



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION NO. 265 OF 2013
IN THE MATTER OF THE ESTATE OF THE LATE NZOVE MUU DECEASED)
DANIEL WAMBUA NZOVE.....1ST PETITIONER
FRANICS KIVUTI NGOVE.....2ND PETITIONER
VERSUS
KIVINDYO NZOVE.....1ST OBJECTOR
FRANCISCAH NZOVE.....2ND OBJECTOR

RULING

1. There are two Applications filed in this matter. The first one is dated 12th July, 2016 by the Objectors while the second one is dated 20th September, 2016 by the Petitioners.
2. The Objectors Application dated 12/07/2016 basically seeks an order of review or setting aside orders made on 29/06/2016 directing the disposal of the matter by way of written submissions. The same is supported by an affidavit of Kivindyo Nzove the 1st Objector and further on the following grounds:
 - (a) *That the matter should be disposed of by way of oral evidence.*
 - (b) *That there is a document in the form of a will which has been advanced by the Petitioners regarding the mode of distribution of assets of the deceased herein.*
 - (c) *That the Objectors position is that the said will is forged.*
 - (d) *That the issue of forgery cannot be disposed of by way of written submissions.*
 - (e) *That the will surfaced at the end and was not part of the initial proceedings when the Petition was first moved to court.*
 - (f) *The issue in contention is distribution.*
 - (g) *The Objectors position is that the deceased shared out his estate to three houses before he died in the presence of the clan.*

(h) That each house is settled as per the agreement.

(i) That these issues can only be brought out in oral evidence.

3. The Objectors Application dated 12/07/2016 is vehemently opposed by the Petitioners on the following grounds:-

(a) That parties had agreed by consent to dispose of the matter by way of written submissions.

(b) That the will complained of has been within the knowledge of the Objectors all along.

(c) That the Application has been brought with undue delay and therefore is an afterthought aimed at delaying the finalization of this matter.

(d) That the issues raised by the objectors should be investigated by the police and not by this court since they are criminal in nature and no complaint has been made by the Objectors.

(e) That if the Objectors feel the will is forged they have a remedy in criminal proceedings.

(f) That the Objectors have not met the threshold of setting aside consent orders and therefore the Application should be dismissed.

4. The Petitioners Application is dated 20/09/2016 and basically seeks for an order of temporary injunction to restrain the 1st Objector or his authorized agents, servants, employees and/or any other person acting under authority from trespassing into, disposing or from dealing in any other manner with the parcel of land known as **MUTHETHENI/KIONYWENI/179** which is being occupied by the 1st Petitioner pending the hearing and determination of the Cause. The said application is supported by the following grounds:-

(a) That the Petitioners and Objectors are beneficiaries of the deceased estate.

(b) That prior to the death of the deceased, he had subdivided his properties between his children.

(c) That parcel MUTHETHENI/KIONYWENI/179 is part of estate of the estate of the deceased.

(d) That the Petitioners were bequeathed the said parcel MUTHETHENI/KIONYWENI/179 by the deceased and have been in occupation of the same before and after his death only for the Objectors to trespass thereon and to wantonly cut trees as well as destroying structures and setting up their own structures thereon.

(e) That the Objectors have their own separate portion of land which comprises the deceased estate.

(f) That the Objectors have refused to stop the interference on the suit land in order for the status quo as at the time of the death of deceased to be maintained pending the determination of the cause.

(g) That it is in the interest of justice if the status quo as to the time of deceased's death be maintained pending the determination of the cause.

5. The Petitioner Application was opposed by the Objectors on the following grounds:-

(a) That the Application is similar to another that had been filed and dated 28/08/2013 which was disallowed by Lady Justice Mutende.

(b) That the instant Application is an abuse of the court process.

(c) That the Application seeks to evict other beneficiaries before confirmation takes place.

(d) That the Application is premature and should be disallowed.

(e) That the Objectors have been in the possession of the particular parcel of land since they were born.

6. Counsels for the parties herein filed submissions which I have carefully considered. I have also considered the rival Applications and affidavit filed by the parties. The issue for determination is whether or not each of the parties has convinced this court to grant the orders sought in their rival Applications. I shall deal with each Application separately.

7. Application dated 12/07/2016

Parties herein had earlier agreed to canvass the summons for confirmation of grant by way of written submissions. The Objectors thereafter felt that oral evidence should be the way to go in view of the existence of a will that had been made by the deceased regarding the distribution of his estate. Indeed an order made in the presence and with consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court. The consent had been entered into by the Advocates and therefore ordinarily the parties ought to be bound by the same since the advocates were the duly recognized agents of the parties.

However, the issue of the existence of a will allegedly made by the deceased and which is claimed to be a forgery merits this court to entertain the Objector's Application. Indeed the alleged will is said to determine how the estate of the deceased is to be shared out or distributed amongst the Petitioners and Objectors. Even though the authenticity or otherwise of the alleged will should be investigated by investigative agencies in view of allegation of forgery, this court cannot shut out parties seeking to contest the said document. The matter had been scheduled for confirmation of grant but that the Objectors filed affidavits of protest to the mode of the distribution. The Petitioners are using the will to advance the issue of distribution to which the Objectors are opposed. I find it would be fair and just to allow the parties tender oral evidence. A court handling probate and administration disputes should give the parties a wide latitude in agitating or ventilating their issues. Matter to do with Succession of deceased estates are wholly governed by the Law of Succession Act and the Probate and Administration Rules. Rule 73 of the said Rules provides as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

In view of the foregoing, I find that the Objectors have shown that there are sufficient grounds to justify the setting aside or varying the orders made on 29/06/2016 to pave way for reception of oral evidence by the parties. The Objectors have contested the contents of the will and therefore it is only fair and just to order the parties present oral testimonies. As noted above, the issue of the will is a key pillar in the distribution of the estate and as such the same should be canvassed exhaustively before the grant can be confirmed since it affects the mode of distribution of the estate. The Petitioners shall suffer no prejudice if oral testimonies are called for as they will have the opportunity to defend the will and their proposed mode of distribution. Consequently, I find the Objectors Application dated 12/07/2016 is merited. The same is allowed in terms of prayer 1 thereof with no order as to costs.

8. Application dated 20/09/2016

Upon perusal of the above Application, I find the same is similar to another one dated 27/08/2013 that had been filed by the Petitioners seeking similar orders of injunction against the Objectors and their

families. The previous Application dated 27/08/2013 had been determined by Hon. Lady Justice Mutende vide her ruling dated 23/05/2014 in which the court had ordered that the estate of the deceased be distributed and status quo be maintained pending confirmation of grant. As the summons for confirmation has since been filed and the Objectors have already filed their affidavits of protest, the only issue remaining is for the parties to adduce oral evidence so that the court could proceed to determine the issue of the distribution of the estate. Injunctive Orders against some of the beneficiaries would not anger well in view of the fact that the suit property is subject of a dispute contained in a will yet to be contested in court and further that the suit property might form part of the estate of the deceased for distribution to the beneficiaries in the end. It is only fair that status quo currently, obtaining be maintained pending confirmation of grant. Consequently I find the Petitioners Application dated 20/09/2016 lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

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

D.K. KEMEI

JUDGE

In the presence of:-

Kyalo for Nthiwa for Administrator

No appearance for Muema for Protestor

C/A: Kituva