



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 37 OF 2001

IN THE MATTER OF THE ESTATE OF PIUS KINGOO MUTHWA (DECEASED)

BETWEEN

FRANCIS MUSAU KINGOO

PETER MUSYOKA KINGOO.....ADMINISTRATORS

AND

SCHOLASTICA KINGOO.....OBJECTOR/APPLICANT

RULING OF THE COURT

1. The objector herein filed a summons dated 10th September, 2015 seeking the following orders:

a) That the grant of letters of administration intestate issued to (1) Francis Musau Kingoo (2) Peter Musyoka Kingoo all of P.O. Box 51, Makueni granted on the 25th day of April, 2001 and confirmed on 7th February, 2003 be revoked.

b) That this court issues injunctive orders preventing the administrators from intermeddling and or wasting and or entering and or selling or in any other manner from dealing with the estate of Pius Kingoo Muthwa (Deceased) until the hearing and determination of this application.

2. The summons is supported by the grounds on the body of the motion and the supporting affidavit of the objector sworn on 10th September, 2015. Her case was that her signature was forged in obtaining the consent needed to obtain the certificate of confirmation for grant as well as when the applicants filed the succession cause for the grant to issue. That the Applicants are wasting the estate of the deceased by selling part of the estate causing injustice to the beneficiaries. That the parcel of land **Parcel No. Makueni/UNOA/20** has to benefit the beneficiaries of the deceased and even in trust for the children who were his dependants. The objector cited the decision of Nyamweya J. in **Machakos Miscellaneous Application No. 407 of 2015 Estate of Reuben Musembi Nzau (deceased) Stephen Mutua Kasembi v. Samuel Makau Kasembi and another.**

3. In response thereto, the 2nd Administrator/Respondent filed an affidavit on 14th December, 2015. He contended that the consent was executed by all the beneficiaries including the objector before D.M. Ndungi Advocate and the objector cannot claim that her signature was forged. That the grant was issued on the strength of the said consent. That the said property which comprises of 47 acres was distributed among the sons and daughters. The sons being Francis Musau Kingoo, Joseph Kimeu Kingoo, Peter Musyoka Kingoo, Johnbosco Wambua Kingoo, Benard Kingoo Muthwa and John Mwanzia Kingoo each

getting 7.5 acres and the daughters getting 2.0 acres jointly. That the said distribution was done in accordance with the deceased's division of land during his lifetime. That the applicant was aware of the proposal but did not raise any issue at the time of confirmation. That over 12 years have lapsed from the date of confirmation thereby the application is an afterthought. That the objector failed to prove that the signature was forged as is required in law. To support the said argument the applicants relied on **In Re Estate of Michael Mwangi Githinji (deceased) [2009] eKLR** and **Re Estate of Thomas Mutua Mukumbu (deceased) [2014] eKLR**.

4. Initially parties herein had agreed to canvass the Application by way of viva voce evidence but later abandoned and opted to file written submissions.

5. I have considered the Objector's Application as well as the submissions of both learned counsels for the parties. It is not in dispute that the grant herein was confirmed on the 7/2/2003 and a certificate of confirmation to that effect was issued on 10/02/2003. The present Application has been lodged more than twelve (12) years after the said confirmation. The issue for determination is whether or not the Objector has convinced this court that indeed her signature on the consent in support of grant and confirmation of grant had been forged so as to justify revocation of the confirmed grant.

6. The law governing Applications for Revocation of grants is Section 76 of the Law of Succession Act which states that 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 when the following conditions are established:-

(a) 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.

(b) That the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently.

7. The Objector has based her objections on two grounds namely that the signatures secured by the Administrators had been forged and further that the proposed distribution is not fair to the beneficiaries as the apportioned parcels are not equal in size thereby discriminating against the daughters of the deceased.

8. The Administrator/Respondent has countered the above assertion by claiming that the Objector/Applicant duly signed the consent before one D. M. Ndungi Advocate and further provisions have been made for the Applicant and her sisters as regards the distribution of the estate of their late father.

9. I have perused the record and pleadings and note that indeed there is a list of the beneficiaries vide a hand written letter stamped with a court stamp for 7th February, 2001 and commissioned before D. M. Ndungi Advocate who signed it on 6/2/2001. This was part of the primary documents accompanying the P&A 5 and P&A 80 forms at the initial stages when the succession cause was being lodged by the Respondents. A gazette notice was thereafter issued and a grant vide Form P&A 41. The record further reveals that the summons for confirmation of grant was not accompanied with a consent by all the beneficiaries to the said confirmation. The two Respondents appeared before Hon Justice Mutitu (as he then was) on the 7/2/2003 and informed the court there were no objections to the confirmation and the said judge duly confirmed the grant and a certificate of confirmation of grant was subsequently issued. It must be noted that none of the beneficiaries attended court during the said confirmation and further there was no consent to the confirmation of grant. It is therefore clear that the Respondents did not inform the court of this apparent anomaly and there was therefore material non disclosure on the part of the Administrators. There was no evidence whether the beneficiaries and the Objector herein had been served with the summons for confirmation of grant. There is no affidavit of service filed in court to confirm the same. Further it is a requirement that all beneficiaries should present themselves to court during the confirmation so that their views regarding the distribution of the estate could be received by the court. This was not done. The Administrators claim that a consent had been signed by the

beneficiaries is not believable since they appear to rely on the earlier list of beneficiaries filed at the beginning and which is quite different from the requisite consent to distribution of shares of the estate of the deceased. There was no consent filed in support of the confirmation of grant. A further perusal of the proposed mode of distribution by the Administrators reveals that all the sons of the deceased were each allocated 7.5 acres while the Objector and her two sisters were allocated only two (2) acres to be shared jointly by them. It was necessary for the administrators to secure the consent of the beneficiaries when they sought to have the grant confirmed and who would then confirm whether or not they agree to the mode of distribution proposed by the Administrators. This was a glaring omission and therefore it is my finding that there was a material non-disclosure on the part of the Administrators in failing to disclose the existence of other beneficiaries legally entitled to inherit the deceased's estate. The certificate of confirmation of grant issued to the Administrators is liable for revocation and or annulment.

10. As regards the ground that the Applicant's signature is a forgery, I find the same is a serious allegation which must be proved by forensic evidence from a document examiner as the same borders on accusation of a criminal offence that requires to be proved beyond the requisite threshold of proof. The Applicant did not indicate whether she had lodged a complaint with the police for investigations and whether any criminal proceedings had been instituted and or commenced. As such I find the Applicant's claim of forgery of her signature has not been clearly established.

11. As regards the Applicant's prayer for injunctive orders, I find that it is indeed proper to preserve the estate of the deceased from wastage and intermeddling in view of the fact that the certificate of confirmation of grant was obtained unprocedurally by the making of a false statement and concealment from the court of something material to the case. The estate of the deceased must be secured and protected for the benefit of the beneficiaries. The Administrator's claim that they have since shared out properties to the beneficiaries following the confirmation of grant and therefore the order of injunction could be disruptive is not persuasive. I must point out that once the confirmation of grant has been established to have been initiated through a flawed process, there is no other option but to revoke the said confirmation and order that the properties of the deceased should not be intermeddled with and or wasted. Hence the prayer for an order of injunction is merited.

12. In the result it is the finding of this court that the summons for revocation of grant dated 10/09/2015 has merit. The same is allowed in the following terms:-

(1) The grant of letters of Administration intestate issued to Francis Musau Kingoo and Peter Musyoka Kingoo dated 25/04/2001 and confirmed on 10/2/2003 is hereby revoked.

(2) The Applicant and the Petitioners do sit with all interested beneficiaries to agree on the mode of distribution of the estate failing which either of the Administrators, Applicant or any of the beneficiaries of the estate of the deceased do file a proposal for distribution within sixty (60) days.

(3) An order of injunction do issue preventing the Administrators and any other persons from intermeddling and or wasting or in any other manner from dealing with the estate of Pius Kingoo Muthwa (deceased) pending the filing of fresh summons for confirmation of grant and or until further orders of this Honourable court.

(4) There shall be no order as to costs.

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

D. K. KEMEI

JUDGE

In the presence of:

Marabi for Ngatia for 2nd Respondent

Mutune for Munyasya for Applicant

C/A - Kituva