



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 215 OF 2013

FRANCIS MUSYOKI KILONZO

DORCAS NDUKU WAMBUA.....PETITIONERS

VS

VINCENT MUTUA MUTISO.....RESPONDENT

MATHEMBO KILONZO MBWALA.....ADMINISTRATOR/APPLICANT

RULING

INTRODUCTION

1. The Applicant/Administrator in the Estate of the Deceased herein by appointment in a previous succession cause over the same estate, by Chamber Summons filed on 16/10/2014 seeks the following Orders:

- a) *That Succession Cause No. 215 of 2013 be dismissed for being an abuse of the Court process.*
- b) *That the costs of this Application be on the Cause.*

2. The Chamber Summons is supported by the Affidavit of Mathembo Kilonzo Mbwala and based on the main grounds that there are two (2) Succession Cause pending in respect to the estate of Kilonzo Mbwala Ngesu i.e them being Succession Cause No. 430 of 2006 and Succession Cause No. 215 of 2013. Attached to the Application are the following documents:

- 1) *Grant of Letters of Administration Intestate in Succession Cause 430 of 2006 in the matter of the estate of Kilonzo Mbwala Ngesu issued on 31/10/2006 to Mathembo Kilonzo Mbwala.*
- 2) *Sale agreement between Francis Musyoki Kilonzo, Dorcas Nduku Wambua and Annah Mathembo Kilonzo (vendors) and Vincent Mutua Mutiso (purchaser).*

The vendors are the beneficiaries of the Estate of Kilonzo Mbwala and the property is plot No. 943 situated at Iveti Mungala, where the vendors undertake to file a Succession Cause and pass vacant possession. The agreement is dated 18th September 2012.

3. The Affidavit of Mathembo Kilonzo Mbwala avers that she petitioned the Court to be Administrator of the estate of the late Kilonzo Ngesu in Succession Cause 430 of 2006 as the wife to the deceased while Petitioners in Succession Cause 215 of 2013 are the son and daughter in-law to the deceased. She avers that the sole intention to filing Succession 215 of 2013 is to perpetuate fraud as evident in the sale transaction in respect to plot No. Iveti/Mungale/943.

REPLYING AFFIDAVIT

4. The 2nd Petitioner Dorcas Nduku Wambua swore an Affidavit in response to the Chamber Summons filed on 10/11/2014 and avers that at the time of filing the present Petition she was not aware of the existence of P&A No. 430/2006. She avers that the Court ought to consolidate the two Petitions as the Grant issued in 31/10/2006 has become useless and inoperative due to the lapse of time. She also avers that the Applicant participated in the sale as she does not deny that she appended her thumb print on the sale agreement.

FURTHER AFFIDAVIT

5. The Applicant/Administrator herein filed a further Affidavit on 17/12/2014 where she avers that the Petitioners knew of the existence of

P&A No. 430 of 2006 and that a Grant cannot become useless or inoperative when it is not annulled and/or revoked. She further avers that this petition should be dismissed for duplicity and being sub judice and that the interests of the Petitioners can be addressed in P&A No. 430 of 2006 and that no prejudice will be suffered if this Petition is dismissed.

SUBMISSIONS OF THE APPLICANT

6. The Applicant submits that the Petitioners herein knew all along of the existence of P&A No. 430 of 2006 and filing of the Petition herein is only meant to waste the Courts time. They cited the case of **Republic v. National Environmental Tribal ex-parte Orbit Chemicals Industries Limited and Another** (2013) eKLR the Court reiterated the rationale for the principle of *sub judice* which was set out in the case of **Nyanza Garage v. Attorney General, Kampala** HCCC NO. 450 of 1993 such that:

“Secondly, a multiplicity of suits clogs the wheels of Justice, holding up resources that would be available to freshly matters and creating and/or adding to the backlog of cases Courts have to deal with parties would be well advised to avoid multiplicity of suits.”

7. The Applicants also submit that the present suit is an abuse of the Court Process and state in reliance with section 76 of the Law of Succession Act that a grant can only be annulled by Court either on its own Motion or on Application by any interested party, and that a Court should not issue two separate Grants in respect to the same estate. It is the Applicants prayer that the present Petition be dismissed and the Petitioners have already started intermeddling with the deceased estate. The Petitioners did not file their Submissions to the Application.

DETERMINATION

8. The issue to be determined herein is whether the Petition herein is *sub judice* in view of a previous Succession Cause and, if so, the appropriate orders to be made in remedy therefor.

9. It is not in dispute that the estate of the late Kilonzo Mbwala Ngesu is in the process of being administered in the High Court at Machakos Succession Cause No. 430 of 2006 which the Petitioner/Respondent claim that they were not aware of. The parties herein also seem to agree that the issues raised herein can be dealt with in Succession Cause No. 430 of 2006 and, hence, the Petitioners prayer that the same to be consolidated. It is undoubtable that that Petition No. 430 of 2006 was filed first in time before the Petition herein, and consequently the filing of the present cause offends the rule on **sub-judice**. However, as there can be no valid two or more grants of representation to the same Estate of a Deceased person, the later petition and grant issuing therefrom must be struck out.

10. This Petition is for striking out, having not been determined on the merits. All parties agree that there is a previous Succession Cause which is still pending, then the Petitioner herein can pursue their interests in the Succession Cause No. 430 of 2006 which was gazetted in the official Kenya Gazette in accordance with the law, as notice to the whole world for general public information. Accordingly, no party can validly plead ignorance of the filing of a succession cause which is duly gazetted.

11. The Petitioners may, as advised by Counsel, pursue their interests in Succession Cause 430 of 2006.

ORDERS

12. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Petition herein is struck out.
2. The proceedings and ensuing Grant of Representation by Letters of Administration, if any, issued in the Petition P&A Cause No. 215 of 2013 are set aside, nullified and of no effect.
3. The respondent shall pay costs of the Petition to the Applicant.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019.

G.V. ODUNGA

JUDGE

Appearances:-

M/S B.M. Mung'ata & Co. Advocates for the Applicant

M/S L.N. Ngolya & Co. Advocates for the Respondent.