



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 167 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE MBITHI MUU ENGOLI (DECEASED)

FRANCIS MUTHOKA MBITHIPETITIONER

VERSUS

BONIFACE MUU SAMUEL1ST OBJECTOR

PATRICK MULEE SAMUEL2ND OBJECTOR

MUTHAMA SAMUEL3RD OBJECTOR

RULING

1. The Protestors herein filed a summons for revocation of grant dated 29/06/2009 and specifically sought for an order that the grant of letters of administration made to Francis Muthoka Mbithi on 20/08/2008 and confirmed on 6/04/2009 be revoked on grounds *inter alia*; that the grant was obtained fraudulently by making false statement and concealment from court of material facts; that the proceedings in which the grant was obtained were contrary to section 39, 57 and 72 of the Law of Succession Act as well as rules 7, 25, 26 and 40 of the Probate and Administration Rules; that the grant was obtained by untrue allegation in law and in fact and finally that some properties belonging to the deceased were left out.

2. The Application was supported by the annexed affidavit of Patrick Mulee Samuel the 2nd Objector herein dated 29/06/2009. The objector's case is that they are sons to Samuel Muu Mbithi (deceased) who was a brother to the petitioner and Titus Kasema Mbithi (deceased) and entitled to the estate of the deceased. It was their case that the house of Samuel Muu Mbithi was not represented as a beneficiary.

3. The Petitioner filed a replying affidavit dated 22/03/2014 wherein he deponed *inter alia*: that the deceased herein had two (2) wives Alice Mukonyo Mbithi and Ngii Mbithi who are all deceased but had children some of whom are deceased; that the deceased had three (3) properties namely Machakos Kiandani/1750, 2050 and 2095; that the house of the 2nd wife lived in Kambu in Makueni County and upon the death of the deceased sold parcels Machakos/ Kiandani/2050 and 2095 to third parties; that the house of the 1st wife Mukonyo Mbithi is settled on parcel Machakos/Kiandani/1750 which is to be shared between three sons namely Samuel Muu Mbithi (deceased), Titus Kasema Mbithi (deceased) and Francis Muthoka Mbithi (Petitioner); that he petitioned for letters of grant over the deceased's remaining asset Machakos/Kiandani/1750 and duly obtained a confirmed grant whereby he was to hold in trust for himself and the families of his two deceased brothers after his married sisters opted not to stake a claim; that he sought to sub-divide the land into three portions only to be frustrated by the Objectors herein; that the application should be dismissed.

4. It was agreed that the summons for revocation of grant be canvassed via viva voce evidence. The objectors called two witnesses while the Petitioner likewise called two witnesses.

5. **Mathew Mbithi Mulee (OB.W1)** testified and stated that he is the Senior Chief of Mumbuni location and confirmed authoring a letter dated 31/05/2018 from his office in which he indicated that the deceased herein had two wives namely Mukonyo Mbithi with eleven (11) children and Ngii Mbithi with seven (7) children. He produced the said introductory letter. On cross – examination, he confirmed that the 1st wife resided on plot **Machakos/Kiandani/1750** while the second wife resided in Kambu area in Makueni County. He also stated that he was not aware that the second house sold their land at Kiandani area and relocated to Kambu in Makueni. He also confirmed that both houses had been settled by the deceased during his lifetime. He confirmed that Samuel Mbithi was the father of the Objectors.

6. **Boniface Muu Samuel (OB.W2)** testified that he is a son of the late Samuel Muu Mbithi who was one of the sons of the deceased from the first house. He maintained that his family was not involved during the filing of the petition and that two assets namely

Machakos/Kiandani/2050 and 2097 have not been listed as assets of the deceased and wished that all the family members should be involved in the distribution. On cross – examination, he stated that his family resides on parcel **Machakos/Kiandani/1750**. He also confirmed that the second house of Ngii Mbithi resided on parcel Machakos/Kiandani/2050 and which has been distributed vide **Succession Cause No. 140 of 2016** to Ngii Mbithi’s grandsons. He also stated that all the family members of the second house moved to Kambu in Makueni but left behind great grandson on parcel 2050. He also confirmed that parcel 2097 belonged to the second house of Ngii Mbithi and that he together with his fellow objectors do not have any interest thereon. He also confirmed that none of the children of the deceased except the objectors have raised any objections. He further confirmed that the Petitioner ranks first when it comes to persons to take out letters of grant of administration. He confirmed that the objectors have sold part of plot No.1750 to purchasers and stated that they are only entitled to their late father’s portion on plot 1750. He confirmed that the wife of Titus Kasema Mbithi has not lodged an objection and further that the Petitioner has not sold any portion of plot 1750. He finally confirmed that the objector’s mother Mary Mbithe Samuel is to receive the share on behalf of her husband and that the objectors will be relieved once they get their father’s share on plot 1750. The objector’s thereafter closed their case.

7. **Francis Muthoka Mbithi (Pet. W1)** testified and sought to rely on the contents of his replying affidavit to the summons for revocation of grant. He stated that the deceased was his father and who had two wives Mukonyo Mbithi and Ngii Mbithi. He stated that the deceased had three parcels of land namely 1750, 2050 and 2095 and that the second house sold their two parcels and relocated to Makueni thereby leaving only parcel 1750 to the first house. He stated that he only filed for succession on the remaining portion 1750 that was for the first house and which is to be shared equally between him and his two late brothers Samuel Muu Mbithi and Titus Kasema Mbithi. He stated that he had purchased his own land in Makueni where he resides and was in the process of sub-dividing plot 1750 into three portions when the objectors rushed to court. It was his view that the Objectors intention is to sell the land to the detriment of those entitled to inherit it. He denied any wrong doing or concealment of any material facts as he held the property in trust and that he did not include the second house as they had their own two parcels of land and who have not lodged any objections. He finally stated that he is not aware of any properties left out. He urged the court to allow him distribute the property into three equal portions and confirmed that his sisters do not wish to be included as beneficiaries as they are married off. On cross-examination, he stated that he only filed for letters of grant for plot 1750 which had been given to his mother’s house since the other parcels had been given to the second house. He also confirmed that the title deed issued to him did not have the words “*in trust*” and further that there was no consent to the sub-division. On re-examination, he maintained that he had no intention of defrauding his late bothers. He finally maintained that the chief’s introductory letter was not fraudulent since it was only the three sons from the first house who were to benefit from the plot 1750.

8. **Beatrice Kamene Joseph (Pet. W2)** testified that the deceased herein was her father. She stated that the Objectors are sons of her deceased brother. She sought to adopt her witness statement dated 2/11/2016. She stated that the land given to the first house is to be shared between the three sons as the sisters are all married and who have agreed not to be given any property. She finally urged the court to allow the Petitioner proceed with the distribution. On cross-examination, she confirmed that she did not sign a consent to filing of the petition. She also confirmed that the petitioner was to hold the parcel on behalf of his late brothers but noted that the title deed indicated the petitioner as sole owner of parcel 1750. On re-examination, she maintained that the petitioner should be allowed to distribute the land between himself and his two late brothers. The Petitioner closed his case.

9. Mr. Kituku learned counsel for the objector’s filed submissions dated 19/05/2020 where he submitted that the petitioner was fraudulent when he presented himself as the sole surviving beneficiary when in actual fact there were about twenty other beneficiaries. It was also submitted that the conduct of the petitioner in registering himself as sole absolute owner of parcel Machakos/Kiandani/1750 instead of holding it in trust merits revocation of the grant. It was also submitted that there was no consent to the petition, summons for confirmation and distribution by the beneficiaries. It was further submitted that the petitioner omitted to list some of the free property of the deceased for distribution. It was the contention of learned counsel that this is a fit case for revocation of the grant and urged the court to allow the application as prayed.

10. M/s Nzei & Company Advocates for the Petitioner filed their submissions dated 21/10/2020. It was submitted that the petitioner ranks in priority over the objectors who are grandsons of the deceased while the petitioner is the only surviving son of the deceased and hence entitled to petition for letters of grant of administration intestate. It was submitted that the objectors failed to prove any of the grounds and that their testimonies revealed their motive namely to bar the petitioner from sub-dividing the deceased’s parcel of land Machakos/Kiandani/1750 and in the end exclude the petitioner from getting a share of the said land. It was also submitted that the objectors having sold part of the deceased’s land demonstrated that they cannot be trusted with the administration of the deceased’s estate. It was finally submitted that the petitioner has not committed any act or omission that would make him unfit to complete the administration of the deceased’s estate and should be allowed to complete the same within reasonable time and that the objectors application be dismissed with costs.

11. I have given due consideration to the objectors application as well as the rival affidavits. I have also considered the oral evidence presented by the parties herein. I find certain issues are not in dispute. Firstly, that the deceased had two wives namely Mukonyo Mbithi and Ngii Mbithi both of whom are deceased and that they had several children some of whom have also passed on. Secondly, the deceased had given his properties to the respective houses prior to his demise whereupon the 1st house of Mukonyo Mbithi was given parcel Machakos/Kiandani/1750 while the second house of Ngii Mbithi was given parcel numbers Machakos/Kiandani/2050 and 2097. Thirdly, that the second house has since sold the two parcels and left some portions to a few members of their house and relocated to Kambu area of Makueni. Fourthly, the second house had filed **High Court Succession Cause No. 149 of 2016** wherein they distributed their portions of land. Fifthly, parcel Number Machakos/Kiandani/1750 is registered in name of the petitioner as sole owner and is yet to be distributed between the petitioner and his two deceased brothers one of whom was the father of the objectors. Sixthly, the Petitioner had earlier proceeded with summons for confirmation of grant and duly obtained a certificate of confirmation of grant in which he was to hold parcel number Machakos/Kiandani/1750 in trust. The issues for determination are as follows:-

(i) Whether the three properties namely Machakos/Kiandani/1750, 2050 and 2097 are free properties of the deceased.

(ii) Whether the failure by the petitioner to include all the family members and the two properties Machakos/Kiandani/2050 and 2097 warrants an order for revocation of grant.

(iii) What orders may the court grant?

12. As regards the first issue, it transpired from the evidence of the witnesses that the deceased owned three (3) properties namely Machakos/Kiandani/1750, 2050 and 2097. The objectors have taken issue with the petitioner for failing to include parcel numbers 2050 and 2097 in the list of assets during the filing of the petition for grant of letters of administration. The Petitioner has denied any wrong doing and pointed out the fact that he was only pursuing parcel No. 1750 that had been given to the first house since the other two parcels had been given to the second house who were to pursue this separately. Section 3 of the Law of Succession Act defines free property to mean the property which that person was legally competent to freely dispose during his lifetime and in respect of which his interest has not been terminated by his death. The operative time for property to be considered free property is the time the deceased was alive. It is not disputed that the three parcel Machakos/Kiandani/1750, 2050 and 2097 had been registered in the deceased's name at the time of his death and thus they were free property of the deceased.

Even though parcel number 1750 is currently registered in the name of the petitioner the same is still free property of the deceased since the same has been vested in him in his capacity as the personal representative of the deceased and yet to be distributed. It is also noted that the other two parcels 2050 and 2097 have since changed hands pursuant to conclusion of **Machakos Succession Cause Number 140 of 2016** that had been lodged by the second house and therefore have already been distributed. As the two assets have been distributed then the same has become fait accompli thereby militating against the Objectors claim that the assets should still be treated as free property of the deceased. Such an assertion at this stage holds no water as the same has been overtaken by events. Indeed good practice would have required that one succession cause be filed and that all the assets of the deceased be distributed under the said cause. That notwithstanding, I find that no prejudice has been suffered by the parties since the objectors themselves are in agreement that parcels 2050 and 2097 had been given by the deceased to the second house of Ngii Mbithi. In any event the said second house has not lodged any objection in these proceedings implying that it is fully satisfied with the distribution of the properties. The conduct of the objectors in trying to bring up the issue of those two properties is merely to bolster their case against the petitioner but as pointed out above that the said properties are not available for distribution then their claim in that regard must be rejected. That being the position, I find that the only property that is freely belonging to the deceased is Machakos/Kiandani/1750.

13. As regards the second issue, the Objectors are seeking for revocation of grant on the ground that the Petitioner fraudulently concealed material facts from the court. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:-

“Revocation or annulment of grant of representation, whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance of inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court orders or allows; or

(ii) to proceed to diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(iv) that the grant has become useless and inoperative through subsequent circumstances.”

The objectors herein appear to raise the following grounds:

(a) The grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or

(b) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

14. Applying the test of law in section 76 of the Law of Succession Act, the Objectors have alleged that the Petitioner omitted to list names of family members as well as failed to list other assets of the deceased and finally caused himself to be registered as absolute owner of land parcel Machakos/Kiandani/1750. To decide in their favour the court has to be satisfied that the Applicants have furnished evidence whose level of probity is such that a reasonable man even in a case as this where the Respondent has not adduced any evidence, might hold that the more probable conclusion is that for which the Applicants contends, since the standard of proof is on balance of probabilities/preponderance of evidence (see **Lancaster –vs- Black – Well Collery Co. limited [1918] WC Rep 345**).

15. None disclosure of material facts to the succession court by the Petitioner is the main accusation laid against him by the Objectors. The objectors maintain that the petitioner did not include the names of all family members and also failed to include the two other properties namely L.R. Machakos/Kiandani/2050 and 2097 and finally that the petitioner had himself registered as sole owner of parcel No. Machakos/Kiandani/1750. As noted from the evidence of the petitioner and his witness, it is clear that the deceased had already distributed his assets prior to his death in that he had given the second house of Ngii Mbithi two parcels of land reference Machakos/Kiandani/2050 and 2097 while he gave the first house of Mukonyo Mbithi parcel number 1750. The petitioner averred that he only pursued over parcel 1750 that had been given to the first house and that he had listed the names of the three sons of Mukonyo Mbithi as his sisters did not stake any claims to the estate. His sister Beatrice Kamene Joseph confirmed that her fellow sisters had no claim against the estate as they were married. Even though the objectors have maintained that the second house should have been listed, I find the failure did not prejudice anyone especially from the first house where both petitioner and objectors belong. The objectors confirmed that the second house had been given their two separate portions of land and that they have no claim thereon. In any event evidence was presented to the effect that the second house filed a separate **Succession Cause Number 140 of 2016** and proceeded to distribute their properties. Hence the petitioner could not have listed the said properties in this cause. I note that the second house has not lodged any objections in this cause thereby indicating that they are fully satisfied with what they had been given. The objectors in their evidence confirmed that the two parcels duly belonged to the second house and hence, I find it rather curious that they are now accusing the petitioner for not including the said properties for distribution yet they have no claim thereon. They attempted to avail copies of search records (green cards) but which actually confirm that the said properties have already been distributed vide **Succession Cause No.140 of 2016**. This in my view was rather defeatist and did not help to advance their case against the petitioner, in any way. Further the chief's introductory letter presented by the objectors had the names of the sons of the 1st house one of whom was the father to the objectors. It is therefore disingenuous and in bad faith on the part of the objectors to accuse the petitioner for omitting names of family members when in fact the name of their father Samuel Muu Mbithi was duly listed. In any case the Petitioner being the only surviving son of the deceased ranked in priority to take out letters of grant of administration while the objectors being grandsons are to get their share through their deceased father. Finally, the objectors have claimed that the petitioner caused himself to be registered as absolute owner of the property given to the first house. I have perused the certificate of confirmation of grant issued on 6/04/2009 and which indicates that the petitioner was to have parcel 1750 registered in his names and to hold in trust. However, the title deed issued on 17/06/2009 has the petitioner registered as proprietor and there is nothing showing that it is being held in trust. Indeed that was not proper since it did not tally with the certificate of confirmation of grant. The petitioner has tried to allay fears that he did not mean any harm to the objectors as he had proceeded to approach the Land Control Board for consent to subdivide the land into three equal portions but was frustrated by the objectors. He denied selling any portion of the land while on the side of the objectors they confirm having sold a portion of the land to third parties which prompted the petitioner to seek for orders of injunction that were granted on 14/06/2016. Even though the petitioner tried to pitch for innocence, his registration as absolute owner of the land did not help matters as the same did not tally with what was in the certificate of confirmation of grant. This seems to be the only ground for revocation of the grant. However, the power granted under section 76 of the Law of Succession Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice. The deceased herein died in 1990 and this cause was lodged in 2008. The revocation of the grant may set the parties back several years, yet the Applicants are only dissatisfied with the fact that the Petitioner who hails from the first house just like their late father has registered himself as sole owner of the property instead of holding it in trust for them. Section 47 of the Law of Succession and Rule 73 of the Probate and Administration Rules enjoins the court to exercise inherent jurisdiction to make orders as necessary to meet the ends of justice. I find an order revoking the grant will cause prejudice to the parties who are all anxious to have the property shared equally between the petitioner and his two late brothers one of whom was the father to the Objectors. The objectors themselves have confirmed that their claim shall come under their late father Samuel Muu Mbithi. That being the position, I decline to issue an order for revocation of grant. However, I find an order cancelling the certificate of confirmation of grant and directing the petitioner to apply afresh for the distribution of the estate of the deceased namely **Machakos/Kiandani/1750** within a certain time line to be appropriate in the circumstances.

16. As regards the last issue and in view of the foregoing observations, the objectors summons dated 29/06/2009 succeeds to the extent as follows: -

(a) The certificate of confirmation of grant issued on the 6/04/2009 is hereby cancelled.

(b) The petitioner is directed to apply afresh for the distribution of the asset of the deceased namely land parcel Machakos/Kiandani/1750 equally between himself and his late brothers Samuel Muu Mbithi and Titus Kasema Mbithi and or their family representatives within the next thirty (30) days from the date hereof.

(c) Title to L.R. Machakos/Kiandani/1750 now in the name of Francis Muthoka Mbithi be and is hereby cancelled and that the same do revert in the name of the deceased Mbithi Muu Engoli.

(d) The orders regarding the status quo made on 14/06/2016 shall remain in force until the final confirmation of grant.

(e) As parties are members of one family, each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 8th day of February, 2021.

D. K. Kemei

Judge