



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MERU

SUCCESSION CAUSE NO 308 OF 2010

IN THE MATTER OF THE ESTATE OF M'IMIRONGO M'UTHAKA (DECEASED)

ANDREW MURIUKI M'UTHAKA.....1ST PETITIONER

PATRICK KAMENGU.....2ND PETITIONER

JOHN MUTUMA ROBERT.....3RD PETITIONER

VERSUS

SUSAN NKATHA.....1ST OBJECTOR

DAVID MUGAMBI.....2ND OBJECTOR

LUCY KAMAMI.....3RD OBJECTOR

FREDRICK KABERIA.....4TH OBJECTOR

RULING

1. By an application under certificate of urgency filed on 27th February 2020 the Petitioners through the firm of M/S Vivian Aketch and Company Advocates came to court under Section 76 of the Law of Succession Act, Rule 44(1) of the Probate and Administration Rules and Article 50 of the Constitution of Kenya seeking that the court reopens the Petitioner's case for purposes of adducing further evidence before the ruling scheduled for 26th March 2020 could be rendered. They also sought for costs of the application to be provided. The application was supported by the affidavit of Patrick Kamengu the second Petitioner sworn on 27th February 2020. The said supporting affidavit made averments that the Deceased during his lifetime had given certain properties to some beneficiaries and that those beneficiaries had developed those properties and as such the distribution by this court was erroneous.

2. The Petitioners application was opposed by the replying affidavit of Susan Nkatha sworn on 10th March 2020 in which she averred that the deceased who is her father did not make any wishes as to how his property would be distributed upon his death and that the averment by the applicant were false. She also averred that the Applicant did not show that he had authority from the other beneficiaries to swear the affidavit on their behalf and that the Applicant had already filed a notice of appeal which was still pending and that the application herein was an afterthought. She also argued that the earlier application by the Petitioner dated 2nd December 2019 seeking that the grant be annulled should not be granted as no fraud or concealment of material facts was proved. She argued that the applicant was a witness but did not disclose the facts he alleges were concealed. She said that it was not possible that the deceased could have given out some properties to some beneficiaries and left out others.

3. From the supporting affidavit, the replying affidavit and the submissions by counsel in court, this court is not able to establish that the annexures to the Applicant's supporting affidavit are photographs of properties developed by the petitioners and/or situated on any one of the parcels of land that have been mentioned in the supporting affidavit of Patrick Kamengu. The Applicant has not shown what evidence he wants to adduce further and whether such evidence could not have been obtained by him after the exercise of due diligence or was not within his knowledge and could therefore not have been produced by him at the time he testified before the court made orders distributing the estate.

4. The application dated 27th February 2020 was filed while rulings in applications dated 9th December 2019 and 16th December 2019 were awaiting delivery on 26th March 2020. In the application dated 9th December 2019, the Objectors had sought that an order of eviction do issue against Daniel Kirimi Mutua and one Gitonga from plot No .3 Laare Market which the court had distributed to some of the

objectors by its ruling dated 14th February 2019. Instead of responding to the Objectors application dated 9th December 2019 the Petitioners filed the application dated 16th of December 2019 brought under Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules which basically provide for the grounds upon which a grant of letters of administration intestate may be annulled or revoked. In the said application the Petitioners were seeking that this court issues an order to exhume the remains of the deceased for purposes of obtaining DNA samples and that the children of Teresia Kainda that were born post the year 1974 be subjected to DNA analysis to establish whether the deceased was their father. The application dated 27th February 2020 was also brought under Section 76 of the Law of Succession Act, Rule 44(1) of the Probate and administration Rules and Article 50 of the Constitution of Kenya. Section 76 of the Law of Succession Act provides:

76. Revocation or annulment of grant 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 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 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 the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed 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

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

5. The petition herein was filed by the Petitioners who are Applicants in applications dated 16th December 2019 and 27th of February 2020. Before this court arrived at the decision to distribute the estate the parties herein had an opportunity to tender oral evidence and the two applications by the Petitioners are more of appeals against the determination of this court. This court cannot sit on appeal on its own judgement. The Applicants have already filed a notice of appeal and should go ahead and do the honourable thing by filing a memorandum of appeal and challenge the determination of this court in the proper forum, instead of loading the court with irrelevant and unnecessary applications one after another over issues that have already been determined. The Applicants/Petitioners applications dated 16th December 2019 and 27th February 2020 do not have any merits and are dismissed with costs to the Objectors.

6. The objector's application dated 9th December 2019 was not opposed by the Petitioners and therefore the same is allowed with costs. The persons sought to be evicted are not beneficiaries of the estate of the deceased and it has not been shown that the court gave them authority to occupy the property in question.

HON.ANNE ADWERA ONGINJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONGINJO

JUDGE