



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.733 OF 2007

IN THE MATTER OF THE ESTATE OF JOSPHAT MUSAU MUKUVA (DECEASED)

REBECCA NTHAMO MAKAU.....OBJECTOR/APPLICANT

VERSUS

THOMAS KILONZO MUSAU.....PETITIONER/1ST RESPONDENT

PETER MUKUVA MUSAUPETITIONER/1ST RESPONDENT

RULING

1. The Objector/Applicant herein filed a summons for revocation of grant as well as certificate of grant dated 7/02/2012. She also sought for orders restraining the administrators from distributing the assets to the beneficiaries pending the determination of the application. The application is supported by the affidavit of the Applicant sworn on even date. The gist of the application is that the Applicant is the wife of the 1st Administrator one **Patrick Makau Musau** (now deceased) and that the interest of her said husband was not catered for in the schedule of distribution. It was the Applicant's claim that some assets were left out and/or concealed from the schedule of properties in the certificate of confirmation of grant. Finally it was averred that the concealment aforesaid was meant to disinherit the Applicant and her children.

2. The application was strenuously opposed by the Petitioners/Respondents. A Replying Affidavit dated 18/10/2012 was filed by Peter Mukuva Musau one of the Administrators who averred that the **1st Administrator Patrick Makua Musau** passed on on 22/02/2009 but which information was not relayed to court due to ignorance. He averred the deceased had prior to his death had distributed his assets among his three (3) sons. He also averred that the Objector had been a former wife of the late 1st Administrator but that she had separated with him and got married elsewhere after begetting two children with her husband. He opposed the proposed revocation of grant as the remaining administrators are ready and willing to administer the estate faithfully. He further averred that most of the properties raised by the Objector had already been transferred by the deceased prior to his death and no longer form part of the estate and that any new assets are unknown unless the Objector avails proof of ownership. It was finally averred that the Objector is not entitled to any share of the assets save for her two(2) children as she is not a beneficiary and should wait to benefit from what her two children shall get when the estate of her estranged husband Patrick Makau Musau will be distributed to the said children.

3. Parties agreed to canvass the protest by way of viva voce evidence. It was also agreed that witness statements be filed and exchanged.

4. The **Objector** herein **Rebecca Nthamo Makau** sought to rely on her affidavits as well as witness statements. She started off by stating that she objects to the confirmation of grant since the name of her husband was not listed. She stated that she wants to be listed as a beneficiary on behalf of her late husband Patrick Makau Musau. She also claimed that some assets have been left out while others have been sold and that the grant should be revoked. On cross – examination she denied having deserted her husband with whom she had six (6) children. She also indicated that she is ready to avail evidence of ownership of the properties left out and/or sold by the administrators. She finally suggested that the grant should be in names of three (3) administrators including herself.

5. **Fredrick Kilatya Kioko** a former assistant chief Mbiuni sub-location stated that he knew the Objector and her husband for a long time as they had been married under Kamba Customary Law and that he had once endorsed a marriage agreement between the two. He vouched for the Objector to be made an administrator of the estate of the deceased herein. On cross-examination, he denied that the Objector had been divorced by her late husband and further denied that the Objector's husband had another wife. With that the Objector closed her case.

6. The surviving Petitioner **Thomas Kilonzo Musau** started off by stating that he is the 2nd Petitioner herein and the second born son to the deceased herein. He stated that the 1st and 3rd petitioners have since passed on. He stated that his elder brother had two wives who include the Objector and one Patricia Mwikali Makau and that the Objector had separated with her husband and got married to one Muema Muli. He added that his late brother's share will be shared among his four sons. He denied ever selling properties of the estate and further denied the existence of a traditional ceremony over the marriage between the Objector and the late 1st administrator. On cross – examination, he denied

discriminating against the deceased 1st Administrator and further denied disposing of the assets of the deceased.

7. **Mary Mutheu Mukuva** stated that she is a wife to the 3rd Administrator Peter Mukuva Musau who had since passed on. She stated that the Objector herein was a former wife to the late 1st Administrator and who had two children out of wedlock and went ahead to bear one child with the 1st administrator. She further stated that upon the Objector leaving her matrimonial home, the 1st Petitioner married another wife **Patricia Mwikali Makau**. She suggested that the remaining administrators be allowed to continue to run the affairs of the estate. On cross – examination, she accused the Objector of having been a lazy woman who tormented the 1st administrator who later died due to stress. On re-examination, she stated that the objector should not be made an administrators as she is likely to bring chaos.

8. **Patricia Mwikali Makau** started that she was married after the Objector separated with the late 1st Petitioner who died on 24/02/2009. She stated that she got three (3) children with the said 1st Petitioner who married her after separating with the objector. She finally stated that she has confidence in the remaining administrators to administer the estate. On cross – examination, she denied finding any woman when she got married to the 1st Petitioner.

9. **Veronicah Mutua Masika** stated that she knew the Objector very well as she used to quarrel a lot with the 1st Petitioner who was her husband. She added that the Objector deserted her husband for ten years and got married to another man and further accused her for destroying her marriage.

10. **Boniface Muathe** stated that the deceased herein was a neighbour and that the surviving administrators should be allowed to run the estate.

11 Parties filed written submissions. The Objector's submissions are dated 21/11/2019 while the Petitioners submissions are dated 16/12/2019. It was submitted by the Objector that she is the wife to the 1st Petitioner Patrick Makau Musau (now deceased) who has been left out in the certificate of confirmation of grant as a beneficiary. It was submitted that the failure to include the 1st Administrator or his wife or children by the remaining administrators was a fraudulent concealment aimed at disinheriting the family of the 1st Administrator. It was further submitted that the Objector is a beneficiary by virtue of Sections 3 and 29 of the Law of Succession Act.

12. Learned counsel Mrs Nzau for the respondents submitted that the Objector's claim that assets have been disposed is baseless because the said assets were distributed by the deceased prior to his death. She submitted that no good reasons have been given by the Objector to warrant annulment of the grant and that the Objector should not be made as an administrator as she is hostile to the rest of the beneficiaries and might lead to delay due to disunity. It was also submitted that the Objector should finalize **Machakos Succession Cause No.440 of 2011** from where the rightful beneficiaries of the 1st Administrator Patrick Makau Musau will be determined and thereafter they will be given their shares under the estate of the deceased herein and in the meantime the Administrators shall hold the shares due to the deceased Administrator in trust for his beneficiaries awaiting the outcome of **Succession Cause No. 440 of 2011**. Learned counsel was of the view that there is no reason to revoke the confirmed grant and that the application dated 7/02/2012 should be dismissed with costs.

13. I have considered the rival affidavits and witness statements as well as the oral evidence adduced herein by the parties. I have also considered the submissions filed by the parties in support of their rival standpoints. It is not in dispute that the grant issued on 11/02/2008 has since been confirmed by this court on the 21/10/2011. It is also not dispute that two of the administrators have since died leaving only Thomas Kilonzo Musau and pursuant to the consent dated 20/07/2017 Mary Mutheu Mukuva was appointed as a Co-Administrator replacing deceased 3rd Administrator Peter Mukuva Musau. It is also not in dispute that the deceased 1st Administrator Patrick Makau Musau had two wives namely **Rabecca Nthamo Makau** (objector herein) and **Patricia Mwikali Makau**. It is also not in dispute that several beneficiaries including the deceased 1st Administrator's family have been left out in the certificate of confirmation of grant. The issues for determination are follows:

(i) Whether or not the grant as well as the certificate of confirmation of grant should be revoked and or annulled.

(ii) Whether the objector should be added as an Administrator.

(iii) What orders may the court grant.

14. As regards the first issue, it is noted that revocation of grants is found in Section 76 of the Law of Succession Act which gives the court jurisdiction to revoke or annul grants. The Section provides as follows:-

“ a 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 concealment from the court of something material to the case.

(c) That the grant was obtained by means of an untrue allegations of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or 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 grant within one year from the date hereof or such longer period as the court has ordered or allowed.

(ii) To produce to the court within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars.

(e) That the grant has become useless and inoperative through subsequent circumstances.

In the present application the objector has made a raft of allegations against the surviving administrators. Some of these allegations are firstly that the administrators during the confirmation of grant did not disclose to the court that the 1st administrator had long passed on way back on 24/02/2009. Secondly that the surviving administrators failed to include the 1st administrators and his family as beneficiaries of the estate of the deceased. Thirdly that some properties have been left out in the schedule of distribution. The oral evidence adduced herein clearly established that the objector was a former wife of the late 1st administrator and who had children together. The surviving Petitioner Thomas Kilonzo Musau admitted in his affidavit that indeed the 1st Petitioner had died on 24/02/2009 but that they had not informed the court due to ignorance. He also confirmed that the Objector was a former wife of the 1st petitioner and who had children. However the surviving administrator's claim that he did not include the 1st petitioner as beneficiary as he was waiting for the family of the 1st Petitioner to commence a separately succession cause which would determine the genuine beneficiaries not believable. It is noted that the grant was confirmed on 21/10/2011 and it is inconceivable for the surviving administrators to deliberately leave out genuine members of the family and purport to hold their properties in trust. In any case a perusal of the certificate of confirmation of grant does not indicate any properties held in trust for the 1st Petitioner's family. They were deliberately omitted by the surviving administrators. There was thus concealment from the court of something material to the case. It was incumbent upon the administrators to list all the beneficiaries and their interests in the estate. The surviving administrators did not disclose this crucial fact to the court during the confirmation of grant. Again a perusal of the chief's introductory letter indicates that there are other adult female members who have been left out in the confirmation proceedings. If the said female members intended not to take part then they should have filed documents of renunciation of claims to the estate of the deceased. No such documents were filed alongside the affidavit in support of the confirmation of the grant. During the oral evidence herein it transpired that there were some properties omitted from the schedule of distribution. When prodded by the Objector over the said properties the surviving administrators claimed that the said properties had been distributed by the deceased prior to his demise. However they did not avail any documentary evidence to that effect and hence the objector's complaints appear to me to be not far-fetched but have some truth in it. Once the same is proved the court will proceed to distribute the estate being guided by the provisions of Section 42 of the Law of Succession Act. Arising from the events as explained in the foregoing, I find that there was concealment of material facts or untrue allegations made by the surviving administrators during the confirmation of grant. However, revocation of the grant of representation issued to the surviving Petitioners will not serve any practical and useful purpose. However the grant may now be revoked and a fresh one be issued to the surviving administrators. Since the actual distribution of the estate is done during confirmation of grant and it is thus the confirmation which is amenable to revocation. Indeed the Objector herein has no problem with the initial grant since her beef with the surviving petitioners is to do with the skewed distribution of the estate. The initial grant had been issued to the three sons of the deceased. However two of them have since passed on leaving only Thomas Kilonzo Musau who has since been joined by the wife of the deceased 3rd Petitioner pursuant to the consent entered on 20/07/2017. That then leaves the estate to be administered by the two Petitioners. The Objectors attempt to be made an administrator has been resisted by a majority of the family members owing to the fact that she had separated with the late 1st Petitioner for a very long period. They seem to see her as a trouble maker and is likely to cause disunity once she is made an administrator and thus delay the finalization of the matter. Indeed the objector has been indefatigable as she has lodged application upon application and has taken the bull by the horns and this has caused some sort of discomfort on the remaining administrators. Since the task of administration requires teamwork then if there is no possibility of unison if the objector is brought on board then I find that it is best to have the two administrators continue with the task of administering the estate. This then resolves the second issue earlier pointed out hereinabove.

15. As regards the third issue and in view of the foregoing observations, I proceed to make the following orders:-

(a) The grant of representation issued to Patrick Makau Musau, Thomas Kilonzo Musau and Peter Mukuva Musau is hereby revoked and a fresh one is issued in the names of THOMAS KILONZO MUSAU and MARY MUTHEU MUKUVA.

(b) The certificate of confirmation of grant of letters of administration intestate issued to Patrick Makau Musau, Thomas Kilonzo Musau and Peter Mukuva Musau dated 21/10/2011 be and is hereby revoked.

(c) The Petitioners shall file and serve fresh summons of confirmation of grant and serve upon the objector herein and all the family members of the deceased within 60 days of the date of this ruling.

(d) The Objector shall file and serve her affidavit of protest if need be to the summons for confirmation of grant within 30 days of service.

(e) The status quo obtaining as at the date of this ruling with respect to the occupation and possession of the properties belonging to the estate of the deceased Josphat Musau Mukuva shall continue to obtain and be maintained pending the hearing and determination of the summons for confirmation of grant and any affidavit of protest. There shall however be no further transfer of the said properties pending the determination of the summons for confirmation grant.

(f) There shall be no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **20th** day of **April, 2020**.

D. K. Kemei

Judge