



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.58 OF 1990

IN THE MATTER OF THE ESTATE OF PAUL NDETO KUNGA (DECEASED)

BETWEEN

ABRAHAM MUSEMBI NDETO1ST ADMINISTRATOR

STEPEHN MUEMA NDETO2ND ADMINISTRATOR

EVA MWIKALI NDETO 3RD ADMINISTRATOR

AND

WILSON KIMATU KUNGA4TH ADMINISTRATOR/ OBJECTOR

RULING

1. This cause was filed in 1990 by **Eva Mwikali Ndeto and Alice Wayua Ndeto** who are the widows of the deceased as the intended administrators of the estate of **PAUL NDETO KUNGA** who died intestate on 15th of December 1980 domiciled in Kenya. The beneficiaries of the estate were listed as **Eva Mwikali Ndeto, Alice Wayua Ndeto, David Wambua Ndeto, Francis Mutiso Ndeto and Abraham Musembi Ndeto**. The last three are the sons of the deceased. A grant of letters of administration intestate was later issued on 26th of July 1992 to the said administrators.

2. An objection was later filed by **Wilson Kimatu Kunga** in August 1992 in which he alleged to be the brother of the deceased. He claimed that the property had been registered in the name of the deceased who had been his elder brother and who was to hold it in trust and that he accused the Applicants for secretly filing the summons as a way of denying him his share of the deceased's properties. A consent was later reached and filed on 17th of November 1992 in which all parties agreed to have him as one of the applicants for the grant of letters of administration in the cause.

3. The only property or asset that was cited in the summons was Plot number **MASII/KITHANGAINI/630** (Hereinafter referred to as "the property").

4. A certificate of confirmation of grant was subsequently issued on 14th October 1993 to **Eva Mwikali, Alice Wayua Ndeto and Wilson Kimatu Kunga** confirming that the distribution of the property would be done jointly.

5. On 15th of March 2016, the 4th administrator/ objector filed a summons for rectification of grant seeking the following orders:

a. That the confirmation of grant issued to Eva Mwikali, Alice Wayua Ndeto and Wilson Kimatu Kunga on 26th of June 1992 be amended as per the schedule of properties attached thereto.

b. That costs of the application be in the cause.

6. The same was supported by the affidavit of the objector wherein he averred inter alia;

a. That he was not represented by a counsel previously and that the administrators made a fundamental error during the confirmation of the grant.

b. That the deceased who was his elder brother had been registered as the proprietor of Masii/Kithangaini/630 and to hold it in trust and that they were to jointly share the same.

c. That the history of the property had not been explained to the Honourable court during the process of confirmation of grant due to his mistake.

d. That he and the deceased were the only sons of their deceased parents and that the property had been owned by their father, John Kunga who died in 2009 and since his deceased brother was older, he was registered as the proprietor thereof during the issuance of title. He averred that his father owned 34.5 Ha before he purchased 5 Ha adding up to 39.5 Ha.

e. That he had bought a further five acres from his uncle which was consolidated with the current title but separate from the one inherited from the parents and was separately fenced.

f. That since the widows represent his deceased brother's interest in the portion owned by his father, they should share equally the remainder of the portion of the land and after removing the 5 acres which he had bought separately and which are part of this title after the whole parcels were consolidated.

g. That he proposes that the property measuring 16 Ha or 39.5 acres should be shared as follows;

i. Eva Mwikali Ndeto & Alice Wayua Ndeto – 17.25 acres

ii. Wilson Kimatu Kunga -22.25acres.

h. That the property has never been subdivided since his sisters in law have objected to any attempts to share the said property.

i. That he seeks indulgence for making the application late and prays that the amendments be done as per the attached schedule marked WKK3.

7. In order to establish the exact acreage, this court ordered the parties to engage surveyors and a report be filed. A report was filed on 19TH of June 2018 vide a letter from Kivuva Omuga & Co. Advocates as well as on 26th September 2018 which stated that the property measures 16 hectares. It further stated that the piece of land was subdivided into 4 portions and set aside as follows;

A - Wilson Kimatu Kunga.....5.7 Ha

B- Alice Wayua Ndeto.....3.8 Ha

C - Eva Mwikali Ndeto.....4.5 Ha

D- Wilson Kimatu Kunga.....2.0Ha

8. On 20th December 2018, **Abraham Musembi Ndeto and Stephen Muema Ndeto** filed a summons for appointment as *administrators De Bonis Non* on the grounds that Alice Wayua Ndeto had died on 9th of August 2018 and that they are her sons. They also claimed that the current estate is a continuing trust and that the administration had not been completed. The same was supported by the affidavit of Abraham Musembi Ndeto and Stephen Muema Ndeto and an annexed burial permit for Alice Wayua Ndeto (deceased) marked AMN1. A consent was later reached and a grant of letters of Administration intestate was issued on 20th of December 2018 to **Abraham Musembi Ndeto, Stephen Muema Ndeto, Eva Mwikali Ndeto and Wilson Kimatu Kunga.**

9. A fresh summons for confirmation of grant was filed on 17th of October 2019 by the objector wherein he proposed that the portion of land marked "D" in the surveyor's report dated 25/5/2018 be marked in his name as it is land he had solely bought but was mistakenly consolidated with ancestral land. He averred that portion "A", "B" and "C" in the surveyor's report be divided equally with him getting half the share and that the remainder thereof be shared among **Abraham Musembi Ndeto, Stephen Muema Ndeto and Eva Mwikali Ndeto.**

10. The 1st, 2nd and 3rd administrators filed a replying affidavit on 22nd of January 2020 in which they averred inter alia; that this court is not seized with the necessary jurisdiction to entertain land disputes whether the land is held in trust or otherwise and his claims ought to be canvassed before the Environment & Land Court; that It is not true that the shares of respective beneficiaries have been ascertained; that had the property been solely owned by the deceased then a search would have shown otherwise; that the title deed for the property and the deceased's certificate of death got lost and were subsequently found with the Applicant thereby making them apprehensive that the Applicant is up to no good.

11. When the matter came up for mention on 8th of February 2021, the 4th administrator submitted that the grant be confirmed as prayed for in paragraph 9 & 10 of his supporting affidavit and indicated to the court that he did not have a response to the Replying affidavit by his fellow administrators.

12. On the other hand, the 1st, 2nd and 3rd Administrators submitted that the 4th Administrator was a brother to the deceased and not a beneficiary. They submitted that the grant should be confirmed in the names of the widows of the deceased and that the issue of trust should be canvassed in another forum.

13. In response, Mr. Malanga for the fourth administrator further submitted that the issues raised had been dealt with by the grant that was confirmed on 26.9.1992 and which has not been challenged to date. He submitted that as per the court order of 14.2.2018 a surveyor had been contacted and a survey done and thus asked the court to confirm the grant as the 1st 2nd and 3rd administrators have not presented a different proposal. He submitted that the consent has not been set aside.

14. I have perused the record, the documents filed in court and considered all the submissions of the parties and find the following issues necessary for determination:

a. Whether the Objector is entitled to benefit from the property?

b. Whether this court has jurisdiction to handle the matter?

c. Whether the grant should be confirmed as proposed by the 4th administrator?

15. I note that there are two pending summons before this court; one dated 15.03.2016 for rectification of grant and summons for confirmation of grant dated 16.10. 2019. Of note is that the annexure in both summons and the grounds therein are the same namely a report by a surveyor together with a sketch map of the parcel of land to be distributed.

16. Rectification of grants is provided for under section 74 of the Law of Succession Act as well as Rule 43(1) of the Probate and Administration Rules. The latter provides thus:

‘Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased, or in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons...’

17. It is trite law that he who alleges must prove his case. This principle is provided for in the evidence Act, cap 80 of the Laws of Kenya. The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** provides that:

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

18. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.

19. The Objector seeks to have the grant rectified on the grounds that he was not represented by a counsel earlier in the proceedings and that his co-administrators made a fundamental error during the confirmation of grant and also that he had purchased an extra five acres that was erroneously included as part of the estate.

19. Looking at the 4th administrator’s assertions, I note that he has not produced any evidence of any kind before this court to show that he was entitled to more than was originally stated in the grant that was confirmed on 14th, October 1993. Indeed, the said certificate of confirmation of grant clearly indicated that the property was to be shared jointly between the administrators. The Objector participated in the said proceedings and was even present in court during the confirmation proceedings. He waited for 23 years in order to file summons for rectification of the grant. The information he now raises seems to have arisen later when he alleges to have purchased more property. No evidence has been tabled before this court to enable it have an insight of what might have taken place. The objector had duly agreed to have the property shared jointly. The present turn around by the objector raises eye brows since he has not explained the reasons behind the change of goal posts. No wonder his fellow administrators are reading some mischief on his part. The objector had the opportunity to challenge the mode of distribution during the confirmation of the grant. His feeble claim that he did not have an advocate at the time is not convincing since his fellow administrators were equally laymen. In any case, the court did explain the process and that the court only endorsed what he and his fellow administrators had proposed. The court’s hands are thus tied and as such it is unable to ascertain the issue of the initial property and that of the extra pieces of land and whether it should be part of the estate. The 1st and 3rd Administrators in their replying affidavit only state that the shares have not been ascertained and leaves it to court. I am not satisfied by the 4th administrator’s claims that the sole property of the deceased be shared differently than as earlier proposed leading to the issuance of a confirmation of grant dated 14.10.1993.

20. In as far as this court’s jurisdiction is concerned on handling of land disputes, section **47 of the Law of Succession Act** provides that;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”

21. Further, rule **73 of the Probate and Administration Rules** provides:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of Justice or to prevent abuse of the process of the court.”

22. In the case of **Santuzza Bilioti alias Mei Santuzza (deceased) –v- Giancarlo Falasconi (2014) eKLR** where the issue of jurisdiction of the succession court in handling land matters particularly cancellation of titles, the court held that;

“This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased’s property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.”

23. This being a succession court, it has jurisdiction to deal with matters relating to the deceased’s property and to distribute the same among the deceased’s dependants. The court has to establish what belongs to the deceased before it proceeds to distribute the same among the beneficiaries.

24. I find that the Objector has not provided any tangible evidence to necessitate the rectification of the confirmed grant issued on 14th, October 1993. He has failed to produce evidence regarding the alleged purchase of extra land from third parties which he claims were amalgamated into the deceased’s land such as sale agreements or supporting affidavits from members of families of the alleged seller. In the absence of such evidence, the court has no option but to go by the terms of the earlier certificate of confirmation of grant. The 1st, 2nd and 3rd Administrators have maintained that the shares have not been ascertained and that all the property belonged to the deceased.

25. A grant can only be confirmed by the court once it is satisfied that in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares as provided by **section 71 of the Law of Succession Act**.

26. The 1st, 2nd and 3rd administrators have maintained that the asset belongs to the deceased and that if the 4th administrator/objector has any claims, then he should approach the Environment and Land Court for redress regarding his claim that the deceased held the land in trust for him.

27. On the other hand, the Objector has not provided any evidence to show how and when he allegedly purchased the extra parcels of land. The surveyors have also not provided an actual map of the property and backed by records from the office of the Land Registrar.

28. Indeed, the certificate of confirmation of grant dated 14.10. 1993 presupposed that the 4th administrator herein had reached a consent with the other administrators in the proposed distribution. He must have duly signed the consent to distribution of the properties which is to the effect that the property was to be shared jointly and as joint proprietors then the said consent is still binding upon him and he is only entitled to a half share. He has not raised any issues that the said consent had been obtained through fraud, collusion or malpractice.

29. In **Hirani v Kassam (1952) 19 EACA 131** that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.....; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

30. No evidence of fraud, collusion or any other reason whatsoever has been placed before the court to lead to the consent being set aside. The only allegation raised on rectification of the grant is that information had been left out. However, none of the facts has been proven the same. The 4th administrator should be content with a half share of the property while the remainder should go to the family of the deceased to be shared jointly by the family of Alice Wayua Ndeto and Eva Mwikali Ndeto which is as follows:

Wilson Kimatu Kunga.....19.5 acres

Eva Mwikali Ndeto.....9.875 acres

Abraham Musembi Ndeto

Stephen Muema Ndeto.....9.875 on behalf of the family of Alice Wayua Ndeto

31. In the result, it is my finding that the 4th administrator’s applications dated 14.3.2016 and 16.10.2019 only succeed to the extent that a new certificate of confirmation of grant shall issue capturing the names of the new administrators **Abraham Musembi Ndeto, Stephen Muema Ndeto, Eva Mwikali Ndeto** and **Wilson Kimatu Kunga** while the distribution shall be as directed in paragraph 30 above. As parties are family members I make no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this day **17th** of **May, 2021**.

D. K. Kemei

Judge