



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

P & A CAUSE NO. 230 OF 2005

PAUL NAMUNYU MAUNDA.....DECEASED.

AND

FRANCIS WAFULA NAMUNYU & ANOTHER.....PETITIONER

AND

ANDREW WAKUMA.....OBJECTOR/APPLICANT

R U L I N G

1. The application by the objector, **Andrew Wakuma**, dated 14th November, 2013, is essentially for the revocation and/or annulment of the certificate of confirmation of grant dated 7th November, 2013.

The grounds for the application are contained in the appropriate summons for revocation of grant dated 14th November, 2013 as enhanced by the averments in the supporting affidavit dated 14th November, 2013 and a supplementary affidavit dated 24th February, 2014 together with an affidavit deponed by Jepheneah Nakiboli Murefu, dated 23rd December, 2014.

The respondents oppose the application on the basis of the grounds contained in their replying affidavit deponed by Richard Nyongesa Namunyu, dated 13th January, 2014.

2. Written submissions were filed by both objector and respondents in support of and opposition to the application. These have been considered in the light of the supporting grounds which may be condensed into only two grounds i.e. the necessary certificate of confirmation of grant was obtained without the consent of the applicant/objector and by concealment of material facts with the intention of disinheriting the applicant of ten (10) acres at the estate's Mbai farm.

The objector does not seem to oppose the actual grant of letters of administration but rather to the mode of distribution of the estate as reflected in the disputed certificate of confirmation of grant.

The issues for determination are therefore whether firstly the consent of the objector was necessary prior to the filing of the necessary summons for confirmation of grant dated 24th May, 2013, which led to the disputed certificate of confirmation dated 7th November, 2013 and secondly, whether the objector was entitle to ten (10) acres of the estate's Mbai farm.

3. With regard to the first issue summons for confirmation of grant are normally taken out after the expiry of six (6) months from the date of issue of the grant in accordance with section 71 of the

Succession Act and for purposes of empowering the distribution of any capital assets.

The holder of the grant is responsible for applying to the court for confirmation of the grant.

Herein, the grant was issued on the 15th October, 2008 to the first and second respondents but they delayed in taking out the summons for confirmation of the grant. The consent of the objector is not necessary prior to the taking of the summons for confirmation although he was permitted to raise any protest with regard to the proposed mode of distribution. Ground two of the application pertaining to the Mbai farm appears to be such protest but it was unnecessary for the objector to enjoin other respondents in this application yet they are not the appointed administrators of the material estate.

4. With regard to the second issue for determination, the objector says that he was the eldest son of the deceased from the second house and that in a family meeting held on 27th January, 2001, presided over by the chairman of his clan and while the deceased was alive, he (deceased) shared out his property among his children and in the process the objector was allocated ten (10) acres of the Mbai farm and two (2) acres of the land at Namwela/Malakisi in the County of Bungoma which is the ancestral home.

The chairman of the clan did not depone an affidavit in support of the foregoing claim but the clan secretary did as much in his affidavit dated 23rd December, 2014 in support of this objection.

5. In his supporting supplementary affidavit dated 24th February, 2014, the objector presented the annexure marked **"AW1"** which he identified as a copy of the minutes of the material meeting held on 27th February, 2001. He said that it was after the said meeting that each beneficiary fenced off their respective portions. He developed the ten (10) acres of the Mbai farm and showed his sons where they would set up their homesteads within the farm.

In essence, the annexure **"AW1"** was meant to be proof of the meeting and the resolution reached with regard to the division of the lands belonging to the deceased among his sons. Ironically, there was no mention of the annexure by the clan secretary in the affidavit dated 23rd December, 2014 meaning that he was not the author of the minutes neither could he confirm authenticity or otherwise thereof. However, he confirmed that the deceased divided his property among his sons during his lifetime and that the objector was treated as one of the sons.

6. What the second respondent has indicated in his replying affidavit dated 13th January, 2014, deponed also on behalf of the other respondents is that the objector is not a son of the deceased but was brought up by the deceased who gave him the two (2) acres of land at Namwela.

The respondents clearly imply that the objector was only a dependant of the deceased rather than a sibling beneficiary of his estate. This fact is somehow confirmed by the clan secretary who stated that the deceased inherited the mother of the objector when the objector was only three (3) years old. Therefore, if the mother of the objector was the inherited wife of the deceased and the deceased treated the objector as his own son then the objector would be treatable as a dependant for the purposes of succession. He would as such be entitled to a share of the estate of the deceased within a reasonable degree.

7. Under section 29 of the Succession Act, a dependant would include children whom the deceased had taken into his family as his own.

Section 26 of the Act is the governing provision for dependants who feel that they have not adequately been provided for out of the deceased's net estate.

Indeed, the objector herein feels, that he was not adequately provided for when he was denied the ten (10) acres of the Mbai farm which he alleges was allocated to him by the deceased. This allegations anchored on alleged minutes of a meeting said to have been held on 27th January, 2001, at the instance of the deceased for purposes of sharing his portions of land among his sons, the objector included.

A copy of the minutes is the annexure marked **"AW1"** in the objector's supplementary affidavit.

8. Although the origin of the annexure (AW1) was not made clear by the objector, the respondents did not substantially dispute it nor show that it was a false document. In fact, the document strongly implied that the deceased at one point during his lifetime shared out or distributed his material portions of land among his sons and that the objector was regarded as one of the sons.

Indeed, in the affidavit in support of the petition for grant of letters of administration dated 25th November, 2004, the objector is mentioned and referred to as a son of the deceased.

Also, in the initial summons for confirmation of grant dated 8th February, 2013, there was a proposal to allocate five (5) acres of the Mbai farm to the objector in addition to the two (2) acres of the Mamwela/Malakisi plot.

However, in the disputed summons for confirmation dated 7th November, 2013, the objector was completely left out of the Mbai farm.

9. Even if the respondents did not recognize the annexure “**AW1**” as a true reflection of what the objector was entitled to in the Mbai farm, they held him out as a dependant son of the deceased thereby appreciating that he was entitled to a share of the deceased's property by endorsing his allocation of two (2) acres of the Namwela plot.

It is instructive to note that the said two (2) acres are also reflected in the annexure “**AW1**” in addition to the ten (10) acres of the Mbai farm. It therefore beats logic as to why the respondents would recognize only the two (2) acres at Namwela and not the ten (10) acres at Mbai farm yet the objector was held out as a son of the deceased not only by the deceased but also by all the beneficiaries of the estate who cannot now turn against him by withholding the Mbai farm from him. He may not necessarily be entitled to the ten (10) acres of the farm but he surely is entitled to a reasonable portion thereof.

10. Therefore, without necessarily revoking the grant and/or the certificate for confirmation of grant dated 7th November, 2013, this court finds it just and reasonable to order that the objector be allocated in addition to the two (2) acres at Namwela, a portion of the Mbai farm not exceeding six (6) acres from the twenty (20) acres allocated to the second respondent, Richard Nyongesa Namunyu, as per the certificate of confirmation of grant dated 7th November, 2013. the certificate may accordingly be rectified to reflect the charges made by dint of section 26 and section 27 of the Succession Act.

[Read and signed this 25th day of March, 2015.]

[In the presence of Mr. Chebii H/B for Mr. Samba for objector and M/s. Munialo for Respondents]

J.R. KARANJA

JUDGE