



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 456 OF 2010

(CONSOLIDATED WITH SUCCESSION CAUSE NO. 205 OF 2010)

IN THE MATTER OF THE ESTATE OF NGOTYA NDOLO (DECEASED)

ROGERS MWANZIAPETITIONER / 1ST RESPONDENT

ONESMUS MUTUA MULANDI2ND RESPONDENT

VERSUS

MUSYOKA NGOTYAOBJECTOR / APPLICANT

NDUKU NGOTYAOBJECTOR / APPLICANT

RULING

The Objectors herein were issued with a grant of letters of administration intestate with respect to the estate of Ngotya Ndolo (Deceased) on 5th July 2010 in Machakos High Court Succession Cause No. 205 of 2010. The Petitioner was thereafter also issued with a similar grant on 13th October 2010 with respect to the estate of the deceased in Machakos High Court Succession Cause No. 456 of 2010. The two succession causes were then consolidated on 26th October 2012 for purposes of being heard together.

The Objectors subsequently filed an application by way of Notice of Motion dated 28th May 2015 as amended to a summons dated 22nd October 2015 seeking the following orders:

1. That preservation and protection orders do issue that the Petitioner/1st Respondent whether by himself or through his servants, agents and or/or employees or any other person whomsoever claiming under him or through him be restrained from selling, trespassing, intermeddling or interfering in any way with parcel of land No. 1538/MIUMBUNI/NGOLENI SECTION and any other assets of the deceased herein or from doing any other prejudicial act thereon pending the hearing and determination of this application and the main suit herein.
- 2A. That the Respondent s be cited for intermeddling with the free property of the deceased herein, that is, parcel of land No. 1538 MIUMBUNI/NGOLENI ADJUDICATION SECTION and this court be pleased to grant any other orders that it may deem just and expedient to meet the ends of justice including punishment of Rogers Mwanzia and Onesmus Mutua Mulandi and any other person whomsoever interfering with the estate of the deceased herein.
3. That the Petitioner/1st Respondent be removed as an administrator herein and a fresh grant

of letter of administration intestate (letter 41) do issue in view of consolidation of Succession Cause No. 205 of 2010 and 456 of 2010 consolidated herein in the Objectors' names and omitting the said Rogers Mwanzia.

The grounds for the application are that the parcel land No. 1538/MIUMBUNI NGOLENI ADJUDICATION SECTION belongs to the deceased who died intestate on 29/01/2002, and that the Petitioner has intermeddled with the estate of the deceased by selling the suit property without the knowledge or consent of any of the family members, and while the issue of distribution of the deceased estate is still pending. Further, that the 2nd Respondent is currently in illegal occupation of the suit property.

The Objectors in a supporting affidavit and further affidavit sworn by the 1st Objector on 22nd October 2015 and 30th November 2015 respectively, explained that the Petitioner is their step brother, and that he should be omitted as administrator due to his acts of intermeddling with the estate of the deceased. Further, that the Respondents' act of intermeddling have culminated in a criminal case against the 1st Objector's son in Machakos Criminal Case No 1510 of 2015 for trespass. The Objectors exhibited letters on the ownership of land parcel 1538 Miumbuni/Ngoleni by the deceased, and a sale agreement dated 7/2/2008 in which the Petitioner is alleged to have sold the said parcel of land to the 2nd Respondent .

The Objectors' counsel, B.M Kituku & Company Advocates, reiterated the foregoing arguments in submissions filed in court dated 18th December 2015, and stated that the Machakos Chief Magistrate's Case No. 990 of 2010 in which the Objectors were granted an injunction against the Respondents does not oust this Court's exclusive jurisdiction to entertain the succession matter.

The Response

The Petitioner/1st Respondent filed a replying affidavit sworn on 16th November 2015 in response to the application, wherein he averred that the Objectors have filed a similar application in Machakos CMCC 990/2010 which has never been prosecuted to date, and are in abuse of the process of Court. He denied intermeddling with the deceased's estate and averred that there are no grounds to warrant his removal as an administrator of the estate.

The 2nd Respondent filed a replying affidavit he swore on 16th November 2015 wherein he denied selling, trespassing on, intermeddling with or interfering with the parcel of land number 1538/Mumbuni/Ngoleni Section. He alleged that the said parcel of land was given to the Petitioner by the Petitioner's deceased mother, who had been utilizing the land prior to her death in her capacity as the deceased's wife. Further, that the Petitioner then disposed of the said land and that the 2nd Respondent has since invested in the land, built permanent structures thereon and occupied and used the land with the knowledge of the Objectors and other beneficiaries of the deceased.

The Respondent's counsel submitted during the hearing of the application that they would rely on the pleadings filed.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Objectors and Respondents. The issues to be decided are whether the orders for preservation of the estate and for revocation of grant sought herein are available to the Objectors. The sections of the law relied on by the Applicant are sections 45 and 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules

Section 45 of the Law of Succession Act addresses intermeddling with a deceased's estate, and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

Section 47 of the Law of Succession Act on the other hand gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. The Applicant also relied on Rule 49 of the Probate and Administration Rules which states that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit.

In addition, the property of a deceased person vests in administrators in their capacity as the personal representatives of the deceased, and it is indeed the duty of administrators to preserve a deceased's estate in this capacity pursuant to the powers and duties of an administrator as set out in sections 79 and 83 of the Law of Succession Act.

I am also mindful that the law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant.

In the present application the Respondents do not dispute that the parcel of land No. 1538 MIUMBUNI/NGOLENI ADJUDICATION SECTION belongs to the deceased. The Petitioner in addition does not deny that he entered into a sale agreement with the 2nd Respondent with respect to the said parcel of land on 7/2/2008, and has not brought any evidence that he had a confirmed grant of representation with respect to the Deceased's estate at the time of the alleged sale. In addition the grant of letters of administration intestate was issued to the Petitioner on 13th October 2010 after the said sale.

There is therefore no possibility of the parcel of land known as No. 1538 MIUMBUNI/NGOLENI ADJUDICATION SECTION being legally sold to the 2nd Respondent by the Petitioner on 7th February 2008 or at any other date. Any purported sale of the said land on the said date is thus of no legal effect, and the said property therefore still forms part of the estate of the Ngotya Ndolo (Deceased). The Court finds that to this extent the Petitioner and 2nd Respondent have intermeddled with the estate of the deceased.

Notwithstanding this finding, I am of the view that the Petitioner's intermeddling does not qualify as one of the grounds for revocation of his grant of representation under section 76 of the Law of Succession Act, particularly as the acts giving rise to the intermeddling by the Petitioner took place before the issue of the grant of representation to both the Objectors and the Petitioner. It is also not prudent to proceed with administration of the estate of the deceased under two different grants as is presently the position, and as the Objectors and the Petitioner are from two different houses of the deceased, it would be equitable to have one representative from each house participate in the administration of the estate.

Arising from the foregoing, the application by the Objectors only partially succeeds, and I accordingly order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. The grant of letters of administration intestate with respect to the estate of Ngotya Ndolo (Deceased) issued to Musyoka Ngotya and Nduku Ngotya on 5th July 2010 in Machakos High Court Succession Cause No. 205 of 2010 and with respect to the estate of Ngotia Ndolo

- (Deceased) issued to Rogas Mwanzia Ngotya on 13th October 2010 in Machakos High Court Succession Cause No. 456 of 2010 be and are hereby revoked.
2. A new grant of letters of administration intestate shall issue to Musyoka Ngotya and Rogas Mwanzia Ngotya who shall be joint administrators of the estate of Ngotya Ndolo (Deceased).
 3. The said joint Administrators shall file and serve upon all the beneficiaries of the estate of Ngotya Ndolo (Deceased) summons for confirmation of grant incorporating all beneficiaries and all of the deceased's properties.
 4. The 2nd Respondent whether by himself or through his servants, agents and or/or employees or any other person whomsoever claiming under him or through be and are hereby restrained from selling, occupying, trespassing on, intermeddling or interfering in any way with parcel of land No. 1538/MIUMBUNI/NGOLENI ADJUDICATION SECTION pending the hearing and determination of the main suit herein.
 5. The joint Administrators of the estate of Ngotya Ndolo (Deceased) shall be put into possession forthwith of the parcel of land known as No. 1538 MIUMBUNI/NGOLENI ADJUDICATION SECTION, and there shall be no further sale and/or disposition of any kind of the said parcel of land and/or **other assets and properties of the deceased by the joint Administrators and/or beneficiaries of the deceased's estate** pending the hearing and determination of the main suit herein.
 6. Each party shall meet their respective costs of the summons dated 22nd October 2015

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23rd day of March 2016.

P. NYAMWEYA

JUDGE