



No. 253.2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 236 OF 2009

IN THE MATTER OF THE ESTATE OF KIOKO MUSYA (DECEASED)

NELSON MAKAU YUMBU.....1<sup>ST</sup> PETITIONER

MULEI YUMBU..... 2<sup>ND</sup> PETITIONER

VERSUS

DAVID MWANIA.....1<sup>ST</sup> OBJECTOR

BORNIFACE ISAAC MUTINDA KITETA.....2<sup>ND</sup> OBJECTOR

RULING

1. The Petitioners herein applied for Grant of Representation in two (2) Succession causes.

i. Succession Cause No. 235 of 2009

ii. Succession cause No. 236 of 2009

They filed a Citation Cause in court whereby all persons who were entitled to be issued with grants were cited. They disregarded the citation, therefore the court allowed them to take out Letters of Administration Intestate.

2. **Succession Cause No. 235 of 2009** was in respect of the Estate of **Kithembe Musya (deceased)** while **Succession Cause No. 236 of 2009** was in respect of Estate of **Kioko Musya (deceased)**. The two (2) petitioners were nephews to the deceaseds in both matters.

3. **Kithembe Musya (235/2009)** was survived by two (2) sons, **Mue Kithembe** and **Mutisya Kithembe** while **Kioko Musya (236/09)** was survived by three (3) sons, **Kilove Kioko**, **Kyai Kioko** and **Mutisya Kioko**. The only asset left by the deceased persons in both succession causes was **Land Parcel Number Mwala/Kyawango/336** which was held by them as proprietors in common in equal shares.

4. The Petitioners filed the two causes in their capacity as nephews to both deceased persons and also beneficiaries of the estate. It was their averment that their late father **Yumbu Musya** died leaving them at an early age. Although the subject land was registered in the joint names of both deceased persons, they

held it in trust for them by virtue of their relationship.

5. The Grant of Letters of Administration in both causes were issued on the **15<sup>th</sup> June, 2009**. Summons for Confirmation of Grants were filed on the **24<sup>th</sup> March, 2011**. The objectors herein filed an affidavit in protest against the confirmation of the grant. By a court order dated **4<sup>th</sup> November, 2011**, both succession causes were consolidated with **Succession Cause No. 236/2009** being the lead file.

6. The Application for confirmation of the grant is supported by an affidavit deposed by the 1<sup>st</sup> Petitioner having been authorized by the 2<sup>nd</sup> Petitioner. He states that their late father died leaving a young family. At the time of Land Adjudication, their two (2) uncles were registered as joint owners of **Parcel No. Mwala/Kyawango/336** to hold in trust for the family of the late **Yumbu Musya**. Prior to their demise they wrote a letter dated **24<sup>th</sup> March, 1973** expressing their intention of having the land transferred to the Petitioners. They prayed for distribution of the estate- the same to be registered in their joint names.

7. In their affidavit of protest against confirmation of the grant the objectors deposed that the Petitioners had deliberately concealed crucial and material facts from the court by failing to disclose all the beneficiaries of the deceased and in particular beneficiaries of the **Parcel Number Mwala/Kyawango/336**. They stated that a letter authored by the area **Assistant Chief of Kyawango sublocation** showed the actual beneficiaries of the land.

8. They disputed the alleged transfer of the land to the petitioners and stated that no sale agreement was made in respect of the land to the petitioners. They stated further that the land was held in trust for all members of **Muasya Kyai** and any party who occupies a part of the said land continues to do so with the consent and authority of all the family members.

9. In a further affidavit deposed by the petitioners sought to clarify that the land in issue was part of the ancestral land that belonged to their grandfather **Muasya Kyai**. During adjudication process all family members had their respective portions registered in their names except the entitlement of the petitioners whose father's parcel was registered in their uncle's names to hold for them as trustee. The land was never sold. The petitioners have occupied the land for over **40 years** without any interruption.

10. An evolution of evidence adduced by way of affidavit establishes that the land in issue was ancestral land inherited from the grandfather of parties herein, **Musya Kyai**. It is also not in dispute that the petitioners occupy part of the land that forms the estate of the both deceased persons herein. In the affidavit in support of the application for Confirmation of the Grant, the prayer is for the land to be registered in the petitioners joint names as that land belonged to their late father. They have annexed a letter purportedly written by the deceased consenting to the removal of their names from the register and registration of the petitioners' names instead.

11. It is important to note that some of the sons of the deceased listed on Form **P & A 5** did not sign any consent to confirmation of the grant. Even if they have not objected to the application for confirmation, it is important that they give their consent because, although it is stated that the land was held in trust for the petitioners, the certificate of official search in respect of the land in issue shows that the deceased persons held it as proprietors in common in equal shares.

12. There is a letter written by the chief who listed the beneficiaries of **Musya Kyai**. He stated that the land in issue was held by both the deceased persons in trust for the whole family. What is of interest is the fact that **Yumbu Musya** the father to the petitioners is indicated as having had two (2) wives. The eldest was **Mumbua Yumbu** the mother to **Kinyele Yumbu** and **Mutua Yumbu**. Then the second wife the mother to the petitioners. It would be important to know whether the step-brothers are also entitled to the parcel in issue.

13. According to **Section 51(g)** of the **Law of Succession Act**, a person making an application for grant must give names of all surviving spouses, children, parents, brothers, and sisters of the deceased and of the children of any child of his or hers then deceased. If the list of family members of the deceased given

by the Chief is authentic, this means that the petitioners omitted some names of people who survived both deceased persons herein.

14. This court having considered what was deposed by both the Petitioners and Protesters, prior to making final orders regarding confirmation of the grant, it is important to hear other persons who by virtue of being beneficiaries of the estate of the deceased persons herein are interested persons. These are people who will help this court reach an informed decision.

15. In the premises, I direct that summons requiring attendance do issue for;-

- i. All the surviving children, brothers, spouse of the deceased persons herein.
- ii. The Chief, Kyawango Location
- iii. The Chairman of Evanie clan

The Deputy Registrar to give a hearing date on priority basis.

**DATED, SIGNED and DELIVERED At MACHAKOS this 3<sup>RD</sup> day of APRIL, 2014**

**L.N. MUTENDE**

**JUDGE**