



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1649 of 2005

IN THE MATTER OF THE ESTATE OF MUSISIA KITUNGU (DECEASED)

RULING

The Summons dated 3rd May 2011 is for the revocation of the grant herein. It is premised on **Sections 47** and **76** of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. There is an opposition of support sworn by Yuvinalis Mutiso Mutisia and another in affidavit sworn by Victor Mutisia Ndolo.

I have carefully perused the record, especially the papers filed in this application and the oral arguments. It would appear that the applicant is complaining about the distribution of the estate. The contention is that the process of confirmation of the grant was flawed as the laid out procedure was not followed. It is alleged that the process was fraudulent. Distribution, it is contented, did not follow Section 40 and 35 of the Law of Succession Act. Consents of all the survivors of the deceased were not obtained as only four (4) of them consented. The mode of distribution is also said to have been skewed in favour of some survivors. Some survivors got a maximum of 36 acres while others got a paltry 3 acres.

The respondents have countered this by arguing that they were not responsible for the confirmation proceedings and the distribution proposed in those proceedings as they were appointed as administrators after the demise of the administrators who were in charge at the material time. They take the position that any complaints ought to have been raised with the administrators who were in office at that time. They further argue that the proposed distribution was agreed upon, and they produced minutes of a meeting in 2003 where the alleged agreement was arrived at. The confirmation was based on the said minutes. They further state that the applicants did in fact consent to the grant and the proposed distribution. They further argue that the applicants are guilty of laches as the application is coming five (5) years after the confirmation.

The main contention revolves around the mode of distribution. To my mind the applicants are seeking the rectification of the schedule in the certificate of confirmation on the distribution of the estate.

The certificate of confirmation dated 9th October 2006 shows a distribution that is uneven. For example:

- (a) Domitila Syomiti Musisia gets 36 acres out of Machakos/Matuu/830 and 0.65 hectares out of Machakos/Matuu/1983 – making an aggregate of 36 acres and 0.65 hectares.
- (b) Mutiso Musisia gets 36 acres out of Machakos/Matuu/1820, 0.8 hectares out of Machakos/Matuu/2540, 0.65 hectares out of Machakos/Matuu/1983 and 7.14 hectare out of Donyo Sabuk/Komarock 1/272 – making an aggregate of 36 acres and 8.59 hectares.
- (c) Benedict Muia Musisia for 3 acres out of Machakos/Matuu/1820, 0.5 hectares of Mavoko Town/Block

12/858, 714 hectares in Donyo Sabuk/Komarock 1/272, 0.11 hectares out of Kangundo/Kikambuani/503, 0.75 hectares out of Kangundo/Mbitini/498, 0.25 hectares out of Kangundo/Mbitini/53 – making an aggregate of 3 acres and 9.5 hectares.

(d) Kamene Ndolo Mwanzia got 10 acres out of Machakos/Matuu/1820, 0.5 hectares out of Mavoko Town/Block 14858, 7.14 hectares out of Donyo Sabuk/Komarock 1/272, 0.11 hectare out of Kangundo/Kikambuani/503, and 0.14 hectare out of Kangundo/Mbitini/1309 – making a total of 10 acres and 7.89 hectares.

(e) Benedetta Mbiti Martin got 7 acres out of Machakos/Matuu/1820 0.5 hectares in Mavoko Town/Block 12/858, 7.14 hectares in Donyo Sabuk/Komarock 1/272, 0.11 hectares in Kangundo/Mbitini/1309 and 0.85 hectares in Kangundo/Kikambauni/842 – making a total of 7 acres and 8.74 hectares.

(f) Celestine Mbithe Mutunga gets 8 acres out of Machakos/Matuu/1820, 0.5 hectares in Mavoko/Block 12/858, 7.14 hectares in Donyo Sabuk/Komarock 1/272, 0.11 hectare in Kangundo/Kikambuani/503, 0.75 hectare in Kangundo/Mbitini/55, 0.35 hectares in Kangundo/Mbitini/498, 0.25 hectares in Kangundo/Mbitini/567, 2.0 hectares in Kangundo/Mbitini/53 and 0.85 hectares in Kangundo/Kikambuani/842 – making a total of 8 acres and 10.95 hectares. The picture which emerges is as follows:-

(a) Lawrence Ndolo Musisia – 10 acres and 7.89 hectares.

(b) Benedict Muia Musisia – 3 acres and 9.5 hectares

(c) Beneditta Mbithe Musisia – 7 acres and 8.74 hectares.

(d) Celestine Mbithe Mutisya – 8 acres and 10.95 hectares.

(e) Domitilla Syomiti Musisia – 36 acres and 0.65 hectares.

(f) Mutiso Musisia – 36 acres and 8.59 hectares.

An analysis of the above clearly indicates that the said distribution was not fair nor even or equitable. The share taken by Mutiso Musisia is the largest. It is no where near what Benedict Muia Musisia and Benedetta Mbithe Musisia got.

The law on distribution upon intestacy is set out in Part V of the Law of Succession Act. The legal philosophy behind the provisions in Part V is equal distribution of the assets, with the surviving spouse enjoying a life interest. That spirit does not appear to have been captured in distribution in this case .

I have carefully gone through the affidavit in support of the confirmation application. The disparity in the distribution has not been explained. It is said that the distribution was agreed upon in a family meeting. The Law of Succession Act does not provide for distribution by consent. It has provided clearly in Part V how the estate is to be distributed. I note that in the confirmation application no accounts were tendered, to show the debts owed by the estate, whether they were settled and the property available after the debts were settled. Distribution should follow only upon payment of debts and settlement of liabilities. The alleged minutes attached to the affidavit of the respondent to this application allude to the existence of some debts.

The deceased was a polygamist. He had two wives; translating to two (2) households. The estate of polygamist is divided in accordance with **Section 40** of the Law of Succession Act. From the record, there is no evidence that the estate herein was dealt with under **Section 40**. Under **Section 40**, the property is initially shared out between the two houses proportionate to the number of children in each house. Thereafter, the estate is distributed following the provisions of **Sections 35, 36, 37 and 38** of the Law of Succession Act.

The applicant alleges that not all survivors consented to the proposed distribution. The respondents counter that by saying that the consents were obtained. The application for confirmation dated 6th June 2006 was supported by a consent to confirmation of grant dated 6th June 2006 purportedly signed by five of the survivors of deceased. Of the five, one is not a beneficiary under the certificate of confirmed grant. The list of survivors in the summons for confirmation has eight individuals, yet only five of the eight consented to the confirmation application. The record is silent on whether any of the survivors were present in court on 9th October 2006 when the grant was confirmed. Under Rules 40 and 41 of the Probate and Administration Rules, a confirmation application should be heard in the presence of not just the administrator but of all the survivors. However, the presence of the survivors is dispensed with if they file consents to the said application and proposed distribution. It would appear from the record that these provisions were not complied with.

This application for revocation has been brought by eight of the direct beneficiaries of the estate. It would appear that a substantial section of the beneficiaries are not confident with the manner the estate is being administered by the administrators. The office of an administrator is that of a trustee. An administrator holds estate property on behalf of and for the benefit of the beneficiaries. He is accountable to the beneficiaries. When confidence and trust is lost, the office of administrator becomes untenable. That appears to be the case here.

I am convinced that the applicants have made out a case for the grant of the order sought in prayer (3) of the application dated 3rd May 2011. I am disposed to make the following orders:-

- (1) That the grant of letters of administration intestate made to Victor Musisia Ndolo and Daniel Mutunguma Muia on 18th February 2009 and the rectified certificate of confirmation are hereby dated 18th February 2009 revoked and cancelled.
- (2) That Victor Musisia Ndolo and Daniel Mutunguma Muia shall prepare and file in court in the next thirty (30) days of the date of this ruling of a statement of account and an inventory of the assets to reflect their dealings in the estate since their appointment on 18th February 2009.
- (3) That Victor Musisia Ndolo, Daniel Mutunguma Muia, Yuvinalis Mutiso Musisia and Celestine Mbithe Musisia are hereby appointed administrators of the estate of Musisia Katungu (deceased) and grant of letters shall issue to them accordingly.
- (4) That the new administrators shall propose a fresh distribution fully complying with **Sections 35 and 40** of the Law of Succession Act in an application fully complying with **Section 71** and Rules **40** and **41** of the Probate and Administration Rules.
- (5) That the matter shall be mentioned within forty five (45) days be fixed at the registry to monitor compliance with Order (2) above.
- (6) That there will be no order on costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29th DAY OF April, 2013.

W.M. Musyoka
Judge