



KTL.NO.34/2015REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION MISC. APPLICATION NO. 69 OF 2012

IN THE MATTER OF THE ESTATE OF LENA KIMANI (DECEASED)

PATRICK MULWA KIMANI.....PETITIONER

VERSUS

- 1. PATRICK MUTULA MUNG'ALA)**
- 2. KENNETH KALOKI MUNG'ALA)**
- 3. MARY MUSYAWA MUNG'ALA)**
- 4. GRACE MUENI MBOYA)**

**5. CELESTINE MULU MASAI) (Suing as Chairman, Secretary and
Treasurer for and on behalf of **UMUI WA MAENDEEO SELF HELP
GROUP).....INTERESTED PARTIES/APPLICANTS****

RULING

1. The Applicants herein moved this court pursuant to the provisions of **Section 45, 47 and 76** of the **Law of Succession Act** and **Rule 44(1) and (2) and 73** of the **Probate and Administration Rules** seeking orders that:
 - i. The grant of probate or letters of administration (grant) issued to the Petitioner in **Kitui Principal Magistrate's Court Succession Cause No. 13 of 2011** on **13th December, 2011** be revoked and/or annulled forthwith.
 - ii. And, pending the hearing hereof a preservation order do issue against the Petitioner/Respondent preventing him from subdividing, selling, disposing, alienating or in any other way from interfering or meddling with **Land Parcel Number Yatta B2/Kwa Vonza/202**.
2. The application is premised on grounds that: The interested parties purchased various portions of land comprised in **Land Parcel Number Yatta B2/Kwa Vonza/202** from the beneficiaries of the Estate which purchases constitute liabilities to the Estate of the deceased; At the time of petitioning for the grant though aware of the sale the Petitioner did not include names of the Interested Parties as creditors to the Estate of the deceased.
3. That, the grant was obtained fraudulently as the Petitioner and other beneficiaries did not disclose to court the interest of Interested Parties; Interested Parties paid **Kshs. 1,500/=** for their respective portions following the demand from the Petitioners; therefore the grant was obtained by

concealment of material facts from the court and the proceedings to obtain it were defective in substance.

4. **Patrick Mutulu Mung'ala** the 1st Interested Party having been authorized by other Interested Parties swore an affidavit in support of the application where he deponed *inter alia* that he purchased portions of land forming part of the property **Yatta B2/Kwa Vonza/202** from **Mambo Kimani, Stephen Kimani, Paul Kimani** beneficiaries to the Estate. **Kenneth Kaloki Mung'ala** the 2nd Interested Party purchased a portion of land from **Paul Kimani**; The **Umui wa Maendeleo Self Help Group** purchased a portion of land from **Paul Kimani**, where the Petitioner was a witness to the transaction;
5. **Francis Muthui** deponed that he had interest in the parcel of land having purchased a portion of it.
6. In response thereto, the Respondent deponed an affidavit in reply where he deposed that the beneficiaries who purportedly sold portions of the land had not been joined as parties to the application for their opinion to be interrogated. That the Estate of the deceased is vast and the grant cannot be annulled because of the alleged sold plots; The Applicants have specific people to pursue for refund of their money or transfer of what they purchased.
7. **Paul Kimani, Mambo Kimani and Stephen Kimani** Interested Parties filed supplementary affidavits where they admitted having sold portions of land forming the Estate of the deceased but claimed that the Land Control Board declined to give the required consent therefore the sale was null and void.
8. The application was canvassed by way of written submissions that I have taken into consideration.
9. The deceased herein died on the **8th October, 2008**. It is deponed in the affidavit in support of Petition for letters of administration intestate that the only asset left at the time of the deceased's demise was **Yatta B2/Kwa Vonza/202**. She had no liabilities. The Applicants adduced in evidence agreements entered into between them and sellers of various portions of land. On the **16th September, 2007** prior to the deceased passing on, **Mambo Kimani** a holder of **ID No. 11424204** sold to **Patrick Mutula Mung'ala** (1st Applicant) a parcel of land that he described as **part of 202 Kwa Vonza** belonging to his grandmother at **Kshs. 35,000/=**. He received **Kshs. 4,000/=** leaving a balance of **Kshs. 31,000/=**. This was done in the presence of some elders. **Mambo Kimani** had no proprietary interest in the land therefore he lacked the legal capacity to sell the land. The sale in the circumstances was null and void.
10. On the **16th October, 2008** **Mambo Kimani** received **Kshs. 31,000/=** from **Patrick Mung'ala**. This was after the death of the deceased.
11. **Stephen Kimani** sold to **Patrick Mutula Mung'ala** part of the subject land at **Kshs. 45,000/=** on **19th May, 2008**. The balance was paid on **31st May, 2008**.

Paul Kimani sold to **Patrick Mutula** part of the land on **5th June, 2008** at **Kshs. 45,000/=**. The balance was paid on **1st July, 2008**.

On the **19th September, 2008**, **Paul Kimani** was advanced **Kshs. 10,000/=** by **Patrick Mung'ala** to spend on his mother's treatment in exchange of a portion of land.

12. On **27th October, 2008**, **Stephen Kimani** sold to **Patrick Mung'ala** another parcel of land at **Kshs. 24,000/=**. On **23rd March, 2011**, **Patrick Mung'ala** bought land from **Paul Kimani** at **Kshs. 100,000/=**.
13. **Kenneth Kaloki Ndunda**, the 2nd Interested Party bought land from **Paul Kimani** at **Kshs. 100,000/=**.
14. **Mary M. Mung'ala**, the Chairperson of the 3rd Interested Party paid **Kshs. 80,000/=** to **Paul Kimani** on behalf of the **Umui Self Help Group** as consideration of land on the **1st October, 2010**. She paid a further **Kshs. 30,000/=** on the **30th October, 2010** and **Kshs. 120,000/=** on the **20th November, 2010**.
15. The land purported to have been sold by the beneficiaries for the Estate of the deceased is stated to have belonged to the deceased. Some of it was sold after the deceased had passed on.

16. Property belonging to the deceased is protected against any damage or wastage. **Section 45(1) and (2) of the Law of Succession Act** provides thus:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

The beneficiaries of the Estate disposed of part of the Estate of the deceased prior to obtaining requisite authority. This was done prior to the grant of letters of administration intestate being issued to the administrator of the Estate. In the case of **Gitau and 2 Others V. Wandai and 5 others (1989)KLR 231** it was held that:

“any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

17. Both the Interested Parties and the beneficiaries of the Estate entered into sale agreements knowing that letters of administration had not been taken out. Their transaction was null and void.

18. It is admitted the beneficiaries disposed of land to some other people thereafter, whose interests were catered for during the distribution process. This establishes the fact that their action was fraudulent.

19. It is stated that the Petitioner and other beneficiaries did not disclose to court of the existence of creditors to the Estate of the deceased. Evidence adduced falls short of establishing existence of any creditors to the Estate. The deceased did not leave any liabilities. Persons who survived him intermeddled with her Estate which is criminal act. Failure to disclose existence of criminal acts that were done in respect of an Estate of the deceased that is protected by the law cannot result into revocation or annulment of the grant.

20. The Interested Parties are at liberty to pursue beneficiaries who defrauded them for refund of what they expended.

21. In the result the application fails. It is dismissed with no orders as to costs.

Dated at Kitui this 16TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE