



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 39 OF 2017

(FORMERLY NRB SUCC CAUSE NO 1303 OF 1999)

IN THE MATTER OF THE ESTATE OF ANTHONY JOHNSON MUSYOKI WAMBUA (DECEASED)

JOHN MULI MUSYOKI.....APPLICANT

AND

ALICE NDUKU MUSYOKI.....RESPONDENT

RULING

1. By Summons dated 8.8.2015 the Applicant sought revocation of grant that was issued to Alice Nduku Musyoki on 20.8.1999 and confirmed on 11.6.2001 on the ground that the grant was obtained by concealing the fact that the deceased was survived by two widows, that is Tabitha Mukulu Musyoki (now deceased) and the Respondent; further that the deceased had other dependants. The application was supported by John Muli Musyoki vide his affidavit filed on 23.9.2015 wherein he stated that when the petitioner filed the petition, she did not disclose each and every survivor of the estate and in light of the same, the grant was obtained fraudulently and by concealment of material facts and hence the same to be revoked. The applicant vide further affidavit dated 24.9.2018 deponed that the respondent has transferred parcels of land belonging to the deceased into her names and attached copies of the search, and also has sold part of the estate to a third party and attached copies of photographs of the same.

2. The application was not opposed by the Petitioner who failed to file a Replying Affidavit or any response at all.

3. This court was satisfied that service was effected on the respondent who had failed to attend court and file any response and thus reserved the matter for ruling.

Analysis

4. I have carefully read and understood the contents of the application and the Affidavits and annexures thereto. I have also perused the court record on which the confirmation proceedings were undertaken and the annexures thereto. The main issue for determination here is whether the Administrator excluded lawful dependants to the estate and what orders the court may make.

5. The legal basis for confirmation of grants is provided in **Section 71** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya. In cases of intestacy, like in this case, *'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.'*

6. The chief's letter annexed to the summons for revocation revealed the beneficiaries to the estate of the deceased. However, the court has noted that the petition filed by the respondent does not include the said beneficiaries. I have noted that the respondent has made no explanation or response to challenge the averments of the applicant. In **Mohammed & Another v. Haidara [1972] E.A 166** at page 167 paragraph F-H, **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

7. In **re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR**, Justice Odunga in quoting the case of **Central Bank of Kenya vs.**

Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held by the Court of Appeal that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not relieved of the onus on him of justifying his application stated that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. He further stated that

“It is trite that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of a fact which he asserts, must prove that those facts exist and that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Further the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person”

8. From the application, the court is being called to find, in the absence of uncontroverted evidence that there are beneficiaries of the estate of the deceased who have not been disclosed to the court. The applicant seeks also to draw the attention of court to the fact that the estate of the deceased has been transferred in disobedience of the orders of the court prohibiting the same. In support of the same, the Applicant has annexed a letter from the chief indicating a list of beneficiaries of the estate and also annexed upto date searches indicating the act of transfer of the estate of the deceased into the names of the respondent. With such apt annexures I am satisfied that indeed there are beneficiaries who were excluded in the petition and indeed the respondent has been acting in disobedience of the court orders. I am inclined to find that the respondent obtained the grant fraudulently and through concealment of material facts.

9. In *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1995] eKLR*, the Court of Appeal approved and applied the case of *Brink’s-MAT Ltd vs Elcombe (1988) 3 All ER 188* where the Court set out the principles as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

(i) The duty of the applicant is to make a full and fair disclosure of the material facts.

(ii) The Material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.

(iii) The applicant must make proper enquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.”

10. From the foregoing, the respondent is no longer able and willing to safeguard the beneficial interest of all beneficiaries of the estate of the deceased

Determination

11. In the wider interests of justice and in consideration of the provisions of **Article 159(2)(d)** of the **Constitution** and the **Law of Succession Act** the Applicant’s application dated 8/8/2015 must be allowed. Consequently, the following orders are made:-

(a) The Grant made to Alice Nduku Musyoki on 20.8.1999 and confirmed on 11.6.2001 be and is hereby revoked.

(b) A Fresh Grant shall be issued in the joint names of the **Petitioner** and **Alice Nduku Musyoki**.

(c) The Administrators’ and/or any of them to file summons for confirmation of Grant within 21 days upon issuance of the fresh Grant.

(d) The application for confirmation of the grant shall be served upon all the beneficiaries and shall be fixed for directions within 30 days of filing.

(e) The registration of **Alice Nduku Musyoki** as proprietor of parcel numbers **MASII/VYULYA/1469, MACHAKOS/NDALANI PHASE 1/471, MACHAKOS/NDALANI PHASE 1/472, MACHAKOS/NDALANI PHASE 1/473** and **MACHAKOS NDALANI PHASE 1/475** are hereby cancelled and the ownership be reverted back and registered in the names of the deceased **ANTHONY JOHNSON MUSYOKI WAMBUA alias ANTHONY MUSYOKI**.

(f) The County Land Registrar Machakos County is hereby directed to comply with order No. (e).

(g) Pending the confirmation of the grant herein, the said **Alice Nduku Musyoki**, her servants or agents are hereby restrained from selling, wasting and or transferring the properties of the deceased.

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

These are the orders of this Court.

Dated and Delivered at Machakos this 5th day of February, 2019.

D.K. KEMEI

JUDGE