



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Succession Cause 192 of 2007

IN THE MATTER OF THE ESTATE OF KYAKA MBENGE NDANA - DECEASED

1. MBAIKA

MUTISO

2. MUTUNGA MBENGE.....APPLICANTS

VERSUS

1.

NDANGWA KYAKA

2. MUTUA MBENGE.....RESPONDENTS

J U D G M E N T

In this succession matter, in which it is not disputed that there are four beneficiaries MBAIKA MUTISO, MUTUNGA MBENGE, NDANGWA KYAKA, and MUTUA MBENGE, letters of administration were confirmed on 9th February 2009. The distribution was reflected in a certificate of confirmation dated 10th February 2009, and was as follows:-

Nganga Kyaka – Wamunyu/

Mutua Mbenge - Kyamatula/137 The same land to be shared

Mbaika Mutiso into four equal parts

Mutungu Mbenge

It is not disputed that some of the beneficiaries MBAIKA MUTISO and MUTUNGA MBENGE, the applicants herein did not sign the consent to mode of distribution.

Thereafter, a dispute arose and a Chamber Summons dated 13th October 2009 was filed by them for leave to file for review of the court's orders. As a consequence, the Judge ordered the Executive Officer to go

and ascertain the situation on the ground. His report dated 6th July 2010 was filed in court. In the report, it was ascertained that the land was apportioned into four portions. Portion A was for Mutunga Mbenge. Portion B was for Mbaika Mutiso. Portion C was for Mutua Mbenge. Portion D was for Ndangwa Kyaka who sold same the to William Mutua. It was observed that plots A and B had stony areas and were bigger. These are the plots of the applicants. Plots C and D were smaller, but with more fertile land. There were entry foot paths and clear boundaries between the plots.

Following directions given by the court, Mbaika Mutiso and Mutunga Mbenge (applicants), filed the present summons for revocation of grant on 9th March 2011. They sought the revocation of the confirmed grant claiming that the respondents Ndangwa Kyaka and Mutua Mbenge used untrue information to obtain the confirmation of the grant, and that the letters confirmed of administration were obtained without the knowledge of the applicants.

The applicants for revocation, acted in person. Mr Nduva Kitonga was for the respondents.

At the hearing of the application, Mbaika Mutiso submitted that the major complaint was to do with the boundaries. Mutunga Mbenge on his part stated that the land had already been divided by Kyaka who was registered as a trustee. They were surprised to receive a document from the court that the land should be divided afresh. Mr Muema for the respondents relied on the replying affidavit. Counsel stated that the replying affidavit explained the issues involved.

I observe that in the replying affidavit sworn on 30th May 2010 by Mutua Mbenge (one of the respondents) states that the confirmation of grant was done in the absence of the present applicants. It was also deponed in paragraph 9 of the said affidavit that the respondents had applied for the orders that the Executive Officer signs documents with regard to confirmation of grant on behalf of the present applicants. It was also clearly deponed that the land had been divided equally at confirmation stage, while infact the Executive Officer's report later established that the agreed division and occupation of the land was not in equal shares.

This court has powers to revoke a grant of representation, even if the same has been confirmed either on an application by an interested party or on its own motion - Section 76 Law of Succession Act. With the facts and evidence before me, I am of the view that this is a case for revocation of grant. The respondents gave a false proposal to share the land equally, when they knew that that was not the position on the ground. They misled the court.

At the same time, since the issue in contest in the application for revocation appears to be simple and straight forward regarding the division of land which has already been divided on the ground, I will revoke the grant and issue a fresh confirmed grant to legalize the portions that are already divided on the ground. In this regard, I apply the provisions of section 47 of the Law of Succession Act (Cap 160). Issuing a fresh confirmed grant is in my view the most expedient order to make. It avoids further costs to beneficiaries.

Consequently, I revoke the confirmed grant issued by the court on 9th February 2009 and dated 10th February 2009. I also issue a fresh confirmed grant in which the land asset distribution will be as per the report of the Executive Officer dated 6th January 2010.

It is so ordered.

Dated and delivered at Machakos this **18th** day of **June** 2012.

George Dulu
Judge

In presence of:-

Nduva Kitonga for Petitioners

Applicants present in person

Nyalo – Court clerk.