court is an Application for Revocation and or annulment of a grant issued to the Petitioners on 1st August, 2008 and subsequently confirmed on 14th October, 2008. The Application is supported by the affidavit of Margaret Mwangeli Kimeu and the grounds on the body of the Application. The said was issued in respect of the estate of **Serah Mune Mutula** (deceased) who died on 8th May, 2006. The Petitioners later on 9th June, 2008 had the grant rectified. The Respondents' contention is that they were not consulted at the time of the confirmation of grant. That due to the foregoing, their view on the mode of contribution was not put into consideration. It was further contended that the petitioners failed to include; Dorothy Mueni Mutula, Margaret Mwangeli Mutula, Benson Kyalo Mutula, Mwangangi Mutula, Joyce Muthoni Mutula, Irene Nthenya Mutula and Josephine Mwelu Mutula who are the deceased's dependants. That from the rectification certificate of confirmation of grant, it is clear that the petitioners are the only ones listed as beneficiaries thus the respondents herein have been disinherited of their father's estate. It was contended that the grant offends the provisions of section 76 (a) (b) and (c) of the Law of Succession Act since the respondents' consent was not obtained before confirmation of grant.

2. In response to the summons for revocation, the 1st petitioner filed a replying affidavit on 9th November, 2016. He contended that the petitioners' mother (Serah Mune Mutula) was initially the sole administrator of the deceased's estate. That in her Application for confirmation she ensured the respondents were apportioned shares in the deceased's estate. That following their mother's demise, the petitioners applied to be administrators of the shares of their mother's estate which properties she got from the initial distribution. He contended that the Respondents had had their share of the deceased estate and cannot be heard to say they have been disinherited.

3. The 1st objector's evidence in support of the Application was taken orally. She stated that their consent was not obtained at the time their mother Serah was applying for distribution of the estate yet they are the deceased's biological children and that their brothers sold their mothers property.

4. The Respondents in their submissions relied on Section 26 (1), 26 (2), 40 (8) of the Laws of Succession Act. The Respondents further relied on **Succession Cause No. 1958 of 2003 and 1781 of 2004 in the matter of the estate of Kamuyu Nganga Waweru [2008] e KLR** and **Succession Cause No. 306 of 2003 in the matter of the estate of the late Jackson Muriungi Muindu (deceased) [2014] e KLR**. The petitioner's submissions were a reiteration of the averments in the affidavit.

5. I have carefully considered the application herein. The issue in contention is whether or not the Respondents' consents were procured while applying for confirmation of grant in which a mode of distribution was scheduled. It is noteworthy that in the application dated 17th June, 2008, in which the estate was distributed among all the dependants, the respondent's consents were not procured. The property sought to be distributed in the motion dated 10th September, 2008 were the parties mother's in the strength of distribution in the application dated 17th June, 2008. Bearing in mind the fact that the consents were not procured, the distribution therein cannot be said to have been fair and done within the law. There being no consent of all the beneficiaries, an inference is drawn that the petitioners misled the court by stating that the shares of the deceased had been identified and that all the dependants consented to the mode of distribution. In the words of Section 76 of the Succession Act therefore the respondents have established a case for revocation of the grant herein. The said section 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. 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 order or allow; 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.”

6. Under the Provisions of Rule 26 (1) (2) of the Probate and Administration Rules notice should be served upon every other person entitled to benefit from the estate and further a consent to the proposed mode of distribution prepared and signed. A perusal of the initial P&A 5 forms reveals that the names of the four objectors were not included as dependants of the estate of their late mother **Serah Munee Mutula** as they were her biological daughters. Only the administrators as sons were indicated. Again the Summons for Confirmation of grant did not contain a consent signed by the Objectors and neither were

the Objectors invited to appear in Court to express their opinions as to whether or not they agree to the proposed mode of distribution of the estate. This was quite irregular indeed and revealed that the Administrators had concealed material facts from the Court. The Objectors being daughters to the deceased were entitled to not only benefit in the estate of the deceased but to participate in the proceedings. I find the Objectors have convinced this court that they have good reasons for seeking to revoke the grant and therefore the grant herein as well as the confirmation were obtained by the Petitioners in contravention of Section 76 of the law of Succession Act as well as Rules 26 (1) (2) of the Probate and Administration Rules.

7. The upshot of the foregoing observations is that the Application succeeds with the following orders being made:-

1. The grant issued herein and the subsequent confirmation dated 9/06/2008 be and are hereby revoked.

2. That all titles issued pursuant to the revoked grant and certificate of confirmation as per scheduled of properties in the certificate of confirmation of grant dated 9/06/2008 are hereby cancelled and the whole parcels of land revert back into the name of Serah Mune Mutula(deceased).

3. The Administrators and Objectors to sit and agree as a family failing which they are at liberty to file separate schemes of distributions within the next sixty (60) days from the date hereof.

4. As parties herein are members of one family, I order that each party to bear their own costs.

Dated, signed and delivered at MACHAKOS this 29th day of September, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Ngolya for Uvyu for Applicant

Kyalo for Matata for Respondent

C/A: Kituva