



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 645 OF 2011

IN THE MATTER OF THE ESTATE OF BETH MUTHEU NGUSYA (DECEASED)

GEORGE MUTALA NGUSYA.....PETITIONER

VERSUS

AGNES NTHENYA(CHAIR PERSON)OBJECTOR

DANIEL MUTHAMA(TREASURER)SUING ON BEHALF OF

MATUKANDO DEV. SELF HELP GROUP.....OBJECTOR

RULING

The Summons

The Petitioner herein was on 1st February 2012 issued with a grant of letters of administration intestate with respect to the estate of the deceased Beth Mutheu Ngusya (hereinafter referred to as “the deceased”). The said grant was confirmed by this Court and a Certificate of Confirmation issued to the Petitioner on 4th October 2013. The Objectors herein on the other hand claim to be *bona fide* purchasers of a portion of the parcel land known as Matungulu/Kyaume/1969 which is part of the deceased’s estate.

The Objectors have filed an application by way of summons for revocation of grant dated 16th September 2014, wherein they are seeking the following orders:-

1. That pending the hearing and determination of the summons for nullification of grant, the Petitioner be restrained from disposing, selling, transferring, or in any manner dealing with parcel of land known as Matunguli/Kyaume/1969 which is the asset of the estate of the late Beth Mutheu Ngusya.
2. That the grant of letters of administration to the Estate of Beth Mutheu Ngusya (deceased) made to George Mutala Ngusya on the 1st February 2012 be revoked or annulled.

The said application was canvassed by way of affidavit evidence and written submissions.

The grounds for the said application were that the grant was obtained fraudulently by the concealment from court of a material fact, namely that part of the parcel of land known as Matungulu/Kyaume/1969 had been sold to a 3rd party, and that the interest of the Objectors have not been taken care of.

The Objectors filed an affidavit in support of the summons sworn by Agnes Nthenya Muli on 16th

September 2014, wherein they stated that they purchased the said portion of land measuring three quarters of an acre on 14th April 2011, at a consideration of Kshs. 524,000/=, which amount was paid in full. They attached a copy of the sale agreement. It was further averred by the Objectors that as *bona fide* purchasers they had prior rights as administrators, and had not renounced their rights.

The Objectors' learned counsel, J.M Mutua & Co Advocates, filed written submissions dated 1st March 2016, in which it was argued that the sale agreement on 14th April 2011 was entered with one Samuel Mutua Ngusya who was a son of the deceased as the vendor, and it was an express term of the agreement that the said vendor would undertake succession proceedings in order to obtain a grant with the Objectors included as a *bona fide* purchaser, and would transfer the purchased portion to them.

It was further submitted that apart from not including the Objectors as a purchaser in his petition, the Petitioner did not inform court about the purchase in accordance with section 76 of the Law of Succession Act. That the Petitioner therefore concealed a material fact from Court by making fraudulent statements and thus the grant ought to be revoked. Reliance was placed on the decision in **A.S & 2 Others vs S.A.M (2014) e KLR** for this position.

The Response

The Petitioner filed a replying affidavit in response sworn on 17th June 2015. He denied that there was concealment of material facts as alleged, and stated that the Objectors were strangers to him and his family. Further, that the deceased was the registered proprietor of the property known as Matungulu/Kyaume/1969, and that the sale agreement dated 14th April 2011 annexed by the Objectors was entered into with his deceased brother. Further, that at the time of the alleged sale the deceased's estate was not administered, and no person had capacity to sell any part of the estate without resorting to Court, therefore the sale agreement cannot stand. The Petitioner averred that the Objectors recourse is against the vendor.

Mwangi Wahome & Co Advocates, the learned counsel for the Petitioner, filed written submissions dated 7th March 2015, wherein it was submitted that the Objectors' sale agreement was null and void since the estate of the deceased was un-administered at the time when the purported sale agreement was made. In addition, that no person had capacity to sell or alienate any part of the estate before the confirmation of grant.

It was further argued that the sale agreement between the Objectors and Samuel Mutua Ngusya on 14th April 2011 amounted to intermeddling with the estate of the deceased as per section 45 of the Law of Succession Act. Reliance in this regard was placed on the decisions in **The matter of the Estate of Veronica Njoki Wakagoto(Deceased), Succession Cause number 1974 of 2008** and **John Kasyoki Kieti vs Tabitha Nzivulu Kieti and Another, Machakos HCCC No. 95 of 2001.**

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. The issue to be decided is whether the Objectors were *bona fide* purchasers of, and entitled to benefit from the deceased's estate; secondly if so, whether the Petitioner is culpable of non-disclosure of this material fact; and lastly, whether the Petitioner's confirmed grant of letters of administration should be revoked.

On the first issue as to the Objectors' entitlement to the deceased's estate, section 66 of the Law of Succession Act recognises adverse interests to the estate of a deceased including those of creditors at section 66 as follows-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without

prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

In addition, section 86 of the Law Succession Act enjoins the personal representative of the estate of a deceased, to pay all the estate's debts of every description that are enforceable at law and owed by or out of an estate, before any legacy is paid or settled.

One of the definitions of a creditor given by the **Black's Law Dictionary, Ninth Edition** at page 424 is “a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation”. A debt under page 462 also includes “a non-monetary thing that one person owes another such as goods or services”. Therefore a purchaser of land from the deceased is deemed to be a creditor and to have a debt owed to him or her by the deceased, to the extent that the deceased was under a legal obligation while alive to transfer the land to the purchaser or refund the purchase price.

In the present application, the Objectors claim to have entered into a sale agreement with one Samuel Mutua Ngusya as the vendor on 14th April 2011. They attached a copy of the sale agreement to their supporting affidavit as Annexure “ANM 3”. The vendor is described therein as “the legal owner of the parcel of land reference plot number 1969 of Kyaume Misuuni registered in the name of Beth Muteu Ngusya (deceased)”. The said deceased died on 9th April 2002, before the sale agreement was entered.

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.

The Objectors did not bring any evidence that the said Samuel Mutua Ngusya with whom they entered into a sale agreement had a confirmed grant of representation with respect to the Deceased's estate at the time of the alleged sale of the land on 14th April 2011. In addition the grant of administration for the deceased estate was issued to the Petitioner herein on 1st February 2012 and confirmed on 4th October 2013 after the said sale.

It is thus my finding that a portion of the parcel of land known as Matunguli/Kyaume/1969 could not have been legally sold to the Objectors by the said Samuel Mutua Ngusya on 14th April 2011. 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 deceased. The Objectors therefore do not qualify to be creditors within the meaning of the Law of Succession Act, as they did not purchase the land from the deceased, or a person authorized to sell the said property, and on the contrary actually intermeddled with the estate of the deceased contrary to section 45 of the Law of Succession Act.

This finding also effectively disposes of the second and third issues before this Court, as to whether the Petitioner was culpable of non-disclosure of a material fact which can give rise to revocation of the grant issued to him. The finding by this Court on the two issues is in the negative, since the Petitioner could not legally include the Objectors as creditors in the Petition for grant of administration, or in the confirmation of the same.

The prayers in the Objectors Summons for Revocation of Grant dated 16th September 2014 are accordingly denied, and the Objectors shall meet the costs of the said Summons.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of June 2016.

P. NYAMWEYA

JUDGE