



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NOS. 733 & 734 OF 2015

IN THE MATTER OF THE ESTATE OF ELIZABETH KAMENE NDING'A (DECEASED)

BENEDICT VALA NDING'A.....ADMINISTRATOR/RESPONDENT

VERSUS

PETER MUEMA NDING'A.....1ST OBJECTOR/APPLICANT

STEPHEN MUASYA NDING'A.....2ND OBJECTOR/APPLICANT

CHARLES MULATYA NDING'A.....3RD OBJECTOR/APPLICANT

JOHN MUNYAKA NDING'A.....4TH OBJECTOR/APPLICANT

RULING

1. This ruling is the subject of two summons for revocation or annulment of grant. The first application is dated 29th March, 2018 made **Martina Wavinya Wanyama** (hereinafter referred to as the 1st applicant). The gist of the said application is that the 1st applicant is a daughter of the deceased herein and that when the letters of administration herein were taken out, herself and her siblings were not notified and their consent was never sought.
2. It was her case that the Respondent must have concealed this fact from her on the basis that she is a daughter of the deceased and that he had other siblings or went ahead to forge their signatures. She further deposed that she was never served with the summons for confirmation of grant in order to enable her protest and only realised that the letters were taken out after she got word that the Respondent, her brother was selling properties forming part of the estate of her mother, the deceased.
3. The 1st applicant averred that she was entitled to share in the net estate of the deceased yet her interests have not been adequately provided for and the Respondent intends to disinherit her.
4. The second application is dated 8th June, 2018 made by the Objectors herein. According to them, they are sons of the deceased herein while the Respondent is their brother and hence beneficiaries to her estate together with another brother, **Leviticus Nzomo Nding'a** who passed away after the certificate of confirmation was issued and is survived by a young son, **George Nding'a Nzomo**.
5. According to the Objectors the Respondent confirmed the grant registering the property known as 12715/11 (IR No. 40213/4), which belonged to their deceased mother, in his name as trustee only. According to the Objectors, they agreed to have the Respondent as the sole administrator because he was the youngest literate brother of the Objectors and was therefore trusted but the Respondent has breached the said trust by selling the said property in the sum of Kshs 75,000,000.00 and failing to give the Objectors their shares contrary to their agreement. According to the Objectors, the Respondent is not in a position to give any inventory as required by section 76 of the Law of Succession Act and has failed to disclose the existence of other properties of the deceased which were not included in the list of properties owned by the deceased for distribution.
6. The applications were opposed by the Respondent. According to him, his immediate family appointed him as the administrator of the estate of their deceased mother who was the registered owner of LR 12715/11 which upon transfer by transmission was sold off to a third party for valuable consideration and proceeds thereof shared amongst the beneficiaries less expenses. It was his case that upon receiving the 1st applicant's application, he consulted the 1st applicant who informed him that she had instructed her advocate to withdraw the application and was assured that the same had since been withdrawn. It was therefore his case that there are no pending issues and that the 1st applicant swore an affidavit to that effect.

7. The Respondent however denied that the said property was to be registered in his name as a trustee but was to be vested in him absolutely for the purposes of sourcing for a purchaser to defray the school fees expenses and sharing with other family members. According to the Respondent in order to facilitate the forgoing he had to borrow money from friends and financial institutions to facilitate the completion of the process as the Objectors refused to participate and fund the process of acquiring documents and sourcing for a buyer. It was his case that the applicants were paid their entitlements and have confirmed the same.

8. In a further affidavit sworn by **Stephen Muasya Nding'a** it was deposed that the 1st applicant, **Janior Nthenya, Janerose Itumbi Kasomo** and **Marysoret M Muthini** were not part of the petitioners which granted the Respondent the letters of administration. According to him, the application by the 1st applicant is still pending hence her support for the Respondent is insincere and in bad faith. It was his position that he had never entered into an agreement with the Respondent confirming receipt of his share.

Determination

9. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

10. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

11. In this case the Respondent has averred that the 1st applicant, **Martina Wavinya Wanyama**, has since intimated that she is no longer interested in pursuing her application for revocation or nullification of grant. The Respondent has exhibited a letter purportedly written by the 1st Applicant to her advocates to that effect. He has also exhibited a copy of an affidavit sworn by the 1st applicant confirming the said position. These averments have however not been disputed by the 1st applicant. In **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded.”

12. As the 1st Applicant has not refuted the allegations contained in a sworn affidavit that she is no longer interested in pursuing her summons, the said summons is hereby deemed as abandoned.

13. As regards the Objectors' Summons, it is confirmed from the affidavit in support thereof that the Respondent was identified as the sole administrator and trustee of the estate of the deceased. From the Objectors' own evidence, there was an agreement between the Respondent and the Objectors in which it was agreed that the proceeds of the sale of land parcel 12715/11 (IR No. 40213/4) would be shared amongst them with each Objector/Applicant receiving 16% while the Respondent receiving 20%. From this averment it is clear that the parties herein agreed that the property in question be disposed of. It cannot therefore lie in the mouths of the Objectors to say that the property was to be held in trust for them by the Respondent since if that was the case, then it would not have been capable of being sold.

14. It is therefore clear from the Objectors' own case that the said property was to be sold and the proceeds shared amongst the said beneficiaries. That being the position, the Objectors cannot turn round and contend that some beneficiaries were left out, when they themselves had agreed amongst themselves without bothering about the alleged omitted beneficiaries, who in any event have not applied for nullification of the grant, to dispose of the property and share the proceeds therefrom. Though it was contended that some properties were left from the list, no documentary evidence was presented either showing that they belonged to the estate or their current status considering the allegation by the Respondent that the Objectors are beneficiaries of the same.

15. That being the position this is not a matter that falls within section 76(a), (b) and (c) of the **Law of Succession Act**. The Objectors consented to the Respondent taking out letters of administration in respect of the estate of the deceased as the sole administrator. They agreed that the suit property be sold and the proceeds shared. Their only problem seems that the Respondent sold the said property and pocketed the proceeds therefrom. In my view, if the Objectors are correct the issue here is one revolving around breach of trust.

16. The Respondent has however disclosed that the omission to list some of the properties was due to inadvertence but that the said properties have since been distributed amongst the beneficiaries. In my view this is a matter in which the Respondent ought to render an account to the beneficiaries of the estate of the deceased. Section 83(e) of the Act sets out as one of the duties of personal representatives as follows:

within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

17. Let the said account be rendered within 45 days of this decision.

18. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 6th day of February, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wambua for Mr Kuria for the Administrator

Mr Munyao for Mr Malelu for the Objectors

CA Geoffrey